Adjudication in Judicial Review: An Inferential Approach

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Abstract: The thesis focuses on Judicial Review of Legislation, exploring—with the aid of Robert Brandom's inferential semantics—the possibility of engaging in a properly *judicial* assessment of the constitutionality of a law. In order to do this, and after criticising the proportionality approach to the subject, it addresses both the nature of the question that is put forward in cases of review of legislation and the essential features of adjudicative decisions, claiming that the conjunction of these two aspects leads to the configuration of a dilemma: the question asked in judicial review of legislation cases does not seem to be *judicially* answered. Resorting to inferential semantics, the thesis aims to provide a solution to the dilemma and to make explicit the costs of staying within judicial boundaries.

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I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Introduction

The legitimacy of judicial review rests on a promise, one that lies on the grounds of constitutionalism itself: that we, as a collective, can better develop our communal life by binding politics to law. This binding does not need to be understood in terms of an opposition between law and politics[1]. The constitution can be seen as the structure that allows political decisions to be made in the first place, working as its vehicle. But what serves to constitute a common will, to substantiate sovereignty, also—and by those same facilitating structures—establishes limits given by the very rules that serve to provide the institutional framework within which political participation and decision making takes place[2]: the legal form can only institutionalise[3], and therefore, facilitate political communication if those forms constrain.

In its simplest formulation, this promise can be translated into the idea of establishing legal limits to what can be politically decided[4], even if these are limits that serve to carve the space in which politics can arise[5]. They can be understood as constituted by the reasonability of a given decision[6] or can be grandiloquently presented as a way to prevent a majority from 'destroying the greatest historical achievements' of the people[7], thus imposing constraints on the political practice[8].

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[1] Opposition aptly characterised in Loughlin's notion of 'the straitjacket of law', in (2000), 5. This idea is explored in Tomkins (2005), 11 ff.

[2] Christodoulidis (1998). The general paradox configured by the tension between a power that arises from The People, but that has to be constrained by institutional forms in order to be effective—Loughlin & Walker (2008); or between Self-Rule and Law-Rule—Michelman (1988), 1499.

[3] Habermas (1996), 458.

[4] Klarman (1992), 796; Waluchow (2007), 27; Laws (1995), 73; Tushnet (2008), 19.

[5] Habermas (1996), 151. Similarly, the limits can be understood in terms of securing that the legislative debate is performed respecting the constitutional conditions that make the law-making practice one that lives-up to the standards set by the constitution, filtering 'naked preferences' and thus allowing the identification of a public value (Sunstein (1986), 1133; (1985), 63); or as protections aimed at preventing politically engaged citizens from self-enclosing tendencies that would impede reconciling self-rule with law rule— Michelmann (1988), 1532.

[6] Möller (2012b), 122, 178; Kumm (2010), 157-63.

[7] Ackerman (2007), 1806: the Supreme Court is there to protect previous constitutional achievements attained on the back of political moments of serious mass mobilisation, and to judicially acknowledge when one of those rare moments capable of amending the constitution outside the scope of Art. V have taken place—Ackerman (1984), 1030-46.

[8] Ackerman (1991), 296.

Regardless of its conceptualisation, the notion of legal limits to politics should seem to be particularly attractive and easy to understand for anyone who regularly engages in legal affairs; after all, is it not its capacity to bound and restrict the decisions of those who are its subjects, a palpable feature of law? There is an obvious—but not trivial—way in which the law constrains what its addressees can do: the fact that some particular ways of acting are proscribed by law, reduces the space of action that is left for the subjects to decide what activities they can engage in. And it is not only forms of behaviour of individuals that are taken outside the realm of what is legally acceptable, but the restriction also works *vis-à-vis* collective subjects: just as the law constrains my individual decision regarding how fast I drive my car or how I must treat somebody else´s property, it constrains the decisions taken by the directives of certain companies regarding what information must be included in their reports to the authority, and it also constrains a group of workers that are legally impeded to engage in certain forms of collective-industrial action against their employers. And if we keep an eye on our bound workers, we can immediately notice one of law's most conspicuous means by which it fulfils this function: by vesting rights. For it is the property right of the owner of capital on the means of production[9] what gives rise to the correlative prohibition, directed to *his* workers, to disrupt the ordinary operation of *his* factory. When it comes to the relation between law and politics, constitutional rights make this bivalence between facilitation and constraintment most patent. For even if they are not explicitly defended as limits to what can be politically decided[10], but are understood as tools to overcome limitations of the political process[11], they fix boundaries to what can count as a valid piece of legislation.

Looking at the constitutional scenario, we can see how simple the realisation of the promise from which we depart might seem: if we grant legal/constitutional rights,

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[9] It is worth noting that property over means of production is not considered by Rawls as as basic liberty—(1999), 54. A remarkable contribution regarding the special position of property as a right, is found in Julius (2017).

[10] Dworkin (1978) and (1996); and similarly Rawls (1993), Lecture V.

[11] Ely (1978), 453; Habermas (1996), 80.

then they can work as boundaries to what politics can decide and do. In this way, the constitutional framework works both as a vehicle of politics that enables the different political points of view to express themselves in the constitutionally configured arena, and also as a limit to what can count as the outcome of the political process[12]: just as our fellow workers, who can freely engage in any form of industrial-collective action, except—of course—from the kind of action that the law deems forbidden; in politics all decisions are possible, all but those that the law—by means of constitutional rights—appraises as unconstitutional. This is the promise that Judicial Review of Legislation aims to honour, that legislated law cannot contradict constitutional rights, attempting to fulfil 'the modern constitutionalist aim of securing, by judicially enforced higher law, individual rights against political oppression[13].

So now, in the same way that labour judges have to decide when a particular action of a group of workers infringes the property rights of the owner of a factory, the Constitutional Courts are supposed to decide when a piece of legislation infringes the constitutional rights that fix the limits of what is constitutionally permitted, and they are supposed to enforce these constitutional boundaries by means of a *judicial* decision[14]—it is an adjudicative moment assessing a legislative one.

Against this understanding of Judicial Review of Legislation, I will argue that the operation it demands of the Court is impossible, that there can be no properly *Judicial* Review of *Legislation*. The reasons for this impossibility will rest on two considerations, one regarding the nature of the question that is asked in Review of *Legislation* cases and another regarding the proper characterisation of *judicial* decisions. I will argue that these two aspects cannot be reconciled. I will claim that the appropriate understanding of Review of *Legislation* (as opposed to Review of *Application*) is one in which what is at stake is the validity of a piece of legislation

[12] Leubsdorf (1987), 193-4.

[13] Michelman (1988), 1493. It prevents 'law from being eroded by the legislation of transient majorities'—Rawls (1993), 233.

[14] Tushnet (2008), 22.

that depends on the semantic inferential relations between the *intensions* of the legal and constitutional provisions at issue, and that this relation is not something that can be *judicially* assessed. To justify this, I will argue that the judicial moment is characterised by the challenge of correlating a legal rule with an *extensional* fragment of the world, an 'observational' challenge that is absent in Review of Legislation. And since this 'observational' dimension is missing when it comes to the question about the validity of a legislated rule, a decision about a law's validity cannot constitute an instance of adjudication.

If this is correct, then the Court is in a complicated position, because despite this dissonance between the intensional question of validity that is put forward in Review of Legislation and the extensional dimension that characterises judicial answers, it still has to decide—and it has to do it with *judicial* tools: Review of Legislation, I will claim, puts the court in the dilemma of having to employ judicial means in order to answer a non-judicial question.

Tackling the dilemma requires to identify these means. To do this I will turn to Robert Brandom's inferential semantics in order to explain how the extensional dimension of adjudication is structurally expressed in a particular distribution of entitlements to assertions, to premises that can ground the judicial justification of a decision. Exploring this distribution will make patent the specially poignant position of the court: inferential semantics will allow me to show how the lack of an extensional dimension in Review of Legislation cases entails a profound curtailment of entitlements to assertions that could justify the court's ruling —it entails, that is, a deficit of premises in which to ground the decision. But Brandom's philosophy of language will also allow me to show how the Court can address the constitutional question of validity despite the curtailment of premises effected by the pure intensionality that characterises the assessment of validity. Overcoming this dissonance between question and answer, however, comes at a cost of the rationality of the process itself: I will argue that deciding these constitutional questions *as a*

judge entails a degradation of meaning that impedes giving an appropriate, rational consideration to the constitutional problems that are taken to the judicial arena.

One final comment before explaining the order in which I will proceed. I will be claiming that Constitutional Courts are not entitled to some crucial premises when deciding on the constitutionality of a law, being therefore profoundly deprived of reasons to put forward in their justifications and forced to consider only some 'secured' inferential relations between the contents of the rules at issue. But this does not entail a restrictive approach to adjudication in general: as I will argue, it is only the special position in which the court finds itself on Review of Legislation cases what determines that a strictly *judicial* decision has to be restricted to a minimalistic inferential semantic analysis. On the other hand, the fact that ordinary judges deal with concrete fragments of the world determines that they have at their disposal premises that are unavailable for the constitutional court.

The first chapter of the thesis deals with the proportionality approach to Judicial Review. There I will criticise proportionality as an adequate tool to tackle constitutional cases, and, by doing this, I will identify some key elements of the alternative theory that I will be proposing in the following chapters: first, I will claim that the way in which proportionality casts constitutional queries is one that cannot address the conflict as one between incompatible or straightforwardly contradictory claims; against this, and from the second chapter onwards, I will argue that the notion of *contradiction* is to be placed at the centre of the constitutional analysis, that unconstitutionality is to be understood precisely as a relation of incompatibility or normative contradiction between legal and constitutional provisions. Resting on the labour cases *Viking* and *Laval*, the second objection claims that the decision reached through proportionality is not constrained by the constitutional provisions the Court claims to be applying, hinging instead on premises that are not legally established which work to the direct the detriment of the worker's collective rights. In proportionality, I will argue, the Court is not bound to the Constitution—and the third chapter will address how bounding to law

corresponds to a fundamental feature that serves to characterise a properly judicial decision. Finally, I will argue that proportionality blurs the difference between assessing the constitutionality of a law and assessing the constitutionality of an action by assuming that these problems can be adjudicated in a similar way. The second chapter will explain why this difference is crucial.

The aim of this second chapter is to distinguish between Judicial Review of *Legislation* and Judicial Review of *Application*. By doing this, I will attack what I will call the *conflated* approach to Judicial Review, according to which both in the American and European models of Judicial Review the Constitutional Courts are supposed to perform the same function under different procedural conditions. Against this, I will defend that while on the European model the courts have to decide on the validity of a rule in consideration to its relation with one or more constitutional provisions, on the American system what is to be analysed is the constitutionality of a concrete application of a piece of legislation. To ground this distinction, I turn to the difference between extensional normative conflicts, which cannot lead to the loss of validity of one of the conflicting rules, and intensional normative contradictions, which can. I will argue that recognising this difference is crucial to maintain the distinction between validity and applicability as two related, but different properties. This will allow me to characterise the validity problem presented in cases of Review of *Legislation* as one that depends on the semantic relations between the rules at issue.

Having established the nature of the question that the court has to face in cases of Review of Legislation, the third chapter will attempt to identify what can count as a properly *judicial* answer. Here I will not try to present a full theory of adjudication, but only to identify an essential feature of it, one that is absent in Review of Legislation cases. I will claim that the judicial moment is characterised by the particularity void, by the distance between the intensional nature of a rule whose application is at issue and the extensionality of the concrete fragment of the world that serves as the object of adjudication. To cross this void, I will claim that the

judge has to engage in an application discourse in order to legitimise her decision. With recourse to Wilfrid Sellars' work on different patterns of linguistic activity, these considerations will allow me to model the judge's position into that of an 'observer', of a subject that must attempt to perform a 'language-entry transition' that connects the non-linguistic world with language. I will argue that without the possibility of grounding the decision in 'observation'—without void, and therefore, without application discourse—a decision cannot be a judicial one even if it is validly adopted by a court within the scope of its legal powers. And that is precisely the problem that arises with Review of Legislation: the inferential relations that determine the validity of the rule at issue cannot be the object of 'language-entry transitions', they cannot be observed because they correspond to a different type of linguistic activity and so a *judicial* assessment of them is unavailable.

The fourth chapter deals with the need to employ judicial tools to answer to a non-judicial question. To do this I will first examine Brandom's inferential semantics, attempting to provide a sufficiently comprehensive exposition of the way in which his work explains meaning in terms of a net of commitments and entitlements, to assertions and substitutions, that participants attribute and acknowledge as consequence of claiming something. I will explain how meaning arises in the practice of giving and asking for reasons, so it stands in an intrinsic relation of co-determination with *reasoning* itself. After this exposition, the crucial step will consist in employing Brandom's devices to identify the responsibility that a Court would undertake by declaring the unconstitutionality of a piece of legislation and the means by which it can vindicate it. This will allow me to examine to what extent the court can live up to the commitments entailed by its decision without overstepping the margins that define the judicial moment, and the costs—both in sense and rationality—of staying within those boundaries.

Chapter 1: Proportionality and its Promises

Introduction

Constitutional rights set the limits of legislative decisions and Judicial Review corresponds to the procedure by which they are enforced. It is at this moment of enforcement when proportionality enters the picture, dominating contemporary constitutional rights law[15]. Constitutional rights, we are told, do not work as regular legal provisions, they—the constituents of the legal limits to politics—are not to be understood as norms but as principles[16], and because of the way principles are conceived—as *optimisation* requirements—proportionality analysis is not only an alternative, but in fact required in order to assess if a piece of legislation 'infringes' them[17]. In this scheme, proportionality is presented as the structure that allows the Constitutional Court to decide, in a rational way, when certain political decisions infringe the constitutional rights that mark the legal boundaries of the political, securing the restraint of politics to the domain of law.

Therefore, both proportionality in general, and balancing in particular, burst into the constitutional discussion offering a structure for rational argumentation, one in which the different interests and values involved in the constitutional debate can be appropriately assessed and evaluated against one another. In this way, proportionality seeks to assure that the outcome regarding the possible infringement of the constitutional limits to politics is decided in the light of a rational balance between the opposing principles. While constitutionalism is compromised to bind politics to law, proportionality is compromised to offer an adequate structure to enforce this binding—it is supposed to allow the assessment of whether or not a law has infringed constitutional limits, and is supposed to do that by means of offering a rational structure that allows for an appropriate consideration of the relevant

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[15] Möller (2012), 13; Beatty (2004), 160; Webber (2009), 87 and with further references.

[16] Alexy, (2002), 388.

[17] Alexy (2014), 52. As Schmitt points out, 'there can be no adjudication of a norm over another norms'—(2015), 112. Two norms can stand in a relation of contradiction, but one does not infringe the other.

principles affected by the decision. This is, proportionality promises, at least (i) that we can use it to enforce the constitutional limits to legislative decisions and (ii) that the process of enforcement thus carried out is one that responds appropriately and rationally to the constitutional values at stake.

In this Chapter I will tackle these promises and thus present two objections to proportionality[18]. First, I will claim that proportionality cannot but distort the claims involved in constitutional debates (1). I will do this by characterising proportionality as a second level matrix of analysis (1.1) that prevents the claims to be understood as standing in an unbalanceable relation of proper contradiction (1.2). After this, I will claim that proportionality cannot serve as a mechanism to enforce constitutional constraints (2), for it structures the constitutional problems in terms of questions whose answers are not available in the constitution (2.1). *Laval* and *Viking* will serve as examples of how this detachment from the constitution works both to safeguard neo-liberal interests and to conceal such affront by presenting it as a legal decision, despite the fact that its pivoting arguments do not arise from the constitution (2.2).

1. Distorting the claims

Let's start by looking at the possibility that proportionality offers to balance the relevant constitutional interest on a rational way. We are told that an interference with a constitutional right is justified as long as there is a balance between the values affected by it and the ones that it favours. Proportionality, after all, is not there to replace legal and moral argumentation, but it aims to provide the appropriate structure to rationally engage in that legal and moral assessment. According to this structure, proportionality operates through a three-step

[18] Urbina (2017) presents somewhat similar objections to proportionality, but against what is suggested here, he argues that these two problems relate to two different accounts of proportionality—Part I and II respectively.

sequence[19]: on a first level, the *suitability* of the measure is examined; this is, if it actually aims toward a legitimate goal. This means that a measure that interferes with a fundamental right can only be deemed constitutional if it promotes a legitimate aim. On a second level, the *necessity* of the measure is assessed, and so now what is questioned is whether or not such an aim can be achieved by means of a less intrusive measure. Finally, as a third step, the judge must engage on a strict analysis of proportionality, which corresponds to the process of *balancing*.

Operating through this structure, judicial review is seen as a process that, unlike the ordinary and democratic process of decision making, ensures that the solutions that are reached by the courts are rationally justified[20], that their decisions will give adequate consideration to all the relevant interests. And in proportionality, that adequate consideration calls for the assignation of values to the conflicting principles.

The values involved in the constitutional dispute, the balance of which defines the limits between *prima facie* and *definitive* infringement of rights, are supposed to enter into the rational structure of the balancing process in order to be weighted one to the other[21]. This way, only to the extent that the degree of non-satisfaction of one principle is proportional to (or matched by[22]) the degree of satisfaction of the other, the infringement of the constitutional right at stake is justified[23]. And the way of assessing the proportionality between the opposed principles requires assigning value to both the principles involved and to the degree of satisfaction and non-satisfaction that is effected by the measure whose constitutionality is under evaluation.

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[19] Alexy (2014), 52; Möller (2012a), 711. A fourth operation that addresses the existence of a *legitimate aim* is distinguished in some versions of the test—Kumm (2004), 579 ff.; Klatt & Meister (2012), 8; Urbina (2017), 5;

[20] Courts would be immunised from the ordinary political pressure, Kumm (2010), 154. In a similar sense: Rawls (1993), 216; Dworkin (1997), 30.

[21] Alexy (2002), 67.

[22] Rivers (2006), 177.

[23] Alexy (2002), 102.

1.1. Proportionality as a second-level structure

Proportionality, thus understood, corresponds to a test that provides the Court with a structure within which constitutional reasons and considerations are addressed through its staggered sequence evaluations. This relation between the structure of proportionality and the constitutional reasons that are assessed in it, allows to characterise proportionality as a second-level structure for the operationalisation of reasons. The most sophisticated endorsement of this model has been put forward by George Pavlakos in order to defend proportionality as a suitable candidate to deal with deontological reasons[24]. His argument models the analysis of proportionality on the structure of autonomy, which in turn provides the background that makes the practice of practical reasoning possible in the first place. Within this practice, deontological constrains do not work as fixed points in the moral space, they are not canonic propositions with a defined meaning that prescribe particular courses of action, since their extension and intensity are in need of determination for each concrete case[25]. As Pavlakos argues, the internal point of view of an agent reconstructs all relevant reasons within the practical reasoning process, vindicating each from his reflexive point of view. And this point is reflexive for it operates on two levels: on the one hand, the agent has his first order reasons and they will usually be in tension, but on a higher level, he can make those reasons the object of his thought, achieving the capacity to scrutinise them in the light of considerations that are not external to the very practice of practical reasoning. Harry Frankfurt's example of an unwilling addict[26] serves to explain the point: this is a man that wants to use his drugs, but that can also reflect on that desire and form a second order volition—he doesn't want to want to use his drugs. While at the first level he has conflicting desires, at the second level he wants his desire not to take drugs to determine his conduct. Second level volitions, the capacity to reflect on first level

[24] Kumm and Walen attempt to defend proportionality from this charge, in Kumm & Walen (2014).

[25] Pavlakos (2011), 132.

[26] Frankfurt (1971).

desires, are what characterises a person, so the key issue is the capability of thematising one's own desires by means of a reflection that has them as its object.

So, it is on the second level that the tension between reasons is resolved through a process of deliberation that, by assigning concrete meaning to conflicting reasons, ensures a coherent, yet provisional outcome. Here is where deontological and teleological arguments gain force by being attached to the practice of practical reasoning: 'This level stands for our capacity to take a reflective stance *vis-à-vis* our reasons, it allows us, in other words, to reflect on how we reflect'[27]. Second level propositions are not substantive, the do not directly guide action, but constitute the scheme that rationally relates facts with the agent's thoughts, they constitute the background that enables us to represent the first order propositions as normative, substantive reasons[28]—'reasons do not exist in a pure form independently of a reflective practice, but are constitutively dependent on it'[29]: something counts as a reason if, submitted to the reflective capacity of an agent, it provides a justified solution to a practical problem[30].

Having identified some facts as reasons, they then need to be coherently maximised, and so from the same reflexive point of view their extension and intensity has to be decided. To do this, the reflexive structure of autonomy yields a general principle that enjoys the status of a rational truth: only principles for action that all deliberative agents should accept as reasons for actions are valid. And it is in the light of such Kantian regulative principle, specified by means of rules that regulate practical reasoning, that it is 'possible to assign values to the various conflicting first-order reasons that call for optimisation in any particular context of action'[31].

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[27] Pavlakos (2011), 149.

[28] Pavlakos (2015), 280, 292

[29] Pavlakos (2011), 150.

[30] Pavlakos (2009), 79.

[31] Pavlakos (2011), 151.

In this reading, the process of balancing corresponds to the second-level thematisation of first-level reasons. The 'measure for the correct balancing', in Pavlakos account, is derived from the second order reflection that characterises practical reasoning: balancing formula is understood as an expression of such two-level structure by 'preserving the primacy of practical reasoning over teleology and deontology'[32]. Just as in our ordinary practical reasoning we distinguish between first-level teleological and deontological reasons that are in tension, on the one hand, and a second-level structure through which they are coherently maximised, on the other; with proportionality analysis we find the same two levels at work: conflicting first-level teleological and deontological constitutional considerations, and a second-level proportionality test that allows to address them. Therefore, constitutional rights reasoning as proposed by Robert Alexy 'is a species of rational practical reasoning'[33]: by engaging in proportionality analysis the judge is not doing anything substantially different from what all rational agents do when they have to make practical decision on which different kinds of reasons are relevant, and if we can operate all the time with deontological reasons, then so can the judge.

If this is a brief but still adequate description of proportionality, then the rationality of the process itself hinges on the possibility that this kind of analysis is actually appropriate to assess the values that enter into the balancing process thus configured. That is, the key issue at stake is whether or not the matrix of analysis that is presented by proportionality can give a fitting account of the principles involved and the relation between them. And the problem immediately arises once one accepts the possibility of a discrepancy between the structure of proportionality and the nature of either the values to be assessed or the relation between them.

In what follows I will try to elaborate on this idea and propose a critique of proportionality that is similar but not exactly the same as the more mainstream objection to it. According to this usual challenge, the problem of proportionality lies

[32] Pavlakos (2011), 153.

[33] Pavlakos (2011), 129.

on the fact that since it can only operate by ascribing discrete values to all the principles to be balanced, proportionality necessarily understands all the rights involved on the analysis as commensurable rights; that is, as rights for which it is possible to predicate a concrete weight. The idea of balancing, in order to maximise, seems to entail that rights are in a way equivalent to profit: 'optimisation', in an economic context, 'has a clear meaning because it is obvious what one is optimising, namely, profit'[34]. What this understanding impedes, according to the mainstream objection, is to make sense of rights as something incommensurable[35]. And of course, if some rights or principles are actually incommensurable, then translating them into the language of proportionality, assigning them a value to be balanced against another, constitutes a distortion of such right. And this connects to another critique which asserts that reasoning with rights by means of balancing their weights prevents such rights from actually working as they should, that is, as *firewalls*. The problem with Alexy's approach, then, would lie in the fact that he is assimilating principles with values, and therefore disregarding the distinction between the deontological sense of the former and the teleological sense of the latter[36]. Understanding rights on this consequentialist manner, they are wrongly conceptualised as the kind of thing to which a given weight can be predicated; and because of that, they run the risk of being defeated if under some circumstances the opposing weight turns out to be higher: it would be part and parcel of understanding rights this way that they can be overcome, so the critique is also based on the idea that submitting rights to the structures of proportionality necessarily distorts them, preventing us from seeing them for what they really are: incommensurable firewalls against certain decisions.

Aligned with this, I will claim that proportionality entails a distorting effect, one that misconstrues the possible relations between the rights at issue by excluding the alternative of understanding them as standing in an unbalanceable relation of

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[34] Möller (2007), 462.

[35] Webber (2009), 90.

[36] Habermas (1996), 329.

contradiction[37]. To better understand this problem, it is useful to think of proportionality as a particular grammar. In this context, grammars are to be understood as networks of discriminations[38] that define the set of possible descriptions of an object, or—since the world is not the totality of *things*—of *facts*[39]. Because of this, grammars cannot be tested against facts or empirical evidence; we cannot choose a grammar in consideration to the facts it picks *vis-à-vis* another: the difference between them is not that they pick up different objects or events, but that they define that different descriptions of those events are acceptable, and by that they establish the frame within which something may count as a fact in the first place[40]. A grammar, then, provides the framework through which the world is thematised in a process that attributes meaning to it in accordance to the categories that constitute such grammar in the first place.

Being this the case, every meaningful account of the world supposes that what is being thematised in a meaningful way has been reduced to the grammatical structures that are operating in such ascription of meaning. Therefore, each grammar not only provides a structure that makes meaning possible, but by those same means hinders the possibilities of different meanings—such reduction is the price of sense. This does not mean that a different meaning cannot be provided, but

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[37] Notice that this is not to claim that if it weren't for proportionality, law wouldn't entail a distorting effect: as we will see in Chapter 3, Law can only operate by thematising the conflicts it addresses by casting it to its own terms, so everything that appears in law has already been structured by it in a way that law can comprehend. This entails the rejection of a somewhat naive view that asserts that law's role is exhausted in the settlement of pre-configured conflicts. This view ignores that law operates before the conflict is legally solved: before deciding the case law re-signifies the problem into its own terms, so law doesn't just resolve the issue, but actually configures it—law isn't just answering a question, but also stating it. So it is always possible that some form of conflict, given its nature, is necessarily inappropriately thematised by law. Just think of an indigenous group that, facing industrial enterprises that want to operate on their territory, go to a Court trying to vindicate their relation to their lands. Although there is no reason to accept as a starting point that the institution of property rights, or rights of use or exploitation or usufruct or servitude, are adequate to express the way that they understand their relation to an ancient cemetery, once they face the judge, either they reduce their claims into one of these categories or they will not be heard at all. This, in turn, leads to 'see the legally authorised recognition of a claim as a prize to be sought'—Veitch (2007), 83. The argument to be put forward here is about a second-level reduction effected by proportionality: while at one level law reduces conflicts and claims to schemes of interpretation, at another level proportionality reduces the possible understandings of these schemes and the relations in which they can stand.

[38] Mulhall (2001), 176.

[39] Wittgenstein (1922), 1.1.

[40] Norval (2006), 231.

only that within each grammar the scope of what is and, even, can be meaningful is restricted by the structural categories that constitute it.

In this way, having more than just one grammar synchronically operating opens a prospect, that of moving from one grammar to another, and with that, attaining a shift from one form of understanding to a different one—multiple grammars allow alternative senses of a same extension. This movement corresponds to what is called 'aspect change'[41], a concept that Aletta Norval takes from Wittgenstein and tries to use as equivalent to Rancière's 'opening up the space where an argument may be heard in the first instance'. The idea is that this change allows us to challenge the way in which a political hegemony thematises certain problems: being hegemonic, the sense that is attached to a phenomenon is *de*contested, so its surrounding concepts are limited in a particular way, constraining their political use[42]. The hegemonic grammar can therefore be characterised as the grammar of perception: continuous aspect perception is automatic, we describe an event without being aware of other possible interpretations, focusing on the *readiness to hand* of the correct form of description[43]. Aspect change occurs when one realises that a new kind of characterisation of a situation may be given, and by seeing it in those new terms a shift in perspective that establishes different relations between objects is effected. The change allows one to step 'beyond the guidance of grammar' without, however, 'giving up on intelligibility'[44], since the break introduced is one that is not so radical as to no longer make sense to the subject. It is not a change that denies everything that came before, but one that depends of the previous steps and re-orders and re-signifies them: the action is the same, but now we make sense of it differently.

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[41] Wittgenstein (1958), XI.

[42] Norval (2006), 232.

[43] Norval, (2006), 235

[44] Norval (2006), 231.

1.2. No contradiction

Once we look at proportionality as grammar, we notice that in order for it to work, the principles and relations among them that are the object of analysis must be constructed, by the structures of the proportionality test, in a way that is comprehensible to proportionality itself. Everything that enters into the proportionality analysis can only do it by being reduced to the categories through which proportionality operates, and this is where the reduction of possibilities that facilitates the attribution of meaning expresses itself as a price in reflexivity, for the obvious meaning that cannot be attained within a scheme of interpretation is one that questions that same scheme of interpretation: if the meaning of an act within a scheme were to question it, then that would spell meaninglessness, and that would impede it to question the scheme in the first place. This means that within proportionality, the categories that structure the operation of the analysis cannot be contested; and because of that, if we have a right whose point is precisely to deny that a relation of proportionality between rights is to be established, then such right cannot be accommodated as such within the proportionality analysis. Such contestation can never express itself within proportionality, it has to remain outside, invisible to the constitutional problem.

Once proportionality is working, then, the principles involved are understood as principles whose value is not denied by the very act of balancing one against the other, so it is understood from the get-go that a relation of proportionality between them is appropriate and rational. In this way, workers' rights to collective-industrial action is to be extended up to the point that it doesn't disproportionally affect the opposing property rights of the owner of the means of production. But that implies that under this scheme each right is characterised as one that is not supposed to abolish the other. Otherwise, if it is recognised that the whole point of the right is to disproportionally affect the opposing one, then it would be irrational to submit the determination of its extension to the condition that its exercise does not disproportionally infringe the right that it is supposed to overwhelm. In other words,

proportionality could not claim to be a rational way of dealing with the conflict if it doesn't assume that the conflict is one whose appropriate solution is defined by a balance between the opposing principles.

And this is what has to be problematised by noting that from a different perspective it is possible to make sense of the relation between the rights involved as one that contradicts the way in which proportionality construes such relations. Once we depart from proportionality, we can claim that what is worthy in one right on a certain context—the idea that justifies and grounds it—can be understood as something that is defeated by the very act of balancing such right against the opposing principle: suppose that what is valuable of a certain right is that it constitutes an achievement in the fight against some forms of oppression, so its purpose is to work as an instrument of emancipation by means of annulling legal rights that allow one group to exploit another; if that is the case, then just by entering the terrain of proportionality such emancipatory right is denied its value.

Let me try to make the point clearer: using proportionality we could understand that a couple of principles are in such a relation that one weighs infinitely more than the other, and so the heavier will always necessarily defeat the lighter. But the only way in which such defeat can take place, within proportionality, is by putting them both on the same scale. What this approach does not see is that the very act of considering both principles could negate the value of one of them. What I could be claiming is not that a certain right weighs more than the opposing one, but that my right is there to exclude the other from consideration, that my right *contradicts* or is *incompatible* with the other, so it is affected by the very act of weighing it against the latter. And the possibility of the court facing contradictory claims is palpable once its position is contrasted to the structure of autonomy in which Pavlakos models it: while a subject that engages in the practical reasoning process cannot be entitled to contradictory claims, the court has to deal with claims endorsed by different subjects, and they can contradict each other: at the same time that I can go to the Court and claim I am the owner of some extension of land and therefore the

State cannot take it without compensation, the State can claim that I am not the owner, so no compensation is required; and then, how is the court to proceed? The same agent is not entitled to endorse them since they are not just in tension, but they are contradictory claims, but they nevertheless can be simultaneously presented to the Court, and then the alternative of maximising one on a proportional relation to the other is no longer available, since there is no single scale that can deal with both contradictory propositions. Therefore, the Court can only decide by rejecting or changing one of the claims so the contradiction ceases and is replaced by a simple tension.

And if we stay with the parallel between proportionality and practical reasoning, we will notice a second way in which proportionality restricts the possibilities of thematising constitutional claims: if the structures of proportionality are just as flexible as the ones of ordinary practical reasoning, then proportionality as a theory would not be telling us much, it would just be repeating that given a certain problem all relevant reasons are to be considered as they are normally considered by reflexive rational agents. On the contrary, if the idea is that by means of proportionality, practical reasoning adopts a structure that is not identical to the ordinary thematisation of reasons, then, within the proportionality test, the first order reasons will not be in position to be considered with as much openness as within the general practice of practical reasoning. This is the predicament I fear we segue into: for proportionality to make a difference, its structures must constrain the operation of first level reasons in a way that is not defined by the general practice of practical reasoning. And this problem can be taken one step further by asking about the degree of reflexivity that proportionality can accommodate in comparison to ordinary practical reasoning. According to Pavlakos' model, at the second level two things occur: moral propositions of the first level are the object of our reflexion and from this reflexion we obtain other moral propositions about the relevant properties that make something a concrete reason. Now, my question is to what extent is it possible, within the ordinary practical reasoning, to move the location of one moral proposition among the different levels. Can the position of a reason be disputed, so

the agent can start considering a certain reason as one to be weighed by a second order analysis and then reconstruct his scheme of practical reasoning in a way that what used to be a first level reason is now reassembled as a proposition that serves to define what can be a reason in the first place? Can we, as rational agents, take someone's claim not as a first-level proposition to be assessed by means of second order moral propositions, but as one that is supposed to integrate or modify in some way this very second-level that serves to define what a first-level reason is?

I think that the way Pavlakos presents the structure of ration agency might give room to this possibility. As we've seen, the reflexive structure of autonomy is grounded in a general practical principle whose content corresponds, more or less, to the Kantian Categorical Imperative: 'only those principles are valid that any deliberating agent would want to endorse as reasons for action'. But such starting point is vague, so it has to be specified by rules that provide the criteria for the distribution of costs in the process of optimizing practical reasons[45]. It is here where a reason that in principle only counts as a first order consideration could be reformulated by an agent as part of the background architecture of practical reasoning: the first order reason could be elevated into the realm of the specifying rules that define the properties of first order reasons, so it would no longer be purely an object of moral thought, but it would constitute part of the standards that contribute to define what can be regarded as one of those objects. The obstacle that this displacement has to overcome arises, in Pavlakos´s account, out of the fact that within the practice of practical reasoning, reasons do not work as canonic propositions that by themselves prescribe concrete courses of action in particular cases —they need to be scrutinised by the second-level process of deliberation in order to define its practical force *vis-à-vis* conflicting considerations. Only once they are thematised by this reflexive structure, they acquire their concrete, practical meaning. And if that is the case, then it seems impossible for a reason to be thematised by means of the same structure that it is simultaneously supposed to

[45] Pavlakos (2011), 151.

modify: if the reason modifies the structure on which its meaning pivots, then it is the sense of the reason itself what is destabilised.

But this obstacle is not impossible to avoid. Wittgenstein's certainty only prevents us from doubting everything simultaneously but does appear to give space to doubt part of the second level architecture that is taken for granted in the process of articulation—we can meaningfully resist and alter some of those propositions by pivoting on others that remain implicit. That idea is similar to the process that we previously described as 'aspect change', where the shift of perception took place not by denying everything that came before, but only by re-signifying the previous steps. And because we don't go as far as completely negating the relations on which we are operating, we reflect without 'giving up on intelligibility'.

If this is a possibility within ordinary practical reasoning, then the structure of autonomy allows a degree of reflexivity that cannot be matched by proportionality: if proportionality is there to offer a particular structure, distinct from the ordinary structure of practical reasoning, then primary reasons could not challenge such structure by operating within it. If that is the case, the claims that aim to alter the thematising structure have to be distorted, since they cannot be considered as claims that express propositions that attempt to specify the Kantian Categorical Imperative, thus regulating practical reasoning, but just as first-order reasons that need to be optimised. Understood like this, proportionality leads us to a dilemma, because it cannot have it both ways: either it gives the conflicting reasons the same possibilities that they have when they are articulated by rational agents, and in that case it doesn't seem to offer anything new; or it does provide a particular structure to that articulation, and therefore it restricts the ways in which those reasons can be thematised.

Now we can see two related but different ways in which submission to the balancing process entails the distortion of the constitutional claim that is articulated. On the first case, the reduction affects the possibility of understanding such a claim

as one that is not just in tension, but is incompatible with the opposing one; so it impedes doing justice to a claim that aims to, and whose value hinges on, the exclusion of another interest from consideration. On the second scenario, the structure of proportionality—if it is to offer something that we didn't already have—can only place the claims made as first order reasons, but not as constituent parts of the very structure of articulation that serves for the identification of reasons at the first level.

None of this, of course, is just a hypothetical problem. We can see in practice how proportionality can only deal with certain rather serious problems by shaping them in a way that cannot give its due to the principles involved. In *Lustig-Prean and Beckett v. UK*[46], case strangely celebrated by the defenders of proportionality themselves[47], it was ruled that the discharge from the Royal Navy on the sole ground of being gay violates Article 8 ECHR. This—obviously—is not the part that should not be celebrated, for the problems lie on the justification of the decision. The Court argued that the contested measure aimed at a legitimate goal, which was the maintenance of morale, fighting power and operational effectiveness of the armed forces, and that it was a suitable means to further such a goal. The problem the Court identified was that the expelling of army members based on sexual preference was disproportionate, since it entailed a serious infringement of the soldier's privacy that was not justified *vis-à-vis* the degree of disruption to the armed forces that is carried with the acceptance of gay people in the Royal Navy. It is true, the Court asserted, that if declared homosexuals were to serve in the army, then integration problems would arise in the military system; but pointing to the experience in other European armies that had recently opened the armed forces to homosexuals and similar cases regarding the inclusion of women and racial minorities, the Court predicted that the degree of disruption caused by the inclusion of gays was relatively minor. The measure was disproportionate, in the end, because gays would not actually cause such a big headache if they were accepted in the

[46] App. Nos. 31417/96 and 32377/96, 27 September 1999.

[47] Kumm (2010), 147.

army. Well, lucky them! For only if the levels of homophobia were higher—so the degree of disruption that they cause were more serious—then the discharge based on sexual orientation would be justified. This way, according to proportionality, the extension of the rights of an oppressed group is to be determined in part by the level of hatred that is expressed by their oppressors, but not so that the more hatred is directed at them then the more extensive their rights must be, but inversely: the more that they are oppressed the lesser the degree to which their rights can be extended.

The problem, as we can see, lies on the very formulation of its terms. First of all, one should immediately be suspicious about the values that are put as conflicting principles, for why do we have to understand this as a measure that affects the (individual) right to privacy and not the (collective) right of an oppressed minority to be equally recognised in their dignity by a public institution? If we understand that what is at stake here is this second claim, then the mainstream critique of proportionality reclaims front stage, since it seems quite inadequate to ask for a discrete value that could answer *how much weight should be recognised to the democratic ideal of constituting a community of equally free citizens* and *how much further away from that ideal we are moving if we exclude homosexuals from the army*. These do not seem to be the kind of questions that can be answered that way. But the problem also presents itself when we look at the relation between the opposed principles, for if what is at stake is a right regarding the dignity of an oppressed minority, then obviously it cannot be appropriately thematised by conditioning the extension to which it is to be exercised to the degree of disruption that such exercise would cause: framing the problem in those terms would immediately deny the emancipatory potential of the right. The claim that cannot be heard is that the extension of the minority's right is not to be balanced at all against the homophobic reaction that their inclusion could generate, not that it should be given a superior weight *vis-à-vis* such disturbance. Understood like this, the right of a minority to be treated equally in the access to public positions is defeated and depleted of its value when it has to be weighed against the disturbing effects that it

causes on the privileges that it is supposed to overthrow. Proportionality can only cast the problem as one in which the opposing principles are in tension, but not as one in which the relation between them is one of proper *contradiction*, as a conflict in which one of the rights is there to exclude the other: if the only way of doing justice to a right is by exercising it disproportionally against the opposing one, then proportionality cannot but miss the point and constitute an irrational procedure, a bad taste charade when seen from the perspective of the oppressed group that is told that their right is going to be given its due.

Finally, it is worth noticing that allowing for the possibility of understanding rights in constitutional cases as standing in an unbalanceable contradiction is not to say that these rights, in their general constitutional formulation, are incompatible—that one is there to negate the other. In constitutional disputes, rights are put forward in relation to the interest of some group or in consideration to some particular setting, hence the same right can work as a legal vehicle for different demands. This means that in one case a right can be there to exclude the other in this dispute, but not to override it *tout court*. To make the difference explicit, think of black people in the '60s opposing restaurant owners who denied service to them: they were not claiming that their right to eat at whatever restaurant they want (and could afford) was to be balanced against the owner´s right to exclude them; quite the opposite, the fight against segregation is the fight to annul the oppressor's rights and it would obviously defeat the emancipatory effort to say that in order to decide, a proportional relation must be achieved between the right to exclude blacks and the right of blacks not to be excluded. But, understanding that what was at stake was an unbalanceable contradiction doesn't require us to understand that they were straightforwardly trying to negate private property. The straight forward contradiction was directed against special dimension of this right: the right to own a restaurant included the right to deny service to blacks; and so we can make sense of the blacks' fight as one that aimed to negate particular instances of general rights that were not being questioned. If we go back to *Lustig-Prean and Beckett*, we'll see that arguing that equal treatment to minorities requires that the disturbance that

they cause to the ordinary operation of the military forces is not to be considered in the discussion, does not impede recognition of the constitutional value of the proper organisation of the army: that remains as a constitutionally relevant goal, but once it is confronted with the claim of an oppressed minority, such goal does not translate as the homophobic disturbances that the inclusion of gay people could generate.

2. Enforcing legal constraints?

In this section I will argue that proportionality cannot honour its second promise, that of serving to judicially enforce constitutional constraints on legislative decisions. If the previous section aimed to make explicit how the structure of proportionality is inadequate for certain claims, here I want to show how, once the judge is operating within this structure, proportionality serves precisely to freed her from having to decide in consideration to the constitutional provisions: while the form of proportionality constraints the understanding of the claims involved, distorting them whenever is necessary, the identification of the values and weights within such form is up for grabs, unbind to any relevant constitutional provision. Proportionality, I will argue, frames the problem in a way that makes law silent regarding its solution. After explaining how proportionality detaches the judge from law, I will deal with the consequences of this liberation: if legal standards are not serving as pivots for the constitutional decisions, then something must take their place. With reference to *Laval* and *Viking*, I will show how once legal constraintments have been pushed aside, *Law and Economics* analysis takes over, providing the relevant criteria to decide constitutional cases and facilitating an entrenchment of neo- or ordo-liberal visions of society in law 'while insulating them from the democratic process that might come to question and challenge them'[48].

[48] Van der Walt (2014), 362.

To see how proportionality leads to unconstrained decision making, let us go back to its ordinary characterisation. Alexy tells us that proportionality is only supposed to provide the structure in which practical reasoning takes place, so it is part and parcel of proportionality that the values to be assigned to both the principles at stake and to the degree of fulfilment and non-satisfaction of them by a contested measure are not given by proportionality itself[49]: it is not proportionality that decides that expelling army members based on their sexual orientation constitutes a serious infringement of soldier's right to privacy, nor that the integration problems that their inclusion would generate would only be minor. 'Weight formula is not an alternative to moral argument, but a structure of legal and moral argumentation'[50]; or, in somewhat similar terms, proportionality is just 'a legal framework that must be filled with content'[51]. We have seen already that such structure necessarily constrains how the different claims can appear within the process of argumentation itself, but from there we can now take one step further.

If the weight formula does not indicate the concrete weights to be introduced to the constitutional consideration, but on these weights nevertheless depends the decision about the constitutionality of a piece of legislation, then one has to wonder what serves to relate the authoritative measure whose constitutionality is under evaluation and the constitution itself. Aharon Barak claims that the operation of proportionality depends on 'the principles and values of each legal system', so balancing would reflect how each system values social benefits and marginal harms[52]. Law is therefore supposed to provide the answer: the distance between a legislative decision, like excluding homosexuals from the army, and the constitutional limits that are supposed to constrain it, should be crossed by means of legally established considerations—it should be the law that defines that 'excluding homosexuals

[49] Jestaedt (2012), 18.

[50] Alexy (2014), 59.

[51] Barak (2012), 489.

[52] Barak (2012), 490.

constitutes a serious infringement while the damage to the operational organisation of the army is minor'.

To see how far this resort to the values endorsed by the legal system can take us, the first thing to notice is that an enforcement of constitutional provisions on legislative powers cannot pivot on previous legislative decisions: to identify the values to be weighted, the Court cannot refer to other pieces of legislation in order to justify that excluding a minority from entering the army constitutes a 'serious' detriment of constitutional rights. Doing this would amount to employing one law to set the magnitude in which a constitutional right is negatively affected and then using such quantum thus identified a standard to assess the constitutional status of another law —the legislator tying itself. On the contrary, if what is being enforced are constitutional limits, then the assigned values have to arise from the constitution; and since the conflicting constitutional provisions by themselves cannot solve the conflict between them (by themselves they do not dictate the extent to which one must fulfil this optimising prescription[53]), the court is in need of a constitutional criteria to distribute the relative weights of the provisions to be balanced—in absence of one, recurring to the 'principles and values of the legal system' is a sterile attempt to constrain the decision. Against Habermas[54], Alexy has argued in favour of the rationality of balancing by claiming that reasons can be offered in support of 'judgements about intensity of interference and degree of importance'[55] of the principles at issue, allowing to understand that an inferential system is implicit in balancing[56] and thus securing its rationality. This might be so, but the relevant question now is a different one and it has to do with the possibility of understanding that it is the constitution that sets the crucial weights and provides for their justification.

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[53] Habermas (1996), 254.

[54] Habermas (1996), 259.

[55] Alexy (2002), 405.

[56] Alexy (2005), 575.

2.1. Proportionality against the text

It is at this point that proportionality releases the judges from the constitution, that it frees her from the constitutional provisions in order to decide the question about constitutionality: when asked why should judges be the ones who decide the constitutional problems that are dealt through proportionality analysis, Mathias Kumm immediately concedes that they only know the law and that law does not provide the answer for these issues: 'within the proportionality-based human rights paradigm, the law—understood as the sum of authoritatively enacted norms guiding and constraining the task of adjudication—typically provides very little guidance for the resolution of concrete rights claims'[57]. And Kumm is certainly right in this: the relevant constitutional provisions would rarely do more than assert the rights or interests in tension[58], they constitute the object on which the decision must fall, and it is precisely for that reason that they cannot provide the solution. So if the judge looks back at the constitution attempting to find an answer to a case in which a magazine calls a paraplegic reserve officer both a 'born murderer' and a 'cripple', the only information that she will find is that the constitution recognises both freedom of expression and a general right to personality—it will find the rights in conflict, but they cannot provide the measure to assess whether ordering the magazine to pay damages to the sum of DM 12.000 constitutes a 'serious' infringement of freedom of expression. When it comes to weighting, proportionality offers 'no immediate guidance as to what makes a measure disproportionate or how to conduct the balancing'[59]. Alexy focusses on the fact that the judge can obviously offer reasons that justify this distribution of values[60]. This is trivially true but also beyond the point, for whatever these reasons are, the criteria to make the distribution cannot be grounded in the very rights that the assigned weights are aiming to balance.

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[57] Kumm (2010), 152.

[58] See Webber (2013).

[59] Möller (2012b), 99.

[60] Alexy (2005), 576.

This detachment from the constitution seems like an inevitable consequence from the way in which rights are understood by proportionality. Since they are conceptualised as principles that require to be realised to the greatest possible extent, then their scope is radically expanded: trivial pursuits such as feeding pigeons and riding horses are protected by constitutional rights[61]; even more, Kai Möller has argued in favour of understanding that the right to autonomy covers even evil interests[62]. That being the case, then constitutional conflicts will be constituted by the enactment of any conceivable law or the performance of any imaginable action—everything turns into a constitutional question, and so the constitution simply cannot provide the answers.

Accordingly, Kumm tells us that the fact that something constitutes a constitutional value says nothing about the relation between such a value and another one, neither in abstract nor concrete terms[63]; and this means that it is the constitution itself that is silent regarding the relation between the principles involved. Nevertheless, the decision about the constitutionality of an authoritative act is grounded—according to the proportionality approach—precisely on the assertion of a relation between those values, and therefore the constitutionality of a law depends on a relation of which the constitution itself says nothing. Self-deprived from constitutional tools, proportionality needs to offer a suitable replacement capable of steering the court's decisions, and the notion of (rational) justification is thus pushed to the foreground. Now, when every measure affects and promotes constitutional rights, the criteria to decide on the constitutionality of an interference lies not on the constitution but on the substantive justification of the questioned action, and proportionality provides the matrix to make the assessment[64], offering the balancing format that is to be filled by moral arguments or propositions such as 'that the infringement with the

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[61] Cohen-Eliya & Porat (2011), 479.

[62] Möller (2012b), 77.

[63] Kumm (2007), 136.

[64] Cohen-Eliya & Porat (2011), 467; Kumm (2010), 157-63; Möller (2012b), 122, 178.

personality right is serious'[65]. These propositions are represented by the values to be weigh and so there is a shift from interpretation to justification[66]: constitutionality turns into reasonability[67], a property that theorists of proportionality don't think that can be easily found at the legislative stage[68].

The extent to which a general notion of justification has displaced the constitution as the pivot in which the decision rests, is made explicit in the discussion about the role of limiting clauses. Even if the legally authoritative text does provide an answer to the constitutional question, an idea crucially related to the test of proportionality comes in to rescue the judge from the obligation to decide only in consideration of the constitution, because attached to the theory of balancing is the notion that the constitutional text itself is not very important when it comes to solving the constitutional disputes[69]. For Möller, the fact that constitutions establish a set of distinct rights, giving each one a particular formulation that often have individual limitation clauses, is so irrelevant in solving constitutional disputes that nothing would be lost in the process if instead of those lists we were to operate just with one comprehensive *prima facie* right to personal autonomy[70]. So, if a constitution explicitly conditions the limitation of a right only to the requirement of being established by means of a law, the constitutionality of such a legal limitation would still be decided by the moral evaluation that operates through proportionality. But that is not enough, for even if the constitution leaves no space whatsoever to include an exception or limit to a right, such absence is not an obstacle to its inclusion. Martin Borowski tells us that this doesn't mean that the text is not to be taken seriously (and, how could he?), but only that 'one ought, too, to allow for some leeway where a reasonable need for limitation is present'[71]. He is talking here about

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[65] Alexy (2014), 63.

[66] Kumm (2010), 142.

[67] Möller (2012b), 178.

[68] Kumm (2010), 154-155.

[69] Kumm (2010), 144.

[70] Möller (2012b), 88.

[71] Borowski (2007), 223.

the possibility of limiting the scope of a right even when the text itself does not provide grounds for that limitation; and one might think that the leeway he is referring is to be restricted to those cases in which we have some constitutional rights whose status as actual fundamental principles of the rule of law is not undisputed. But one would be wrong, because even though Alexy repeats that the possibility of a judge ruling against the literal text of the constitution is something that has to be taken very seriously, he is nevertheless happy to include an exception to the 103.2 rule of the German Fundamental Law, which forbids nothing less than the retroactivity of criminal laws (!)[72].

Therefore, the limiting reasons must be interpreted generously to cope with substantive considerations that are to be scaled in the proportionality analysis; and precisely because those substantive considerations come into the game to define the limits of the constitutional rights, then it is these substantive considerations that provide the force of the argument regarding the constitutionality of a measure. The constitutionality of a questioned measure is then to be decided in the light of considerations that are not defined either by proportionality (that only offers 'little more than a structure which functions as a checklist'[73]) or the constitution (that doesn't define the values to be balanced and whose text only has a 'modest role to play'[74]), but demands a new political decision[75], one adopted by judges through moral reasoning[76]. They, Kumm tells us, must engage in 'an exercise of general practical reasoning, without many of the constraining features that otherwise characterise legal reasoning'[77].

So, proportionality is just a structure and the constitution itself does not provide the values to fill it. Then, in order to decide, something like a rational policy assessment

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[72] Alexy (2000), 215.

[73] Kumm (2007), 140.

[74] Kumm (2010), 144.

[75] The identification of the limits of politics is 'itself inextricably political'—Bellamy (2007), 149.

[76] Möller (2012a), 717.

[77] Kumm (2007), 140.

is required[78]. But the rationality of it can only take us so far, and it is key to notice that in hard cases such distance is still one (crucial) step short. The rational structure of proportionality comes into play when the judge has to explain why he thinks that, given the considerations at stake, the balance falls to one side and not the other. In order to provide a *full* argument to support his decision, the judge should have to develop 'a complete moral argument with regard to the relation between the two values at stake'[79]. But he cannot do that, for the issues are 'too complex to be resolved in a theoretically satisfactory way at the moment when we have to decide the case'. So how can the judge decide the outcome of the balance in hard cases? Well, now they are the lucky ones, for they are *fortunate*[80] enough to have moral intuitions to which they are 'sufficiently strongly committed to feel confident in saying that the balance between the two values should go one way or the other'[81]. With a dash of irony we can say that Möller obviously is not proposing that intuition should prevail unrestricted by any checks firmly grounded in reason; rather 'it is that intuition will feature as part of the decision-making process where no theoretically satisfactory account of the relevant issues exists'[82]. But notice the role that Möller is allowing intuition to play: it is that of deciding the outcome of the balance within a process that is called 'balancing'.

Being that the case, asserting that the balancing process has to be carried out by comparing how important the principles are 'for the constitution'[83] appears as an empty formula, because nothing necessarily follows from it[84]. And the problem operates also at a second level: since the scope of rights is extended, then several rights will be at stake for every given measure, and it is the judge who has to decide which ones will be put forward. We have seen already how *Lustig-Prean and*

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[78] Kumm (2007), 140.

[79] Möller (2012a), 729.

[80] Möller *dixit*.

[81] Möller (2012a), 729.

[82] Möller (2012a), 729.

[83] Alexy (2003), 442.

[84] On the compatibility between proportionality's inherent 'lack of guidance' and the rule of law, see Webber (2013), 411-6.

Beckett v UK could have been understood as a case in which it wasn't privacy, but dignity that was affected by the homophobically motivated measure; hence the identification of the values that are to be considered as the constituents of the constitutional conflict is part of the question that is left unresolved by proportionality. And the discrepancies here cannot be understated: while LGBT+ activists rightly claim that the exclusion of gay people from the army constitutes an act of arbitrary discrimination that affronts the most fundamental right of every citizen to be treated equally by the law, that is obviously not how the measure is understood by the opposing side, for they would claim that there is an arbitrary discrimination only as far as 'those who are on an equal condition receive a different treatment', but their point would precisely be that gay men are not on an equal condition in relation to heterosexuals (at least when it comes to entering the army forces). All the discussion about gay marriage pivots on this discrepancy. That is why it is so convenient to present the problem as one that affects the right to privacy, for such understanding is more likely to generate consensus among the different actors; however, the cost of such consent lies in making invisible the oppression that affects sexual minorities: if the problem is stated as one that has to do with the right to privacy, then the interference is thus presented as one that has to do with something common to everyone, for we are all equally susceptible of being victims of privacy violations, and therefore the situation is put forward in a way that serves to conceal the particularly burdensome position that sexual minorities occupy in society.

And this political divergence with respect to the identification of the proper right involved in the constitutional dispute can be even more acute. While in the previous case it would not be problematic to defend that equal treatment to all citizens is a legitimate goal, so disagreement would only start when it comes to decide if the questioned measure interferes or not with it (and the magnitude of the interference), we can easily think of other cases in which the parties in dispute would not even agree on recognising something as an acceptable principle. Just to give an example, I understand that the strengthening of workers´ bargaining power is of crucial

importance in a democracy, an essential aspect of the right to association and to political action in general. But that is hardly the way labour rights are understood by the CATO Institute. If we were to stand with Möller, then in deciding a constitutional case in which these two claims are put forward, we probably shouldn't even ask if the constitution recognises collective labour rights, since the decision would depend just on the judge's assessment of the right to personal autonomy. If that is the way to proceed, then it is not even possible to pretend that the law can adjudicate this divergence, and therefore the decision could only rest on the political stand that the Court takes.

This way, proportionality frames the problem in a way that not only excludes the possibility of understanding the opposing rights as standing in an unbalanceable contradiction, but it does so in a manner that disconnects from the constitution the identification of which are the claims and rights involved, their abstract value and the magnitude of the intervention—these questions are set by proportionality so that they cannot be answered by the constitution. If this is the case, then in what sense can we say that it was the constitution that constrained a legislative decision?

2.2. Proportionality against the workers

Let me draw on *Laval* and *Viking*, two labour cases that perfectly exemplify how the race to the bottom is invisibilized by proportionality, to try to make these previous points clearer[85].

Viking is a Finish firm that owns a *royal-navy* size fleet of ferries. The conflict originated when Viking, wanting to take advantage of lower labour standards, tried to use the Estonian flag when going to Tallinn. Because of this, The International Transport Workers Federation (ITF), together with the Finnish Seamen's Union (FSU), took industrial action that aimed at impeding the change of flag. Viking went

[85] For a critical approach to these cases, see Davies (2008); Barnard (2008a), 14; Van der Walt (2014), Ch. 7. Endorsing the decisions: Sabel & Gerstenberg (2010).

to English Courts and from there the case went to the ECJ. Viking claimed that the industrial action infringed their right of freedom of establishment.

In *Laval*, a Latvian company got a contract in Sweden and posted Latvian workers there. Those Latvian workers, together with the Swedish, started negotiations with Laval's Swedish subsidiary in order to extend the collective agreement to the posted workers. In the context of those negotiations, the union blocked Laval's building sites and Laval went to the Swedish courts, which also referred the case to the ECJ. There, the worker's action was weighed against the right of freedom to provide services.

In those cases, the ECJ decided by assessing the right to strike in Community law against the right of establishment and freedom to provide services. According to the proportionality scheme, both claims cannot operate without some matrix that can thematise each right, for they are not to be understood as *fixed points that prescribe particular courses of action*. The result of this process, as we now know, was that the Court recognised the fundamental status of collective action, but—and this is really the important part[86]—conditioned its exercise to the extent that it was proportional to the companies' rights. That is, the worker's right—a right that is there to serve as a vehicle to defend them against the firms' claims—can only be exerted within certain limits defined in consideration to the companies' interests.

At this point we can repeat what we previously mentioned: by conditioning the exercise of the workers' right to a proportional relation to the firm's right, we exclude the possibility of understanding the former as a right in *contradiction* to the latter. So, if that is how the workers made sense of their rights, then their understanding of it was defeated by the Court before it could have even been heard[87].

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[86] The recognition of the right to strike as a fundamental right 'has little more than rhetorical value'—Barnard (2008a), 14.

[87] For Letsas, drawing *harmony* out of this antagonistic relation is to be celebrated—(2012), 99.

But now we can say something else, we can offer a more complete understanding of how proportionality operated to the detriment of the workers. The first thing to notice is that the ECJ held that Article 39 EC, that grants freedom of movement of workers, Article 43 EC, that grants freedom of establishment, and Article 49 EC, that grants freedom to provide services, all 'do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services'. This is, the Court gave horizontal effect to those rights against the unions. This way, despite not being public institutions, and despite the fact that Article 137(5) EC states that Community is not competent to regulate the right to strike[88], the actions of the workers were constrained in a proportional relation to those rights established in the Treaty.

Such an extension of the scope of those rights, however, is not based on the text of the Treaty but on what can only be considered a political consideration: that the rights granted to the companies would not be sufficiently protected if non-state barriers weren't also restricted by the employer's rights. In other words, that even though the text of the Treaty is silent about this, the adequate protection of the firm's rights requires understanding those rights as playing a role in the determination of the acceptable degree to which worker's fundamental rights can be exercised. The same can be said about the extension that the Court gave to the Directive 96/71: this directive aims to secure that workers that are posted from one Member State to another receive a minimum level of protection. Even though the rule states that it is not there to prevent the application of more favourable conditions to workers, the Court argued that its purpose was only to secure a set of minimum terms and conditions. This means that, despite its text, the directive could not be used in order to achieve labour conditions that went beyond the established minimum. The conclusion that followed was that the use of a collective agreement

[88] Regarding this extension of the community framework, see Azoulai (2008), 1341.

containing more generous terms and conditions was not covered by the directive. Therefore, it was not acceptable to use the collective agreement (backed by collective action) to impose more worker-protective requirements or to go beyond the matters laid down in Article 3(1).

This shows how the Court's analysis not only proceeds by disengaging itself from the relevant legal texts (the employer's rights restrain not just the state, but also the unions; the directive doesn't cover collective agreements that go beyond minimum conditions), but also how the space that is left open once the text is pushed aside is filled by the Court's own decisions, for there is nothing in the law that establishes that the degree of satisfaction of the workers interests that was achieved by the collective action is disproportionate to the harm done to the firm's rights[89]. This is particularly clear when the Court states (in *Viking*) that 'to the extent that [ITF's] policy results in shipowners being *prevented* from registering their vessels in a State other than that which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified'. Why is it assumed by the Court that preventing the registration cannot be justified? According to proportionality such a conclusion depends on the value assigned to what is gained by the workers in relation to what is lost by the company, and in making such assessments no help from the law can be obtained. After all, what is the value to be given to the articulation of the political power of the workers? Of course, the Court didn't understand that *that* was the value involved in the conflict, but—as we have seen—that is precisely part of the problem: that it is not just the resolution of the dispute, but the identification of its terms is up to the Court's political decision[90]. And even if we focus just on the fight to improve the working and economic conditions, the situation is still particularly poignant, for the Court seems to ignore that the more harmful the collective action

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[89] 'Under circumstances like these', Van der Walt claims, 'a strictly or predominantly legal judgement was simply impossible', in (2008), 345.

[90] The court appropriated 'the jurisdiction to suggest judicial resolutions for conflicts that are deeply political', Van der Walt (2008), 343.

is for the employers' economical interest, the more effective it is in advancing the workers' claims.

So, it seems that the Court cannot apply the proportionality test and then, based on its result, decide in favour of one of the parties. On the contrary, it appears as if the conflict is configured in a way that unless the Court starts by taking a stand in favour of one of the claims, it simply cannot decide the case at all—if both claims are equally important, then the conflict appears to be governed by the political equivalent of Newton's third law of motion: every step forward for one claim entails an equal step backwards for the other.

And if that last observation is analysed together with the horizontal extension of the Treaty's rights, then we can more clearly advert the political nature of the ruling. An interesting consequence of the horizontal effect given to the Treaty lies in the qualitative difference that such an extension makes to the nature of the interventions to be balanced. In principle, if the Treaty were to remain only with vertical effect and a question about the status of collective labour rights were put forward, then such questions would refer to the way in which the Member State has legislated regarding the union's collective rights. This is, the issue to be judged would be whether or not the scope of the right to strike, as it is established on the legislation of some state, interferes disproportionally with the Treaty's right to freedom of establishment and to provide services. The Court would have to compare the national law against the Community's rights. But, by extending such rights against unions, the problem is configured in a way that leaves the Member State aside and focuses the issue not on some piece of legislation about the right to strike, but on an actual strike.

If up to this point, and in relation to constitutional or fundamental rights, I have used the expressions 'scope' and 'exercise' indistinctly, it is because from the perspective of proportionality both levels are not qualitatively different. Even more, for some, that distinction cannot be sustained: 'the limiting provisions in the ECHR

frequently do speak of limits in the "exercise of rights", and this, too, has found its way into art 52(1) ChFR. Can such "limits on the exercise of a right" be reasonably distinguished from "limits of a right"? The answer is negative'[91]. And such impossibility to distinguish between the intension and the extension of a right is based on the fact that, for the theory of proportionality, the justification of an interference with a right is always to be determined in the same way, regardless of whether we are talking about *a law* that concedes a right to some group or *the exercise* of a right by a member of it. If we are dealing with a law, then what has to be decided is if the scope of the right, as it is established by the legislation, is proportional to the interference that such rights cause to other constitutional rights or values. At this level, it could be argued that legislation allowing unions to engage in particularly intense forms of boycott disproportionately favours workers' rights against their employers. What we are dealing with in *Laval* and *Viking*, on the other hand, is a question about the proportionality of a concrete exercise of a right granted by law, and not the law that bestows the right. The theory of proportionality offers the same answer to both kinds of problems, it claims to be adequate to resolve those two different conflicts.

But such equation leads to a severe alteration to what we usually understand as the role of rights in advancing claims, a distortion that in principle should equally affect all rights indistinctly, but that in practice—or at least in these two labour rights cases—only affects one side of the conflict (and it is easy to guess which). If what is to be the object of the analysis is not the *intension* of the right—i.e., the way in which the right is established in the law—but its *extension*—i.e, the way in which the right is actually exercised by the workers—, then the three levels of analysis of the test of proportionality are to be focused on such exercise, and since the first step in proportionality requires asking what is the aim pursued by the measure that interferes with a right, the Court has to start its analysis by asking what is the goal of the strike and boycott performed by the workers? It is crucial to notice that the

[91] Borowski (2007), 214.

pure formulation of the question precludes the possibility of understanding that it is the very exercise of the right that constitutes the legitimate goal of the workers. Instead of that, they are questioned by the Court about what they are looking for with their collective action, and so the decision about the justification of the strike will then depend on the relation that the Court can establish between such goals and their employer's right. One cannot but wonder if this would be an acceptable position regarding other rights. Can we presume that the Court would also ask what is the legitimate goal that is pursued by the exercise of freedom of speech? Probably not, for in that case it would be palpable that such a right is deprived of most (if not all) its value. In any case, we don't need to wonder if the Court would dare to ask the same question when it comes to the rights of the firms, because we only need to read its ruling to notice that such an inquiry is never formulated.

This is the asymmetry we are looking at: when it comes to the rights of the workers, its exercise is scrutinised so that it is only justified as long as it pursues a legitimate goal in a way that is proportional to their employer's right; but for the employers the exercise of their rights is never questioned, and this is how the race to the bottom is invisibilized in the analysis, for they [the employers] are never asked *what goal are you pursuing with this activity?* That query would have allowed us to patently see the actual interests in, and the essence of, the dispute: it is one between workers fighting for better labour conditions and gaining more power in production relations against private companies trying to maximise their profit; and so the proportionality of the means employed by the workers could have been assets against the revenues that the corporations were trying to make by taking advantage of the lower labour protections available. Instead of that, it is only the power and labour conditions of the workers and the means they employ to improve them that is put on the stand; hence the Court recognises that the exercise of the strike interferes with the firm's commercial activities, but never sees the flagrant symmetry of the relation: allowing the firms to carry out their operations interferes with the workers exercise of their labour rights.

The problem is, from the beginning, stated as one in which the worker's action is put under suspicion of affecting the employer's right, but not the other way around. Excluding the question about the aim of the companies' actions serves the Court to conceal what otherwise would have been patent: that when it comes to deciding such cases the rational structure provided by proportionality cannot help us. At this point the illegitimate arguments or purely moral considerations or populistic pressures that might affect the rationality of the decision taken at the 'ordinary' political/legislative level have already been filtered, but we still have a distance between the competing interest and the decision, we nevertheless face an open question, one that can only be decided by taking a political stand: if it is true that the more effective the collective action is the more it damages the employers' interests, then finding an answer requires favouring—i.e., to assign more value—either the workers' improvement of their labour conditions and power, on the one hand, or the firm's interest in maximising profit, on the other. Neither law nor proportionality settles the issue, and so by pronouncing on the issue, the Court thereby loses its position as a 'third' to the dispute, it has aligned itself with one of the actors, and it is only because it has done so that it can decide. And the way in which the decision is made and the alliances are formed, is by the endorsement of the *Law and Economics* approach: by not assigning values to the claims made, proportionality opens the door for *Law and Economics's* thinking to fill the gaps, to provide the criteria that serves to make the decision; and with this, collective rights are seen as obstacles that must be overcome in favour of individual rights that favour the liquidity of the human capital market[92]— collective action has become a 'restriction', and so the 'social' interests are from the start on the back-foot[93]. Stated like that, the true nature of the ruling is made explicit and we can see it for what it is: a political decision taken against the workers.

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[92] Supiot (2017), 238. Christodoulidis sees in this a shift in our understanding of the public good, shift that is effected by the instalment of a default *market* constitutionalism that serves to establish a common mesure that turns social protection into a commodity that circulates alongside property rights and economic security —Christodoulidis (2013), 2014.

[93] Barnard (2008b), 264.

Chapter 2: De-conflating Judicial Review

Introduction

In the first Chapter we have seen that proportionality fails to honour its promises, that it is not a suitable method to enforce legal constraints; that its incapacity to accommodate contradictory, incompatible claims entails a distortion of them and that it neglects the difference between assessing the constitutionality of a law and the constitutionality of a concrete, particular action performed in accordance with a law.

From this point forward, I want to propose a new approach to Judicial Review of Legislation (JRL). In particular, I want to argue that when a court has to rule whether or not a law is unconstitutional, the scope it has to decide—to the extent that it is to decide *as a judge*, with *judicial* tools—is considerably restricted: I will defend that in cases of JRL a court can only declare that a law is unconstitutional if there is an incompatibility between the propositional content of the constitutional clause and the propositional content of the law whose constitutionality is under examination—the analysis of unconstitutionality is reduced to a study of the 'secured' semantic relations between the two rules.

To do this, I will identify JRL as a procedure that is categorically different from, but usually confused with, what could be called Judicial Review of Application (JRA). To present this distinction I will look at the discussion about the different models of JRL with the intention to reveal that, under the term JRL, at least two very different functions have been conflated from the very first moments of JR. In order to achieve this, I will first present what in this work will be called 'the conflated approach' to JR, according to which judicial review of constitutionality is always about assessing the validity of a legal rule (1). I will claim that this understanding can be traced back to *Marbury v. Madison* (1.1), that it conflates validity with applicability and normative *conflicts* with normative *contradictions* (1.2); and that it

is at odds with the procedural features of the American model of JR (1.3). After this, I will show how, despite its inconsistencies, this understanding is extended in the academic literature about JR, even by heavyweights like Ronald Dworkin or Jeremy Waldron (1.4). The aim of the second section is to offer what I characterise as a 'de-conflated' approach to the review of constitutionality, in which different functions are assigned to the different models of JR (2): with reference to *United States v. Salerno* I will show that the mechanisms by means of which normative conflicts and contradictions are de-activated do not require to repeal the validity of any of the involved rules, and by doing this, the *extensional* nature of the former will be identified as the crucial factor in distinguishing between problems of application and those regarding validity. This will allow me to conclude that the basis for the unconstitutionality of a law can only be a normative contradiction (2.1), and this will, in turn, lead to an alternative reading of *Marbury* as a decision about a rule's applicability (2.2) and to an understanding of the judicial duty to 'say what the law is' that does not entail the power to address the rule's membership to the system (2.3).

While explaining this distinction between JRL and JRA, and thus de-conflating JR, constitutes the aim of the present chapter, on the next one, a distinction between legislation and adjudication will be offered. This will allow me to present a characterization of adjudication in general, one that will then be taken into the particular arena of constitutional decision-making, serving as the background against which the atypical position of JRL can be recognized as such.

By interlocking the distinction between JRL and JRA, on the one hand; and legislation and adjudication, on the other, the anomalous nature of JRL will be made explicit. As I will argue, what is unusual about this process is not reducible to the traditional view that accuses JRL of entailing a shift of powers that presents a counter majoritarian problem. While we could agree that JLR presents a challenge when it is faced with the democratic principle, such contradiction is not what I want

to focus on. What I want to argue is something more fundamental that is too often elided in the literature about JRL: that this procedure, that aims to determine the validity of a law, is anomalous *within* the very idea of adjudication, so its particularity can be seen even before the democratic principle is considered. And it will be this atypical position what will demand a purely inferential approach to decide these cases. A crucial consequence of this is that a defence of this reduced approach to JRL does not commit to defend the same understanding of adjudication in general—it is the particularity of JRL what demands the judge to decide about the relation between a law and a constitutional provision by performing only a restrictive inferential analysis that is insufficient in ordinary cases of adjudication.

1. The conflated approach

The characteristic feature of the conflated approach lies on its assumption that, regardless of the different procedural features that characterise different models of JR, this procedure is always about the same issue, that of deciding on the constitutionality of a piece of legislation. By assuming this, the conflated approach assigns the same function to two different models of JR: abstract and concentrated, on the one hand; and concrete and diffuse, on the other. Some brief and general remarks about these models can be useful enough to move forward: the second model finds its origin in the United States Supreme Court (USSC) and it is characterised by the conjunction of two properties: first, every court can resolve the constitutional question (therefore it is diffuse); and second, such question is only to be presented within the frame of a concrete case that is to be resolved by such court (that is why it is concrete). The first system, on the other hand, corresponds to the 'European model', beginning with the Austrian Constitutional Court of 1930, established by the Austrian Constitution enacted in 1920 based on a draft by Hans Kelsen, who would have even referred to the Court as his 'favourite child'[94]. In this model there is just one court that can resolve the constitutionality question

[94] Hinghofer-Szalkay (2017).

(therefore it is concentrated) and it analyses the subject regardless of a concrete case (that is why it is abstract). This way, according to the traditional approach, in both cases what is to be judged is the constitutionality of a law. Hand in hand with this classification comes a warning, and from no other than Kelsen himself: the American model is intrinsically problematic because it makes probable a lack of uniformity in the decisions about the constitutionality of a piece of legislation, and therefore the concentrated review is to be preferred[95]. In this way, according to the traditional view, both systems of JR do one and the same thing, so the difference between them is reduced to the procedural conditions on which that same substantive judicial activity is performed; and—the mainstream approach continues—the procedural conditions that characterises the abstract review are more suitable than the ones that characterise the concrete review process to fulfil such function. Here we can find the basis of the conflated approach: regardless of the procedural differences, the function is the same in both models, and the concentrated one is to be preferred.

But before accepting Kelsen's suggestion, there is an alternative that we should consider, one that arises once we take a detailed look at the way in which different legal categories are entangled in the conflated approach. I will argue that the assumption according to which the same function is supposed to be performed in both the European and American models has grown on the back of a serious misunderstanding of the categorical difference between validity and applicability; that is, that it is only at the unacceptable cost of collapsing the two that the conflated approach can be defended. I will show how this confusion originated in the genesis of the American version of JR; and by disentangling it, by putting forward analytical tools that allow us to differentiate questions about the validity of a rule from questions regarding its applicability, we will be in a position to propose a differentiation in functions that will lead to a rejection of the conflated approach

[95] Kelsen (1942), 186.

and to defend that each model aims at a particular goal, one that is coherent with the procedural particularities of each system[96].

My aim is to argue that while the JR performed in the European model has to be understood as addressing the constitutionality of a piece of legislation, in the case of the USSC what is tackled is the constitutionality of a concrete application of a law. Although both the question about validity and the question about application requires to relate the semantic content of a legal rule with that of a constitutional one, only in the latter case such relation is mediated by a concrete, extensional fact, by a fragment of the world that exceeds any fixed formulation. That extensional quality that is decisive at the moment of application and that is absent when it comes to validity, will be essential not only to distinguish the function of each model, but it will also constitute the basis to differentiate between adjudication and legislation, thus constituting the bridge between this and the following chapter.

To advance the argument, my fist steps will consist in studying *Marbury v. Madison*, to look at how validity and application are illegitimately entangled from the very inception of JR in the United States; then, by clarifying this confusion and thus assigning different functions to each model, I will argue that the restrictive semantic approach to adjudication that I propose is indispensable to perform the function of concentrated systems.

1.1. *Marbury v. Madison*

To see how the debate about the function of the USSC has been riddled with confusion since its first moments, we should start by noting the line of thought presented by Chief Justice John Marshall in his famous justification of JRL by the USSC. His argument has been provocatively called by Lawrence Sager ‘the little old judge argument’: the power to review the constitutionality of a law is just the

[96] See: Atria, (2001a).

ordinary power that is constitutionally given to judges, it is—at the end of the day—just another case of 'judges doing what judges have always done'. The form of this train of thought is that the Constitution is Law and that judges are to deal with Law in general. From this would follow that if there is a conflict between 'regular' and constitutional law, judges are to solve the conflict in favour of the latter. This way, the constitutional conflict is presented as just another case of a conflict between different regulations, the same type that judges are supposed to solved on a daily basis[97].

I will try to show that the fate of this defence stands or falls depending on how the JR is to be understood. That is, there is one possible function of JR that is compatible with this understanding of it as being just an ordinary instance of adjudication, and there is another function that is incompatible with what the judicial process is about.

But let us not put more words in Marshall's mouth and go directly to what he said in *Marbury v. Madison*. He argues that (1) 'all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation', and because of that (2) 'an act of the legislature repugnant to the constitution, is void'. This comment of Marshall is not exclusively about the judicial function, but an insight regarding the way he sees the general relation between law and constitution: the first statement about the fundamental legal status of the Constitution entails, according to him, the second one about the validity (or voidness) of the ordinary law; this is his first inference. He will later commit to two premises from which he will arrive at his second conclusion: regarding the court's role he claims two things: (3) 'it is emphatically the province and duty of the judicial department to say what the law is' and (4) 'if two laws conflict with each other, the courts must decide on the operation of each'. From those remarks about the judicial function he arrives to a particular consequence about the constitutional

[97] Sager, (1990), 898.

analysis, conclusion that is presented on a conditional form: (5) 'if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case… then the Constitution, and not such ordinary act, must govern the case to which they may both apply'.

I will spend some time scrutinising what could very well be the most quoted ruling in the American tradition; if I do so, it is not simply to expose the inconsistency of Marshall's argumentation, but because I think that those five sentences serve to articulate two opposing views of JRL, one that by connecting validity with a concrete conflict between law and constitution conflates the two models of JR, and another that allows to distinguish two different functions, being one of them coherent with the particular features of the concrete and diffuse model. The key for the distinction lies on the sense to be given to the third statement: 'It is (…) the duty of the judicial department to say what the law is'. In order to see this, we must first make explicit the conflation in which Marshall has put us and then disentangle and reorganise the categories that he collapsed.

The first inference that Marshall puts forward is about the validity of law and its dependance on the constitutional regulation. He says that if a law is repugnant to the Constitution that law is void. But in that inference he doesn't directly address the question of when, or under what conditions, a law 'is repugnant to the Constitution'. Usually we understand that the validity or voidness of a law is dependant on the fulfilment of the standards that the Constitution establishes for the creation of the law. If we were to use Hart's categories, we would say that the criteria for the distribution of validity or voidness is established by a rule of recognition.

But from Marshall's text we can infer that he is thinking about something else, for he then turns to talk about a constitutional *conflict* between a law and the 'paramount law of the nation'. From this perspective, he understands that a law is repugnant to the constitution if it is in *conflict* with it, and he explains what he means by *conflict* when he asserts that it arises in cases in which 'both the law and

the Constitution apply to a particular case'. Notice that in this sentence it is key that Marshall is talking about a concrete conflict of application: when he relates the voidness of a law to its relation with the Constitution, he is not thinking about whether or not the law was enacted satisfying of the standards imposed by the rule of recognition—he is connecting the validity of the law to the question about the particular judicial decision of a case in which the legal provision is opposed to a constitutional one. If a conflict in application occurs, then, for Marshall, the law is void and the judge must decide according to the constitutional clause. This recourse to a particular case in order to tackle the voidness of a law is no accident: Marshall needs to present his case for JR as fitting the constraint established in Article III of the United State Constitution, according to which the domain of the judicial department lies on deciding concrete 'cases or controversies'. If the validity of a law is not dependant on a particular case, then it would be quite difficult for Marshall to justify the court's involvement in the decision about the voidness of a piece of legislation.

Now, one possible understanding of Marshall's set of inferences is that being the law void because it conflicts with the Constitution on a particular case, then the judge is not to apply it. The attractiveness of this reading is that it allows to address and relate to each other all of Marshall's points: the Constitution is supreme law, so if an ordinary law is in conflict with it regarding a particular case, then such law is void, and if the law is void then the judge cannot apply it[98]. In other words, three relations are assumed in this understanding of Marshall's ruling: that validity defines applicability, that the power granted to judges to apply the law entails the power to assess the validity of such law, and that a conflict between a law and the constitution at the level of application defines the voidness of such law. In this way the question about a conflict between law and Constitution is related to the question regarding the validity of the law, and the question about validity is related to the question about judicial application. In this scheme, the third assertion of Marshall,

[98] Bickel (1986), 3.

the key idea that 'it is the duty of the judicial department to say what the law is' can be read as referring to the power of the court to say that a particular text is not law, that it is void, because it conflicts with the Constitution.

Notice that if this is how we are to understand what Marshall is saying, then he is defending this scheme as one that is supposed to follow from the very nature or rationality of a legal system with constitutional supremacy. He doesn't give any positive or legal support to his reasoning, so we are entitled to attribute to him the belief that these relations (first, between validity an application; then, between a law's voidness and the court's power to declare it; and finally, between a conflict and voidness) are necessary in a legal system as the American in 1803. The naturalisation of this articulation, the acceptance of this series of inferences, constitutes the inception of most of our current predicament, of what I have called the *conflated* understanding of judicial review. Making explicit the illegitimacy of these inferences is the aim of the following section.

1.2. Objections to Marshall's inferences

Here I will argue, against this possible reading of Marshall's ideas, (a) that there is no necessary connection between validity and application; (b) that the judicial power to decide on the application of a rule is compatible, but does not entail the power to decide on the validity of those rules; and (c) that the verification of a normative conflict at the moment of application between a legal and a constitutional rule does not entail the voidness of the first one.

a) From validity to application

Marshall's picture assumes that if a law is void then the judge cannot apply it[99]. But this is an enormous oversimplification. A norm is valid if it is part of the legal

[99] For a concept of validity-as-application Wróblewski (1992), 78-9.

system, and its membership—as it has been said before—depends on the satisfaction of the criteria established by secondary rules of recognition. If a norm satisfies those criteria, it will remain as part of the system until there is an explicit statement of cancellation, i.e., until it is abolished, and such abolishing effect takes place once an abolishing law is in force.

Usually, norms that are in force are to be applied by judges and norms that are not in force are not to be applied; but this correspondence is far from being an entailment relation: as it is commonsensical for any judge, it is not enough to know that a law is no longer in force to assert that it cannot be applied[100]. There is nothing particularly mysterious in having to apply a law that has already been abolished to a case that was verified while the law was still in force. The most typical occasion for this phenomenon is found in criminal law cases in which a legal modification that increases the penalty for an offence, simultaneously derogates the original law which established a lesser punishment. On that scenario, given general rules regarding the non-retroactivity of substantive criminal regulation, the judge will have to apply the law that is no longer valid, and therefore she must not apply a valid and in force law[101].

Now, this decoupling between validity and application doesn't immediately seem to prove Marshall wrong. After all, retroactivity (including preteractivity) and utractivity (the application of a rule to a case that took place after it was abolished), all occur in consideration to special norms that regulate the relation between *being in force* and *being applicable* to a case, so if there is nothing legislated to modify the default correspondence, the usual effect is plain activity: what is in force is applicable and what is not in force is not to be applied. But it is certainly not the case, as Marshall's argument seems to imply, that just because a law is not currently valid at the time of judgement that the judge can ignore it. My point is precisely that

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[100] See, in general, Guastini, (2001).

[101] Preteractivity (the retroactive application of a derogated law) also attest that validity and applicability do not need to go hand in hand.

modern legal systems include norms that define themselves the relations between validity and application[102], so there is nothing in the rationality of a legal system that assures the connection that on Marshall's reading is defended. On the contrary, precisely because legal systems are not static, there have to be special rules regulating the application of laws once legal modifications have taken place between the verification of the action to be judged and the moment of judgement: if something can actually be considered part of the rationality of a legal system, no *necessary* relation can be sustained between validity and application regarding every rule.

Some readers might reply that, since the examples that I have put forward all dealt with laws that *were* part of the legal system, they are irrelevant for this discussion because the connection that *Marbury v. Madison* establishes is not between repealed laws and its applications, but between not-laws-at-all and their applications. Marshall's ruling in *Marbury v. Madison* wouldn't be *constituting* the voidness of the law at the time of the judgement (*ex nunc*), but it would be *declaring* it from the very beginning (*ex tunc*). If something was never part of the legal system—the defence of Marshall would continue—, if it was never valid nor in force, then the USSC is just expressing the always-already lack of legal existence, and when it comes to that kind of voidness, there is no application possible.

Even if this is what Marshall was talking about, then still his argument is not enough to justify the lack of applicability: once again, judges and legal practitioners in general are all well aware that judges can be legally obliged to apply foreign law to decide a case, and foreign law is, by its very definition, not just currently invalid law in the legal system of reference, it has never been valid, nor in force, nor part of the relevant legal system in any way. In terms of its validity or existence in relation to a national legal system, the status of foreign law—unless there is a particular rule that asserts otherwise—is for all purposes that of *not-law*. This means that it is not

[102] For Wróblewski, these are 'transitional rules' (1992), 84.

true that a rule that manifestly fails to satisfy the conditions established by the rule of recognition, and therefore has never been part of a national legal system, necessarily cannot be applied (and even preferred) by a judge in order to adjudicate a case[103]. In these cases, just as it happens with the derogation of laws, the application is disconnected from the validity: the decision of what rules have to be applied by a judge is not something that can be decided just by looking to the rules that define the validity, force or membership to the system. To suggest that these questions are identical constitutes a collapse of application into validity, in *hartian* terms: an inclusion of the rules of recognition in the scope of the rules of the rules of adjudication.

b) From a decision about application to a decision about validity

The previous point is directly related to one of the main objections presented against *Marbury v. Madison*: there is no reason to assume that the question about the validity of a rule (however it is to be determined) has to be decided by an institution just because such institution has to decide the question of application; the court can very well be obliged to apply a rule without being entitled to consider its validity[104].

To make this point clear let us take the case of a ruling that orders the restitution of the due thing to the owner who lacks possession. Suppose that the Constitution of this legal system orders that in cases like this a ruling in favour of the owner can only be declared if the judge offers the defendant the opportunity to present witnesses, and that in this case such opportunity was never given. Now, when the owner goes to an executive procedure to get the execution of the ruling, the new judge in charge of such procedure may know that the Constitution was infringed by the previous one, and even more, such disconformity could also be alleged by the counterpart. Despite this, there is no reason whatsoever to assume that the new

[103] In this sense: Vilajosana (2010), 42.

[104] Bickel (1986), 3.

judge cannot enforce the previous ruling: as far as the law operates with constitutive norms and contemplates differentiated scopes of competence, it is perfectly possible to have a (constitutive) legal rule-A that establishes that some quality—i.e., an official stamp and signature by the judge—constitutes the institutional status of 'definitive ruling' on whatever decision the courts adopts; and simultaneously another competence rule-B can order the new judge to enforce all 'definitive rulings' according to rule-A and forbid him to consider any claim that the losing party of the principal case presents during the execution (this would be quite a reasonable rule for an executive procedure). If that is the case, then the question about the validity of the decision dictated by the first court on the principal case is not relevant to the new judge: he is incompetent to address it. Regardless of the substantial validity of the first ruling, the second judge would be legally forced to apply it in consideration of the conjunction of rule-A and -B and the fact that the decision of the first judge has the official stamp and the appropriate signature.

The same is true when it comes to the infraction of constitutional conditions for the validity of a piece of legislation: suppose that the Constitution in a legal system has a rule that asserts that any action of a public officer, performed in breach of his institutional duties, is void. Suppose also that in this legal system legislators are forbidden to accept money from third parties in exchange for voting laws in their favour. Both conditions, I think, are perfectly reasonable and probably are included in many modern legal systems. Chile's legal system has rules like these, and we recently had a case in which a group of Senators received illegal money from a private fishing company that, in return, asked them to vote in favour of a law that gives this company fishing rights in perpetuity and for free. With their votes, the law was approved and enacted through its publication in a public record. Months later, the bribery was discovered and so the Senators are currently facing a criminal trial. Suppose, finally, that they are found guilty of bribery (as they should be, for the felony is obscenely clear). I think that it shouldn't be too hard to argue that given these conditions the fraudulently approved law should be void according to the Constitution—the approval of the law corresponds to an action performed by public

officers done in breach of their institutional duty of not receiving money in exchange for favourable legislation. But it also seems quite clear that with this information we still don't know what institution, if any, is legally competent to declare the voidness of this law: 'For the statement that an act is null is not possible without another statement, answering the question of who is competent to establish the nullity of the act'[105], so if courts were to have the power to annul laws, it wouldn't be just because they have the power to apply the law[106], but because a specific piece of legislation grants them such power.

This way, when a case is presented to a judge, the question regarding the validity of the rules at issue is in some sense hidden by the competence rules that define what rules are to be applied: when these competence rules order the application of another rule, the question about validity is displaced—such rule is now applicable regardless of its validity status. Because of this, competence rules like these are to be considered, systemically, as part of the set of adjudication rules, and not related with the rules of recognition or change.

Once we look at this carefully, it is truly quite obvious: not just courts, but a very broad variety of institutions and both public and private subjects are legally required to apply law. Policemen obviously have to, but no one would ever think that because of her applicative powers a police officer can refuse to enforce a judicial rule ordering to seize some object because in the main trial the judge didn't give the defendant the opportunity to present witnesses. In other words, from the fact that judges have *jurisdictio* it doesn't follow that their *competence* has to include the power to decide on the validity of the rules they are supposed to apply. And this circumscription that is defined by competence rules also impedes them to apply all valid rules on their procedures: family judges are not usually entitled to apply criminal legislation, even if the cases that they are deciding might very well

[105] Kelsen (1942), 190.

[106] On this matter, see Bickel (1986), 8-9.

constitute criminal offences. This compartmentalization[107] that takes place at the level of competence rules is crucial to avoid the proliferation of normative conflicts between valid rules: for each judge, only the rules that competence rules define as *prima facie* applicable can stand in conflict. This leads us to our next point.

c) From an extensional normative conflict to an intensional normative contradiction

The third illegitimate relation on Marshall's argument is undoubtedly the more visible one and the more interesting for the present study: he seems to be contending that a conflict at the level of application between a law and the Constitutions renders the first one void—that if regarding a particular case, both are simultaneously applicable and they offer incompatible answers, then the unconstitutionality of the law is to be declared. This is hard position to defend. When it comes to the movement from lack of validity to un-application, Marshall's sin lies on an oversimplification of the problem, but at least there is a connection there. Now the problem is more acute—I will show that conditioning validity to the absence of a normative conflict turns the former into an unmanageable category. Against this, I will argue that what can serve as the basis for the unconstitutionality is a *contradiction* at the semantic level of the rules and not *conflict* at the applicative moment.

The first step in our clarification attempt is to provide an explanation of both normative conflicts and normative contradictions. This is crucial for the present study since only once we have a clearer image of them, we will be in position to understand what relation has to be established between a legal and a constitutional rule in order to assert the unconstitutionality of the first. An ideal starting point to move forward is to analyse the possible relations in which the semantic contents of two rules can stand, and we can base these relations on Alf Ross' categories[108]:

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[107] A similar idea is found in Dworkin (1986), 250.

[108] Ross (2004), 128-9. A different scheme is found in Kelsen (1991), 123.

i. Identity or total inconsistency, case in which both rules share the same semantic content and therefore every possible fact-in-the-extensional-sense that instantiates the operative facts of the first rule necessarily instantiates the operative facts of second one;

ii.- Subordination or total-partial inconsistency, case in which the semantic content of the first rule corresponds to a sub-set or a specification of the semantic content of the second one, so every possible fact-in-the-extensional-sense that instantiates the operative facts of the first rule necessarily instantiates the operative facts of the second one, but not vice-versa; and

iii.- Overlapping or partial inconsistency, case in which the semantic contents of the rules is such that at least one possible fact-in-the-extensional-sense that instantiates the operative facts of the first rule, instantiates the operative facts of the second one, and at least one possible fact-in-the-extensional-sense that instantiates the operative facts of the first rule, does not instantiate the operative facts of the second one, and vice-versa.

Given this classification, a *normative contradiction*[109] is configured between pairs of rules that stand in relation of identity or subordination, as long as the consequences they assign to their semantic contents cannot be simultaneously enforced, or if they establish incompatible deontic status to those semantic contents[110]: in the same legal system, there is an incompatibility if it is simultaneously 'allowed or required of unmarried men to get married' and

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[109] The notion of 'contradiction' is related to the notion of 'incompatibility': while *contraries* are incompatible sentences—so the contraries of '*f* is a circle' are '*f* is a triangle', '*f* is an octagon', etc.—the *contradictory* of a sentence is the negation of it, the one that is entailed by all its *contraries*, in our example: '*f* is not a circle'. *Blue*, *green*, *yellow* are all incompatible with and therefore contraries of *red*, and they all entail the contradictory of *red*, i.e., *not-red*, its negation (Brandom (2008), 126)—every explicit incompatibility is or entails a *contradiction*.

[110] The grounds for this understanding of normative contradictions can be found in Von Wright (1951), 2. He characterises the semantic content of the rules as 'act-qualifying properties', as opposed to 'act-individuals' which are understood as 'individual cases which fall under' them.

'forbidden to bachelors to get married' (contradiction based on a relation of identity); or if it is simultaneously 'liberated or forbidden to feed cats' and 'required to feed felines' or of it is simultaneously 'permitted or required to run' and 'forbidden to move' (contradictions based on a relation of subordination)[111]. Normative contradictions are considerably more complex when we are dealing with relations of subordination than when they are in cases of identity[112]; but still, once the incompatibility is established at the intensional level and therefore a pair of rules stand in normative contradiction, every fact-in-the-extensional-sense that instantiates the operative facts of either of the rules in relation of identity will lead to a *normative conflict* at the moment of application; and the same is true for every fact-in-the-extensional-sense that instantiates the operative facts of the subordinated rule: both rules are applicable, and they establish incompatible solutions to the

[111] Hruschka (2005); Raz (1980), 56.

[112] While the incompatibility is easily noticed if the special rule is one that permits what the general one forbids, the inverse is not clearly the case: if a rule forbids a sub-type of what is generally permitted—as it would be the case if a rule forbids to run and another allows to move—, then in every case that instantiates the content of the forbidding rule we will find a normative conflict, but from that it wouldn't follow that both rules are incompatible: permissions correspond to the negation of a prohibition, but their structure is not equivalent to a forbidding norm. To see this lets notice the difference between a prohibition and a requirement to perform the same action. A prohibition to do x grounds a duty to omit *all* particular actions that constitutes instances of 'x', so by forbidding x, all sub-types of x are forbidden. This is not true when we face a requirement to x. The duty in that case is not to perform all actions that could be described as x, but *any* of them. Prohibitions conjunctively affects their content, requirements do it disjunctively. Now, if permissions are the negation of a prohibition and liberations are the negation of requirements, then permissions qualify their content disjunctively and liberations qualify their contents conjunctively. This means that from a permission or requirement to x, it doesn't follow at the *intensional* level neither a permission nor a requirement regarding a particular sub-set of x; as it does when we are dealing with prohibitions and liberations. I think this is aligned with Von Wright's remarks about the deontic status of the disjunction of two acts: 'from the fact that at least one of the acts is permitted, it follows that their disjunction is permitted, and from the fact that both acts are forbidden, it follows that their disjunction is forbidden. In other words: the disjunction of two acts is permitted, if and only if at least one of the acts is permitted. Speaking loud or smoking is permitted in the reading-room, if and only if speaking loud is permitted or smoking is permitted' (in (1951), 6). From this follows that although 'permitted to run' is incompatible with 'forbidden to move', 'permitted to move' is compatible 'forbidden to run'. And, on the other side, while 'liberated from moving' is incompatible with 'required to run', 'liberated from running' is compatible with 'required to move'. Notice, of course, that even though normative contradictions are verified when the general rules are permissive or requiring, a normative conflict will arise, at the *extensional* level, every time a concrete fact instantiates the content of the special rule, regardless of its character.

concrete case[113]. With the pairs of rules that we indicated, from the normative contradiction (at the intensional level), a normative conflict will arise in cases of application (at the extensional level). But this doesn't mean that every verification of a normative conflict entails the existence of a normative contradiction: for a pair of rules whose semantic contents overlap, a case that instantiates both their operative facts will generate a normative conflict, but this conflict at the level of their *extensions* will not be the expression of an underlying incompatibility at the *intensional* level of their semantic contents—there is no incompatibility, no normative contradiction, between a pair of rules one of which requires parents to save their children and another rule that forbids entering someone else's house; but of course there can be a fact-in-the-extensional-sense that instantiates both of them (the case activated by a mother going into someone else's house to save her daughter) and with it a normative conflict will be triggered[114].

Against this background, we can now asses Marshall's claims. According to *Marbury's* argument, a law is repugnant to the constitution if it is in *conflict* with it, and the conflict arises in cases in which 'the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law'. By claiming this, he seems to be proposing that if on a particular case both the constitutional and the legal regulation collides then the legal regulation has to be considered void. If this were to be the case, then the very idea of legal validity seems to be hopeless: validity relates a rule with a legal

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[113] If the contradiction includes a liberating or a permissive rule, then the incompatibility at the intensional level between the deontic statuses does not entail an *impossibility of joint compliance*: the preference in favour of the liberation or permission only allows the addressee to exclude the requiring or forbidding rules, so by following these latter ones, no rule is infringed. The contradiction or incompatibility is not expressed in an impossibility of simultaneous performance (as it is claimed in Elhag *et. al.* (1999), 39), since such impossibility only occurs when we have rules that 'prescribe' certain forms of behaviour; but the incompatibility is extensionally manifested in a *conflict* by the fact that every concrete action that instantiates the content of the rules will receive incompatible deontic statuses. See Raz (1999), 91. Munzer, who distinguishes between 'rules that conflict in themselves' and 'rules that conflict on a particular occasion', claims that permissive rules can lead to situations in which joint conformity is logically impossible, but recognises that claiming this requires an extension of the term 'conformity'—(1973), 1143-4.

[114] Alchourrón claims that a normative system with just these two norms: (i) Judges ought to punish all those who have committed a crime, and (ii) Judges ought not punish those who are under age, is one that is '"inconsistent" *modulo* a set of (contingent) facts': it is consistent, but 'it will put judges into a normative conflict whenever they are confronted with a case of a minor who has committed a crime'—(1991), 423. A similar distinction is found in Guastini (2014), 118.

system, but in Marshall's reading that relation is dependent on the existence of a *normative conflict* at the particular level of application to a concrete case—conflict that it is not configured by the stable relations that stand between the fixed contents of two or more rules, that is not dependent on the finitude of the rules' *intensions*, but on the contingent verification of a particular case that, supporting multiple descriptions, falls under the *extension* of both of them. The validity of a rule, in this reading, hinges on the verification of a fact-in-the-extensional-sense, on the occurrence of an event that can be subsumed on both the legal and the constitutional rule. A simple example will help us to see why this model cannot work.

Suppose that after a crude dictatorship that imposed strict censorship on books, the People takes over power and, through a constitutional assembly creates a new Constitution that asserts a right to write and publish books. Suppose also that, as it happens on most criminal codes, the law of such country forbids and criminally punishes the intentional slander, injury and expression of false accusation. Here we have two rules, a constitutional one that grants a right to publish books, and a legal one that forbids intentionally expressing false accusations. Under those conditions, what is the constitutional status of such criminal legislation? If we were to take Marshall's view, the answer has to be: 'it depends'. Since it is possible for one extensional, concrete action to be described both as 'publishing a book' and as 'expressing an intentionally false accusation', the law will be valid as long as no intentionally false accusation has been performed by the publication of a book, but if a book that falsely accuses someone were to be published, then a normative conflict would arise: in that case, the same extensional, concrete action would be constitutionally allowed as an instance 'publishing a book', and legally forbidden as an instance of 'false accusation'—the two rules would stand in normative conflict and therefore the legal prohibition would be void. Notice that we wouldn't just be discussing which regulation should prevail and be applied by a court on this case, because it might be unproblematic to assert that the legal prohibition cannot be applied *on this particular case*; but why from this concrete collision or conflict

should follow a general consequence regarding the validity or voidness of the law? Under this scheme, every single legal rule whose operative facts are not in a relation of exclusion or heterogeneity with the operative facts of any constitutional rule[115] is in danger of being declared void, and whether that voidness is actually verified or not depends on the contingency of some particular fact-in-the-extensional-sense taking place.

Again, as it happened with Marshall's relation between validity and application, the conflation that we must avoid now is also between the two categories but in the other direction: on Marshall's argument, the *conflict* that would render the law invalid is only configured at the level of application of both norms, and because of that it is dependent on a particular case that instantiates the content of the legal and constitutional rule; but the validity of a rule corresponds to its membership of the relevant legal system, status that is independent of the applicability of the rule to a particular case. While on the first inference he illegitimately assumed that if a rule lacks validity it cannot be applied, now he seems to understand that if a rule conflicts with hierarchically superior one, then the first is invalid.

Kelsen argued that a conflict of norms corresponds to 'a situation in which two norms are valid, of which one prescribes a certain course of conduct, and the other a course incompatible with this'[116], but if we are to make sense of validity of law as depending on the relation between the legal and the constitutional regulation, so that the alleged law is void if there is a conflict between the two, then such conflict can only be understood as a general or necessary conflict between the two contents and not one that is only configured under a particular circumstance. We need something that, unlike the properties that can obtain in contingent events, remains unchanged from case to case. This is, if voidness is conditional on conflict, then the conflict has to be configured at the *intensional* level of the propositional contents of both norms,

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[115] So every possible fact-in-the-extensional-sense that instantiates the operative facts of the first one cannot instantiate the operative facts of the second one.

[116] Kelsen (1973), 228.

not at the extensional level of application. In other words, it has to be a case of rules that stand in *normative contradiction*[117] or *incompatibility*—relations that being exclusively dependent on the content of the norms, which remains stable for all cases, is independent of the verification of a concrete case; the conflict cannot be that of practical collision or *normative conflict*, which depends on the verification of unrepeatable concrete cases[118]. That seems to be the only way to make validity dependent on the relation between the contents of the rules without appending it to the contingency of a particular case, i.e., without making validity dependent on application. More about this will be said in this and Section 2, but a full explanation of this relation of *incompatibility* will only take place with the help of Brandom in the fourth chapter.

In other words, while validity cannot be distributed in consideration to normative *conflicts*, it can—although it doesn't have to—be dependent on the existence of a normative *contradiction* between the constitution and a piece of legislation. To de-conflate JR, I will go deeper into these relations, and explain why the configuration of neither a normative conflict nor a normative contradiction has to lead to a loss of validity, even though regarding the latter, such invalidation is possible if a special regulation so establishes. But before moving in that direction, it will be convenient to take two prior steps to attain a better understanding of the conflated model: the first one is to show how this approach not only collapses validity and applicability, but also, how it fails to accommodate the procedural features of the American system of judicial review. I will argue that the concrete nature and diffuse competence that characterises the American model are incapable of being reconciled with decisions about a rule's membership to the legal system. Then, I will show how this conflated understanding is extended in the literature.

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[117] Alchourrón & Bulygin (1991), 141.

[118] Hilpinen (1987), 38.

1.3. Not fitting the procedural features of the American model

In the previous sections I have argued that the described understanding of *Marbury* leads to an impossible scenario, one that collapses validity into application; that infers from the power to decide on the application of a rule, a power to decide on the validity of it. This move that cannot distinguish between extensional and intensional relations among rules, and thus confuses normative conflicts with normative contradictions.

Having established that this particular reading of Marshall's ruling is unsound, now I want to argue that the function that such reading attributes to the USSC is one that cannot be achieved through the procedural features that characterise JR in the American model: if validity depends on the stable relations between the contents of two rules, if it hinges on an incompatibility between the contents of the norms at the intensional levels, then—by the very general nature of the incompatibility relation—the features of concreteness and diffuse competence of the American model turn out to be irrational. In other words: if the court is to be judging the validity of a law, being the validity independent of the particular configuration of any concrete case, then why would it be only revisable in the context of a case or controversy? If the object of analysis is not particular to that case, but a general feature, why organise the system in a way that the analysis can only take place when the court is in front of a concrete case? What changes from case to case is not the content of the rules involved but the particular features of each concrete controversy that is to be addressed by those rules. What shifts is the extensional dimension of the fragment of the world that constitutes the object of adjudication in every individual act of adjudication, not the intension of the legal material that is to be applied to it. This is the extensionality that characterises the applicative moment and that is absent when the analysis is focused on just the rules at issue.

Just as the concreteness cannot be reconciled with the abstract nature of the incompatibility, the diffuse nature of the model is also unsustainable: each court can

decide on its own if a rule is valid, so the judicial decision about validity has no effects on other courts (except the USSC). This means that the decision has *inter partes* effects regarding the validity-status of a rule.

What is the picture of validity that a system that adopts the American model is committed to? It seems we are on the edge of a performative contradiction: we say that we are deciding on the membership of a rule but *inter partes* effects regarding the validity of a rule seem to be incompatible with such assertion. If the analysis to be performed were dependent on the particularities of a case, then any discrepancy between courts could be explain by references to the differences between the cases that each court is dealing with; but we have seen that such case-dependency is incompatible with legal validity, or at least with a notion of it that is not reduced to the applicability of such law to a concrete case. The question that has to be addressed is if validity is a property that can be judged independently by each court, or if by its very nature is something that cannot be distributed that way. What I will argue is not that it is *possible* but *inconvenient* to grant each court the power to decide on the validity of a law, but that validity—since it refers to a property that a rule has in relation with the whole legal system—is not something that can be decided that way. In other words, a decision that does not have *erga omnes* effect cannot be about validity, even if it claims to be.

If a rule is void, then it is not part of the legal system; but that exclusion is in relation to the whole system, and as far as two courts are courts of that same system, the exclusion entails that for both of them the rule is void. So the prevention of the *erga omnes* effect configures a grammatical mistake when it comes to a decision about validity: validity, as long as it is not collapsed into applicability, is not a relation that can be ‘compartmentalised'—its generality is not some effect that can or cannot be verified, for it corresponds to an intrinsic property of some rule in reference to the legal system: a rule cannot be simultaneously valid and void in the same legal system, but that is precisely the possibility that is configured if the decision about it only has *inter partes* effect—this is to recognise that the first

decision does not legally settle the issue about its membership to the system. Since validity corresponds to a relation between the rule and the legal order, once it is affirmed, its status can be *changed*, but that possibility entails that until then the status of the rules is the one that was judicially decided. What is to be noticed is that *changing* the status is not what is at stake here: *inter partes* effect regarding the validity means that the new decision is not changing anything, for the first one didn't have the effect of defining the status of the rule for other courts. If the first court's decision does not settle the status of the rule as void, at least for the moment, then the first court did not actually exclude it from the legal system, i.e., if the decision has *inter partes* effect only, then the decision might have declared that the rule was invalid, but it didn't actually managed to invalidate it.

Using speech act terminology, the ruling has the illocutionary force of a declaration, this is, an speech act whose function is to configure the social reality (in our case: legal reality) in the way that it declares that the world is configured. If a ruling declares that 'rule-A is part of the system', the function of such act is to configure the world so that rule-A is part of the system[119]. But, if rule-A is part of the system *only for this case*, then its status regarding the system is simply not defined by the ruling, and since deciding on the validity of a rule *is* to fix its status regarding the legal system, the act failed to configure the reality the way it declared it to be. This means that the diffuse and concrete model is structured to produce failed rulings: the declaration of voidness does not actually achieve the exclusion of the rule from the system.

The whole picture is bleak: lack of general effect is consistent with understanding that what was analysed was not the validity of a rule, but some particular problem that was configured on *this case only*—its applicability. That would be the case if the court were to solve a conflict of rules that takes place in the concrete case, but we have seen that such particular conflict is disconnected from the question about

[119] Searle, (2010), 95.

the validity: validity has to be general (case-independent) and that is why the effects of the ruling declaring or denying it cannot be *inter partes*.

None of this changes once we consider the particular position of the USSC in the system: being the higher court in that legal system, the *stare decisis* principle entails that other courts have to recognise its ruling when 'the point has already been decided in a prior case', this is, only as far as the prior case is *directly* in point[120]. Regarding its decisions and their force on lower courts we could agree that the problem of *inter partes* does not arise, but the logic of the system remains the same: for every ruling of other courts the contradiction between what is declared ('such rule is valid/void') and the effects of that declaration remains untouched.

Even more, for the USSC itself *inter partes* effect still applies, so if the validity of a law is challenged twice in front the USSC, the second time it will appear that the first decision of the court was just as ineffective as the lower courts decisions: the USSC would have declared once that such law was valid, but now that it faces it for the second time, the law status is once again hanging in the air. As Gary Lawson puts it, if there is a conflict between 'the Constitution on the one hand and a prior judicial decision on the other. Is there any doubt that, under the reasoning of Marbury, the court must choose the Constitution over the prior decision?'[121]. In a similar sense, Kelsen argues that '*stare decisis* is not at all an absolute principle': 'above all it is assumed that it is not valid in the case of an interpretation of the Constitution. "Constitutional questions are always open to examination". Hence it is possible that the Supreme Court declares one and the same statute in one case constitutional and in another case unconstitutional as well as *vice versa*'[122].

Because of this, if the USSC is to decide on the validity of a legal rule, then it is not just that it is desirable to adopt the Austrian model, but more radically, that the

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[120] The reference is to Goodhart (1934), 42.

[121] Lawson, (1994), 27.

[122] Kelsen (1942), 189.

concrete and diffuse model simply cannot do the job: on the one hand, validity is case-independent, but the model requires the opportunity of a concrete case; on the other, validity is a relation with the legal system, so it binds all courts, but the model gives freedom to each court to decide about it independently. From this it would follow that if what is to be analysed by a court on a JR process is the validity of a law, then such analysis should be conducted on an abstract and concentrated system. This is how JR of *Legislation* should be understood: as a process in which the validity of a law is judged by its relation to one or more constitutional provisions, so that if there is incompatibility between them the law is rendered void. Such relation, being one between the contents of the legal materials at the two levels, is independent of any particular case and is therefore to be analysed in abstract, that is, not as an application problem—validity cannot to depend on concrete, particular cases that are faced at the level of application. If JR of *Legislation* is a review on the validity of a law, then the appropriate procedural features are those of the European model; and in that case, Marshall's *dictum* 'the judge is to say what the law is' corresponds to the power to declare which rules are part of the legal system. Under these considerations, the preference of an abstract and concentrated model is beyond doubt, and a concrete and diffuse model can be seen as the result of a Supreme Court justice trying to do what cannot be done on a particular case or controversy.

But, if we hold on to the distinction between validity and applicability, if we differentiate between a *normative conflict* at the extensional level of a concrete case, conflict that is configured at the moment of application; and a *normative contradiction* that is configured at the intensional level of the contents of the rules involved, contradiction that depends on an incompatibility which is configured regardless of any concrete case that can be subsumed in both the rules at issue; then we can propose a different understanding of the function that a concrete and diffuse JR model is supposed to achieve: a court, in the American model, is not there to address the general question regarding the validity of a rule in consideration to the constitution; but the constitutionality of a concrete application of a legal rule in a

case in which a constitutional provision is also internally applicable. A court like the USSC is not engaging in JR of *Legislation*, but on what we can now properly call JR of *Application*.

Before moving in that direction, I want to address how extended this conflated approach is in constitutional literature and how it has pervaded the American practice, which, in an oblique attempt to distinguish between validity and applicability, differentiates between *facial* and *applied* challenges to legislation. This leads to a dangerous confusion about the role of courts in general, but even more alarming is that such confusion regarding the function of the USSC entails a conflation of the legal categories that are embroiled in the characterization of the legislative and judicial functions, leading to the collapse of validity into application and to an impossibility to distinguish normative conflicts from normative contradictions.

1.4. The spread of confusion

Despite the fact that endorsing the conflated approach entails the rather serious consequence of collapsing essential legal categories, this has been surprisingly neglected by a considerable number of authors—even giants like Dworkin and H.L.A. Hart seem to have overlooked the problem. *Law's Empire*, one of the most sophisticated defences of JR, explicitly claims that the role of the USSC is that of deciding on the constitutionality of statutes. He asserts that 'if the Constitution, properly interpreted, does forbid capital punishment, a justice who refuses to *strike down*[123] state statutes providing death penalties would be changing the Constitution by fiat'[124]. The same idea was defended in his earlier *Taking Rights Seriously*[125] and is even more clearly supported in his later *Freedom's Law*, in which a particular

[123] My emphasis.

[124] Dworkin (1986), 371.

[125] Dworkin (1978).

conception of democracy is construed precisely in order to defend the 'invalidation' of legislation by courts from the accusation of being undemocratic[126].

That also was the way in which Hart appears to have read *Marbury v. Madison*, and in general that seems to be his understanding of the role of the Supreme Court—in his words, the function of the court in these cases is 'to review and declare unconstitutional and also *invalid*[127] enactments of the congress as well as of the state legislatures'[128].

They are in good company: Mathew Adler, Larry Kramer, Mark Tushnet, Jeremy Waldron and many others have claimed that under a concrete and diffuse model of JR, paradigmatically exemplified by the USSC, the Court is supposed to decide on the validity of the laws at issue, that it has the power to declare them void or to strike them down[129]— as Marshall before them, they all entangle, more or less explicitly, the two categories.

The problems of conflating the two are expressed in how difficult it has been to offer a coherent treatment of the distinction—originally presented in *United States v. Salerno*[130] and now extendedly accepted by the American practice—between *facial* challenges and *applied* ones. The attempt to distinguish the two can be understood as the attempt to differentiate between validity and applicability problems within a practice that neglects their differences. I will argue that the differentiation between these two challenges is improperly constructed and that the problem lies precisely in its incapacity to maintain the difference between the validity and applicability.

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[126] Dworkin (1996), 15.

[127] My emphasis

[128] Hart (1983), 124.

[129] Adler (1997), 762; Kramer (2004); Tushnet (2008), 19–23; Waldron (2006), 1357; Cappelletti & Adams (1966), 1215 and 1223; Damaska (1990), 428; Fernandes (2001), 977-9; Lawson (1994), 25-7; Spiliotopoulos (1983), 474 -9; Stone (2002), 348-50.

[130] United States v. Salerno, 481 U.S. 739 (1987).

On a facial challenge it is claimed that there is 'no set of circumstances' on which the law can be constitutionally applied. The second case, on the other hand, refers to the unconstitutionality of the statute *applied to a particular set of circumstances.* The problem is once again that the validity of the statute is being made dependent on questions about its operation: according to *Salerno*, only if the statute cannot be *applied* constitutionally to any case, is it facially invalid, and therefore from a condition about a potential, but concrete instance, we arrive to a consequence about validity in general.

Michael Dorf, who engages in a profound study on this subject, criticises that with this standard 'broad middle range of statutes, which are unconstitutional in a substantial number of applications but constitutional in a substantial number of others' are to be regarded as facially valid[131]. The problem that this middle range of cases presents is the following: using Dorf's example, let us suppose that we have a constitutional right to dance in barrooms wearing shoes, and a state statute forbids dancing on barrooms *tout court*, regardless of whether shoes are being used or not. This is a law that forbids a whole genre of conducts (dancing on barrooms) of which the constitutional right only extends to some cases (dancing on barrooms wearing shoes). This means that by *Salerno* standards, the law is facially valid, for it can be applied to some cases without affecting any constitutional right: every time it is applied to a dancer who is barefoot, no constitutional right is affected since there is no right to dance barefoot. So, a barefoot dancer would lose both the facial and the applied challenge[132].

Dorf wants to argue that a constitutionally invalid law cannot be applied, even in cases in which its application wouldn't affect constitutional rights. The problem is that he still connects the general question about the unconstitutionality of the law with particular instances in which the law stands in a concrete normative conflict with the constitutional regulation: in order to impede the application of an

[131] Dorf (1994), 240.

[132] Dorf (1994), 243.

unconstitutional law, he argues in favour of the doctrine of the *severability*, according to which the court should treat the unconstitutional applications of the statute as being severable from the constitutional ones. In this way, our barroom-forbidding law should be held unconstitutional '*as applied* to the persons who are not barefoot', so the whole law doesn't fall, but only to the extent that it criminalises non-barefoot dancing—the remainder of the law is valid[133]. This allows him to say that the invalid law, which is severed from the valid, is not to be applied.

There are practical problems to this approach, and Dorf is aware of them; but the issue which I want focus on is how his work collapses validity and applicability in a way that makes it impossible for him to sustain his argument. Let us start by noting the particular way in which Dorf expresses his idea: he says that what is to be held by the court is that *the statute is unconstitutional as applied to some group* (in our case, to non-barefoot dancers, for they—unlike the barefoot dancers—have the constitutional right to dance). I'm not quite sure how to make sense of this. This sounds pretty much like saying that the court is to declare that some applications of the law are unconstitutional (those which are performed on non-barefoot dancers); but that assertion would be incompatible with his claim that what is to be judged by the court is *the law itself*, its constitutionality, and not an application *vis-à-vis* the right that someone might have to perform some action. In other words, Dorf insists that the object to be compared with the constitution is not an action to be affected by the application of the law, but the law itself: the focus has to be 'on the constitutionality of a challenged *statute* rather than on the privileged or unprivileged character of the conduct of the litigant challenging it'. But if what is to be judged is the law *itself*, then why would the decision of the court be not about the statute *itself*, but about the statute *as applied to some case*?

As it was mentioned, the way in which Dorf tries to solve this contradiction is by recognising the *severability* doctrine[134], which mediates in his attempt to reconcile

[133] Dorf (1994), 249.

[134] See also: Stone (2002).

the analysis of the law itself and its application. This doctrine consists in performing a function that the constitution never assigns to the courts, that of rewriting the law. So, he claims that:

> Prior to the court's ruling, the law read: 'Barroom dancing shall be an offence'. By ruling that the statute's unconstitutional applications are severable, the court essentially holds that the law has two parts. The first reads: 'Barroom dancing shall be an offence if the dancer is not barefoot'. The second reads: 'Barroom dancing shall be an offence if the dancer is barefoot'. Under this analysis, the second part of the statute stands on its own as a constitutionally valid law.

The basis of Dorf's problem, I think, lies on the fact that he doesn't propose a standard for validity of *the law itself* that is independent on the contingency of concretely affecting rights by its application on particular cases. For Dorf the question of the validity of the law is connected to its conflict, in a particular case, with a constitutional right. That is why the judgment of validity is not predicated to its natural subject, the rule 'forbidden to dance'; but to instances of application ('forbidden to dance *as applied to…*'). And then he is in the impossible situation of having to convert the decision about the application of a law into one about the general validity of such law, and this transition is done at the cost of changing the law itself: through *severability*, he goes from the unconstitutionality of the law *as applied* to persons who are not barefoot, to the unconstitutionality of a new law whose content now includes a reference to the ones to whom the application was deemed unconstitutional: 'Forbidden to dance if the dancer is not barefoot'. So in the end, although he never told us if the law whose content is just 'forbidden to dance' was valid or not, he did inform us that such law was unconstitutional *as applied to barefoot dancers*, and that a different law that was never enacted —'forbidden to dance to not barefoot dancers'—would be unconstitutional too.

What is relevant for a normative incompatibility is not the application of the rules, but the relation between the rules themselves, between one that 'forbids to dance' an one that 'allows to dance wearing shoes'—both are incompatible in the same way that the assertions 'J can run' and 'J cannot move' are incompatible: even if in the case of barefoot dancers there is no normative conflict between the rules, a system is inconsistent if it simultaneously allows to dance wearing shoes and forbids to dance. Such relation of incompatibility between contents, that is independent of particular applications, constitutes the normative contradiction that remains stable throughout all possible applications and normative conflicts between rules.

In all these readings, it is understood that in the American model the courts analyse the constitutionality of a law, within the framework of a concrete case or controversy, and declares the voidness of it if a conflict between the law and the constitution is verified. This is the *conflated approach* to JR: understanding that whether it is a concentrated and abstract model or a diffuse and concrete one, the analysis is always the same—the validity of a law in consideration to the constitutional text. The differences that the conflated approach sees between the two models are only regarding the opportunity in which this analysis takes place (a concrete case or in abstract terms), the institution that engages in it (ordinary courts or a specialised one) and the effects of the decision (*inter partes* or *erga omnes)*. Against this, I have argued that the validity or voidness of a rule is incompatible with *inter partes* effect and that it cannot depend on the verification of a conflict at the level of a concrete case.

2. De-conflation by different functions

In this second section I want to argue in favour of a different approach[135], one that distinguishes between JR of *Application*, as a process that aims to assess the

[135] A similar position is defended, regarding the Chilean case, in Atria (2001a).

constitutionality of the application of a legal rule to a concrete case based on an analysis of an extensional normative conflict between legal and constitutional provisions; and JR of *Legislation*, a process that asses the constitutionality of a piece of legislation based on an analysis of a possible intensional normative contradiction between legal and constitutional provisions.

It is only appropriate to begin this disentangling task by noting that this difference was early recognised by Carl Schmitt: commenting the decision of 4 November 1925 of the German Reichsgericht, he claims that the key moment of the ruling lies on the idea that 'the judge is subject to statute', but such subjection 'does not rule out the possibility that a statute of the Reich or some of its provisions may be declared to be invalid by a judge if that statute stands in contradiction with other provisions that enjoy precedence and that the judge must take into account as well'. Although the court used the expression 'invalid', Schmitt rapidly makes clear the proper way of understanding the decision: 'What this says is that if there are provisions in a constitutional statute that regulate a certain kind of matter of fact, and if we can subsume a case that is to be decided under that regulation, then the regulation contained in the constitutional statute is to be given preference, in the case of collision'. So 'It is only the possibility of subsumption of the facts of a case under the provisions of the regulation in the constitutional statute that makes it possible for a judge (…) to refuse to apply the ordinary statute (but not to invalidate it) (…) This is not really *a denial of the validity* of the ordinary statute. It is only *a non-application* of the ordinary statute'[136].

2.1. De-activation of normative conflicts and normative contradictions

I will defend that our understanding of unconstitutionality as a property that arises from the verification of some form of *conflict* between a piece of legislation and a constitutional provision, requires to identify the relation that serves as the basis for

[136] Schmitt (2015), 83 (my emphasis).

the unconstitutionality as one that has to correspond to a normative *contradiction*: it will be on the back of it that a law can be coherently taken to be unconstitutional. To achieve this, we need to get a better understanding of the difference between, and ways of solving, both normative conflicts and contradictions, and thus explain how those mechanisms for dealing with them can de-activate the problems they present without entailing the voidness of any of the rules involved[137], but making such voidness possible in the case of the latter. In this way, we can make sense of the unconstitutionality of a law not as a *necessary* consequence of a normative contradiction, but as one that follows from it once another premise is assumed. To make this explicit, we must look at the way in which these problems are solved and to the consequences that follow from the de-activation of the conflict: first I will claim that solving conflicts between rules requires the operation of a rule of preference; then, I will use *United States v. Salerno* and the distinction between explicit and implicit derogation to argue that rules of preference do not affect the validity of the displaced one.

a) Rules of preference

In every case in which for a same fact-in-the-extensional-sense two or more rules assign different and incompatible solutions, a rule of preference has to be invoked[138], one that commands the displacement of one of the conflicting rules in favour of the other. By including them in the picture, the definitive applicability of a rule to a concrete case corresponds to a twofold property that is properly addressed by distinguishing between the internal and external applicability of a rule: we are to understand that a rule is *internally* applicable to a case if the description that constitutes the operative facts of the rule is satisfied by the event that configures the object of judgement, this is, if the case can be described using the semantic content

[137] This corresponds to the position of the latter Kelsen, explicitated in Kelsen (1991), 124 and Kelsen (1973) at 235, where he claims that the starting point is that two mutually conflicting norms can both be valid.

[138] See Alchourrón (1991), 425. Kelsen in (1990) at 214, claims that unless a 'conflict-resolving principle' intervenes, 'the conflict remains unsolved'.

of the rule at issue[139]. But from that correlation between rule and extensional fact, doesn't follow that such rule is applicable to determine the solution to the case. We still need to analyse the external applicability of the rule. A rule is *externally* applicable if, being internally applicable, its application is required by another rule[140]. While the reference to the internal applicability of a rule answers the question regarding if a concrete case is regulated by a rule; the external applicability provides an answer to the question regarding if a judge has to apply it[141]. This does not have to lead to a regress when it comes to the question about the applicability of the rules of preference: we can assume as a starting point that every valid and internally applicable rule is also externally applicable unless another rule makes it externally inapplicable, and that every invalid but internally applicable rule is not externally applicable unless another rule makes it externally applicable. With this, validity is related to applicability, but not in the necessary sense, regarding every rule, as Marshall was proposing. Also, this escape from an eternal regress, in turn, does not lead us into a circularity if validity—which conditions applicability—is ultimately dependent on actual effectiveness (understood as a non-legal property consisting in the fact that the rule is observed) and not on applicability (understood as a legal property consisting in the fact that the rule is legally to be applied).

In the absence of such a third rule, the interpretative alternatives to deal with conflicts are not sound: it could be argued that one of the conflicting rules include an implicit clause according to which the other one is not to be applied in case of conflict. In the case of a dying son inside someone else's property, we would still have two rules, one of which forbids to enter the private property without the owner's authorisation; but the rule that requires the parents to save their sons would implicitly include in its content a clause according to which the prohibition to enter is not to be applied in cases in which entering is required of parents in order to save their sons. The second alternative is to understand that there is only one rule whose

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[139] Navarro & Moreso (1996), 127.

[140] Navarro & Moreso (2005), 203. For a sense of validity as external applicability, see: Moreso (2012), 230.

[141] Navarro & Moreso (2005), 209.

semantic content arises from a combination of the contents of the original ones[142]: the elements of the preferred rule are included as negative elements into the content of the operative facts of the displaced one—if we are to solve the normative conflict in favour of the requirement to save, then our only rule will assert that it is forbidden to enter a private property without the owner's authorisation if that is not required for parents to save their son[143], so a 'limitative clause' is to be added to the one of the original rules[144].

There is a trivial sense in which these interpretative solutions that dissolve the conflict at the level of the contents of the rules involved are unsound: an example of the first alternative is found in Jorge Rodriguez's work. He claims that in cases of conflict we assume a criterion that gives preference to the permission, 'and therefore, our representation of the rules can be restated' as composed by two rules that do not stand in conflict. But if there is no conflict among the rules, then he cannot claim that in these cases 'we assume that there is a criterion that assigns preference' to one solution over the other 'in cases of conflict'[145]. The problem is that each rule is defined by its content, so an alteration of the content entails the disappearance of the original rule and the creation of a new one, but in that move the object that is supposed to be modified has disappeared—the rule that requires to save cannot modify the rule that forbids to enter, for only regarding such original content we can understand that there is a conflict to be solved in the first place, one that requires the modification of the forbidding rule. To avoid this, it can be argued that there are no rules before the systematic interpretation that renders non-conflicting rules, so when we identify the 'conflict' what we really have are just legislative statements that have to be interpreted in order to arrive to definitive, non-conflicting rules[146]. Although this approach would still have to clarify how

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[142] Rodriguez (2012), 105.

[143] Íñigo Ortíz de Urbina (2008).

[144] Raz (1980), 57.

[145] He goes from this original pair of rules: 'p —> Oq' and 'r —> P-q', to '(p∧-r) —> Oq' and 'r —> P-q', Rodriguez (1997), 159.

[146] Bayón (2000), 102.

'legislative statements' are to be understood[147], the main problem is practical: since each rule can conflict with multiple other rules, the modification of their contents would lead either to an endless multiplication of rules (one for each possible conflicting rule) or to one semantically overloaded rule (that includes in its content implicit clauses regarding each possible conflicting rule). In either case, until all the prima facie rules or legislative statements are considered, no rule can be formulated.

Kelsen's coercive understanding of law, collapsing the distinction between external and internal applicability, exemplifies this interpretative stance. For him, every proper legal norm is a sanction-norm, one that specifies all the conditions on whose fulfilment a sanction is made dependant[148]. With this, rules of preference, and in general, all rules that serve to determine the application of a legal sanction, are included in the content of each legal norm. Thus, the contents of what we are here understanding as rules of preference are included as a negative element in the content of what Kelsen calls 'primary' norms. Understanding that each legal rule includes in its content all the conditions for the imposition of a sanction, allows him to understand that there are no conflicts between primary norms: before he shifted his position in the '60s[149], he claimed that 'conflicts of norms within the normative order which is the object of cognition can and must be solved by interpretation'. So, if the conflicting norms were created at different times, then the application of *lex posteriori* principle entails that 'the validity of the latter norm supersedes the validity of the earlier'. If the conflicting norms were prescribed simultaneously, then 'either the two norms can be understood to be subject to a choice or one can be understood to be limiting the validity of the other (…) If neither one nor the other interpretation is possible, then the legislator creates something meaningless' and 'no

[147] If they are 'norms-formulations', then their meaning corresponds to norms and therefore contradicting 'norm-formulations' should lead to contradicting norms. Also, they cannot be 'normative propositions', for the presuppose already individuated norms.

[148] Kelsen (1991), 45.

[149] For Kelsen's shift, see Duxbury (2008); Paulson (2017); Raz (1976).

objectively valid legal norm is present'[150]. As Joseph Raz has pointed out[151], Kelsen's legal norms become semantically very extensive: all the justifications and excuses that exclude punishing a theft, together with the rules regarding concurrence of felonies and all the procedural regulation that defines general conditions for imposing a sanction, also have to be included in the definitive formulation.

If we are to avoid these undesired consequences and still remain capable of analysing the applicability of a rule to a concrete case, positing shorter rules of preference that command the displacement of conflicting, but also simpler rules, is a convenient alternative. That is, every normative conflict requires the application of a third rule that determines the application of one and the displacement of the other. What is crucial to notice is that the operation of a rule of preference does not exclude the displaced rule from the legal system.

b) Implicit derogation as a problem of applicability

A useful legal category to make this explicit, is that of 'implicit derogation' and the qualitative difference between it and the explicit derogation. The latter corresponds to a legislative act in which by the enactment of a rule the validity of a previous one is ended. This takes place by explicitly mentioning the original law in the content of the new one, which declares that the validity or force of the first is terminated, in Kelsen's terms: derogation is the repeal of validity of an already valid norm by *another norm*, so 'derogating norms are dependent norms'[152]. Because of this, the location of explicit derogation within the theory of law lies in the category of normative powers[153], in relation to the secondary rules of change.

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[150] Kel (2005), 207. As it has been pointed, this model seems to blur the distinction between taxes and fines.

[151] Criticising this approach: Raz (1980), 140.

[152] Kelsen (1991), 106.

[153] Raz (1999), 104.

The implicit derogation, on the other hand, is just a matter of application, more precisely, it takes place by the operation of *lex posterior derogat legi priori.* Although this is a problem that can be analysed in great detail, we can say in general terms that implicit derogation is configured when we have, in the same legal system, two rules that are in a relation of incompatibility, so it is not just that in a particular case is impossible to follow both, but that there is an incompatibility regarding their semantic contents—it depends on a relation at the intensional level that is configured by the fact that they either share the same semantic content or by the fact that the semantic content of the older rule constitutes a 'sub-set' of the semantic content of the newer one[154]. It is because of such a relation at the intensional level of the rules, that on their extensional level we find that every situation in which *legi priori* is to be applied is also a situation in which *lex posterior* is to be applied too; so if the consequences that the pair of rules assign to their shared content are impossible to enforce simultaneously, then the judge cannot comply with both the old and the new rule and she will just have to leave one un-applied. The question is if from such un-application we can infer something about the validity of the displaced rule, and the answer will depend on the nature of the solution that is given to the contradiction.

A good case to study the problem is the important USSC's decision on *United States v. Salerno*. What was being discussed in that case was the *Bail Reform Act* of 1984. The different ways in which this case can be thematised depends on the JR model under which it is analysed, and the different answers to which they lead will be addressed at the end of Section 2.2 of the present chapter; for now, I will just use the rules involved in *Salermo* to exemplify different possible relations between them and explain how *lex posterior* can serve to deal with them. According to the Act, in order to decide on the preventive detention of a person accused of a criminal offence, the judge must consider whether or not the defendant's freedom constitutes a present danger to the community. Previously to the Act things were different,

[154] Kelsen refers to these cases as 'unilateral conflicts', (1991), 234.

because for defendants not accused of capital crimes, bail was denied '*only* when a fair adjudication could not be otherwise ensured'[155]. The relevance of this case to the American jurisprudence is enormous, for it defined the conditions on whose fulfilment depends the distinction between facial and applied constitutional challenges, this is, as it was explained discussing Dorf's work[156], it marks the difference between unconstitutionalities grounded on concrete conflicts, and those that can be declared regardless of a particular infraction.

To properly understand the relation between both rules, what has to be noticed is that the content of the previous standard constitutes a sub-set of the content of the latter standard: defendants not accused of committing a capital crime constitute a sub-set of defendants accused of a criminal offence. These rules stand in a relation of inclusion, since their semantic content is such that every case that instantiates the operative facts of the original rule also instantiates the operative fact of the new rule, but not the other way around. This means that whenever a judge is faced with a defendant that, not being accused of committing a capital crime, asks to be released on bail, she cannot follow both the previous standard for bail and the new one contained in the Act, and she cannot do it because following the first requires her to ignore what she must consider according to the second, and to consider the second impedes her to follow the first—this exclusionary effect is configured by the inclusion of the adverb *only* in the content of the original rule. If a judge is to decide on the defendant's freedom, she faces the problem that each rule is *internally* applicable to the case, but they provide not just different, but incompatible answers to the same question. In this scenario, the judge has to solve the problem by giving preference to one of the rules over the other, and this is when *lex posterior derogat legi priori* can enter in the adjudicating process: if this principle is to be applied, then the new rule is the one to be preferred in the decision of the case. Since this situation is not dependent of the concrete configuration of a case, but is configured by the fact that the semantic contents of the norms demand incompatible actions to

[155] Herman (1988), 165.

[156] See Section 1.4.

the judge regarding defendants not accused of committing a capital crime, the old standard has completely lost its applicability. That is why this phenomenon is called 'derogation': as long as *lex posterior derogat legi priori* is recognised, *lex priori* is never to be applied again—implicit derogation can thus be defined as the necessary lack of application, due to the operation of the principle of *lex posteriori,* of one rule whose operative facts are either identical with, or a sub set of, the operative facts of a later rule.

According to this, in cases of implicit derogation the relation between the pair of rules is one of normative contradiction, and the solution to the normative conflict that arises from it in a concrete case is achieved by the application of *lex posteriori* principle—it is this principle what serves as a rule of preference to displace one rule in favour of the other[157]. What has to be analysed is whether the application of this principle entails anything regarding the validity of the displaced rule. And to answer this is important to notice that *lex posteriori* is not applicable only to cases of normative contradiction: if the relation between the operative facts of the rules is not of identity nor speciality, but overlapping, so that there can be cases to which the old rule is applicable but not the new one, then still the criteria of *lex posterior* indicates that the new rule is to be applied over the older one *in those cases where both of them are applicable.*

A simple modification of the original case can serve as an example. Suppose, as before, that the original standard only applies to defendants not accused of committing a capital crime, but now the Act is only to be applied to repeat offenders. Now, if the judge faces a case in which a recidivist that is not accused of a capital crime asks to be released on bail, then both rules are in principle applicable and they both require incompatible solutions. If the *lex posterior* principle is followed, the judge should decide based on the new rule, but we shouldn't go as far as to say that the old one is 'implicitly abolished', because even if such principle

[157] Bascuñán (2000), 230.

were always followed, the old rule is still applicable to all cases in which non-recidivist request bail: in this example the extension of the rules only 'overlap'—there is no relation of identity nor specialty or inclusion between them, so there are cases to which only *legi priori* is applicable (when the defendant is a non-recidivist not accused of committing a capital crime), cases to which only *lex posterior* is applicable (when the defendant is a recidivist accused of committing a capital crime) and cases in which both rules are applicable (when the defendant is both a recidivist and someone accused of committing a capital crime)—only for this last group the principle of *lex posterior* is to be operationalised.

The relation between this new pair of rules is no longer one of normative contradiction, they just happen to stand, in some concrete cases, in normative conflict. This means that *lex posteriori* serves as a rule of preference for the solution of both normative conflicts and normative contradictions, and only in the second case it leads to what is called 'implicit derogation'. So, every case of implicit derogation supposes the applicability of *lex posterior* principle, but not every instance of application of such principle leads to the 'implicit derogation' of the displaced old rule. But even more than that, the same rule of preference can operate even in the absence of a normative conflict. Allow me to provide one final variation of this example to prove the point: suppose that the original standard simply requires, for defendants not accused of a capital crime, to consider the possibility of a fair trial; and that the new one requires, for recidivists, to consider the present danger to the community—unlike the previous case, now the adverb *only* is nowhere to be found in either rule. Given these formulations, both rules that stand in a relation of overlapping are simultaneously enforceable: for a recidivist not accused of committing a capital crime, the judge can simultaneously consider both if the defendant's release affects the possibility of a fair trial and also whether his freedom presents a danger to the community. There is no normative contradiction or a normative conflict, but if we understand that demanding this double evaluation is inappropriate or inconvenient, then the *lex posteriori* principle can still work as a rule of preference, displacing the first one and indicating that when it comes to

recidivist defendants, the judge should only consider if his freedom puts the community in danger.

So, if we previously saw that implicit derogation entails the application of *lex posteriori*, but the application of *lex posteriori* does not entail an implicit derogation, now we see that the operation of *lex posteriori* as a rule of preference doesn't even require a normative conflict. And this is not a particular feature of the specific principle here at issue, but a general characteristic of rules of preference. The most conspicuous case in which a rule of preference is applied in absence of a normative conflict is the one that is verified regarding the relation between parricide or infanticide and homicide: as in these three cases the sanction corresponds to a period of time in prison, there is no incompatibility between the rules—whoever kills his son within his first 48 hours of independent life can simultaneously suffer the consequences assigned to all three crimes. But, against this interpretation, we usually understand that the penalty associated with infanticide is the only one applicable, and the offender will only be convicted for such felony.

These rules of preference, as we have seen, are necessarily applied in cases of normative conflict, whether they are the extensional expression of an underlying intensional normative contradiction or not, and also in cases in which different solutions are ordered by different rules, even when those solutions are not incompatible. Carlos Alchourrón and Eugenio Bulygin defend that there is no difference between derogation (at the legislative level) and the *ordering* of conflicting rules that is established by the judge, they claim that 'an alteration of the organising relations is just as fundamental as the elimination of contents', since 'the contents that are put aside when another rule is preferred are just as inapplicable as if they were abolished'[158]. For them, rules of preference seem to operate just as derogating rules—and if the latter affects the validity of rules, then so would the former. To prove that this is not the case and that the displacement of a rule does not

[158] Alchourrón & Bulygin (1991), 145.

entail lack of validity, it is enough to look at the different consequences that follow from the abolishment of the explicitly derogating law from those that follow from the abolishment of the implicitly derogating law: while the explicit derogation of the explicitly derogating law does not produce the re-validation of the repealed law[159], the explicit derogation of the implicitly derogating law determines the full applicability of the implicitly derogated law; and the same is the case, *mutatis mutandis*, with the (explicit) derogation of *lex specialis* or *lex superior*. The reason for this is that once the implicitly derogating law is abolished and the normative conflict disappears, there is now just one rule that is applicable and therefore the conditions for the operation of the rule of preference are no longer fulfilled. The originally displaced law doesn't recover its validity (it never lost it), but its scope of application. This regaining of applicability will take place every time the preferred law is 'modified'[160] in a way that makes it no longer impossible nor inconvenient to apply both norms simultaneously: the modification of the (until then) preferred rule can unproblematically determine the re-applicability of the (until then) displaced one.

This means that the preference for the new rule instead of the old one, in cases of implicit derogation (the strongest case possible of displacement of a rule in consideration to a rule of preference), does not exclude the displaced one from the legal system, and it could not be any other way, precisely because the improperly called *derogating* effect is not based on the exercise of normative powers, but on rules that are located at the level of the secondary rules of adjudication; the operation of the rule of preference only takes place at the time of application: the judge must reach one decision and two rules in principle applicable lead to incompatible or incoherent answers—one is not to be applied, but its validity doesn't need to be questioned. Not even in cases of implicit derogation can we say that the displaced rule is no longer valid. On the other hand, since explicit

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[159] In Kelsen (1991), 107.

[160] Since the identity of a rule is constituted by its content, a modification of its content counts as a simultaneous abolishment of a previous rule and enactment of a new one.

derogation constitutes an exercise of legislative powers that are directed towards the validity of a rule, its abolishment leaves the repealed law outside the legal system. Explicit derogation—unlike implicit derogation or the effects of any operation of a rule of preference—is not dependent on a conflict or discrepancy at the extensional level between norms[161]: there is no normative conflict at all between a rule and the rule that explicitly abolishes it, because the operative facts of the repealed law are not part of the content of the repealing one.

Salerno has proved to be quite useful; it has served us to show that the analysis and resolution of a normative conflict or, even less, a case with different solutions that, despite being compatible are nevertheless inadequate to apply conjunctively, necessarily involves the operation of a rule of preference that commands the displacement of one of the involved rules—the same solution is given in all three cases, even when there is no conflict. But this displacement doesn't entail the voidness of the deferred rule, not even in cases of implicit derogation. And the contradiction cannot by itself entail it, since the displacement that is effected by the operation of a rule of preference is compatible with understanding that both internally applicable rules are valid, that the conflict is one between rules that are members of the system[162].

If we take a brief look at the debate about the ontology of norms, we'll see that this conclusion is sound: it will be endorsed by anyone who defends what is called 'an expressive conception of norms'[163]. According to it, what characterises norms *vis-à-vis* other kind of statements is their pragmatic force: norms are the result of a prescriptive use of language. If this is the case, then a norm exists when a set of empirical facts obtains (i.e. when the act of prescribing it is verified), and thus

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[161] In a similar sense, Kelsen (1991), 108. His position on this matter is not clear: he does mention that derogation can occur in two different situations, and one of them would be when there is an incompatibility between two norms; at the same time, he says that 'the fact that two conflicting norms cannot be applied together is no reason for assuming that one of them repeals the validity of the other' (111).

[162] Kelsen (1973), 228.

[163] Alchourrón & Bulygin (1998), 385.

norms are not understood as abstract, but as concrete entities[164]. Since they are understood as concrete entities, although we can predicate of them temporal and spacial conditions—we can say that they exist during a period of time in a given place—we cannot attribute to them the capacity of taking place in logical relations[165]. This is Kelsen's position: his understanding of norms' existence precludes the possibility of subjecting them to the principle of no-contradiction which, depending on the possibility of distributing a truth-values, is applicable to descriptive propositions but not to existing entities. Since they cannot stand in contradiction, 'we cannot claim that if one of the conflicting norms is valid, the other must be invalid (…) When we have a conflict of norms, both norms are valid; otherwise, there would be no conflict'[166]. We've seen that since validity does not entail applicability, then we can have a conflict with just one valid rule (or even without any valid rules, as long as they are both within the judge's scope of competence and internally applicable); but his point would stand even if a conflict that includes non-valid rules is accepted: not being abstract entities, from the fact that the observation of one implies the violation of the other, we cannot infer that one has to be invalid[167].

So, any expressive conception of norms requires to accept that normative contradictions cannot by themselves lead to the voidness of one of the rules at issue —it cannot lead to it because, even if they require incompatible actions at the intensional level, they do not logically contradict each other. This doesn't mean, however, that to reject such conception of norms entails accepting the invalidity of one of the contradictory norms. Opposed to the expressive conception, in a 'hyletic' understanding, norms are characterised at the semantic level. They would correspond to the meaning (and not to the illocutionary force) of certain expressions, being purely 'conceptual entities, independent of language' that can be

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[164] Vilajosana (2010), 37.

[165] Alchourrón & Bulygin (1998), 383.

[166] Kelsen (1991), 213.

[167] On Kelsen's ontology: Ruiter (1997).

expressed by linguistic means[168]—i.e., by *normative* sentences: 'a normative sentence is the expression of a norm, and a norm is said to be the meaning of a normative sentence in much the same way in which a proposition is regarded as the meaning (sense) of a descriptive sentence'[169]. The problem with this approach lies on the fact that since norms are like propositions, they are not subject to spacial and temporal predicates, so we could not say that they exist for a period of time in a defined location.

But these two alternatives do not constitute a dichotomy[170]. As Josep Vilajosana and Riccardo Guastini have shown[171], the problem with these understandings is that they assume that the conditions to individuate norms (conditions located at the pragmatic level, in the expressive conception; and located at the semantic level, in the hyletic one) entail an answer regarding their ontological properties. If both problems are distinguished, then we can defend that (similarly to the hyletic conception) norms correspond not to statements, but to what is expressed by norm-formulations (the signs or symbols used in the enunciation of the norms[172]). These formulations can be understood as deontic sentences[173] that are syntactically characterised as the combination of a deontic operator (forbidden, required, permitted or liberated) with a semantic content constituted by a type of action (to kill, to rape, etc.)[174]. With these criteria for individuating norms, they are meaningful entities that—like descriptive propositions—can stand in logical relations: two norms can be incompatible, so normative contradictions are possible. But this doesn't commit us to attribute to them a set of ontological properties equivalent to that of descriptive propositions. And we do not need to be committed to these ontological properties, because our characterisation is compatible with

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[168] Weinberger (1998), 414.

[169] Alchourrón & Bulygin (1998), 384.

[170] Weinberger (1998), 414.

[171] Vilajosana (2010), 38; Guastini (2018). Weinberger (1998) also rejects the dichotomy.

[172] Von Wright (1963), Ch. VI.

[173] Von Wright (1963), Ch. VI.

[174] See, Mañalich (2014a), 485.

understanding that their existence, when it comes to legal norms at least, can be conceptualised in relation to their membership in the relevant legal system. In this sense, to say that a norm exists means that it is a member of a set. Since this endorsement of existence-as-membership is compatible with the previous characterisation of norms as 'what is expressed by a norm-formulation', now we can predicate of norms both spacial and temporal properties, for they depend on their conditions of existence; and at the same time, we can claim that norms stand in logical relations, since those depend on their characterisation[175]. And because their existence corresponds to their membership, the verification of a normative contradiction would only entail the lack of validity (or nonexistence) of one of the contradictory norms if the conditions of membership so establish it.

c) Contradiction as the basis of unconstitutionality

If norms can stand in a relation of normative contradiction—which, in turn, depends on the meaning of the rules involved—, but from such contradiction it doesn't immediately follow their lack of validity, then a normative contradiction and not a normative conflict is suitable to be the basis of unconstitutionality: as long as unconstitutionality entails the lack of validity of the law that is deemed unconstitutional, then it cannot depend on a problem that is configured at the level of application, on the verification of a contingent fact-in-the-extensional-sense. To keep the categories 'clean', we can now make sense of unconstitutionality as property that arises out of the verification of a normative contradiction. In order to arrive to this we just need to endorse the reasonable assumption that a law that is *incompatible* with the constitution is unconstitutional—such relation of incompatibility doesn't by itself lead to the unconstitutionality nor lack of validity, but is apt to serve as the underlying property on which unconstitutionality arises[176]. This means that in order to arrive at the declaration of unconstitutionality, the constitutional judge has to assume (if it is not explicitly stated) as her major premise

[175] Guastini (2018).

[176] Kelsen seemed to defend a similar view in (1991), 125.

some proposition along the following lines: 'A legal rule that is *incompatible* with a constitutional provision is invalid'[177]. From this point onwards, I will take this statement as the underlying premise for declarations of unconstitutionality. Such major premise, taken together with a minor one asserting the incompatibility or normative contradiction between law and constitution, leads to declare the law void —all this chapter can be read as an attempt to justify such major premise and differentiate it from another one referring to normative conflicts. And the crucial thing that has to be noted is that this incompatibility is not configured at the extensional level of the rules involved, so it doesn't depend on a problem of application, but is configured at the stable level of the intensions of the rules, intensions that remain unchanged through its infinite applications in infinite concrete cases or controversies.

By making this distinction clear, we are now in position to put forward a dual understanding of JR, one in which the question about the constitutionality of an application, being grounded on a normative conflict, can be addressed separately from the question regarding the constitutionality of the law itself, which is understood as dependent on the configuration of a normative contradiction.

2.2. *Marbury* as a problem of application

In the light of the foregoing análisis we can now return to suggest a different, plausible, reading of *Marbury v. Madison*.

We just saw that in all cases of normative conflict the judge must decide according to the applicable rule and leave without application another one. This means that from the verification of a normative conflict it is legitimate to arrive to the non-applicability of one of the conflicting rules. To decide which is to be preferred, the judge must consider all relevant criteria for the solution of normative conflicts and

[177] Ferrer & Ratti (2010), 605.

all rules of competence that are applicable to *that particular case.* The problem with Marshall's argument, as we have said, can be identified as the illegitimate connection that he proposed between validity, on one hand, and normative conflict and applicability, on the other. But once the validity is taken outside the argument, things seem to run quite smoothly: we can reorganise his argument as one that connects a normative conflict between a constitutional rule and a legal one, with the lack of applicability of the latter to the concrete case. That is the solution to which one is to arrive by the application of a rule of preference that commands the displacement of the legal rule, displacement that does not necessarily involve the voidness of the displaced rule.

Only once JR is seen like this, as a matter of deciding on the applicability of the appropriate rule to a concrete case in which a normative conflict is configured, the 'little old judge argument' could be accepted[178]; for as far as it is—structurally at least—the same problem whether the collision is between a constitutional and a legal rule or it is configured with two or more rules belonging to the same hierarchy, the judge will be confined to the moment of application, resolving which rule is the appropriate to enforce on the concrete case she has in front of her. The question about validity doesn't need to be raised, for the non-application of a rule when it collides on a particular case with another one, does not say anything about the validity of said rule. It is important, nevertheless, to repeat one more time that even if this understanding of concrete review is sound, JRA is not a necessary feature that just follows from adjudicative powers, for it is perfectly possible to have competence rules that prevents some (or even all) courts from directly applying the constitution, and if the constitutional rules are taken outside the competence of a judge, then no constitutional normative conflict can arise.

With these considerations in mind, we can reorganise the argument presented in *Marbury* as follows:

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[178] For this reading of Marbury, Wechsler (1965), 1006.

i. The constitution is the fundamental and paramount law of the nation.

ii. The duty of the judicial department to say what the law is.

iii. If two laws conflict with each other, the courts must decide on the applicability of one of them.

iv. If a law is in opposition to the constitution, then the constitution must govern the case.

This way, two changes are made to the original interpretation: first, we are excluding the second premise of Marshall's argument (the illegitimate movement of relating the conflict with the voidness of some piece of legislation). Second, a new meaning to the expression 'saying the law' is demanded: now, it is not about saying what the general valid law is, but what the law is *for this case*. Let's go back to *Salerno* to explore both changes.

That case can now be understood as presenting two different questions: on the one hand, whether or not the new standard set for bail is compatible with the previous and constitutional one. We saw that they stood in a relation of normative contradiction, that the semantic content of the original provision (that refers to defendants not accused of a capital crime) constituted a sub-set of the semantic content of the Act (that refers to defendants in general) and that they both assigned incompatible requirements to the judge. If unconstitutionality arises from contradiction, then the Act should be declared unconstitutional, regardless of the fact that it can be applied in cases in which no normative conflict is configured (those in which the defendant is accused of committing a capital crime): the relevant property for unconstitutionality is to be identified in consideration to the rules' intensions, not on concrete extensions. But such question is not properly thematised in a concrete and diffuse model of JR—as we have seen, the nature of

this query demands an abstract and concentrated system. In a system like the American, the proper question to ask the court is if the application of the legal provision is, in a concrete case, in conflict with the constitution, and the answer will depend on the particularities of the case: if the defendant is accused of a capital crime, then the Act does not conflict with the constitutional standard and therefore it can be applied; but if the defendant is not accused of a capital crime, a conflict arises and the application of the Act would be unconstitutional. The point is made clearer if we return to our first variation of *Salerno*: in it, the Act only applies to repeat offenders, so this alternative rule only 'overlaps' with the original one—there is no contradiction between them, but its application to a recidivist that is not accused of a capital crime should be declared unconstitutional. The answer to be given about the Act's applicability does not allow us to move in direction to its voidness, so while the first question requires the judge to *say what the law is*, in the sense to declare if a piece of legislation is valid; with the second question the judge still *says what the law is*, but only in the sense of deciding what is the law for this case in which two rules are applicable.

Having constructed a proper distinction between validity and application, we see that with the same pair of rules, two different questions can be asked, each presenting its own challenges: the question about validity requires defending a relation between the intensions of the rules, be it of identity, inclusion or overlapping, to decide if the semantic content of one is identical or corresponds to a sub-set of the other. The question about application presents a different problem, that of deciding if the concrete case that serves as the object of the judicial decision (object that instantiates infinite properties and supports infinite true descriptions) constitutes an instance of the semantic content of the rules at issue; and, if it were to instantiate more that one rule, it requires the judge to decide which rule or rules are to be preferred. These different understandings of what it is to 'say the law'—that correlate with the distinction between validity and application, normative contradiction and normative conflict—are grounded in the extensionality that characterises concrete cases, and they will be again contrasted in Section 6.4 of the

following chapter. There, it will be argued that a strictly *judicial* decision regarding the validity or constitutionality of a piece of legislation is impossible: while the question asked in JRL is a demand to 'say the law' in the sense of deciding on the validity of a rule, a judicial answer is one that 'says the law' in the sense of deciding on the application of a rule.

2.3. The *judicial* duty to 'say the law'

It is possible to correlate the two senses of 'saying the law' with two different understandings of the judicial function, so we can see how the problem presented by JR connects with the problem of characterising adjudication in general—characterisation that will constitute the main issue in the next chapter. When it comes to the applicability question, 'saying the law' relates to the identification of relevant standards for the decision of a concrete case, but once 'saying the law' is disconnected from application, the duty of the judicial department is understood in terms of the identification of general propositions of law that do not need to be applicable to any particular case that the judge is required to adjudicate. A brief, critical exploration of the contrast between these two approaches to adjudication—each treating in isolation a different aspect of adjudication: one that focuses on the power to decide cases and another that highlights the power to attribute meaning to law—will serve as an adequate preamble to the following chapter about adjudication.

Larry Alexander and Frederick Schauer exemplify the second alternative[179]. In their view, the USSC is first and foremost a constitutional interpreter, a law-maker and not a case-decider[180]. It is supposed to behave as a general interpreter of the law, regardless of its applicability to a concrete case; so it can instruct, guide, help and order other bodies and branches in relation to the proper way of understanding the

[179] Alexander & Schauer (1997).

[180] Alexander & Schauer (2000), 478.

law[181]. By engaging in this general interpretative task, the court secures the law's capability to determine courses of action despite the existence of contesting interpretations, which threaten 'the *settlement* function of law'[182] even in the absence of a concrete case or controversy[183]. The court, for them, is an 'opinion purveyor'[184] allowed to provide 'useful statements about the law unnecessary to the result in the case'[185] and mandatory for other institutions[186].

While Alexander and Schauer understand the judicial function as one defined by interpretation, neglecting the 'case-deciding' aspect of it—which, despite being explicitly granted to the courts by the Constitution is seen as just a detail; Edward Hartnett and John Harrison seem to endorse the complete inverse relation between cases and interpretation, understanding that the possibility to interpret the law is dependent or accessory *vis-à-vis* the power to decide cases: for the former, the judicial function it is reduced to 'authoritatively resolving particular cases between particular parties. So long as some court—be it a state court or a lower federal court —has the last word regarding "what is to be done" about a particular case between particular parties, the judicial settlement function is fulfilled'[187]. Similarly, Harrison claims that 'the power to interpret the Constitution, however, comes from the case-deciding power. To suggest that the power to interpret is primary, and the case deciding power, secondary, is to misinterpret the Constitution and to confuse cause and effect'[188]. Now the priority is given to the case-deciding power, and the fact that judicial decisions are supposed to be based on law is taken as a secondary feature.

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[181] Alexander & Schauer (2000), 479-80.

[182] Alexander & Schauer (1997), 1371.

[183] Alexander & Schauer (2000), 457.

[184] Alexander & Schauer (2000), 478.

[185] Alexander & Schauer (2000), 481.

[186] Alexander & Schauer (2000), 457, 472-5. As they see it, the prohibition of advisory opinions doesn't prevent the court to use a concrete controversy to assert statements about the law that go way beyond the case they are deciding—Alexander & Schauer (2000), 481: 'every time a court gives a reason it is, in effect, giving and advisory opinion' (Schauer (1995), 655.). Against them, Hartnett claims that the *settlement* function does not demand to understand that the USSC's interpretations are binding to all officials—(1999), 146. Discussing alternatives to the judicial supremacy: Eisgruber (1994), Paulsen (1994).

[187] Hartnett (1999), 147

[188] Harrison (1998), 372-3. Regarding the interpreting power of the executive branch: Lawson & Moore (1996),1273; Eisgruber (1994), 349.

Both opposing approaches to the judicial function, I will argue, are misconstrued. Nevertheless, taken together they serve to identify the crucial aspects of adjudication—they are misconstrued because not enough attention is given to interdependence of the two factors that each approach independently singles-out: I will claim that the relation between the particular case and the general law is no accident of the judicial activity, but its defining feature. So (with Alexander and Schauer, and *pace* Hartnett and Harrison) we shouldn't start from 'deciding cases' and then, in a secondary moment add the requirement to perform such function in consideration to the applicable general laws; nor (with Hartnett and Harrison, and *pace* Alexander and Schauer) should we should start by asserting that the judicial role is 'to interpret the law' and then constrain such activity to the context of particular cases. What is going to be defended in the next chapter is that an appropriate understanding of the judicial activity lies in figuring out the relation between general, legal rules and particular cases—or, in Hart's words, by 'the impartial application of determinate existing rules of law in the settlement of disputes'[189].

[189] Hart (1983), 125.

Chapter 3: On *Judicial* Decisions

Introduction

In the previous chapter I have tried to offer a characterisation of JRL that allows us properly to understand the nature of the question that those cases put forward. To develop such study, I used *Marbury* as a starting point to confront abstract and concrete models of JR. Based on their differences, I presented a theory about the functions that each model aims to achieve, and with it, the question that on each case the court must answer. I concluded that while on concrete models what was at stake was the applicability of a piece of legislation in consideration to a constitutional rule, on abstract models the question refers to the validity of a law in consideration to its relations with a constitutional provision. I argued that the function of concrete models requires the judge to assess the existence of a normative conflict that takes place at the extensional level of the rules involved, but when it comes to abstract review, what the judge faces is a possible normative contradiction between the rules' intensions.

Those previous steps can be understood as attempting to define the problem that is presented to the judge on JRL cases. What I want to do next is to identify the features of a judicial decision, that is, to identify under what conditions a solution to the problem that is put forward can be understood as properly judicial. The importance of this, as I have previously remarked, is that the idea that underpins the justification of JRL is that of judicially enforcing legal limits to political decisions adopted by the lawmaker; so, in order to make sense of what that means, and to identify the extent to which such goal is possible, we need to put forward some theory that allows to identify when a legal decision can be understood as being a *judicial* decision. In this way, once we have identified both the question that is presented to the judge and the defining features of a judicial answer, we will be in a position to present a theory that provides the coordinates within which an answer to

such question could claim to be aligned with the institution's underlying promise of judicially enforcing constitutional limits to the legislation.

If on the previous chapter we could only provide some characterisation of JRL by analysing it hand in hand with what we called JRA, now, our study of the judicial function will demand us to run, up to some extent, parallel considerations about the legislative function[190]. By doing this, I will try to extend the double correlation that was constructed in the previous chapter (extensional problem, normative conflict and application, on the one hand; and intensional problem, normative contradiction and validity, on the other), and the key element that will serve us to move forward is to be found in the binomial extension/intension. I will argue that it is that same binomial what allows us to make sense of the distinction between application and justification discourse, and with them, the distance between adjudication and legislation. I will defend that it is the existence of concrete, radical particulars, and the problems that come with them, what serves to characterise judicial decisions. The lack of such extensional dimension, on the other hand, will be taken as distinctive feature of legislative, justificatory ones.

By doing this, I do not mean to provide a full-blown, exhaustive theory of adjudication. What I am aiming for is something more modest: to identify key features of judicial decisions, characteristics that have to be verified for a judicial moment to arise. What I will try to identify are necessary, but not necessarily sufficient, conditions for adjudication, so it is enough that they do not obtain in JRL to configure a dilemma.

To move in this direction, I will begin by presenting a general scheme of what is usually called a 'mechanical' model of adjudication (1). Then, I will put forward two common objections to it (2): the first one relates to a problem that is taken to be purely semantic and that arises from the indeterminacy of language—the most

[190] In this sense: Atria (2012), 344.

conspicuous case here would be that of 'vagueness' (2.1). The second objection is understood as an axiological one, related to the adequacy of deciding a case according to the general solution given by a legal rule—this is what usually is discussed under the topic of 'defeasibility' (2.2). I will argue that these objections play a key role in understanding the essential aspect of the judicial moment, that the mark of success for theory of adjudication lies on its capability of giving an account of both, in explaining how the judge is supposed to overcome them. In (3) I will use Fernando Atria's approach to adjudication to present a non-semantic understanding of it: while he doesn't deny that there are semantic challenges, when it comes to characterising adjudication, these are understood as secondary *vis-à-vis* substantive problems of appropriateness. I will argue that this displacement of the semantic questions to a lesser role has consequences: the theory, that is grounded on Michael Detmold's particularity void (3.1) and Klaus Günther's sense of appropriateness (3.2), leads to understand that the key aspect of the judicial moment is found on the decision about the external applicability of the rule at issue (3.3). With this, while the challenge of crossing the distance between the intensionality of the rule and the extensionality of the particular case is adequately identified, objections will be presented regarding the offered solution (4): I will claim that the approach entails the resurgence of the justificatory question (4.1) and therefore stands at odds with law's operation (4.2). To escape this blockage without leaving the right neighbourhood, I will recur to Nicos Stavropoulos' and Hilary Putnam's work in order to remark the semantic dimension of the question of appropriateness (5). This will require to challenge the semantic assumption that underlies the displacement of the question of appropriateness outside the theory of meaning or semantic theory (5.1), thus bringing the crucial moment of adjudication back to the question about the internal applicability of the rule (5.2)—only then we would be in position to provide a viable scheme of adjudication that, dealing simultaneously with both vagueness and defeasibility, stays within law's boundaries (5.3). The last part constitutes an attempt to model judicial decisions on the Sellarsian distinction between different patterns of linguistic activity (6). To do this, I will first examine

these three patterns (6.1); then, the empirical or extensional content of language-entry transitions will be addressed (6.2), and finally a relation between the particularity void and observational freedom will be presented as a defining feature of the judicial moment (6.3), rendering the notion of JRL an analytical impossibility (6.4).

1. A familiar starting point

It is a plateau in legal reasoning to say that deductive reasoning through a legal syllogism is a substantial part of adjudication, but that it is—of course—not all there is to it. The scheme is well known: a legal norm works as a major premise; the facts of the case form the minor one and the decision corresponds to the conclusion that follows deductively from them[191]. Some might say, probably with Neil MacCormick[192], that sometimes the whole legal reasoning can be deductive in its essence, others could say that such picture is never enough by itself, but that it is nevertheless characteristic of most instances of adjudication[193]. So, the general discussion is not about whether or not this model adequately captures adjudication but has to do with the extent to which is insufficient—the syllogistic structure plays a role in legal reasoning, but legal reasoning as a whole goes beyond it.

Using John Gardner's example[194], the basis or rough structure of adjudication according to the legal syllogism could look like something like this:

> Law: If X then Y —> Tortfeasors are liable to pay full reparative damages to those whom they tortuously injure;
>
> Case: X —> Jones tortuously injured Smith to the tune of $50;

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[191] Moore (1981), 156.

[192] MacCormick (1978), 19-37.

[193] Leiter (2010), 111.

[194] Gardner (2012), 186.

Decision: Y —> Therefore, Jones is liable to pay Smith $50 in reparative damages.

But, the whole point of the current debate about this topic is that such model is inadequate to fully grasp what is going on the applicative moment. 'Most of legal reasoning'—Brian Leiter tells us— 'is given over to explaining why the applicable rule of law is, in fact, the applicable rule of law, and what the legally significant facts are. And such reasoning is rarely '"mechanical" in the sense of "obvious" or machine-like'[195]: there are previous steps that have to be taken before the legal syllogism can play a role in the judge's legal reasoning.

The case can be terribly complex and not adequately defined only by some property X. Also, it might be very obscure whether the case is actually an X or not, or if the operative facts of the law are actually X. We are told that there are too many delicate considerations that this model cannot give account for. Addressing the issue, MacCormick says that the problem of interpretation must on occasion arise, and with it, a choice has to be made, choice for which a deductive justification as the one presented is 'evidently' impossible[196]. He adds that a 'problem of relevance' can arise too, problem that questions the legal status of the major premise involved; in such case it is not enough justification to present the syllogistic structure, since it is crucial that the syllogism discloses in the plea in law 'a legally valid major premise'—a formula which will be 'a sufficient legal "warrant" for claiming that conclusion given those averments of fact by way of a minor premise'[197]. Only once the interpretative choice is made and/or the warrant is established, the conclusion offered by the syllogism is deductively justified, but—MacCormick argues—in neither case the justification can adopt the indicated deductive in form. This mechanical picture would only be referring to part of the general structure of

[195] Leiter (2010), 111.

[196] MacCormick (1978), 68.

[197] MacCormick (1978), 71.

adjudication but wouldn't actually describe all the steps and problems that need to be solved in order to apply the law. As a corollary, the general consensus seems to be that adjudication would be characterised by a form of legal reasoning that includes, but is not exhausted, in the kind of reasoning that is explicitated by the legal syllogism[198].

Allow me to start from this familiar territory: I plan to examine the main reasons given to assert that this scheme is not satisfactory. My goal with this is not so much to assess the soundness of those objections, nor to present new ones, as it is to use them in order to grasp the underpinning understanding of adjudication that lies behind them—understanding the shortcomings of the mechanical approach to judicial decisions we can identify what is the challenge or problem that characterises adjudication and what are the proper tools to solve it. The aim of engaging in this examination is to assess to what extent, the judicial function can be performed in JRL cases.

2. The objections

There seem to be two obvious ways in which a mechanical description of adjudication is insufficient.

The first objection can be presented in terms of language's inherent indeterminacy. It is usually presented in one of two forms: the first one has to do with ambiguity, with the possibility of the piece of legislation that is taken to be relevant to support more than one sense or intension[199]. If this is the case, then the major premise of the syllogism cannot be identified just by identifying the legislative statement that is supposedly applicable, since it lends itself to two or more rules[200]. Until a decision about the proper interpretation is asserted, the syllogism cannot operate, and no

[198] The underlying idea is that theories of adjudication are theories that refer to the legal reasoning that should be employed by judges. Leiter (2010), Moore (1981), 154.

[199] Klatt (2008), 47.

[200] MacCormick (1978), 66.

legal conclusion is obtained. The second manifestation of language's indeterminacy can be properly studied by looking at the current discussion about 'vagueness' in law. Now, the problem is not that of fixing the major premise based on a legal statement that admits multiple interpretations, but that of identifying the extension of a rule whose intension is clear.

Besides these problems associated with language, *defeasibility* also appears as an invincible obstacle for the 'mechanical' approach, for it seems to require the judge to decide on the appropriateness of applying the rule that serves as the major premise of the syllogism.

In this chapter I will deal extensively (and hopefully convincingly) with vagueness and defeasibility. The problem of ambiguity will be succinctly addressed at the beginning of the following chapter.

2.1. Indeterminacy of language

The syllogistic form allows to identify an answer that corresponds to a 'singular proposition of law'[201]—i.e., a proposition that, referring to the particular relation between specific people, is suitable to decide a particular case—that deductively follows from a major premise that is informed by the content of a 'general proposition of law'—i.e., a law or a piece of legislation[202]. For this to work, of course, it is necessary to connect, by means of a minor premise (or a factual proposition[203]), the general law with the facts of the case. This later step requires the judge to subsume the facts of the case under the extension of the rule to be applied, subsumption that in turn depends on the meaning of the expression employed by the rule at issue.

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[201] Moore (2003), 25-6, Moore (2016), 127.

[202] Moore (2003), 24, Moore (2016), 128.

[203] Moore (2003), 24

The problem that arises from language's indeterminacy has to do with the process of identifying the concrete cases in which the propositional content of the rule is instantiated—it affects the external justification of the judgement based on the legal syllogism[204].

And it is here when vagueness appears as an obvious obstacle[205]: we can think of concrete cases in which it is indeterminate if they instantiate the properties included by the general proposition of law. With Hart, we can understand this indeterminacy as a 'penumbra' that covers the space between instances of clear applicability of an expression and instances of clear inapplicability. Following this line of thought, it is traditionally understood that a predicate is vague if there are borderline cases for its application[206], so 'there are cases in which one just does not know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts'—even if you are told exactly how many hairs a man has on his head, you could still not know whether to describe him as 'bald'[207]. This is why, traditionally, the extension of vague predicates is divided into a three-fold partition, with a borderline section that separates its extension from its anti-extension, a section in which the expression has no definitive truth-value[208]. In those cases, what the judge finds can be called a 'gap of recognition': individual cases in which, given a lack of semantic determination, it is not known if the individual case belongs to the generic case established by the rule[209].

This line of thought can be taken one step further: some concepts, or expressions employing those concepts, do not allow clearly to identify any concrete case as falling under their extension. According to this approach, we would not only have

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[204] Alexy (1989), 221-86.

[205] About vagueness in law, see: Endicott (2000).

[206] Endicott (2000), 31.

[207] Grice (1989), 177. Montminy (2016), 374.

[208] Fine (1975), 266; Klatt (2008), 256-8.

[209] Alchourrón & Bulygin (2012), 50.

concepts whose application is problematic on borderline cases, but also, within that group, we would find concepts that lack clear instances at all.

That seems to be the position taken by Schauer: with the terms employed by the constitution in the establishment of fundamental rights, the indetermination is absolute, so while 'freedom' and 'equality' do have meaning, every instance, application or concretisation of them requires an additional premise for the particular case. In this way, 'freedom' never resolves by itself a particular application[210].

On cases like this, Schauer speaks of *pervasive* vagueness, so just by focusing on the language 'we find that on occasion legal language is so vague by itself that there is nothing clear at all'. There might be no clear instances of 'unreasonable' searches and seizures, no clear cases of equal protection, restraint of trade or of decision that are in the child's best interest[211].

Opposing this view, and with Russell, we can reject a qualitative distinction between vague and not vague concepts: 'The fact is that all words are attributable without doubt over a certain area, but become questionable within a penumbra, outside which they are again certainly not attributable'[212]. Here there is no such thing as pervasive vagueness, since for all words there are cases to which they are unproblematically attributable, but at the same time, all expressions admit vagueness on some concrete cases—since 'all non-logical words have this kind of vagueness', even a seemingly unproblematic expression as 'this is a man' will lead us to the same problem when faced with some particular prehistoric ancestor; and therefore 'the conceptions of truth and falsehood, as applied to propositions

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[210] Schauer (1988), 514. He uses Westen's work to defend his point: to find meaning to 'equality' is always necessary to complement it with some substantive ideal that is independent from the concept of equality itself — Westen (1982), 576.

[211] Schauer (2008), 1125.

[212] Russell (1932), 87.

composed of or containing non-logical words, are themselves more or less vague'[213].

The correction of Russell's point would lead to conclude that for all expressions we can find borderline cases, concrete instances to which it is not clear if the expression applies, and so regarding them it is neither true nor false that they instantiate the employed propositional content. This means that this is not a problem that correlates with the level of specificity of the terms employed, so that every time that a more general term is replaced by a more specific one the problem of vagueness is reduced[214].

If Russell is right, then, to every rule or general proposition of law we could apply the following 'three-candidates' model: 'The objects to which a legal term refers can be categorised into positive candidates to which the term undoubtedly refers, negative candidates to which the term undoubtedly does not refer, and neutral candidates where there is doubt whether the term refers to them'[215]. With this model, when it comes to neutral candidates the meaning of the expression that configures the major premise is not enough to either classify or abstain from classifying the concrete case as an instance of the operative facts of the rule. Despite this, the judge has to resolve anyway, so she faces this challenge: the semantic content of the rule leaves open if the case at hand is a token of the legal type, but she still has to decide if it is or it is not[216].

This is the obstacle that indeterminacy, and specially vagueness, puts forward to a mechanical process of adjudication: a key part of the judicial decision rests on deciding if the operative facts of the rule have been instantiated by the case at hand,

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[213] Russell (1932), 88.

[214] Waldron (1994), 522.

[215] Klatt (2008), 21.

[216] The decision is not part of the given alternatives, but 'the third party, which is excluded by the alternative state of the two alternatives'—a paradox: 'decision can only be made if undecidability is given as a matter of principle', Luhmann (2004), 144.

and the fact that they do, when it comes to vague instances, does not depend on the meaning of the provision to be applied. Focusing on the syllogistic structure loses sight of the crucial step that precedes it, that of properly identifying the premises on which the conclusion hinges. Schauer claims that when it comes to pervasively vague rules there is no possibility of mechanical adjudication, and so, the constitution, being plethoric of them, does not offer the kind of legal material that can be applied without a value judgement[217]—i.e., the kind of judgement that is not grasped by the mechanical model. But even if we deny the existence of this radical type of vagueness, the problem remains, only circumscribed: the syllogistic structure would always be incapable of addressing borderline cases, whether all expressions admit different levels of vagueness or just some.

To deal with this problem, the judge needs to decide if the concrete case at hand is to be subsumed under the operative facts of the rule—the pure meaning of the latter is insufficient to settle such question. It is only after that decision is made that 'a simple deductive justification of a particular decision follows'[218], so the complete justification of the decision hinges on the choice taken within the alternatives that the rule left open.

If we use this line of criticism to bring light to the appropriate understanding of adjudication, then we should arrive at something like this: given the openness of meaning, law's provisions cannot be applied, in order to arrive at a particular decision, without an antecedent move that consists in deciding, within the alternatives left open by the linguistic meaning of the legal rules, if the case is to be subsumed under its terms. So even though the syllogistic structure explains the judge's legal reasoning once she has made a linguistically not-constrained decision, it is silent regarding an essential part of her function—it does not explains how adjudication operates in that previous step in which the meaning of the terms is not enough to define for every case and by themselves if they have been instantiated.

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[217] Schauer (2003), 230.

[218] MacCormick (1978), 67-8.

Since adjudication is characterised, at least partially, by the type of reasoning that lies behind judicial decisions, the indeterminacy of language entails that the mechanical approach falls short from providing a suitable general image of it.

Confronted with a case in which vagueness blocks the form of legal reasoning exemplified by the legal syllogism, what the judge needs can be understood, following Alexy, as a rule for the usage of words[219], a rule that elaborates on the legal property whose application is vague in the concrete case by providing a catalogue of alternative or cumulative criteria whose verification entitles to subsume the concrete case under the extension of the rule at issue[220]. By doing this, vagueness is productively displaced from the current case at issue to an hypothetical new one: let us take the traditional example of a rule prohibiting vehicles from a public park and a concrete case in which the object that enters the park is a bicycle, a pair of roller skates or a toy automobile[221]. A new legal rule can specify that only motorised vehicles are to be considered vehicles for the application of the previous one. With this, the concrete case can be now easily decided; but different ones, ones in which it is vague if the object at issue counts as a motorised vehicle are left in the new penumbra. And once the judge runs out of this type of rules, vagueness comes back to block the operation of the legal syllogism, and then she might need to create her own rule of interpretation for the case at hand, one that serves her to make the choice between the open alternatives. This might seem like a reasonable alternative, maybe the judge has no other option and is forced to put forward a judicially created rule to justify her decision. The question that arises with this move has to do with the function the judge would be performing in whose cases: Would the creation of those rules for the usage of words count as part of the judicial activity or should it be understood as a legislative function performed by the judge?

These remarks about vagueness points us into taking, as an essential feature of adjudication, the judge's need to confront the indeterminacy of language in order to

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[219] Alexy, *Theory Legal Argumentation*, 234.

[220] Relating these rules with Brandom's inferential semantics: Klatt (2008), 52. A similar solution is provided by Alchourrón & Bulygin (2012), 48.

[221] Hart (1958), 607.

subsume the particular case under the terms of the applicable rule. They have also presented us with a question regarding the legislative or judicial nature of a semantic rule required to face such indeterminacy. To answer it, we need to move forward in identifying some essential features of the judicial moment, and to do that, the second objection has to be tackled.

2.2. Defeasibility

The previous remarks about language's inherent indeterminacy does not exhaust the obstacles faced by a purely syllogistic approach to adjudication. Moreover, with the distinction between vague and not-vague cases at hand, it is possible to identify cases on which the legal reasoning seems to be fully captured by the syllogistic model: when the classification of the case under the terms of the rule is not problematic, the case can be decided in a more or less 'mechanical' way, since the 'singular proposition of law' can be derived by logical deduction—the arguments put forward by the judge would be 'logically watertight'[222]. If vagueness were the one problem that makes the 'mechanical' understanding incomplete, such incompleteness would not prevent the syllogistic model to fully capture the judge's legal reasoning in the semantically clear cases.

But there is another obstacle in the horizon of the mechanical approach, one that has to do with the strength of the connection between the rule's antecedent and its consequent. The debate on rule's defeasibility is usually traced back to Hart's work. In 'The Adscription of Responsibility and Rights'[223], the idea is presented in relation to the effect that the verification of exceptional circumstances has in judicial decisions regarding breaches of contracts. There, he argued that the legally established conditions that serve to ground a duty to pay damages are not always sufficient[224], for there are defences that can defeat the plaintiff's claim. 'In

[222] Lyons (1984), 180.

[223] An acute study of Hart's paper is found in Duarte (2015), 8 ff.

[224] Hart (1949), 171.

consequence', Hart continues, 'it is usually not possible to define a legal concept such as " trespass" or "contract" by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others'[225].

From there on, the problem of defeasibility of legal rules connects the force of the conditional form expressed in the rule at issue with the context of its application, relating it to the notion of normality. 'When we express a conditional assertion'— Rodriguez tell us— 'we assume the circumstances are normal but admit that under abnormal circumstances the assertion may become false'[226]. This point is not about subsuming the event that serves as the object of adjudication under the universal terms of the rule, it is not immediately about the instantiation of its operative facts, but it has to do with the status of the rule as a *reason* for the judicial decision: since being a reason for something depends on the context in which practical reasoning takes place, to define whether the rule actually can serve as a reason for the decision requires to consider the context, the circumstances in which the decision is being made[227]. In normal contexts, the rule stands but, given the appropriate abnormal situation, its force might decay—contextual considerations might prevent the rule from being a reason. And since the context of application is not included in the operative facts of the rule, but it nevertheless serves to determine the solution to be adopted, the judge necessarily has to reason outside the syllogistic structure to arrive at its decision: even if the case at hand is clearly subsumed under the terms of the rule, an additional piece of evaluation is required, one that by hypothesis stands outside the semantic constrainments of the rule. Now, since the decision hinges on the normality of the context of application, the rule is not serving as a standard to be applied, for it is its very application what constitutes the object of the judicial decision.

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[225] Hart (1949), 174.

[226] Rodriguez (2012), 89.

[227] Caracciolo (2005), 89.

The previous problem admits being thematised in terms of the logical relation between the operative facts of the rule and the consequence it establishes. For a legal rule with the conditional form 'if A then B', A can be understood as a sufficient condition for deciding B. So, to every case that instantiates A corresponds a solution B. But, using the standard definition in logic of defeasible conditionals, the rule's defeasibility obtains when the truth of 'If A then B' does not exclude the falsity of 'If A and C then B'. When this is the case, circumstance C can be seen as an exception that defeats the conditional 'If A then B', so now A is no longer a sufficient condition for B. This defeasible understanding of the rules, it is claimed, follows from a general feature of our assertoric practice: conditionals constructions are used in a way that is not intended to assert that the antecedent is a sufficient condition of the consequent, 'but only that the antecedent jointly with a set of assumptions (…) is sufficient for the consequent', so we find that the inference from 'If A then B' to 'If A and C then B' is invalid[228]. The most popular examples of this type of defeasibility correspond to Lon Fuller's truck entering a park and the Bolognian surgeon that saves a man by drawing his blood in the street: the World War II military truck seems to undoubtfully instantiate the concept 'vehicle' of the 'no vehicles in the park' rule, and the surgeon seems to have undoubtfully verified the antecedent of the rule according to which 'whoever drew blood in the streets should be punished'. But in neither case, according to the defeasibility argument, the legally established consequence is to be applied.

If on the previous cases the status of the antecedent as a sufficient condition is challenged by the defeasible nature of the rule, the inverse problem can also be presented: the consequence is asserted even though the antecedent is not verified. Here the problem is less apparent: in 'if A then B', A does not seem to specify a necessary condition for B. On the contrary, there is nothing uncommon in having multiple rules that assign the same consequence to different operative facts: suppose the legislation assigns identical punishment to both murder and rape; if that were

[228] Alchourrón (1996), 341.

the case, then it wouldn't make sense to say that assigning such punishment to someone who has committed rape, but not murder, counts as defeating the murder rule. In a case like that, the murder rule could only be taken as defeated if the decision cannot be grounded on another rule whose operative facts have been verified. This shows us that when we look at the status of the antecedent as a necessary condition, defeasibility only arises if there is no other rule whose antecedent had been verified.

But notice that if we look back at the status of the antecedent as a sufficient condition, we can also see that leaving a rule unapplied in consideration to the verification of the antecedent of a different rule doesn't need to be particularly problematic: suppose we have our rule that establishes that 'if A then B' and also another rule according to which 'if C then -B'. The verification of an AC case configures a normative conflict that has to be resolved by employing a rule of preference, and the judge will have to leave a rule unapplied: if the concrete case is both a 'killing' and a 'legitimate defence', then we could say that the rule that punishes murder is defeated when the rule of legitimate defence is preferred. But if this is a case of defeasibility, then defeasibility does not entail a serious problem for the judge: it is unproblematic for criminal judges to prefer justification rules over sanctioning ones—that's the whole point of the former. These cases point to a form of defeasibility in which the displacement of the rule is conditioned to the operation of another one whose antecedent obtains, to the instantiation of a property legally recognised in a different rule. This form of defeasibility is *benign,* not in the sense that hard cases cannot arise out of them (they obviously can), nor in the sense that explaining the relation between the conflicting rules is a simple task (as we saw in Section 2.1 of the previous chapter, we can discuss if the conflict is to be interpretatively de-activated[229] or if a preference rule is to be invoked), but it is benign in the sense that they do not entail the configuration of a hard case[230]: from

[229] Rodriguez (1997), 166; (2000), 166; (2012), 105. Against his recourse to 'second level residual rule', see: Bayón (2000), 105.

[230] Duarte (2015), 20.

the judicial perspective, a case that is clearly both a murder and a legitimate defence is an easy one, and it is easy even if it is problematic to give a compelling account of the distinction between the operative conditions of the legitimate defence rule and negative conditions of the murder rule.

But there is another way of understanding defeasibility that presents a more menacing challenge to rule following in general and adjudication in particular. This corresponds to cases in which a rule's defeat does not depend on the operation of another one. Here the rule whose operative facts have been verified would be left unapplied for reasons that cannot be grounded on the preference of another internally applicable rule, on the verification of other legally relevant properties. This is a *malign* defeasibility whose operation configures a crucial challenge to the judge. Take Hart's remarks about unexpected cases: in *The Concept of Law*[231] he writes that it is not desirable such a rule that the question of its application to every case is always resolved beforehand without requiring a new election between open alternatives. Once we have established a rule, we can always face an unexpected case that demands us to resolve considering the most satisfying balance of the conflicting interest, so when those abnormal cases appear we understand that for them the rule was formulated blindly: just applying the rule if the case falls under 'the clear sense of its text' would 'secure a measure of certainty or predictability', but at the cost of 'resolving in the dark issues which can only reasonably be settled when they arise and are identify'[232].

What is crucial in the previous remarks is the idea of rules that, regarding certain cases, are blind—and such blindness arises from the fact that the lawmaker 'can have no such knowledge of all the possible combinations of circumstances which the future might bring'[233]. The problem is precisely understood as one regarding

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[231] While in *The Adscription* he is concerned with *benign* defeasibility—Duarte (2015), 20—,in *The Concept* he seems to be addressing *malign*.

[232] Hart (2012), 130.

[233] Hart (2012), 130.

'unforeseen' circumstances, but not unforeseen just by individuated rules, but by the legislation in general. So what worries Hart is not the idea of defeasibility as a rule's defeat in consideration to a property legally recognised in a different piece of legislation. When he claims that 'a rule that ends with the clause "unless…" is still a rule', the conditions that would trigger such clause are outside the repertoire of legislated properties. He is not talking about benign defeasibility: there, all the relevant properties were considered by the lawmaker[234], actually, it is only because they were foreseen that the conflict is configured—had the legislator not considered cases of legitimate defence, there would be no rule to oppose the one that sanctions murder.

The defeasibility of a rule, in this deeper, *malign* sense, is characterised by the conjunction of two properties regarding conditions under which it is defeated: first, they do not correspond to properties recognised by other rules that displace it, and second, they cannot be exhaustively listed in advance[235]. Defeasibility, thus understood, seems to lead to understand the antecedent of the conditional rule as establishing only a contributory condition for the consequent—the latter can be attained without the verification of the former, but also, the instantiation of the antecedent only entails the consequent if other conditions are fulfilled[236]. To secure the consequent, then, the judge would need to verify the instantiation of these other properties, which—*ex hypothesi*—are not established in the content of the applicable rules. And it is from these remarks that the main objection to the 'mechanical' approach arises: from the conjunction of the rule at issue and a case that falls on its extension, nothing follows as a conclusion, there is no valid inference—'if legal rules are defeasible then it would follow that one of the reasons the deductive model in law is inadequate is that such rules fail to meet a prime condition for the applicability of the deductive model'[237]. This, of course, was

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[234] Therefore, if the positive features for—say—a contract obtain and the established defences do not, then the necessary and sufficient conditions of a contract would be verified—Mackie (1985), 32.

[235] Ferrer & Ratti (2010), 606; Schauer (2012), 80; Rodriguez (2012), 89.

[236] Rodriguez (1997), 160.

[237] Boonin (1966), 372.

adverted by Hart. That was the way in which he understood the impossibility of 'mechanical jurisprudence': we do not live in a world characterised by a 'finite number of features', and the full set of modes in which they can combine are unknown[238]. If rules are defeasible in this *malign* sense, then a concrete and unforeseen combination of properties in a particular legal issue might very well defeat the applicable rule, and it would be part of the judge's function to assess if that is the case. Understood like this, defeasibility constitutes an impossible challenge to a 'mechanical' approach, for the very basis of the legal syllogism is per definition cut at the root: besides the correspondence between the linguistic content of the applicable rules and a true description of the facts of the case, another step has to be taken—properties outside the ones recognised in their content have a role to play in the final 'singular proposition of law', so the answer is not ultimately dependent on a legal rule[239].

Now, one might ask, why is this so important? After all, isn't it a starting point of the discussion that the judge's legal reasoning is not exhaustedly thematised in the inferentially deductive movement from a major premise, configured by the content of an applicable rule, to a conclusion that refers to individual subjects and particular consequences? Defeasibility of legal rules posits a threat to the 'mechanical' account, but what is at stake with this threat goes beyond the pure syllogistic structure. To properly understand the gravity of the problem is to notice that the syllogistic method aims to give an account of what is taken to be an essential function of the judge—that of deciding the case *according to law*. The syllogistic account of adjudication aims to 'secure' that judicial, particular decision counts as an instance of application of legally established rules, i.e. that the outcome of the trial corresponds to law's decision, and so the parties involved are subjected to the rules of law and not to the judge's will. Of course, a purely 'mechanical' understanding of adjudication achieves subjection to law at a rather high price, that

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[238] Hart (2012), 128; also, in (1949), 172.

[239] Marmor (1990), 72-79. Something similar is true of Lyons (1984).

of invisibilising everything outside the legally established rules[240]. Defeasibility allows the judge to avoid this horn of the dilemma, but it does it in a way that appears to send us directly to the other: that of making impossible for the legal rules to constrain the decision at the moment of their application.

If this is correct, then our analysis of the objections to the mechanical approach have served us to identify the main challenge that a theory of adjudication has to overcome—that of combining these two seemingly irreconcilable aspects of judicial decisions: subjection to law and attention to particularities. Aligned with this, the aim of the following section is to deepen on these issues, and by doing so, I will argue that both linguistic indeterminacy and defeasibility, the main objections to the mechanical approach, can be traced back to one essential feature of adjudication: it has to manage the distance between the universal terms of the rule's intension and the extensionality of the particular case to be decided. We have seen that vagueness and defeasibility arise out of this distance, so the shortcomings of the mechanical approach can be explained in terms of its incapacity to provide a suitable account of how to cross it. If this is the case, then a theory of adjudication should be in the right track if it can adequately address this intension/extension relation—it is the same extensionality that in the previous chapter served us to ground the distinction between JRA and JRL what comes now to extend a gap between the rule and its application. It will be the intensional/extensional binomial what will allow us to distinguish between application and justification discourses; and such distinction, in turn, will serve as the basis for differentiating between legislation and adjudication. Once we have those differentiations at hand, the extensionality of adjudication will allow us to model, up to some extent, the judge's legal reasoning on a general scheme of practical reasoning: defeasibility of the rules to be applied in the former, can be understood in terms of the 'language-entry transitions' in the latter.

[240] Hart (2012), 130.

It is this characterisation of the judicial moment what will then be contrasted against the position of the constitutional judge in JRL cases.

3. A non-semantic approach

The mechanical approach allowed us to identify an essential feature of judicial decisions: they must cross the distance between the intensionality of the rule to which the judge is bound and the particularity of the case that constitutes the object of the judicial judgement—both objections to the mechanical approach arise from this distance between rule and concrete case. Now I will examine a non-semantic approach to deal with this problem.

'The judiciary is bound to the clear wording of the statute and is not authorised to realise their own political opinions by means of an exchange of concepts'. The very possibility of rule of law hinges on this bounding[241], which in turn is incompatible with the power of the judge to alter the content of the rules to which she is bound. If a theory of adjudication is to live up to this standard, then it has to explain how the attention to the non-legally recognised properties is compatible with it—it cannot deal with the distance between intension and extension by altering the rule to be applied; otherwise, it would just have to renounce to the possibility of judges deciding in consideration to legally irrelevant properties. The dilemma can be presented as a question: if a property of the concrete case that is irrelevant according to the rule to be applied, can nevertheless dictate that such rule is not to be considered for its solution, then in what sense can it be said that the judge is still attached to the law?

Fernando Atria has noticed that this problem is suitably captured in Friedrich Von Savigny's notion of improper expression, and an example taken from the latter's *System of the Modern Roman Law* is useful to make patent the point: suppose that

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[241] Klatt, in reference to BFHE 192, 316 (320); in (2008), 18.

in 1840 the legal regulation declares infamous the widow that, during mourning, celebrates a new marriage[242]; suppose also the case of a woman that, after her husband's death—but still during mourning—gives birth to the child that she begot with the deceased man. Given those assumptions, should such a widow be declared infamous if she celebrates a new marriage during mourning but after the birth of the child? Von Savigny tell us that the answer must be negative, that this is a case in which the clear and determined sense expressed by the text of the law has disengaged from its true thought. The reason for this distance between sense and thought lies on the goal of the regulation: the reason to declare infamous a widow that celebrates a new marriage during mourning is to be found in the interest to avoid confusions regarding the paternity of a child, but such goal its already secured on this concrete case because the child was born before the second marriage[243]. Because of that, Von Savigny argues in favour of a restrictive interpretation, considering that law's real thought is to forbid second marriages in which a confusion of paternity could occur, confusion that in this case cannot be configured given the birth of the child prior to the death of the father. This way, the goal that the law aims to secure is not at stake when it comes to this widow, even though the case actually falls under the scope of the rule according to its text. Here lies the anti-semantic stance towards adjudication: the crucial question to be answered in the judicial seat doesn't have to do with assessing the correlation between the semantic content of the rule and the case at hand—what is typically blocked in cases of vagueness—; on the contrary, the problem arises precisely because it is semantically clear: the widow's case is one that is clearly subsumed under the operative facts of the rule. The relevant question is whether or not it is appropriate to decide the case based on the rule.

This is a case in which subjection to law seems incompatible with being attentive to the particularities of the case: law—in principle at least—would forbid the second marriage because it doesn't distinguish, in order to define its applicability, if the

[242] Von Savigny (1878), 162.

[243] Von Savigny (1878), 163.

birth of a child has taken place between the death of the husband and the new marriage. Such birth does not constitute a property recognised by law as a negative condition for its application, so subjection to law would seem to force the judge to decide in favour of the prohibition of the marriage. But it is precisely the attention to the particularities that are verified on that particular case and that are ignored by the universality of the rule, what would allow the judge to assess the adequacy of deciding the case according to it. It is only when we see the particularities of the widow herself that we could say—using Hart's terms—that regarding her, the rule was established 'blindly'. Predictability at the cost of deciding in the dark.

The first thing to be noticed is that Von Savigny's problem is not configured by the simultaneous (internal) applicability of another rule: the widow's case is not one in which there is a second applicable rule that excludes the possibility of declaring her infamous in consideration to the verification of a birth prior to the second marriage. In the same way, Fuller's case is not a hard one because there is a conflicting rule that allows the actions that the 'no vehicles' rule forbids; and the Bolognian law's problem is not configured by the existence of a justificatory or exculpatory rule that covers the surgeon's actions. On the contrary, if those conflicting rules had existed, we would have easy cases of *benign* defeasibility: were those rules available, the judge would have no problem in leaving the surgeon unpunished and claiming that the veterans were allowed to perform their homage. In these examples, the defeasibility at issue is not the benign one, but the one that operates within the applicable rule itself.

The second thing to advert is the key one for our current analysis: all these cases can be adequately thematised as presenting the judge with a question about the appropriateness of the legally established solution for the concrete case—the solution given by the rule seems inappropriate *vis-à-vis* the facts that constitute the object of the adjudicating process. But, of course, the judge cannot be bound to the law if she can put it aside when she takes it to be inadequate. This seems to be an

obvious point, but what has to be problematised is if every displacement of a rule in consideration to the adequacy of its solution to a given case entails a judgment on the rule's appropriateness. At first sight, it might seem that it does: why would it be inappropriate to apply a rule to a case that falls under its scope, if it is not because the rule itself is inappropriate? In other words: Is it possible to assert that, despite the fact that in this concrete case the verification of A should not be followed by the application of B, the rule that correlates B with A is still a justified rule?

For Detmold, Günther and Atria, it is on a positive answer to this last question where we can find the key to identify a judicial moment that can balance both subjection to law and sensitivity to the particular—i.e., on the possibility of understanding that the judge can make a decision about the adequacy of a rule regarding a concrete case, without such call entailing a judgement about the rule's justification[244]. With them, it can be claimed that the judge's bounding to the law cannot extend beyond its scope of justification—limit that is not to be understood as a moral one (as if it were in some sense wrong to be bound in some cases), but as a fact about what is to be subjected to a legal rules: properly understood, they simply would not offer solutions to cases that escape a horizon of considerations defined in the legislative, justificatory discourse; and if no solution is offered, then no bounding is possible. Thus, the judge is still subjected to the law if it can be understood that her decision, even if it departs from the legally established one, does not question the legislative justification—the appropriateness of the rule itself.

3.1. Universals and particulars: the particularity void

As it has been stated this far, the problem to be faced is that of explaining how the particularities of a case that verifies the operative facts of a rule can justify the judge in not deciding the former according to the solution provided by the latter without breaking her subjection to the rule at issue. The alternative that will be now

[244] Atria (2012), 332.

examined claims that this harmonisation is possible as long as the rejection of the legally established solution for the concrete case does not entail a questioning of the justification of the internally applicable rule—bounding is maintained if we can assert that on a concrete case it is inappropriate to correlate B with A without being committed to assert that the rule that correlates B with A is inappropriate.

The obvious starting point of this alternative is to be found in the work of Michael Detmold. He claims that we must distinguish between the non-application of a rule because the rule is inadequate and the non-application of it because it is inappropriate to apply it. The reason Detmold offers for this is based on the distinction between universals and particulars[245]. As far as the judge has to decide on the application of a rule to a concrete case, the rationality problem that is faced in the exercise of the jurisdictional function is referred to particulars, so its solution depends on the properties of the concrete event with which the judge has to deal, and because of that, the judge is in a position in which the legislator can never be: the judge has to offer a practical solution that indicates what is to be done in consideration to what has previously happened—she has to decide that J, a concrete individual, is to be imprisoned for 5 years because he killed Q, another particular human being. The legislator also has to resolve a rationality problem, but his answer to it is not a practical one, for he will only provide a hypothetical or theoretical conclusion that correlates one universal with another—that is what legislated, universal rules do[246]. The practical reasoning problem that the judge faces cannot be solved by means of a theoretical reasoning as the one that characterises the legislative function: universals—which are correlated in the formulation of a legislated rule: 'if A, then B'—do not include any particular; the lawmaker never referred in his rules to J o Q, nor the concrete event of J's firing a gun and Q's dying after the shot hits him, he only decided in universal terms: 'whoever kills is to be

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[245] Detmold (1989), 453.

[246] With Moore, we can say that 'types of acts', as the ones forbidden by criminal law codes, correspond to 'complex universals' that consist of 'a constellation of properties, which are themselves universals', see: Moore (2010), 320. Regarding the relevance of the general character of legislation in avoiding a 'helpless formalism, which designates everything as law that results from the procedure prescribed for legislation', see: Schmitt (2008), 181-4.

imprisoned for 5 years'. Both the judge and the legislator have to provide an answer, but they are qualitatively different. And it is from that difference where this approach hopes to ground the contours of the bounding force of rules: Detmold claims that the solution given at the level of universals and attained in the legislative moment, cannot resolve the judge's problem as it is configured in the adjudicatory stage[247].

The distance that the judge has to cross is configured by the difference between the finitude of a description that refers to fact-in-the-extensional-sense and the infinitude of possible true descriptions of it: on every concrete case infinite properties are simultaneously actualized, but the rule defines by way of a description a finite set of properties as the relevant ones, so each particular case that instantiates the properties that are established on the rule necessarily also instantiates other properties that are not considered by it. That is the particularity void to which Detmold refers: the distance between a description of a fact and the horizon of its infinite possible descriptions[248]—it emerges precisely in the relation between a fact-in-the-extensional-sense, one that conserves its identity throughout all its possible true descriptions, and the infinite set of possible intensions, propositional contents that refer to it and thus serve to identify it.

The existence of this void creates a problem, but only to the judge, not to the lawmaker, because only the first one has to perform the function of assigning a consequence to a concrete case that in its particularity is irreducible to the description employed by the rule that is in principle applicable to it. The lawmaker never faces this void, because his powers always refer to the correlation of universals, without ever having to decide regarding radical particulars. With this distinction at hand, Detmold claims that what defines the role of the judge, and therefore distinguishes it from the legislator, is his confrontation with the particular, with that which cannot be exhausted by its descriptions. It is precisely that

[247] Detmold (1989), 456.

[248] Detmold (1989), 459.

particularity, which is hidden behind the universal categories of the rule, what has to be considered by the judge; she has to look at the man regarding who she is going to decide as the particular human being that he is, not as a member of a category or a class, not as an instance of a universal, but as a radical particular[249]. Freed from the pre-existing schemes, the judge will be able to listen to the human being she has in front of her speaking with his own voice and not having it distorted by external mediations and of an imposed theory, and only then she can decide the case without deciding *for* him[250].

And that last one is the key point for Detmold to overcome an apparent excess of his thesis: up to this point, he has claimed that the distance between the universality of the legislative decision and the particularity of the practical one is such that no particular is included in the universality of the rule. The distance between extension and intension would mean that the rule 'whoever murders is to be imprisoned' would be irrelevant for a particular decision regarding the concrete, extensional case of J's killing of Q. If something is not added to that scheme, then Detmold's thesis would be proving too much—the rule's solution wouldn't just be inapplicable to concrete cases in which it turns to be contextually inappropriate, but the law's intensionality would render it sterile *tout court* in the judge's reasoning regarding extensional facts: no case could be decided on its basis. But now a bridge is built, one that connects intension with extension in a practical, fruitful fashion. Detmold understands that the condition on which depends the legitimacy of the application of a rule for the decision of a concrete case consists in the possibility of understanding that the rule is one that properly belongs to the particular person to which it is going to be applied. If that is the case, then the particularity void is crossed by means of his authorisation[251]. Before she lets the case to 'speak by itself', the rule is for the judge only a theory, one that asserts that 'If A, then B' and that has to be proven

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[249] In Section 6.3 it will be discussed how radical exclusion from pre-established categories makes unintelligible the object that is examined—Veitch (2006), 146.

[250] Detmold (2001), 768.

[251] Detmold (1989), 461.

correct also in the concrete case at issue[252]. And so the extension and limits of the rules' bounding power is intrinsic to its structure: being hypothetical, they cannot just cross and solve the problems faced in the practical reasoning stage, since only in the judicial stage the 'radical autonomy' of human beings is involved[253] and it is such autonomy what has intervened to close the gap.

The importance of this distinction between rationalities and the connecting role of the subject's authorisation, is that given the difference between the type of decision that characterises the exercise of jurisdictional powers and the type of decision that is taken in exercise of legislative powers, then it is possible to assert that the reasonability of the correlation established at hypothetical level—between operative facts and consequence—does not guarantee that it is also reasonable to establish that same correlation at the practical level: the verification of a deficit of authorisation at the applicative moment does not preempt the question regarding the rationality of the hypothetical conclusion to which the lawmaker arrived. The judge could refrain from applying the law because it is irrational to apply it and remain silent about the rationality of the law itself.

3.2. Justification and application discourse

It is at this point when Klaus Günther's work becomes especially relevant. By picking-up from Habermas' universalisation principle[254], the way in which he

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[252] Detmold (2001).

[253] Detmold (2000).

[254] Habermas (1990), 65. As Wellmer points out, this 'rule for argument' arises from Habermas attempt to translate the Kantian question regarding the morally correct action to the justification of a norm. By doing this, Wellmer claims, Habermas wrongly assumes that 'in our moral thinking we address the same question as in a discussion about the justice of social norms which we are in position to introduce or refrain from introducing' (Wellmer (1991), 158.). The consequence of this conflation is the impossibility to distinguish, regarding moral norms, between justification and application: since moral thought assess the correction of a behaviour in a concrete situation, moral norms that arise from it express our understanding of a particular situation by way of a prima facie norm—the moral point of view is an *applicative* point of view, one that addresses the adequate *description* of a particular situation. If that is the case, then what is grounded in the moment of justification 'is the generalizability of ways of acting in particular situations' (204), and therefore 'the validity of moral norms only stretches as far as the validity of the moral judgements that can be—not grounded, but—expressed through these norms. The norms themselves carry, so to speak, a situational index which binds them to the situations in which they have their origins' (204).

works out the distinction between justification and application discourses, as two moments in which the impartiality of a rule is evaluated, gives the theory the grounds to define the contours of the judicial function. Under ideal conditions, the justification of a rule's validity would require considering whether all the consequences and effects of its general observation are acceptable in attention to all possible interests. If such demanding premises were accomplished, then once the validity of a rule were established it would also be secured the appropriateness of the application of the rule to every case that falls under its extension: the consequences and effects of following the rule under the particular conditions of every possible situation would had already been considered in the justification discourse[255]. The relation between application and justification would be such that the appropriateness of the application on every occasion would be a necessary condition of the validity of the rule, or what is the same, that the validity of the rule would imply the appropriateness of its application on every instance.

Since the operation of a strong test of universality as a condition of justification would mean that each justified rule would have to be either so general that it would be applicable to any possible situation or so specific that it would only be applicable in one case, Günther proposes a weak test of universality. In this version, the standard that has to be satisfied by a rule in order to be valid has an index built in that ties its application to a level of knowledge, so in the justificatory discourse only the consequences of the general observation that we can anticipate are considered, and the same goes for the interest—only the ones that we can expect to be affected by the application of the rule are included in the evaluation. Therefore, norms justified under this weak principle are valid *ceteris paribus*, because of the exclusion of some considerations that would be relevant in application situations[256]: since not all interest and consequences are to be considered when a rule has to be justified, the scope of its validity is conditioned by the exclusion, at the level of justification, of some considerations that at the moment of application could end up

[255] Gunther (1993b), 33.

[256] Alexy (1993), 158

being relevant[257]. The function of this discourse is to be understood not as providing answers to concrete cases, but as deciding the set of norms to be included in our deliberations about concrete cases. At this stage we are only defining the norms to be used in the justification of singular normative propositions about what is to be done in particular cases[258].

Now a gap might open between what was considered, at the legislative stage, when the validity of the rule was being discussed and the conditions under which the rule is supposed to be applied: since in the justification discourse not all possible interests and consequences were considered, it could be the case that in a particular case there is an unchecked interest, a relevant unforeseen property that was not evaluated by the lawmaker. It is for this reason that Schauer claims that all rules are both over and under inclusive in relation to their justifications[259]—they are never coextensive[260]. This distance marks the moment of adjudication, for we need another principle that allows us to examine in every opportunity if, given the particularities of the case at hand, the demands of the rule are legitimate[261]. That is, a principle is required to indicate when a valid reason justifies a singular normative proposition, so the application discourse deals with the question regarding the operation of already justified norms in order to secure an impartial application of them[262]. With this, a purely judicial moment emerges, one that does not delve into the same questions that the lawmaker already decided, but that focuses on what the latter did not see: the particularities of the concrete case.

According to Günther's picture, impartiality, at the applicative level requires the different possible interpretations of the situation to be thematised[263] in order to be

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[257] Günther (1993b), 33.
[258] Günther (1993a), 149.
[259] Schauer (1991), 38.
[260] Schauer (1987), 117.
[261] Gunther (1993b), 37.
[262] Günther (1993a), 150.
[263] Günther (1993b), 39.

capable of seeing the case in its particularity. The problem, again, is the gap between intension and extension: on the one hand, the legislator deals with interests and consequences as intensional objects—it has to consider the relation between 'a woman that was raped and wants to abort' and 'intrauterine life' with a prohibition of abortion, but it will not face a concrete raped and pregnant woman that wants to abort. On the other hand, the judge faces the concrete, extensional woman; and just as the concept 'chair' is not a chair, the actual woman is not something that can be exhausted by any set of applicable descriptions that might have entered into the justification discourse—she is extensional because she maintains her identity throughout all of them, and so the set of interests that were considered at the justifying stage is not co-extensional with those that are actualized in her case. Without an application discourse, all properties not considered in the legislative stage would already be suppressed[264] for the judge.

If not giving attention to these other properties is what Hart described as resolving blindly in the dark, then avoiding this darkness requires to consider in the application discourse a complete description of the situation[265]—law's blindness cannot be absolute or otherwise the norm would be pointless. A norm 'controls a situation only so far as the situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared'[266]. In line with this, Günther argues that to decide whether or not it is adequate to apply the rule to the particular case, all properties of the case must be considered, and therefore the justification of the singular proposition requires a description of the case that refers to all the relevant reasons and a coherent interpretation of the valid relevant ones[267].

It is here when the openness to all the properties of a case—openness that characterises the adjudicatory moment as one of application—connects with

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[264] Schauer (1991), 25. A similar idea can be found in Schmitt (2004), 52.

[265] Dwars (1992), 68.

[266] Schmitt (2004), 52.

[267] Günther (1993a), 151; (1995), 48.

Detmold's demand to apply only a rule that it is of the very subject to whom it is to be applied. Only this openness to observe all the properties that are actualised on the case allows the radical human being to speak by himself, and it is only because of that disengagement from the restrictions imposed by the universals of the rule that it is possible to evaluate if the rule can be seen, under the conditions of the concrete case, as one of the subject to whom it is supposed to be applied. To decide that it is his rule requires to consider the particular interests of the concrete subject that is in front of the judge: the rule at issue can only be understood as *his* rule if his interests are taken into account. And the problem with which we are left by adopting the weak justification model is that we have no guarantee that the interests that are verified on a concrete case were actually considered at the moment of justification. If they weren't, then applying the rule becomes a *theft*[268].

By distinguishing between the type of considerations that enter in a justificatory/ legislative discourse and those that are discussed in an application/adjudicative discourse, what is being achieved is a triple movement: first, a theory of defeasibility is presented in a way that commits to the attention to the particularities of the case. Second, it renders the mechanical approach defective not only in cases of semantic vagueness, for it is always insufficient for the judge to corroborate the correlation between rule and case. But—and this is the third point—this is not done at the expense of subjection to law. Regarding the first, the question the judge faces goes beyond asking if the legally established properties are verified or not, since it is under the light of all the relevant properties that the adequacy of applying a rule whose validity is not disputed must be decided [269]. If this is actually a requirement for the legal adjudication, then it might seem that it can never be just a mechanical process of analysing the correspondence between the operative facts of the rule and the case at hand. There will always be one more step to make that is not decided in advance by the rule itself: to check whether or not it is appropriate to apply the rule

[268] If this is correct, then the common idea according to which on an exceptional case the judge must ask himself what the lawmaker would have done—Sunstein (1999), 653-4—is unacceptable.

[269] Günther (1993b), 33-39.

to this case, to determine if in its particularity there is some special interest, relevant but not seen by the rule, that considerations of impartiality demands to be taken into account[270]. Finally, by focusing on the particularities of the case, the judge is not questioning the validity of the rule nor engaging in the legislative function of justification and because of that she is still obeying the law, but from that same position she can now evaluate the appropriateness of the application of the rule to the concrete case. Subjection and attention to the particular are two faces of the same coin, because, with Detmold, Atria argues that the rule to which the judge is bound has not decided the solution to a particular conflict in which a relevant but not legally recognised property is verified[271].

As a corollary, while legislation is identified with universal rules that are grounded on justification discourses under the light of abstract and foreseeable interests and consequences, the judicial moment is characterised by the attention to a fact-in-the-extensional-sense, to concrete interests that are to be thematised in an application discourse that aims to ground a particular rule. With this two-step operation of impartiality, the model aims to honour the 'only normative justification for the trial' by including 'the citizen in the *creation* of the norm' and then giving him or her 'a voice during the process of deliberation as to whether the norm *applies*'[272].

Within this approach, defeasibility is not thematised as being dependent on a linguistic problem, and that is why the mechanical approach is always insufficient: the semantic analysis regarding the correlation between rule and case is already done by the time the question about the appropriateness is presented. This de-semanticalisation of defeasibility entails that it cannot affect the internal applicability of the rule at issue, so it has to be pushed upwards as a question about its external applicability.

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[270] Atria (2016), 209.

[271] Atria (2016), 227.

[272] Christodoulidis (2004), 186. A similar idea is expressed by Michelman's notion of 'republican jurisgenerative politics'—(1988), 1526. In Section 5.3 we will see up to what extent this normative justification can be realised within law.

Before exploring the 'external' aspect of this form of defeasibility, it would be useful to briefly connect these ideas with the topic of the previous chapter. While the characteristic challenge of adjudication was identified by looking at the objections raised against the mechanical approach, now we have used these discourse theory considerations—that connect different types of judgements with different types of justifications—to ground the distinction between the kinds of reasons that are appropriate at the legislative level and those that operate at the adjudicative one. By proceeding this way, I have attempted to differentiate between judicial and legislative arguments without immediately resorting to the democratic principle: what makes it the case that the judge's decision has to be grounded in an application discourse is the fact that she is deciding a particular, extensional case involving radical human beings. At this point, and by bringing back our remarks about the difference between review of *application* and review of *legislation*, we can see how these considerations are slowly allowing us to notice the anomalous character of JRL *vis-à-vis* the judicial function: JRL is about the validity of a piece of legislation, and validity—as it was argued in the previous chapter—depends on the stable relations between the intensions of the rules at issue, there is no *extensional* dimension to it, it is not distributed in consideration to the instantiation of a concrete, particular case. But, as we are now seeing, such concrete case is precisely what is serving us to characterise the judicial position. This is why *judicial* review of *legislation* is an anomalous procedure, because it lacks the extensional dimension of the judicial moment—extensionality that constitutes a precondition to perform an application discourse. Without this base, it seems that the only way to ground the Court's decision is by engaging in a justification discourse, which—as we have seen—serves to characterise the legislative moment. And given the way in which we have proceeded, this particularity of JRL—of a supposedly *judicial* decision that cannot be grounded in the *judicial* manner—can be notice even before we take into consideration democratic principles related to the separation of powers.

3.3. An ‘external’ application discourse

An application discourse in which the judge decides whether it is appropriate to apply a rule whose validity is not questioned, is what serves Atria to characterise the judicial function as one compatibilises both subjection to law, on the one hand, and the possibility to consider the particularities of the concrete case, on the other[273].

Facing this challenge, Atria’s proposal is not to give the judge the power to modify the rule in order to include as a negative condition for its application the instantiation of a relevant, but not originally considered interest. What is at stake is something different: a rule’s defeasibility is not solved by means of a more precise formulation, for it doesn’t matter how precise the employed description is, it will always be possible that a concrete case occurs in which a previously not considered interest is identified. Thus understood, defeasibility does not lead to a modification of the rule’s content, but to its displacement: its content remains unchanged and therefore the case still instantiates its operative facts, but the application discourse demands to leave the rule unapplied.

By denying the judge the power to alter the rule’s content by incorporating a new condition for its application, the alternative defended by Atria is not only attempting to explain the irreducible defeasibility of rules, but also trying to block the way to a new justification discourse, now on the judicial seat, whose aim is to determine—no longer the applicability of the original rule, but—the validity of the newly formulated rule for the decision of the case. This problem is similar to the one that Alexy rightly puts forward against Günther when the last one attempts to explain how cases with conflicting norms should be solved. Günther proposes that on those cases the judge should create a new norm that includes an exception to its conditions of application, so when the conditions that trigger the original collision

[273] Atria (2016), 202.

obtain, the new norm is no longer applicable. But, how is the judge supposed to create this new norm? Günther denies that it has to be subjected to the justification test, arguing that a new norm that allows to balance two previously justified norms does not itself require a new justification. I believe Alexy is right in this point: if the norm created by the judge has its own content that it is not already included in the original norms, i.e. if the new norm is not from the beginning entailed in the conjunction of the two or more norms that it purports to harmonise, then in order to assert its validity it is necessary a new premise to be added to the original set of norms. For Günther the extra premise corresponds to the ideal of a coherent normative system, but Alexy rightly replies that such ideal 'is either a magician's hat one can draw anything out of (…) or it refers to the procedure of justification in a system'[274]; in other words: in a situation of collision, Günther's application discourse turns into a justification-as-coherence discourse whose object is configured by the new norm that is supposed to deactivate the normative conflict.

Atria's option seems to avoid this: if the judge, when deciding the appropriateness of a rule were to modify in anyway its content, such modification would count as the formulation of a new rule whose validity would have to be justified, and with that, the judge would be abandoning the application discourse and entering a justificatory one regarding the new rule with the judicially included exception or addition. That is why it is key for Atria to understand that the object of the appropriateness-judgement corresponds to an already defined and justified rule.

So, if we look at the adequacy judgement in relation to its incidence on the legal syllogism, we can say that Atria's way of thematising the defeasibility of a rule does not affect the movement from the premises to the conclusion:

What is mobilised by the special circumstances is not the possibility to subsume the concrete case under the operative facts of the *prima facie* applicable rule, and so

[274] Alexy (1993), 165.

defeasibility is not a semantic problem that blocks the deductive reasoning in the legal syllogism. As Atria sees it, our widow presents a difficult case despite being clear that the terms of the rule are verified—such rule is internally applicable: that a particular interest is verified on her case does not impede to arrive at the conclusion that follows from the premises, so according to the syllogism that particular woman actually is infamous. If we add to this the impossibility of modifying the content of the rule, then it seems that the only option left in order to escape the rule-established conclusion is by defeating the rule's external applicability—hence, I will label this type of application discourse as an 'external' application discourse: here, the norm is internally applicable but has to be displaced, and therefore the conclusion of the syllogism does not define the judicial decision of the case. Despite defeasibility, the syllogism is nevertheless right, but it does not exhaust the legal reasoning—the judge still has to decide if appropriateness-related considerations demand a different solution.

The judgement of appropriateness, understood as such, takes place after it has been assessed if the operative facts of the rule have been verified, so considering relevant interests that were not foreseen during the justification discourse either takes place outside the legal syllogism or not at all. But here Atria doesn't consider the possibility of locating the judgement of appropriateness—and with it, defeasibility itself—within the analysis of the correspondence between operative facts and the particular case. We will see that his position, although not explicitly stated, rests on a problematic understanding of semantics, one that if left aside, allows putting forward a different theory of defeasibility that locates the sensibility to the particular circumstances within the scope of the minor premise of the legal syllogism and is therefore better suited to address challenges that the current theory faces. In other words, with two different semantics, come two different understandings of defeasibility and two possible ways of dealing, in the judicial moment, with the intension/extension binomial.

Before delving into this other approach, that I will label as an 'internal' application discourse, it would be convenient to analyse the challenges that are faced by a theory of defeasibility as external-applicability.

4. Criticism

In this section I will evaluate the success of Atria's attempt to make subjection to law and attention to the particular compatible; and with it, I will analyse the extent to which his proposal secures a properly applicative space that maintains a separation from justificatory discourses and that is compatible with law boundaries. However, I don't want to deny the relevance of the particularity void nor the importance of the question about appropriateness—the objections that I will put forward are only directed towards the concrete configuration that these features adopt in the non-semantic approach.

In Atria's model, the judicial judgement has not as its object the fairness of the correlation between universals that is established in the law (its validity), but only whether the concrete case is abnormal , i.e. one that actualises interests that were not foreseen in the justificatory moment: the judge examines the case and if the interests of whoever is being judged were taken into consideration at the legislative moment, then the decision of the case is contained in the rule; if they weren't, the judge considers them now and decides the case without applying the rule[275]. That is what constitutes the non-political moment of adjudication: the case is decided based on reasons whose merit is not under discussion[276].

In Atria's model, the distinction between not applying the rule in consideration to unforeseen interests, and questioning the rule's validity—i.e., leaving it without application because the judge thinks the rule itself is irrational—is substantive, formless: it is not possible to give the judge the power to do the first without

[275] Atria (2016), 225.

[276] Atria (2016), 220.

simultaneously granting her the power to do the second[277]. And of course, if the judge leaves a law without application because she takes it to be incorrect, if instead of deciding on its applicability she questions its validity, if, in the end, she engages on a justification discourse regarding the law, then she is not bound to it[278]. As such, the distinction can only be noticed from an institutional approach, and so the focus is turned on the institutional design whereby it is likely that judges only decide on the application and not on the validity of the rule. The structural features of the judicial power are explained in terms of making it probable for judges to engage in one function and not the other.

However, before scrutinising these institutional structures, it is necessary to ask how the judge could determine if a property not addressed by the law and instantiated in a concrete case was actually taken into consideration in the justificatory moment. Atria says that in an abnormal case the judge leaves the rule without application indicating that at the legislative stage the 'considered interests were others'[279]. But, how can the judge determine the set of considered interests? I will claim that without determining the interests, consequences or properties that were evaluated in the justification discourse the judge cannot identify the abnormal cases. And therefore, the application discourse that focuses on the particularities of the case and decouples the judicial moment from the legislative one, entails a judgement regarding the foreseeable interests that would serve to justify the rule. I will argue that an 'external' application discourse entails a justificatory one[280]—i.e., the type that characterises not judicial, but legislative decisions.

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[277] Atria (2016), 212.

[278] Atria (2016), 224-5.

[279] Atria (2016), 224.

[280] A somewhat similar argument is defended in Alexy (1993).

4.1. Justification in the applicative moment

What I fear is that this approach, that relies on the distinction between abstract and foreseeable interests, on the one hand, and concrete and ex-ante unforeseeable interests, on the other, does not evade, but replicates the problem faced by the general understanding of defeasibility. According to the latter, defeasibility is also defended in consideration to the gap between a rule and its justification, but this general formulation—unlike Atria's approach—does not go as far as providing a qualitative difference between the type of arguments that justify displacing of the rule at the judicial moment and those that justify it on the legislative one.

In the conventional approach, it is claimed that since the rule is justified in consideration to a goal, i.e. in consideration to underlying reasons in favour of adopting it[281], then such goal that is made probable by the former cannot be completely ignored when it comes to the application of the rule[282]. This is the basis to argue that in those cases where the application of the rule would betray its aim, where text and thought do not overlap, the judge would be entitled to leave the former unapplied. With this in mind, it has been proposed that norms should be understood as essentially defeasible[283], something that would not depend on the explicit inclusion in the content of the norm of a clause that establishes as a condition of application the verification of 'normal circumstances' or 'the achievement of the norm's goal'. The idea is that norms would be implicitly integrated by a defeater[284] according to which they are not to be applied under certain circumstances. The point of the defeater being implicit and not explicit in the content of the norm is precisely an attempt to express the correct form of application of the norm through a reference to its content, despite the fact that the defeasibility of the norm depends not on such content but on the way it is treated[285].

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[281] Atria (2001b), 22; analysing Searle's take on the issue: (1995), 50.

[282] Atria (2001b), 28, 30, 44-5.

[283] Tur (2001), 355-68, MacCormick (2005), Ch. 12.

[284] Moreso (2008), 48.

[285] Schauer (2012).

That the rule excludes but only within certain limits would allow legal reasoning to be formal but not formalistic[286]. So, in certain extreme cases, in situations that are 'specially compelling'[287] regarding the extent to which the aim of the rule is frustrated by its application, the rule is to be left unapplied.

To notice the problem with this simpler understanding is enough to consider Raz's remarks regarding rule 'opaqueness': 'they [rules] do not point to any value in the action for which they are reasons'[288]—'forbidden to enter vehicles into the park' is a reason to abstain from doing so, but it does not point to a good in abstaining from entering vehicles into the park. This, of course, is inevitable as long as the reasons for the rules are not part of their content, and it goes hand in hand with the fact that 'rules normally represent the result of considering the application of a variety of conflicting considerations to a generic situation (…) norms do not carry their desirability in their faces'[289]. So in order to defeat the rule, the judge first needs to define its justification, but since the rules are opaque to them, the judge either engages in a justification discourse or simply lacks a standard that can constrain the conditions of defeat and then any of the potentially conflicting considerations would be equally capable of pushing the rule aside.

Notice too that the problem is not only that of identifying one among many possible reasons that simultaneously stand as alternative justification, but the judge would also face the threat of regress: regarding any reason that is taken as the relevant one, a further questions can be asked about the possibility of defeating it in consideration to a second-order reason. So, from all the competing reasons, we could agree that vehicles are not allowed in the park because they affect the peace and quiet of the people enjoying the place, but why stop there? Why not ask for the reasons in favour of protecting the peace and quiet in the park? And once identified, the

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[286] Atiyah (1986), Ch. 5, 94.

[287] Schauer (1991), 92.

[288] Raz (2001), 3.

[289] Raz (1999), 76.

question can be pushed once more: we could assume that the park is to be kept quiet because it is mostly visited by elders that dislike loud noises. But in that case, if there were no elders in the park or all of them were deaf, then would it be O.K. to enter with loud motorcycles? The problem is that the underlying justification can only serve as an standard once it is fixed in a canonical form, and if such canonical form serves to make the rule inapplicable, then the defeasibility question can be directed towards it—only not reduced to a fixed expression the aim can keep its sensibility to special cases, but if not fixed it cannot guide the application of the rule.

Schauer adverts this when he claims that there will always be the possibility of a tension between an aim and its concretisation on a rule, because you can always keep asking for a deeper and deeper justification. So, if the standard for applications is that the concretisation cannot frustrate the aim, then the former is always and *ad eternum* defeasible by the aim, and by moving in that direction the very notion of 'rule' is lost[290]. But despite recognising the problem, Schauer's proposal in order to constrain defeasibility to 'specially compelling' situations does nothing to avoid it: it still has no way to grapple with the lack of a standard to identify the relevant reasons according to which a situation can be understood as 'specially compelling'. And as long as there is no parameter to distinguish those considerations, everything is still on the table, capable of taking the rule down regarding the concrete case; and —using Schauer's own expression—'a world in which decision makers consider everything that they feel relevant and ignore, or at least slight, any inconsistent external instruction in making their decision'[291] is not the world of law.

Let us state our problem one more time before going back to Atria's theory. Our problem was that defeasibility turns on the justification of the rule, but since the rule does not express its justification, any reason against the behaviour required by the rule could take it down—and this could be constantly reiterated regarding the

[290] Schauer (1988), 534.

[291] Schauer (1988), 530

reasons underlying every new justification given. In other words, without a standard for defeasibility, any condition C that is taken to justify the rule 'if A, then B' could serve to leave it unapplied; but since we don't have a way to identify C besides a justification discourse, the judge has no measure to determine when to displace the rule. Even more, regarding a reason C already identified, we could question the defeasibility of it—if the interest in 'keeping the peace and quiet in the park' can defeat the rule that forbids vehicles because it justifies it, then the interest in 'not making noises that bothers the elders' can displace it if it justifies the previous justification: the condition that is supposed to govern defeasibility requires a condition to govern its own defeasibility.

What interests us now is to see if the distinction between justificatory and applicative considerations can provide the theory with a standard for the identification of the judicially relevant interests that avoids leaving the rule at the mercy of any consideration that could work as a reason in its favour. If that were the case, then such standard would constrain the judge's decision about the rule's displacement and keep it separated from the question about the rule's justification. Arguing that the judge and the lawmaker look at different things when making their decisions point to a qualitative difference between the considerations that operate at each stage, and that does seem to avoid the problem: only certain kind of interests can justify the displacement of the rule, and those interests are, by their particular and unforeseeable nature, not apt to figure in the legislative, justificatory moment. So, in this theory, not just anything can be a 'property C', but only particular interests that are actually verified in the concrete case. And the law, being universal, cannot refer concrete interests of particular subjects in its content. The conditions that the judge identifies on the application discourse and serve to take the rule down, as long as they refer to the particular subjects to which it is supposed to be applied, cannot be part of a legislated and weakly justified rule—no proper names nor concrete states or events in legislation. On the contrary, there is nothing in the general theory of defeasibility entailing that the movement from 'if A, then B', to 'if

A & -C, then B' is a movement that changes the nature of the rule; 'C', in that theory, can be just another consideration that could have been included in the legislated rule from the very beginning. But if the judge is supposed to decide on the particularity, then in Atria's proposal 'C' is a concrete interest that remains outside the justification discourse. And there seems to be no possibility of eternal regress either, for what defeats the rule is the concrete interest that obtains in the particular case, so we could rest on the involved 'radical human beings' and define the interests at stake using the formulation that they, on their own words, state.

But things are not that simple. The properly judicial moment rests on the judge identifying particular interests that were not considered on the legislative stage. As long as she decides the case based on them, she is not entering in a justificatory discourse that challenges the validity of the rule. For this to work, the question that must be positively answered is whether it is possible to perform one judgement and not the other, whether it can be determined that a concrete interest that is verified on a particular case is a special one, without simultaneously being committed to a set of interests that are to be considered normal. In other words, the theory would fall if the justification problem re-arises, if the judgement about the appropriateness hinges on a judgement about the interests that were considered by the lawmaker at the justificatory stage. To displace the rule, the judge must identify an interest that is disadvantaged by its application, but that was not considered at the justificatory stage, so she has to define the set of interests that typically would be affected either positively or negatively by the general observation of the rule—those are the ones that can be understood as entering into the justificatory discourse. But since there is no list of the considered interest, nor they come already labeled as 'typical' or 'atypical', the judge has a problem: how can she know if the concrete interest that is being wave by one party is typical or not? Atria's scheme, if I understand correctly, presents the judge with a twofold challenge: the first one has to do with the identification of the concrete interest that is verified on the case, the second one

refers to the identification of the set of relevant interests in the justificatory moment. The way they interlock is particularly problematic.

When it comes to the first question, what has to be noticed is that the interest of whoever is trying to defeat the rule can always support infinite specifications: regarding the 'forbidden vehicles' rule, Atria asserts that what was considered and defeated was the interest 'of those who want to use vehicles in the park', that we are to assume that the legislator gave a thought about them and decided that the interest in 'keeping the peace of the place' was more important; but—he continues—such decision is not key 'regarding the question on whether or not it is permissible to use a vehicle on a memorial in the park', for this one is an interest that is 'different from those that are involved in typical cases of application'[292]. The reply that could be expected from those claiming that the rule is to be applied, on the other hand, would argue that the veteran's interest is an interest precisely in 'using a vehicle in the park', the one that was taken into account and lost. They could also add that anyone who wants to use a vehicle in the park can present their claim as one different from the 'typical one': a group of bikers that want to make a motorcycle show in the park could claim that their interest is that of 'organising a sporting event'[293], interest that was not foreseen and has only now surfaced, one that, *vis-à-vis* 'using a vehicle in the park', is as unusual as the interest in 'homaging war heroes'.

In this scenario, we are starting with one defined, justificatory interest that is taken to be typical ('using a vehicle in the park') and thus serves as a standard for the assessment of the concrete, applicative one. But since this concrete interest can be described in different ways, in order to contrast it with the justificatory one the judge has to fix one formulation of it, one from the many that could be predicated for the concrete case—she has to determine if the interest can be reduced to the one

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[292] Atria (2016), 223.

[293] As Wellmer (1991), 202, rightly points out, the question regarding the generalisability of ways of acting in concrete situations depends on the description of the action, so 'as soon as the correct understanding of the situation is clarified, however, it will as a rule be the case that the question of the generalisability of specific ways of acting is also resolved'.

that was considered and defeated in the legislative moment. And as the previous example shows, the interests of both the veterans and the bikers can unproblematically be described as 'typical' (they both want to use a vehicle in the park) or 'atypical' (the first want to homage the fallen, the latter, to organise a sporting event) *vis-à-vis* the considered and defeated justificatory interest.

Now, of course, it might be replied that the whole point of Atria's argument is that what characterises the judicial moment is precisely the task of defining the appropriate description of the concrete interest that is to be assessed: the veterans' interest is *correctly* described as an interest in 'homaging the fallen', so it is special and it defeats the rule; the bikers' interest, on the other hand, is *correctly* described as 'wanting to use vehicles in the park', so it is typical and it was defeated. The problem is that, *ex hypothesi*, neither the interest in homaging dead soldiers nor the interest in arraying a motorcycle spectacle were addressed in the justificatory moment, so taking one as special but not the other requires putting forward a different standard, one that allows reducing the latter but not the former to what is 'typical'. Adducing that special interests defeat the rule but do not challenge its validity is compatible with understanding that whatever interest the judge is presented with is a special one.

On the other hand, the second question addresses the reliability of the previously mentioned hypothesis—i.e., the identification of the justificatory reasons. This task is not less complex. The reason for this lies on the fact that what can be taken to be a typical interest regarding a rule is sensible to the aim that is attributed to it. Allow me to use a remarkable case studied by Atria in order to make the point clear: here we find a CEO that does not write his own labor contract and then demands the application of a legal presumption according to which 'lacking a written labor contract it is legally assumed that the stipulations of the contract are those declared by the worker'[294]. The particularity of the situation, which for Atria makes

[294] Atria (2004), 125-6.

inapplicable the rule that establishes the presumption even though its operative facts are verified, is that the worker in this case is the company's manager, so both the subject in whose favour the presumption is established and the one with the power to decide the writing of the contract are the same person. Atria says that in this case, the reason that justifies the rule does not obtain: a worker that isn't on equal footing to negotiate the labor conditions with his employer. So far so good, but things get complicated once we realise that there might be other reasons too in favour of this regulation. Maybe, the justification of the rule includes considerations related to incentivise the company's boards or owners to respect workers' rights, or to punish them when they fail to properly exert surveillance on their CEOs. Maybe even practical considerations regarding the daily operation of the labour authority that intervenes in the signing of the contract were also taken into account. To make it simpler, just take the case of traffic restrictions: are they established to improve pollution conditions or in order to fight traffic congestions? There is no reason to assume that it has to be only one of them, maybe all those aims and many more were discussed in the legislative stage.

The obvious fact that rules are not transparent to their aim, their opaqueness, becomes a crucial one once it is noticed that the status of an interest as special is sensitive to the aim that is attributed to the rule, since the latter defines the background against which special and ordinary interests are distinguished: if the justification of the rule is that of protecting the weaker party in labour contracts, then the case of the CEO/worker is atypical, but the same case will be typical if we take that the justification of the rule is to force the board to be more acute in examining what the managers are doing—if that is taken to be the goal, then the interest of the manager in using his position at the expense of the company is one that can be unproblematically taken as foreseeable, and the interest of the company in not being abused by management is one that was considered and defeated.

The same happens with traffic restrictions: in a case regarding someone how wants to drive a car that not only does not pollute, but that actually cleans the air while it

moves, the status of his interest hinges on a decision about the rule's aim—if restriction is there to avoid pollution, then the interest in driving this supper-advance-clean-car can claim to be undefeated and special *vis-à-vis* the ordinary one of just driving a car; but if the goal is to fight congestion, then this interest is ordinary.

The malleability of the description that refers to the particular interest in the judicial moment, finds its correlative in the malleability of the justification of the rule in the legislative one, and the combination of both proves the distinction between ordinary, justificatory interests and special, judicial ones to be insufficiently stable to differentiate between legislative and judicial stages. By claiming that the particular interest that is verified on the concrete case is a special one, the judge is committing to a justification of the rule whose applicability is being discussed. This, I think, cannot be any other way: the special interests are precisely those which were not considered in the justificatory stage, so the judge can only identify them if she first addresses the justification of the rule—otherwise, she lacks a background against which her qualification of an interest as a special one can pivot. Unless we adopt a psychological and empirical position about the identification of the considered interests[295], the judge has to define the reasons that justify the rule in order to contrast the concrete interest she identifies on the case and thus decide if it is a special one. The corollary would be presented as follows: deciding on the special interests (applicative moment) seems to require identifying the ordinary ones (justificatory moment); it is not possible to draw a line on the ground and point to one side without simultaneously identifying the other. This does not mean that we can never know the aim of a rule or if its application to a case would be inappropriate, just that the way to answer them is by engaging in a justification discourse.

[295] Shapiro (2011), 253.

The malleability of the interest's description together with the malleability of the rule's justification leaves us in a complicated spot. Savigny feared that the power to correct the 'improper expression' could be used as a pretext to change the established law for one that is preferred by the judge. But the problem runs deeper, because it is not about the possibility of a badly willed action. The judge can honestly think that the concrete interest is relevant-but-not-considered. But then she would necessarily be questioning the justification of the rule by asserting that it is not justified in light of that interest. And since every rule is defeasible, then every application demands a judgement on the rule's justification, and so recognising the validity of the rule is compatible with understanding that in every particular case the judge faces, there is an interest that defeats it.

The non-political moment of adjudication is at stake. Atria correctly insists that jurisdiction corresponds to the power to settle conflicts by means of the impartial application of rules that are common to the parties[296]. But between the defendant that claims that in his particular case there is a relevant but unforeseen interest and the plaintiff that asserts that such interest is an ordinary one that was considered and defeated at the legislative stage, the judge's stand is not impartial, but aligns her with one of them. And her decision depends precisely on whether or not she considers that the rule to be applied is justified in light of the adduced interest.

4.2. Law's reductions

Allowing the rule to be displaced in consideration to factors external to the legally recognised ones puts at risk law's own formality. A judgement is a legal one only to the extent that everything that is thematised by law is reduced to already established categories. With Hans Lindahl we can say that law operates by 'disclosing something as something* anew'[297], as the instantiation of a possibility that has already been fixed on legally defined schemes of interpretation. Those schemes,

[296] Atria (2016), 273.

[297] Lindahl (2013), 119.

categories, possibilities, descriptions, are the mechanisms on which law rests in order to reduce complexity and assign meaning. But such job can only be done as long as what remains outside them cannot block the legal thematisation—opening up to consider external properties, being willing to take into consideration that which lies outside the legal categories, entails retracing what was advanced and therefore reestablishing the complexity that was reduced[298].

Therefore, the properties that can arise within law are limited to the ones that are legally expected. To this we must add a second consideration: the expected properties are in turn determined by the language of law's rules. The semanticalization intrinsic to a rule entails descontextualizating from the specific circumstances on which the rule is to be applied[299]—rules suppress all the properties that are not relevant in consideration to the language employed by them, so there is an essential *allness* in them[300]. This means that it is the force of the language employed in the establishment of the rules what excludes other considerations from the operation. If this is the case, then norms have to work on what Schauer calls the 'entrenched model': existing legal generalizations block all other descriptive possibilities, and therefore the recalcitrant experience of finding a particular case to which the application of the rule would frustrate its aim does not give way to an exemption[301]. If we stand with this characterisation of legal operation, then the judge's problem is not just that without a commitment to a certain justification she cannot apply the rule, but even more, conditioning the application to the justification—conditioning it, that is, in properties that have not been previously recognised by the relevant legal rules—makes the decision contingent on 'tapping something that has not already been elevated as salient'; and 'this is unworkable in law', for 'what *can* emerge legally, has to have been *expected*

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[298] It is in this sense that law constitutes a 'reduction achievement' that breaks the double contingency: rules replace cognitive expectation with normative ones, facilitating anonymous contacts. Christodoulidis (1998), Ch. 8.

[299] Günther (1993b), 88.

[300] Schauer (1991), 24.

[301] Schauer (1991), 45.

legally. And what can be expected legally depends on reductions to role and rule, the exclusionary language of law'[302]. If we stand with this characterisation of legal operation, defeasibility demands the impossible: a '*legal* judgement over appropriateness of the application of law'[303].

We could use Raz's theory to ground this objection. I do not want to provide an exhaustive explanation of the theory, so I'll keep it brief: rules[304] are second-order exclusionary reasons for action—i.e., 'a reason to refrain from acting for some reason'[305]. They usually do not exclude every other possible reason, so in the majority of cases, but not all, we need not know which reasons justify them in order to apply[306]. Up to this point, the exclusionary nature of norms does not prevent a defeasible understanding of them, for they would be compatible with a conflicting reason of an exceptional nature not being excluded[307]. Thus, if the behaviour that the rule requires is omitted in consideration to 'an overriding reason not meant to be excluded by the order', then the addressee of the rule 'is not regarded as having disobeyed the order'[308].

But legal rules are different. They exclude every conflicting reason that is not legal or legally recognised[309], and the legally recognised reasons are determined by the rules of the system[310]—outside the rules' categories, there are no legal reasons. This radical exclusionary effect of legal rules follows from 'the legal system's claim to be supreme'—i.e., its claim 'to have authority to regulate the setting up and application of other institutionalised systems'. And it can only do that if its rules displace the reasons arising from other sources.

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[302] Christodoulidis (1999) 233.

[303] Christodoulidis (1999), 238.

[304] And, more generally, 'all authoritative utterances'—Raz (1999), 77.

[305] Raz (1999), 39.

[306] Raz (1999), 79.

[307] Raz (1999), 80.

[308] Raz (1999), 84.

[309] Raz (1999), 144-5.

[310] Raz (1999), 151.

With this understanding of the exclusionary nature of legal rules, what vanishes is the possibility of them being defeated, in the judicial moment, in consideration to the verification of properties that lie beyond the ones established in the content of the system's rules[311]. In *Practical Reasons and Norms*, Raz offers the following characterisation of courts: they 'are institutions which (…) are subject to an exclusionary reason not to act on certain reasons (…) The standards on which primary organs ought to act (…) are the rules of the system under which they operate and they ought to exclude standards which are not part of the system'[312]. That being the case, 'If a man is legally required to do A in C then the courts are bound to hold that he failed to do what he ought to have done if he fails to do A in C. They will refuse to listen to arguments to the effect that failing to do A in C is really what he ought to have done since there were extra-legal reasons which override the reasons that the legal requirement provides'[313].

Within this scheme, *benign* defeasibility is manageable. Raz's theory can allocate conflicts between second-order reasons: legal rules only exclude non-legal contradictory reasons, so neither of the conflicting legal rules displaces by itself the other, and therefore a preference rule has to be invoked. Things are different with *malign* defeasibility: one cannot endorse it and maintain a commitment to Raz's theory—if a property is not considered, if law has 'suppressed'[314] it by way of its abstractions, then, how could the judge know that such property was actually considered in the legislative moment without engaging in a justification discourse? And how could she know that such property is relevant for the decision of the case?[315] Claiming that there are other considerations to take into account is to reject

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[311] Christodoulidis (1998), 230.

[312] Raz, (1990), 142-3.

[313] Raz (1999), 143.

[314] Schauer (1991), 25.

[315] Christodoulidis (1998), 231. Holton (2002) proposes to understand that principles include a 'that's it' clause which makes them applicable only if there are no other relevant considerations. For a critique : Pavlakos (2006).

the exclusionary effect—we would have to abandon the exclusionary level and examine the justification of the rule to know how to apply it.

This, of course, doesn't prove the defeasibility theory wrong. It could very well be the other way around: since defeasibility is an essential part of an adequate characterization of the judicial moment, it is the exclusionary understanding of legal rules what needs to be abandoned—otherwise we would be committed to a theory of adjudication that does not give an account of the crucial challenge that the judge faces[316]. But notice that accepting the exclusionary nature of rules only entails a mechanistic understanding of the judge's function—an understanding in which the particularities of the case that are not legally recognised are irrelevant—if the only way to defeat a rule is by cutting its external applicability to a case that falls within its internal scope of applicability: if the only way in which all features of a situation can be considered at the moment of application is by allowing them to displace an internally applicable rule (by an 'external' application discourse), then a commitment to the exclusionary nature of legal rules prevents the judge from attending those unforeseen features and consequentially commits to the mechanical approach that ignores them. But, if we were to endorse a semantics that allows to thematise the particularities of the case as a problem of internal applicability, we might be able to have our cake and eat it, we could keep the sensitivity to the particularities of the case, without giving away the exclusionary force of rules that prevents turning questions of application into questions of justification. That is the alternative that will be discussed in Section 5. The possibility of modelling the judge's position on that of an *observer* who is open to other categories without overstepping these limits will be tackled in Section 6.3.

If the characterisation and objections that I've put forward to a non-semantic approach to adjudication are correct, then Atria is right in noticing the challenge that the particularity void presents to adjudication, in remarking the fact that the

[316] Raz has denied that his theory leads to a univocal approach to legal reasoning: (1985), 317; (1995). 333.

concrete properties that are verified in the particular case have to be addressed in order to assess the appropriateness of the application: the claim that we are to find a distinctive quality of the judicial moment in these features is on point, and taken in this work as an essential part in characterising adjudication. The problem lies in the particular way in which the distance between intension and extension are dealt in this model. Atria made an early displacement of semantic considerations, and thus pushed vagueness aside before dealing with defeasibility—that's more or less the route we have followed this far. By doing this, he assumed that these were two distinct problems and thus deprived himself of a valuable tool to deal with defeasibility. In what comes next, I will argue that if the semantic considerations are brought back, we should be able to relate defeasibility and vagueness in a productive fashion.

5. A semantic approach

To defend the exclusionary nature of rules without giving up the sensibility to unforeseen but concretely verified properties, what we need is an expansive semantics—one that allows understanding the judgement of appropriateness as a semantic problem, one that takes the identification of the circumstances of appropriate application of a concept as a semantic issue and understands those circumstances as being themselves defeasible and open to debate and disagreement among speakers. The richness of Robert Brandom's inferential semantics allows us to do this: it understands that the meaning of an assertion is constituted by the material, nonmonotonic inferential relations between the circumstances and consequences of its application, both of which correspond to entitlements and commitments that can be linguistic and non-linguistic and are differently specified from the perspective of each speaker[317]. Here, semantics is all about the perspectival and defeasible nature of the material inferential relations that each speaker endorses regarding each assertion.

[317] See Section 3 of Chapter 4.

But even a less powerful semantics can be employed to extend the scope of semantic analysis. Nicos Stavropoulos, resorting to Hilary Putnam's realism, has made this move, including the question of appropriateness within a semantic framework: in an ingenious move, he has defended that both open texture and defeasibility are two different ways in which Hart wrongfully tries to give an account of the openness of legal concepts[318]. Since Putnam's semantics is considerably weaker that Brandom's—while the former's work focuses on the role that empirical conditions of application have in defining the meaning of a concept, Brandom's inferentialism includes both circumstances and consequences that also can be linguistic—, although Putnam cannot give an account of Brandom's semantic, Brandom can give an account of Putnam's[319]. This allows accommodating Stavropoulos' key remarks regarding defeasible conditions of application, which I will use to construct a different, 'internal' form of application discourse, into Brandomnian circumstances of correct usage.

5.1. Towards a different semantics

We saw that the non-semantic model addressed special circumstances as affecting the external applicability of the rule. The option that we are now considering consists in directing the adequacy judgement to the minor premise of the legal syllogism, making the description of the facts of the case sensible to its particularities.

The first step in Stavropoulos' route to do this is to reject the definitional or criterial model of meaning according to which concepts could be explained and adequately employed through a closed scheme of shared necessary and sufficient conditions. The semantic assumption that underlies the rejected model asserts that the meaning of a concept is defined by a shared list of (descriptions of) the properties that

[318] Stavropoulos (1996), 54.

[319] Klatt (2008), 202.

something has to exemplify in order to fall under its extension—by a shared criterion. Being that the case, 'lawyers cannot genuinely disagree over whether something is, say, a contract. To disagree is to cease employing *shared* criteria'. Since agreement defines what contracts are[320], whoever claims that the disputed object is actually a contract is either analytically mistaken or using a different concept of 'contract'—lack of clarity among norm subjects entails that the rule offers no solution[321]. The real discussion, then, is not about 'whether something is in fact within the extension of the concept of a contract, but only on whether the concept ought to be extended, for reasons independent of "contracthood", to cover it'[322]. If the meaning of the term is exhausted by the shared criteria, our discussion, *ex hypothesis*, cannot be semantic—there cannot be a debate about the properties that have to be verified with respect to an object or state of affairs in order to count as part of the extension of a concept[323].

Once it is denied that meanings depend on a defined set of necessary and sufficient conditions, Stavropoulos has the door open to tackle, as semantic issues, both defeasibility and open texture: on the one hand, since the criteria for the use of concepts are not closed, there will always be the possibility that our list of the conditions that normally define the application of the concept are defeated by an unforeseen condition. On the other, open texture tries to provide an answer to the same lack of definition: the conditions for the adequate application will inevitably fall short to determine the applicability of the concept in every possible situation[324].

He will move forward starting from a critic to Hart's approach, who even though rightly rejects the criterial model, errs on the conclusions that follow from such rejection. In Hart's reading, the use of concepts would be constrained by conditions of application that would guarantee the adequacy of their employment, but such

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[320] Stavropoulos (1996), 3-5.

[321] Marmor (2001), 58.

[322] Stavropoulos (1996), 5.

[323] Stavropoulos (1996), 129-30.

[324] Stavropoulos (1996), 54.

guarantee would in turn be defeasible if an extraordinary circumstance is obtained. Stavropoulos' option, on the other hand, will try to deny that what is considered by Hart under special circumstances as 'defeated criteria' is actually a criteria for the employment of the concept under those circumstances[325]. That will provide space to introduce the question of appropriateness within the semantic judgement about the applicability—not of the rule, but—of the legal concepts included in the operative facts of the rule.

Hart's understanding of the way in which the conditions for application support the use of a concept is similar to the way in which G. P. Baker understands the operation of criteria in Wittgenstein: meaning is not ineffable because there are 'criteria' for the correct understanding of an expression, so the specification of them results in a non-trivial explanation of the expression[326]. Now, from the fact that those criteria are defeasible follows that they cannot be understood as establishing truth conditions for the employed expressions, because even if they are satisfied there can always be new evidence obtained that weakens the support that the criteria offers to the assertion.

The crucial point for Baker is that despite their defeasibility, satisfaction of the criteria does entail *certainty* regarding the assertion, so the 'criterial' evidence that supports a conclusion is conclusive, but not incontrovertible[327]; and that possibility to controvert the support that is offered by the criteria is inevitable because the conditions of defeasibility are infinite. That is why it would be a mistake to present them as negative conditions of application: it is not that the criteria (C) support the assertion (S) under a circumstance (R), because if that were the case, then CR would always support S. Against that, what should be said is that whatever the criteria are—C or CR—it can always stop supporting the assertion. This is, for both Baker and Hart, on cases of defeasibility the criterion for the use of a concept (its

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[325] Stavropoulos (1996), 62.

[326] Baker (1997), 28.

[327] Baker (1977), 51-53.

conditions of application) are fulfilled but defeated. Defeasibility is external to the criteria.

John McDowell's opposition to this tries to move sensibility to the special circumstances inside the criteria themselves: it is no longer that a criterion is constituted by a condition independent from the assertion that is supposed to be guaranteed and that can be defeated in certain context, but that whether or not that condition is actually a criterion for the assertion depends on the context. In this way, certain curvature on someone's mouth would be the criterion to assert that such person is smiling, but if we find a second face that despite having the same curvature is not smiling, what we should do, according to McDowell, is to deny that on that case the curvature in the mouth is a criterion to assert that the face is smiling. It is not the case, as with Baker, that the curve is also a criterion in the second case that turns out to be defeated, but that the curvature is defeated *as a criterion*[328]. The way in which Baker understands the criteria's defeasibility rests on the understanding of them as assertability conditions, as state of affairs that can be determined regardless of the certainty that we can have about the assertion that they guarantee; if that is the case, then the distance between the verification of the criterion and the assertion that they support entail that such support is controvertible[329]. That would be the case if we understand that the criteria to assert that someone is on certain mental state are constituted by what she says or does: if someone says that she is in pain, then we have satisfied the criteria to assert that she is in pain. However, because the subject can always be simulating, one option seems to be to understand that on cases of simulation the criterion has been satisfied and defeated, and therefore there is a distance between the criteria—an appearance that 'is embraced within the scope of experience'[330]—and the fact itself of someone being in pain. From that it would follow a general impossibility for our experience

[328] McDowell (1982), 464.

[329] McDowell (1982), 468.

[330] McDowell (1982), 471.

to reach the facts themselves—it would only go as far as the verification of the defeasible criterion of those facts[331].

Against that, McDowell proposes to understand that even though it is true that on cases of deceit the experience perceives only the appearance of something being the case without reaching to the case itself; on cases of lucidity the appearance that is experienced corresponds to the case itself becoming perceptually manifested to someone[332]: 'when perception is veridical, the content of perceptual experience just is the fact perceived'[333]—the appearance, on this second case, does not fall short from what it looks like[334]. This scheme allows McDowell to assert that on cases of defeasibility the criteria has not been satisfied, that an illusion of satisfaction has been generated: when someone simulates being in pain, he is simulating the verification of the criteria to assert that he is in pain[335].

This is the idea that Stavropoulos takes against Hart. Defeasibility thesis, Stavropoulos tells us, asserts that when the conditions for the application of a concept are verified but the application is nevertheless inadequate, those conditions 'maintain their status as conditions of application: they are satisfied, but special circumstances give us an independent reason not to apply the concept'. Such conclusion is counterintuitive: 'The natural thing to say is that the circumstances show that what we took to be conditions of correct application are not really such—that, in the light of these circumstances, the satisfied conditions lose their status as conditions of application of the relevant concept'[336]. Faced with a special case, what should be done—according to Stavropoulos—is to understand that the conditions that we had to determine the application of the concept have to be modified—what the special case is showing is that our original set of conditions was defective, and

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[331] McDowell (1982), 471.

[332] See Wittgenstein (1958), 95.

[333] Brandom (2003), 94.

[334] McDowell (1982), 473.

[335] McDowell (1982), 466.

[336] Stavropoulos (1996), 62.

so the conditions have to be revised so that our set gives a proper account of the fact that the new circumstances are relevant to the concept[337].

Here we find the crucial difference with Atria's theory: for him, defeasibility leads to the displacement of an internally applicable rule in consideration to the particularities of the case, but the alternative we are now exploring understands that those particularities can alter (or defeat) what we take to be the conditions of application of the concepts included in the content of rule at issue.

We are shifting from defeating the rule by attacking its external applicability, to defeating the conditions of application of the concepts of the rule and therefore attacking its internal applicability. This is the crucial movement that will allow me to propose an 'internal' form of application discourse that does not collapse into a justificatory one.

And this internal defeasibility is inescapable, because the conditions of application are understood as conclusions of a theory about the point of the concept—following Putnam, he understands that the meaning of a concept is to be explained in terms of the best theory regarding the true nature of what is referred by it[338]. This means that we are starting from a theory that aims to explain and justify the concept, so the conditions are established in consideration to such justification: the conditions of applications are those that, if verified, allow to achieve its normative point. Therefore, the conditions are grounded on the paradigmatic or stereotypical cases of

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[337] Stavropoulos (1996), 62-3.

[338] Putnam's argument, in which Stavropoulos' hinges, is directed against the idea that mental representations associated with an expression can define its meaning and reference. The Twin Earth example (Putnam (1991), 30) proves this false and serves as the basis on which Putnam will claim that reference is defined by the properties of the *stuff* that is referred by a term: by pointing at something and claiming 'this is water', I claim that the reference of my ostensive definition 'bears a certain sameness relation (…) to most of the stuff I and other speakers in my linguistic community have on other occasions called "water"'. Such relation is a theoretical relation, one that provides a defeasible answer about what is the commonality among different instantiations (Putnam (1975), 224-5). The meaning of the term is configured by 'whatever had the same nature as the local stuff picked out by that term', and with chemistry we have discovered that such nature corresponds to H2O—notice that this is not to say they the theory defines what is water, water is what shares a certain nature and the theory attempts to identify it—(1981), 24. So the substance of what is called 'water' defines the reference and meaning of the term, and therefore the discussion about the properties that are obtained in paradigmatic instances of water are discussions about the meaning of 'water' (Putnam (1973), 700.

application of the concept, so what is constructed is a theory that tries to justify and explain why the concept is properly applied in those cases—the content of 'gold', and with it, its extension, is not defined by a shared description, as it could be 'yellow and precious metal', but it depends on our theory of what paradigmatic instances of 'gold' share, i.e. being composed by the chemical element of atomic number 79; and since this is a theory about 'gold', and not its definition, it could be proven wrong. 'Normal conditions', those in which there is no defeasibility, 'are nothing but specifications attempting to capture what is essential about the paradigms (the property that collects the together) and are therefore responsible to counterexamples, i.e. cases that do not match the conditions, yet are arguably instances of the same property'[339].

By following Putnam, Stavropoulos understands that the conceptual analysis is directed towards the identification of requisite properties that make an object or state of affairs instantiate a concept, so 'different views of what it is for something to be X'[340] stand in substantive and semantic disagreement. While on the criterial model the meaning of 'worker' is exhausted on shared criteria, so every discussion that lies beyond them escapes the semantics of the concept, here the substantive disagreement on whether some subject is a worker is a semantic issue: we are discussing the meaning of 'worker', the properties that have to be verified in order to be part of its extension, not if 'worker' should be extended to cover cases that are similar to those that constitute its extension[341].

Therefore, instead of saying that there are two independent sources of support for an assertion (conditions of application and the circumstances in which it takes place), so that they can be decoupled (and therefore in order to decide on the application of a concept one first has to analyse the conditions independent of the context and then

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[339] Stavropoulos (1996), 64.

[340] Stavropoulos (1996),125.

[341] Thus, while Dworkin claims that substantive theories related to the 'point' of a practice are separated from semantic analysis, which depends on conventional agreement, for Stavropoulos both aspects go together. And in understanding that these are different issues, Dworkin is aligned with Raz— (1986), 1110, footnote nº 23.

evaluate the weight of contextual considerations), Stavropoulos' alternative is to deny that there are conditions of applications independent of the contextual circumstances. Because of this he accuses Hart of not seeing that his rejection to a conception of meaning based on a closed set of necessary and sufficient conditions should naturally lead him to an understanding of the conditions as being themselves revisable[342]. On cases of defeasibility we are not facing a fulfilled but defeated condition of application, but a situation in which the conditions are not really fulfilled.

Open texture, on the other hand, falls for the same reasons. Hart understood that the conditions of application work mechanically, 'hence, only clear, paradigmatic cases are certainly captured by a rule, so its application is "automatic", whereas in other cases "no firm convention or general agreement dictates its use"'[343]. Because of that, faced to a special case, conditions of application do not work at all: they either automatically guarantee the application, or are silent; and therefore, on hard cases in which such form of operation is impossible, they are defeated and thus fail to provide an answer. For Hart this means that extraordinary circumstances do not lead to revise the conditions of application—the novel circumstances do not alter the conditions, but the latter can't be accommodated into the former. So, Hart 'accepts that the rule's content is, in effect, the definition', being committed to understand that such definition is given by conditions of application that are silent on special cases. On the latter, we would have to discuss—with discretion and in consideration to substantive judgements—if the rule should be extended beyond its extension which remains defined by the defeated conditions. Hart, Stavropoulos concludes, maintains the prejudice of the definitional model: 'the content of a concept should be captured in incontrovertible conditions rendering application automatic'[344], and when that is not possible because of unforeseen circumstances, the conditions are not revised.

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[342] Stavropoulos (1996), 65.

[343] Stavropoulos (1996), 65.

[344] Stavropoulos (1996), 66.

Against this, Stavropoulos proposes to understand that on these cases what is being discussed is precisely the conditions of application: it is not that they resolve the application on normal cases and that on special ones we have to debate whether or not to extend the use of the concept regardless of its definition, but that we are always discussing which are the conditions for the use of the concept given the concrete circumstances.

5.2. Appropriateness as a minor premise problem: an 'internal' application discourse

With an expansive semantics that includes the problem of appropriateness within the identification of the circumstances of application of concepts, it is possible to propose a different form of application discourse, one that can be labeled as 'internal' since it addresses the internal applicability of the rule at issue—i.e., the possibility of subsuming the case under the semantic content of its operative facts. Now we can understand that the question about the adequacy does not alter the major premise of the syllogism, but it also does not demand displacing the rule for the decision of the case. Once the particular case challenges our current conditions of application, what is affected is not only our semantic understanding of the rule's content[345], but as a consequence of this, also the description of the facts that configure the minor premise of the syllogism.

A recent Chilean case of high public connotation could serve to show how this alternative seems to pick up a side of the legal practice: a man stabs his spouse with pruning shears after she revealed an infidelity to him. Besides the justified shock that the event caused, the legal discussion among law scholars and practicing lawyers focused on the correction of grating the author of *femicide* the mitigating

[345] A modification of the conditions constitutes a modification of the semantic content of the rule.

circumstance of ‘acting for such powerful stimuli that they naturally produced a fit of rage and stubbornness’.

The question about the adequate application of the rule of mitigation can be understood as referring to whether or not it is appropriate to alleviately reproach a crime whose speciality *vis-a-vis* homicide is justified on the expression of machismo by way of the criminal act, considering that the author’s motivation is explained precisely with reference to such machismo: if the speciality of the crime consists in the fact that it manifests an attitude of oppression against the victim in consideration to her gender, can the reproach be simultaneously mitigated on the basis that such attitude reduced the author’s capacity to act according to law? Adopting a semantic argument, we could agree with Atria that the judge lacks the power to modify the clause that establishes the mitigating circumstance by way of introducing an exception for the case in which the action is expressive of sexist violence. But the options that each theory offers to prevent granting the mitigation are different.

On the one hand, we might accept—as the Court did—that finding out about an infidelity can constitute ‘such powerful stimuli that it naturally produced a fit of rage and stubbornness’, but simultaneously sustain that the particularities of the concrete situation serve as basis to deny the applicability of the rule at issue. On the other hand, the question about adequacy could be answered when assessing whether or not on this concrete situation it is possible to assert that the offender has ‘acted motivated by such powerful stimuli that they naturally produced a fit of rage and stubbornness’.

In both alternatives what is being addressed is the question about the proper way of thematising the impact of the particular on the judicial decision. This can be approached both as an answer to the question on whether the rule at issue is externally applicable to the case or not, or as an answer to the question on whether the facts of the case can be subsumed under such rule. If we go back to the CEO’s

case, we will find that according to the non-semantic approach, this case is clearly subsumed under the terms of the rule whose external applicability could be contextually defeated by the operation of the 'external' application discourse; but with a semantic theory according to which the special circumstances affect the possibility of applying the concepts of the rule to the case at hand, an 'internal' application discourse could allow us to polemicise if the CEO is actually a *worker* or if it has been the *employer* who hasn't used his right to write down the labor contract—we could discuss if the verification of the properties of being a CEO, taken together with the others that are *prima facie* instantiated in this case, shows that our original conditions of application were defective, that what *prima facie* was a worker wasn't really one. Engaging in this analysis regarding the application of the concepts employed by the operative facts of the rule is what constitutes an 'internal' application discourse. The current discussion about gender identity can be understood in this sense: we took the property of having two X chromosomes as the relevant one to fix the extension of 'being a woman'; but faced with transgender subjects our theory changes, and so a law that a refers to 'women' is not to be displaced when it comes to them (as it could be the case with an 'external' application discourse), instead we claim that such rule is no longer internally applicable. As long as the case is not a paradigmatic one, this way of opening up to consider all the properties of the case allows us to turn the definitionally clear case into a vague one; vagueness, that was originally excluded from the analysis of defeasibility, re-enters the stage by carving a space to allocate the question of appropriateness inside the legal category. Vagueness is therefore understood in relation to the possibility of defeating the instantiation of the legal category based on the current criteria, by showing that the previous understanding of the term's meaning (its conditions of application) was defective.

5.3. Staying within boundaries

With an 'internal' application discourse we have shifted the rules' defeasibility for the defeasibility of the instantiation of its operative facts, and what we gain by this movement is that we get to keep the legal categories safe from onslaughts coming from external ones—we protect law's capacity to reduce complexity. This secures that only are legally relevant properties those determined by law's rules, the exclusion of all others constitutes a presupposition for the reduction of complexity and, to that extent, for law's very operation. Blocking the displacement of legal categories secures that what can arise in the judicial moment is restricted to 'limited pool of possibilities', so a 'commonality of named events' is conserved[346]. But another consideration has to be addressed: not everything can be included or excluded from those names—if that were the case, then the meaning of the terms would dissolve, and rules would be render useless. In order to orientate the judgement in consideration to the particularities of the case, without overflowing the legal borders, the openness of legal categories cannot be absolute. What we need is to explain how the verification of an extra-legal property can defeat the initial adscription of the legal category (we notice that the subject is the CEO, and therefore we withdraw the initially ascribed 'worker' description; we consider the personal sense of someone's own gender and refrain from taking the chromosomic information as establishing the conditions of application of 'being a man'), without losing all constraints—without emptying the concepts 'worker' or 'woman'. The problem can be presented as follows: the content of the concept is explained by the shared properties of paradigmatic instances, e.g., a, b and c; but since these are just the conclusions of a theory, it is possible that the ascription is defeated in a case in which a fourth property, d, also obtains. Now, how are the conditions of defeat constrained? What limits the capability of a property to take down the ascription?

[346] Christodoulidis (1999), 235.

To keep complexity reduced, the constrainment cannot be external to the legal categories that are being applied, but has to come built into them. The meaning of the concept has to be malleable enough so certain *prima facie* ascriptions made in consideration to the current identified properties can be defeated by a change in the theory, but solid enough that it prevents an 'anything goes' scenario. These margins can be identified by looking at the aim of the theory whose conclusions are to be challenged: if the conditions of application of an expression aim to give an account and justify the application of such expression to the paradigmatic cases, indicating what is common to all of them, then on those paradigmatic cases there is no possibility of revision, for if there were, then the branch on which the whole discussion is sitting would be cut. There have to be un-doubted cases of application if a theory about what all of them have in common is to be elaborated—they serve as a basis to assert the criteria for the application of the concept to other cases. By rejecting the definitional model of meaning, the margins of concepts have been extended, but not diluted, and within them extra-legal properties can defeat the *prima facie* conditions of application of the legal properties. If we go back to 'gender politics', we can now understand that gender does not correlate with chromosomic considerations, we could challenge the genetic basis of the conditions of application in favour of considerations regarding the personal sense of one's own gender, thus defeating the original gender ascription, but by doing this we are still able to explain the commonality among our paradigmatic instances of 'being a woman' and 'being a man'.

Deepening on these notions will take a central part of the following chapter; for now, something less demanding will suffice. The basic idea in which the internal constraintment rests is a Wittgensteinian one: the defeating movement can only be performed on the back of some common ground, and, for Stavropoulos, this key feature that prevents from falling into skepticism is to be found in the complexity of the concepts involved: their meaning depends upon others, so 'a characteristic form of disagreement then obtains where there is agreement as to what sort of other

concepts applications of the complex concept depends upon (…) Further, the parties to the dispute will typically agree on at least some of the applications of the concept as exemplary'. So substantive disagreement, as the one between defenders and objectors of gender identity policies regarding what is it to be a woman or a man, rests on shared interpretations 'of at least some of the concept's features'[347].

Now the application discourse can be understood as one in which all *prima facie* instantiated properties of the case, identified in consideration to the currently established conditions of application, are considered in order to decide how they interact in the particular case in relation to the ascription to the legally relevant ones: the discourse, then, aims to provide a theory according to which, given the *prima facie* verified properties, it is justified to assert, or refrain from asserting, the legally relevant property of the particular case. Understood like this, the application discourse doesn't turn into a justificatory one: whether—considering all features of the concrete situation—we can describe the particular subject as 'a woman' or 'an employee' doesn't require to analyse the foreseeable interests and consequences of the general observation of a rule that defines obligations and rights for women and employees—the decision regarding the description of the subject (and therefore, about the rule's internal applicability) depends on the semantics of the concepts involved.

Being open to all possible descriptions is still crucial to the application discourse, but it serves a different purpose from the one that was originally intended: the applicability of the rules depends only on the verification of the properties established in its content, but to define if such property is verified, all others are to be considered in a discourse that pivots, and therefore does not question, the paradigmatic instances. This constitutes an *internal* form of application discourse that is compatible with law's operation, for it doesn't overflow its rule-established schemes of interpretation. This has consequences regarding law's capably of living

[347] Stavropoulos (1996), 144.

up to the standards of legitimacy set by discourse theory as it was discussed in Section 3.2, since it is precisely because its performance takes place *within* the legally established categories, that the judgement is constrained *by law* in a way that undercuts the reflexive underpinnings of its legitimacy: the discursive conditions that provide 'the only normative justification' of the judicial decision[348] are incompatible with the inherent impossibility of legal judgement to allow challenging its categories and reductions, so the only way in which the position of the judge can address the standards of legitimation provided by the conditions of discourse is by constraining the application discourse to the legal categories—the judicial position is the result of translating into the legal operation the requirement of giving the citizen a voice in the debate about the application of a rule to him or her and therefore, to consider the all the properties instantiated in object of judgement. Adjudication is here understood as the way in which law can give an account of that normative justification.

So it can be accepted, with Emilios Christodoulidis, an argument for appropriateness within law's operation, but the possibility of guiding the application in consideration to the particularity of the case can only be understood as 'a case of "fine-tuning" within given co-ordinates, and *not* as revisability in the context of application (…) Given the exclusionary and reductive (more accurately exclusionary *as* reductive) nature of law, considerations of formal justice cannot yield to considerations of appropriateness—i.e. of revocability in application—'[349]. This internal form of thematising the particular will be once again address and compared with its *external* counterpart in Section 6.3 in order to argue that the judge's position can be modelled into that of an *observer* without exceeding law's exclusions.

Notice, of course, that despite the differences, here and just as it was the case with the non-semantic approach, the essential features of adjudication that were

[348] Christodoulidis (2004), 186.

[349] Christodoulidis (1999), 237; (2001), 214-8.

established at the end of Section 3.2—the ones that stand at odds with JRL cases—remain stable: first, the crucial problem is that of crossing the distance between the rules' meaning—i.e., its intension—and the case's extension. Second, the way to do this requires the judge to be attentive precisely to particular properties of the case: it depends on them whether the distance is crossed.

6. The judge as an observer

Until this point, I have resorted to Putnam's realism to defend an 'incorporationist' strategy that aims to include, as semantic issues, considerations of appropriateness. I have done this because this is the approach used by Stavropoulos in order to bring together vagueness and defeasibility as semantic problems, which in turn constitutes the capital contribution that has allowed me to propose a different, 'internal' application discourse. Now, I will attempt to model the judicial position into that of an *observer*, and to do this a different semantic framework has to be invoked. I will resort to inferential semantics to distinguish between different patterns of linguistic activity and claim that one of these patterns serves to understand the operation of application discourses—and with it, the judicial moment. This inferential model allows us to integrate and expand Putnam's theory, understanding that the empirical conditions of application of a concept are just a small—although crucial—component of semantic content: its full extent is only properly grasped once the role of consequences of application is also taken into account and the linguistic (non-empirical) features are incorporated.

Adopting a semantic analysis that goes beyond non-linguistic circumstances of application has two immediate advantages: first, it makes patent that 'an account, however accurate, of the conditions under which some predicate is rightly applied may thus miss important intuitive features of its meaning'[350]. This should be particularly easy to accept in the legal domain: one does not grasp what 'property'

[350] Dummet (1973), 455.

means by just knowing when someone has become the owner of something—just as important is to know what follows from such acquisition and the capability of distinguishing the former from the latter. An inferential analysis acknowledges this by explaining the relation of both linguistic, and non-linguistic, circumstances and consequences of an assertion in constituting its meaning. It is based on these differentiations that the different patterns of linguistic activity that are studied in Section 6.1. are distinguished.

Second, since it is a semantics that resorts to the discursive practice to coordinate both linguistic and non-linguistic circumstances and consequences, and takes the inferences among them as defeasible, it allows to retain the notion of defeasible and semantically relevant conditions of application, without having to accept some undesired consequences of Stavropoulos position: his way of explaining the meaning of concepts relies on a commitment to a certain essence or nature of law, which includes moral facts independent of the social practice. This leads him to understand that our legal obligations do not reflect the content of rules: to identify how the enactment of a rule affects the content of our obligations, the social fact of its enactment must be considered together with moral facts that determine the relevance of the former (its *legal impact*) in the set of legal obligations[351]. With inferential semantics, on the other hand, judgements of appropriateness and justification are included in the semantic analysis by the social-perspectival

[351] Here, rules 'would merely sum up the effect of the relevant considerations on obligations' and obligations 'would be explained by the background moral and social facts that are merely summarised and reflected int he rules'—Stavropoulos (2013), 237. A similar point is made by Greenberg. He claims that the legal effect that the enactment of a piece of legislation has depends on a moral profile (the set of our moral obligations, powers, privileges, etc.—1308) that defines the impact of the action in our moral obligations, rights, powers, etc.: the enactment of a statue changes our moral obligation in a way that is determined by 'the moral significance of the fact that the legal institution took the action in question (including the issuance of the text)'—(1317). Here, the content of law is understood as 'a subset of what morality, taking into account all the relevant considerations [including the actions of legal institutions], requires'—(1302): actions by legal institutions 'change our moral obligations by changing the relevant circumstances', they change the moral profile and thus change the content of the law. Legal obligations, therefore, correspond to those moral obligations resulting from the actions of legal institutions—(1306). The circularity of his argument cannot go unnoticed: we are supposed to identify legal obligations, powers, permissions, etc., by looking at the actions performed by legal institutions, but there is no way to identify them without resorting, precisely, to legal obligations, powers, permissions, etc.—addressing the point by claiming that 'there is a great deal of consensus about which institutions are legal institutions' (1324) serves as admitting the circularity.

character of the inferential, non-monotonic[352] articulation of conceptual content, so the disagreement among speakers regarding the circumstances of application and the reasons they can offer are—as with Stavropoulos—part of the propositional content of the involved concepts; but—unlike Stavropoulos—the inclusion does not require a commitment to an essence or nature of law.

Based on the previous considerations, what I will argue now is that the moment of adjudication, as far as it pivots on an openness to all possible descriptions of the state of affairs that serves as the object on which the decision is made, can adequately be understood as an attempt to perform what in philosophy of language is called a 'language-entry transition'. This is the analytical category in which a speaker has available all his linguistic repertoire to refer, and therefore to assign meaning to an external event. The aim of modelling the judicial moment in this transition is to claim that the latter is impossible in cases of JRL—review of legislation presents the judge with a question whose answer can only correspond to an 'intra-linguistic move', so a *judicial* decision on it, is analytically unachievable.

6.1. Patterns of linguistic activity

With Wilfrid Sellars, language-entry transition corresponds to a type of activity that is performed within a language game, which in turn is characterised as moving 'from position to position in a system of moves and positions'[353]. A position in the game consists, paradigmatically, in endorsing a claim[354], e.g. taking-true that 'it is raining'. And the player can be in a particular position either because he moved there from another one, or because he endorses a claim without having *moved* to it from a previous position. Let us look at this distinction. If occupying a position is to

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[352] 'That is, the inference from p to q may be materially good, even though the inference from p&r to q is not'—Brandom (2008), 106.

[353] Sellars (1963), 328.

[354] Brandom (1994), 235.

think, judge or assert *that so-and-so*[355], for Sellars 'to make a move in a language is to infer *from so-and-so*, *that so-and-so*'—this movement does not need to correspond to a deductively logical inference in order to be sound, it can correspond to a 'material inference' (concept that will be analysed in Section 3.1 of the following chapter): I endorse the claim 'J just came into the office all wet', and from there I infer that 'it is raining'. But a player can assert that something is the case without inferring it from another assertion: if it is raining outside the office, I can just look out the window and come to that same last position. The transition from the visual experience to the position is not a move *in* the language, since the visual sensation that serves as starting point is not the endorsement of a claim—the endorsement is only configured at the end of the transition. While the transition *from* the visual stimulus received by looking out the window *to* asserting or endorsing the assertion 'it is raining' belongs to the language, its starting point does not correspond to a premise in an inference[356]. Within this scheme, 'observation sentences' are understood as paradigmatic cases of positions that are occupied not as result of a movement from a previous position in language.

Having made that distinction, Sellars differentiates between three types of roles expressions can play, three distinct patterns of linguistic activity[357]:

- Intra-linguistic moves consist in inferential moves, moves in which a position in the language game is responded to by adopting another position in the language game. Here, both the stimulus and the response, the initial and final steps in the movement, are positions in the game.

- Language-entry transitions consist in noninferential reports of observation, moves in which a nonlinguistic situation is responded to by adopting a position in the language game. We transit from perceptual experience to linguistic responses by

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[355] Brandom (2001), 189: 'Assertible contents, assertibles, are also believables and judgeables; states of belief and acts of judgment can accordingly be expressed by assertions.

[356] Sellars (1963), 329.

[357] Sellares (1963), 329; Brandom (1994), 234; Sach (2014), 116; O'Shea (2009), 201; A. deVries (2005), 30.

reporting what is perceived. Here, the stimulus is not a position in the game, but the response to it is—the world connects with language by means of the conceptual content of the linguistic response.

- Language-exit transitions consist of deliberate actions, moves in which a position within the language game is responded to by bringing about a nonlinguistic situation. We transit from linguistic expression to action by performing an appropriate behaviour that is not a position in the game—language connects with the world by means of the nonlinguistic response to the conceptual content of the linguistic stimulus.

With Sellars' classification at hand, the parallel between entry and exit transitions constitutes the basis in which Brandom aims to model *action* on *perception* and *intention* on *belief*[358]. To do this, the responses that constitute the language-end of entry transitions are taken as beliefs—takings-true, while the stimulus that constitutes the language-end of exit transitions are taken as intentions—makings-true.

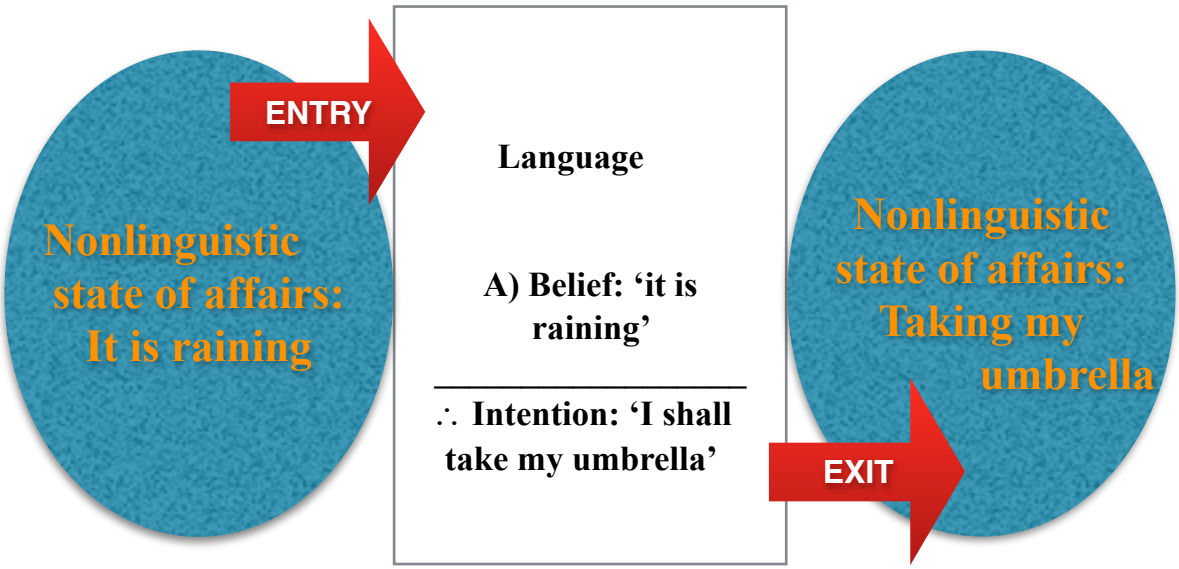
This way, entry transitions depend on 'reliable disposition to respond differentially to states of affairs' by adopting a belief—so if the state of affairs is that of raining, a reliable observer responds linguistically to it by believing 'that it is raining'. On the other side, exit transitions depend on 'reliable dispositions to respond differentially' to an intention by bringing about a state of affairs—so if the linguistic position of the reliable agent is that of 'I shall take my umbrella', he will respond nonlinguistically to it by taking his umbrella[359].

The corollary is this: perceiving is adopting the linguistic position of acknowledging a doxastic commitment (a belief) as response to a nonlinguistic state of affairs; and, conversely, acting is responding nonlinguistically by bringing about

[358] Brandom (1998).

[359] Brandom (1994), 235.

a state of affairs to the linguistic position of acknowledging a practical commitment (an intention). Once both linguistic positions (belief and intention) are inferentially related, a general scheme practical reasoning—going from the nonlinguistic world to the language, and from language back to the nonlinguistic world—can be presented as follows:



This non-monotonic picture of practical reasoning[360] relates, noninferentially and by way of entry transitions (or observation/perception), the nonlinguistic world to language in the form of a belief those content corresponds to the observation sentence 'it is raining' (this is the acknowledgment of a doxastic commitment). Next, inferentially and by way of intra-linguistic moves, the belief, as premise, is connected to an intention, as conclusion, whose content corresponds to 'I shall take my umbrella' (this is the acknowledgement of a practical commitment). This intention, in turn is connected noninferentially to the nonlinguistic world by way of an exit transition whose *terminus ad quem* corresponds to a behaviour that, being an action under *any* description, constitutes an *intentional* action once the description 'taking the umbrella' is privileged.

There is a non-inferential world-language transition (W-L), that leads to an inferential language-language movement (L-L), and then to a non-inferential language-world transition (L-W): acting intentionally, then, 'is to respond to a commitment acknowledged by producing a performance that corresponds to the

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[360] Brandom, in (1998) at 132, argues that the practical inference above sketched is not an enthymeme and that it should be treated just like the theoretical one:

B) It is raining.

∴ The streets will be wet.

He immediately recognises that, with Davidson—(2001), 3 ff., and the same stands with Von Wright (1983), 1 ff.—, an objection can be presented: the reason is incomplete, for, in the first case (A), the inference would no go through if I didn't want to stay dry: while the theoretical reasoning would require the addition of a conditional, a desire would be necessary for a good piece of practical reasoning—some logical or normative vocabulary, which serves to express 'pro-attitudes', has to be included on the premises. But, with Sellars, Brandom claims that such inclusion is not necessary, it only seems that way if we endorse an illicit entailment: from the fact that we arrive to a bad inference if we conjoin a premise incompatible with the desire to stay dry, does not follow that such desire was all along functioning as an implicit premise—ordinary reasoning is never monotonic. 'So the fact that if I add "I want to get wet", as a second premise to inference (A) above the resulting inference no longer goes through does not show that the denial of that premise was already implicit' (at 133). And the same goes for theoretical reasoning (B): presenting it as a formally valid inference requires adding the conditional. But there is no need to treat them as correct in virtue of their form, 'we can treat inferences such as that from "Pittsburgh is to theWest of Philadelphia", to "Philadelphia is to the East of Pittsburgh", or from "It is raining", to "The streets will be wet", as materially good inferences—that is inferences that are good because of the content of their non logical vocabulary' (at 131). What is at stake here, is the role of logic: Brandom defends an expressionist understanding of logic, in which formal validity serves to make explicit patterns of good inferences; but such explicitation is only possible because the inferences thus constructed are already *materially good* in consideration to content of their premises—of their nonlogical vocabulary. From this follows that what makes some pieces of vocabulary distinctively *logical* is precisely that expressive role they play. There is nothing wrong with presenting the inference as Davidson would have them, but even with the conditional, the nonmonotonic nature of the explicitated reasoning still stands: we could add a new premise that would infirm the inference.

content of the intention, and perception is to respond to the presence of, say, red things, by acknowledging a commitment with the corresponding content[361].

Here we can see how Putnam's realism can be incorporated by a broadly inferential approach that integrates both linguistic and non-linguistic circumstances and consequences of an assertion. Regarding *red ball*, its circumstances include the non-linguistic, empirical existence of a red ball. Thus, non-inferential, non-linguistic empirical preconditions, on which Putnam focuses, are part of a semantics that goes beyond them: the circumstances of a concept 'can include not only other claims (…) but also perceptual circumstances'. And, when it comes to the consequences, they 'can include not only the inferential acquisition of further beliefs' but also 'the noninferential responsive performance of actions, under the descriptions by which they can be exhibited as the conclusions of practical inferences'[362].

This allows to give an account, within inferential semantics, of Putnam's Twin-Earth thought experiment—this is planet identical to Earth in every respect but one: the liquid called 'water', despite being indistinguishable from to Earth's water, is not H2O but XYZ[363]. Putnam, understanding that the meaning of 'water' depends on the actual empirical properties of the stuff that is called 'water', claims that 'water' has different meaning in Earth and Twin-Earth; and inferential semantics allows to arrive precisely to the same conclusion: 'water' has different inferential contents in each planet, because in each case there are involved 'different circumstances of application, and hence different transitions from those circumstances to their consequences'[364].

Thus, the previously proposed 'internal' application discourse can be explained in inferential terms: deciding the correct description of the case (whether or not it falls

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[361] Brandom (1998), 137.

[362] Brandom (1994), 119.

[363] Putnam (1973), 700.

[364] Brandom (1994), 119.

under the extension of the rule) requires to identify the circumstances of application of the propositional content of the rule, and these circumstances, which can be both linguistic and non-linguistic, are understood as essentially non-monotonic, since the inclusion of further evidence or new premises can infirm the originally good inference or transition.

6.2. Empirical content

What has to be remarked at this point is the empirical content of the minor premise — 'it is raining' refers to a nonlinguistic state of affairs, it 'picks it up'. The relevant question has to do with the type of activity in which the conferral of empirical content rests. Sellars claims that the possibility of a discursive practice of achieving this depends on the inclusion, within such practice, of language-entry transitions, they are what makes it possible for our language to refer to the world. While it is possible to engage in a discourse that only involves intralinguistic movements, this would be a practice in which some axioms serve as a basis for further moves that never achieve any empirical content. But it is essential to the contents of the ordinary concepts we employ that they stand in relation to others that figure in entry and exit transitions: 'the sorts of contents our claims have cannot be conferred by assertional practices that do not acknowledge some claims as having empirical authority stemming from their status as reports of observations'[365]. These reports, that result from noninferential exercise of perceptual language-entry capacities, play an 'essential semantic role in determining the contents of the empirical concepts applied in such judgements'[366], so the meaning of the expressions that describe the perceptual characteristics of objects and events depends 'on a significant degree of how they are used in language entry transitions'[367]: expressions like 'it is raining' are capable of 'picking up' an extensional fragment of the world because they can play the role of being the

[365] Brandom (1994), 222.

[366] Brandom (2009), 33.

[367] A. deVries (2005), 31.

language-end of language-entry transitions—by being the outcome of a reliable disposition to respond differentially to nonlinguistic states of affairs such as 'raining'.

It is by transiting from a perceptual experience to a linguistic expression that our discursive practice gains its W-L dimension, and this entails both a cost and a particular form of freedom for the speaker. To advert their particularity, the attention has to be directed towards the asymmetry between W-L transitions and L-L moves: by contrasting these two patterns we can identify a gap, the particularity void that has to be crossed in order to connect the extensional world with language.

6.3. Distance and freedom

While in W-L transitions the speaker makes a move from some object on a perceptual or observational situation to a linguistic response, thus connecting a concrete fragment of the world *with* language—by way of a proposition; in the second one, the movement corresponds to a connection between propositions, a movement *within* language—between linguistic entities. The essential difference lies on the *extensional* dimension that distinguishes the first type of activity but that is absent in the second: any concrete fragment of the world that constitutes the world-end of a language-entry transition can only be *identified* by means of a description—a propositional content, but its *identity* (that it is *that* fragment and no other) is maintained through all of its possible true descriptions, all of which serve to identify the same extension[368]. This means that we can (and do) use descriptions that employ different propositional contents to identify one and the same concrete piece of the world. Thus, there is a distance that extends from that fragment of the world to the horizon of the possible propositional contents, i.e., of observational sentences that refer to it. This is the particularity void that we have examined through the previous sections.

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[368] Davidson (2001), 163.

When it comes to L-L movements things are different: now on both ends of the transition we have linguistic entities whose *identities* are defined by their propositional content, so a change at the propositional level entails a change in the linguistic entity itself. Since rules constitute paradigmatic cases of linguistic entities, we can say with Max Black: 'the propositional content determines what the rule is', so '[t]he relation between the rule and its statement in words is not something external and contingent, as in the case of the relation between anything and its verbal designation: the rule is, in some way, constituted by its formulation'[369]. Unlike language-entry transitions, in intra-linguistic movements there is no distance between the propositional content used for the *identification* of the entities involved and *individuation* of the entities themselves.

The fact that the nonlinguistic world only *enters* the game once a *language*-entry transition has picked it up, is essential to assess the viability of Detmold's understanding of the way in which the particularity void is crossed: the demand to 'hear' the radical particular freed from pre-existing categories is conceptually impossible. As N.E. Simmonds has pointed out[370], a radical escape from categorisations makes the particular—'the rich complexity of real life'[371]—unintelligible; so, regarding the pure particularity, no judgement could be made. Since perceptual experience itself requires the grasp of concepts[372], only once a fragment of the world is submitted to categories, such fragment can be 'heard'. But rejecting the idea of a judgement emptied from categories does not disprove the existence of a gap between the employed category and the horizon of possible ones[373].

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[369] Black (1962), 100.

[370] Veitch (2006), 146.

[371] Simmonds (1993), 60.

[372] Brandom (2003), 93.

[373] Christodoulidis (1999), 233.

This far we have seen the cost of crossing the void: one description is privileged and thus others are suppressed. Now the focus is to be put in the freedom the speaker enjoys before making the transition to language, and how it is curtailed afterwards. As an observer, the speaker has available every one of the possible descriptions that he grasps to address the world he faces, for the connection between world and language in entry transitions is not inferential, but depends on the non-linguistic properties of the state of affairs that is being observed and to which he has been trained to react, so all the ways in which the observer can reliably differentially respond to the nonlinguistic state of affairs by non-inferentially making an observational report are at his disposal—the only constraint to the spectrum of W-L transitions that can be made by an observer is given by 'what the reporter can be trained under some circumstances reliably to differentiate, and what concepts the reporter can then key the application of to those responsive dispositions'[374].

Therefore, before making the connection between world and language, every property of the state of affairs to which the observer has been reliably trained to differentially react can be included in the content of the language-entry transition. But once the transition is completed, the intralinguistic moves that can be made using the report as an initial position are partially detached from the properties of the described fragment of the world—now, after the entry, the positions in language available to refer to the state of affairs are dependent on the linguistic, inferential properties of the observational report, and thus are circumscribed by the properties identified in the original claim: from the claim 'a vehicle entered the park', the claim 'an homage to war veterans took place in the park' cannot be inferred, even if an homage to war veterans took place in the park. While for an observer both claims were available to make an entry transition, the inference from the former to the latter is not sound: the set of possible descriptions of, and properties to be ascribed to the state of affairs in an intra-linguistic movement, is curtailed by the inferential

[374] Brandom (2003), 96-7.

properties of the assertion that serves as starting position in the movement. The propositional content that assigns meaning to the nonlinguistic world and thus serves as the basis for subsequent linguistic moves, not only actualises some categories and thus suppresses others, but in the same move determines what *other* possibilities are now *available* and which have been *precluded*.

It is in this sense that the demand of a 'radical openness' in the judicial moment is to be understood, as the attempt to attain observational knowledge from the state of affairs on which the decision will fall, for it is only in this type of linguistic activity that the judge can refer to the fragment of world whose subsumption under the terms of the rule is at issue by employing all his linguistic repertoire. As long as the application discourse requires to consider all the properties instantiated in the concrete case, it is only the position of the observer what allows the judge to attain the materials required to perform the discourse that justifies her decision about the rule's applicability. This is how Detmold's idea of letting the radical human being speak by himself makes sense: not as an attempt to address the particular devoid from categories, but by *observing* it, so all its properties can be perceived. In any other way of referring to it, in which what is asserted about the case constitutes the conclusion of previous claims, the judge's assertion will have been overdetermined by the content of the antecedent linguistic moves and transitions. If we go back to Gardner's example used at the beginning of this Chapter, that of a legal syllogism in which the major premise is configured by the assertion 'Tortfeasors are liable to pay full reparative damages to those whom they tortuously injure', and the minor one corresponds to 'Jones tortuously injured Smith to the tune of $50'; the lesson we get from the Sellarsian model is that this latter premise can be taken as discursively justified only if the judge arrives to it as a result of having performed a W-L transition, for otherwise, if it is the outcome of L-L movements, the properties attributed to Jones' actions would have been predetermined by the properties included in the testimonies or legal writings that served as premises to such conclusion.

The fact that judges can't actually observe the event which they are deciding is no obstacle to understand that this position constitutes the ideal on which the notion on the judicial moment is constructed. And it is possible to do this because the observer's position configures a standard whose satisfaction by a judge, although being practically impossible, does not undercut law's operation. According to the argument of Section 4.2, what is incompatible with law is the possibility to displace legal categories in consideration to external ones (an 'external' application discourse), but such displacement is not entailed by an application that hinges on observation: as it was argued in Section 5.3, the attention to all categories can be directed precisely towards the identification of the verification of the legally recognized properties (an 'internal' application discourse). This means that a theory that characterises the judge's position in relation to the performance of a language-entry transition can remain agnostic regarding the form in which the perceived properties interact, and only if observation points to justify the yielding of the legal schemes it becomes incompatible with law's exclusionary force. In Section 5.3, it was argued that the judicial position is the outcome of an attempt, that of translating into law's exclusionary operation the justificatory standards constituted by the conditions of discourse, standards that provide 'the only normative justification' of the judicial decision[375]—legal adjudication was therefore construed as the refraction of those discursive standards once they enter the legal domain. So, while the refraction impedes the revocability of legal categories in an 'external' application discourse, it does not exclude the observer's position and, with it, attending to the particularities of the case in order to operate 'within given co-ordinates'. In other words, law's 'exclusionary *as* reductive' nature stands at odds with a judicial power to push aside a rule based on considerations of appropriateness[376], but does not prevent the judge from observing the concrete case and its particular subjects, and thus deciding about the instantiation of the legal properties in consideration to the

[375] Christodoulidis (2004), 186.

[376] Christodoulidis (1999), 237; (2001), 214-8.

interactions between all the *prima facie* perceived ones—analysis that is performed *within* the margins given by the semantic content of the rules.

The previous considerations allow us to claim that, remaining inside law's boundaries, the judge can be modelled on an observer, and so the judicial moment can be characterised as the attempt to cross the particularity void by making a language-entry transition that rests on an 'internal' application discourse. On the other hand, justification discourses—the type of discourse that serves to justify universal rules and thus characterises the legislative moment—are performed in absence of a concrete, extensional case that could be *observed*, they consist in intra-linguistic movements. By distinguishing these patterns of linguistic activity, inferential semantics has allowed us to differentiate both types of discourse, and with them, legislation from adjudication, *within* the same semantic framework: while legislation aims to ground universal rules by means of justification discourse that take into account foreseeable interests and consequences that do not depend on the particularities of concrete cases, and therefore consist in intra-linguistic movements (there is no extensional case to be *observed*); adjudication aims to ground particular rules by means of application discourses that take into account concrete interests and consequences that are involved in particular cases, and therefore can be modelled on language-entry transitions (there is an extensional case to be *observed*).

6.4. *Judicial* Review of Legislation?

Finally, the model also serves to make explicit the abnormality of what in the previous chapter was characterised as JRL. This is the key point to consider before moving to the final part of the thesis: if adjudication is construed on the image of an observer who perceives the features of some non-linguistic state of affairs and its concrete subjects, then a case can only be a judicial case if it is one regarding which language-entry transition is possible—otherwise, the ideal on which the judge's position is construed is conceptually impossible. And here lies the obstacle to the

notion of *Judicial* Review of *Legislation*. In the previous chapter I argued that these cases present to the judge a problem regarding the configuration of a normative *contradiction*, the assessment of whether or not there is an incompatibility between a piece of legislation and a constitutional provision. I claimed that these correspond to relations between the *intensions* of the relevant legal and constitutional rules, that was independent of any contingent, extensional fact, for it only depended on the semantic content of the norms involved.

If that is the case, then in JRL the object on which the decision falls is not one that can be addressed by a language-entry transition, there is no possible observational position directed towards the semantic relations between two or more rules, there is no distance—no particularity void—between the law whose constitutionality is being scrutinised and an horizon of its possible propositional contents, since the law's semantic content defines its identity. The judge's position is not available for this kind of problems, for they ask an intra-linguistic question regarding the inferential relations between legal and constitutional rules—a question whose answer, resting on L-L relations between universal rules, characterises the legislative moment. While the minor premise of an ordinary judge—e.g., 'J entered a vehicle into the park'—will not be the result of a language-entry transition, but can nevertheless work as one since it refers to a nonlinguistic state of affairs, the constitutional court's minor premise—asserting that some law is incompatible with a constitutional provision—is not just an intralinguistic movement, but more radically, it cannot serve as a language-entry transition, its content is not one to which a speaker can arrive from the observation of a nonlinguistic situation.

If we go back to Section 2.2 of the previous chapter, we will see that Marshall's assertion according to which 'it is emphatically the province and duty of the judicial department to "say what the law is"' was ambiguous, since it could be understood as a duty to 'say if a law is *valid*' or as a duty to 'say if a law is *applicable* to a concrete case'. It was also argued that while the first sense correlates with JRL, the

second one does it with JRA. If we now apply the Sellarsian distinction to both senses, we will notice that review of legislation asks the judge a question that demands the intra-linguistic answer of saying if a law is *valid*; but the characterisation of the judge's position requires her to reply with the language-entry transition of saying which law is *applicable*. Both senses of the expression 'saying the law', each one defined by a different type of linguistic activity, meet in '*Judicial* Review of *Legislation*' as a grammatical dissonance between question and answer.

This is the dilemma that will be addressed in the following chapter.

Chapter 4: An Inferential Approach to JRL

Introduction

The previous chapter ended by positing a dilemma at the core of JRL, a dilemma characterised by the conjunction of two properties, one that arises from the nature of adjudication (Ch. 3) and another that arises from the nature of the question that is put forward in cases of review of legislation (Ch. 2). I argued that the difference between them can be reconstructed in a highly explicative way with the aid of the analytical distinction between language-entry transitions and intra-linguistic movements. I will now resort to the syllogistic structure to show how this dilemma expresses itself in the different ways in which the ordinary judge and the constitutional court can address the identification of the object on which they are deciding. This will allow me to show how JRL demands to the constitutional court a decision that doesn't seem to be judicially reachable (1). After this, I will put forward the basic idea on which a solution can be attained: that natural meaning in language allows unjustified assertions (2). Next, I will present Brandom's theory of inferential semantic (3), which will then be applied to the constitutional court's position (4) in order to identify the commitments undertaken by a judge by declaring the unconstitutionality of a law (4.1) and thus articulate in Brandom's categories her justificatory dilemma (4.2). Once the problem is made explicit, I will move towards a solution (5) by resorting to the notion of analyticity and to Wittgenstein's work as a way to deactivate the demand for justifications (5.1 to 5.3). After rejecting the way in which history is addressed by the living constitutional approach (6.), Wittgenstein's remarks on *custom* and *agreement*, together with Brandom's *prima facie* entitlements will serve me to clarify the role of constitutional tradition in constitutional cases (7). Finally, and as a consequence of the previous steps, I will claim that constitutional meaning and reasoning are degraded when they are subjected to the *judicial* seat (8).

1. Stating the dilemma

I have argued that part of what characterises adjudication is the particularity void—i.e. the need to address a particular case (that supports infinite true descriptions and actualises an infinite set of properties) by means of a rule (a linguistic entity, defined by its propositional content) that by way of its formulation only identifies as relevant one description and one set of properties. The ordinary judge, then, has to relate a particular event (with concrete subjects, interests and consequences) with one or more pieces of legislation—with a universal rule that is justified in the light of the interests and consequences that, in the legislative process, were foreseen to be affected by its general observance. The nature of the question that the constitutional judge is called to answer, on the other hand, is not about establishing a relation between a universal rule and a concrete case, but one about the relation between two universal rules, a constitutional one and a legislative one.

Framed as a syllogism, the ordinary judge starts with a major premise constituted by a legal rule and has to identify the minor one that corresponds to a true description of the fact-in-the-extensional-sense that serves as the object of the adjudicative process: regarding a legal rule that asserts 'Whoever kills is to be imprisoned' and a concrete case in which it is not clear that the event can be properly described as a killing, the ordinary judge can justify his minor premise (whether it is 'J killed' or 'J didn't killed') in consideration to the concrete interests and consequences that are verified in this particular instance. Such indeterminacy, that opens the door to a decision about whether or not this case is a killing, can be resolved and therefore a minor premise stated, resting on an application discourse: as a judge, she is grounding her decision—describing the event as a killing or not—on an application discourse that justifies describing the object of adjudication as either 'J killed' or 'J didn't killed'. Her minor premise *could work* as language-entry transitions, since it will be referring to a particular event, with concrete subjects, interests and consequences; and so she can justify it on them.

The constitutional judge, on the other hand, also starts with a rule, a constitutional one, that works as a major premise, but she has no fact-in-the-extensional-sense to work with, for the object of her decision is configured by another rule, only now it corresponds to a legal one. The court is not to decide the relation between a state of affairs and the content of a rule, but if a piece of legislation contradicts or not a constitutional provision. If her major premise can be roughly stated like this: 'A legal disposition that is incompatible with the right to equality is unconstitutional/ not valid'[377], her minor premise would probably be configured as 'A prohibition of same-sex-marriage is incompatible with the right to equality'. Because of this, all what is in front of the constitutional judge are universals; so while the ordinary judge can address her problem of fixing her minor premise by means of an application discourse that focusses on the particularities of the event she has to deal with, the constitutional judge cannot enter into that type of analysis, since she has no radical particulars involved—there is no non-linguistic state of affairs to address, but a semantic relation whose assessment is a matter of intralinguistic movements. Now it seems that the court can only ground its minor premise on a justification discourse, which, as we have seen, serves to characterise legislative decisions.

This difference between the ordinary and the constitutional judge stands even if we recognise that some times ordinary judges actually have to engage in legislative activity. Besides the two objections that were examined in Section 2 of the previous chapter against a 'mechanical' model of adjudication, a third one was mentioned, that arising from the possibility of an ambiguous use of language by the lawmaker[378]. Now we are in a better position to address it. Every time that a piece of legislation is ambiguous the judge will have to assert an interpretation of it in order to adjudicate—she will have to assert a universal proposition that, being a universal, cannot be grounded on an applicative discourse. A recent Chilean case serves to illustrates the point: a group of representatives wanted to impeach

[377] Ferrer & Ratti (2019), 606.

[378] Klatt (2008), 47.

Supreme Court justices who granted penitentiary benefits to some of Pinochet's minions that are imprisoned for committing crimes against humanity. The left-wing congressmen argued that by ruling in favour of these criminals, the judges infringed valid and applicable international law, what in turn would constitute an infraction of their [the judges] constitutional duties. The problem arose because Chilean law forbids the Congress 'to review judicial decisions'. Based on that disposition the defenders of the Supreme Court justices argued that the impeachment itself was an infringement of chilean legislation, since it entailed a revision of the court's ruling. But this prohibition to 'review judicial decisions' is ambiguous: 'to review' (in spanish 'revisar') can be understood both as 'carefully studying the decision' or as 'examining it in order to change it'.

Now, if a judge were to asses if the impeachment actually entailed an infringement of the prohibition to review judicial decisions, she would first have to define how to understand the disposition—either as a rule that forbids Congress to *change* judicial decisions or as a rule that forbids even *analysing* them. In this case, the interpretation the judge gives seems to constitute an instance of legislation, for she would't be (immediately) engaged in analysing the correspondence between a rule and a concrete particular event—before that she would have to define which is the rule to be applied, she would have to determine what is the propositional content that constitutes the rule that is then to be applied in order to assess the actions of Congress.

Despite appearances, this judge would not be on the same position as our constitutional court that has to decide if a law contradicts the constitution. The difference lies not only in the fact that the need to perform a substantively legislative activity will only arise in certain marginal cases, due to what can be understood as a defective legislative technique. More importantly, for the ordinary judge the legislative moment is just a necessary step that she has to take in order to adjudicate, not her final destination. On the contrary, JRL is just about this: intra-

linguistic movements are not a previous movement necessary to a subsequent world-language transition, but the very goal to be achieve. For the common judge the legislative, justificatory moment might be a middle and inevitable step to take so that she can actually fulfil the judicial function—after determining the proper meaning of the disposition, and whatever interpretation she ends up sustaining, the judge still has to decide if the concrete action of the Congress instantiates the propositional content of the rule she previously defined. Even in the rare cases in which the ordinary judge has to use an ambiguous disposition, at the end of the day she will still be attempting to perform a world-language movement—and therefore, she will face the particularity void, the one that characterises adjudication and that will never appear to the constitutional judge. For the latter, the case is reduced to intra-linguistic movements, to linguistic entities that are defined by their propositional content. The court has no distance to cross between the defined and finite set of properties that is fixed by the propositional content of a rule and the infinitude of possible properties and descriptions that are actualised by the object of his judgement. And the same is true regarding normative conflicts in which there is no preference rule available: both ambiguity and unresolved conflicting regulation requires judges to posit rules in order to ground their decisions[379]. While in the debate about positivism some might claim that this judge-made law corresponds to a 'moral norm'[380], and others that it can be attained without engaging in moral reasoning[381], such question is irrelevant for our current point—what matters to us is to distinguish between this law-making activity of the ordinary judge and that of the constitutional court: for the former, this is just an inevitable step to take before crossing the void; for the second, there is no void to face afterwards.

And a similar difference stands when it comes to judges who have to decide on the validity of a contract. Here too the judge will be engaged in two intensional objects —the contract whose validity is at issue and the legal rules that defines the

[379] Shapiro (2011), 251. For the systemic relevance of the prohibition of denial of justice and judge-made law: Luhmann (2004), 286.

[380] Gardner (2012), 188

[381] Shapiro (2011), 153.

conditions on whose verification depends the validity of such contract. But a contract, unlike a piece of legislation, does refer to particular parties, it includes singular terms, and therefore, the relation the judge has to establish between it and the legal conditions of its validity can still be grounded on an application discourse.

If the previous arguments are sound, then we can reaffirm the problem of JRL as this one: it demands a judicial/language-entry answer to a legislative/intra-linguistic question.

2. The first step to a solution

In what comes next, I will try to de-activate this incompatibility, to argue that it is not necessary to give a legislative answer to the question that is put forward in JLR cases. That even though the judge cannot engage in an application discourse when it comes to decide a constitutional query about a piece of legislation, that doesn't imply that she must engage in a justification discourse that would make her a constitutional legislator. We have seen that the positions of the ordinary and the constitutional judge can be distinguished in relation to their minor premises: while the former, facing a concrete case, can ground hers in an application discourse; for the latter, who lacks a concrete case, a justification discourse seems the only alternative. To avoid entering into the legislative terrain, what the judge needs to find are propositions that can serve as minor premises in her decision, but that do not demand a justification discourse, assertions that are available in the absence of a justification. In the previous Chapter we saw one approach to this issue: it was argued that conditions of application could be explained as attempts to make explicit what is shared by all paradigmatic instances of an expression. If that is the case, then it must be assumed from the get-go that there are undisputed cases on which the identification of the conditions pivots, for otherwise the branch on which the project is sitting would be cut. Now we need to deepen and expand the analysis, we must turn into the discursive practice as a whole and look up for secure-enough

positions within the language game, for conceptual relations to which the judge can unjustifiably cling—for *hinge* propositions.

These notions—that hitherto have been only superficially addressed here—moves us in the direction of Wittgenstein, to his remarks on rule-following, on certainty and on grammar. He will provide us with some key insights to defend the possibility of a non-legislative review of legislation. But, as it is usually the case with Wittgenstein, his ideas on these issues are too theoretically broad and some of his assertions so cryptic that they can be unsubstantially used to defend almost any position. Because of this, I will not continue immediately with Wittgenstein, but with Brandom. This decision is not arbitrary, my reason for the recourse to Brandom first and Wittgenstein later lies on the connection between them: Brandom's pragmatism—succinctly expressed in his dictum 'semantics must answer to pragmatics'—, although explicitly constructed following Sellars and Michael Dummett's steps, is rightfully understood as aligned with Wittgenstein's enterprise—succinctly expressed in his usually miss-quoted and miss-understood dictum[382] 'the meaning of a word is its use in the language'. Brandom will provide us with a theoretical framework that will allow us to give an account and move way beyond Putnam's semantics, and to fruitfully constrain our use of Wittgenstein. For this reason, I will use Brandom's work to frame the linguistic issues to be addressed and to present the problem of justification in analytically clearer terms. Brandom will not solve our problem, he will actually leave us with an un-resolved, but clearly stated question. But, given the connection between his work and Wittgenstein, he will allow us to stage the problem in a way that the latter's ideas will serve to provide an answer.

What justifies the forthcoming extensive recourse to philosophy of language to deal with these legal problems is that the latter refer to the relation between rules—a

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[382] Miss-quoted, because it is usually stated as 'meaning is used'; miss-understood, because it is usually ignored the immediately previous considerations on the same 43º paragraph of (1978): 'For a large class of cases—though not for all—in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language'.

constitutional one and a legal one—that are defined by their propositional content. Therefore, a problem regarding the relations of rules is a problem whose object of analysis is constituted in part by their meaning, and such meaning will correspond to that of ordinary language. For although law can, of course, define some meanings by itself—typically by means of a constitutive rule—such process can only go so far before it relies on natural language: if a legal rule defines 'accident' as 'damaging event caused by negligence', then the legal meaning of this term will be different from its ordinary meaning; but such differentiation was only achieved by pivoting on the natural meaning of 'damaging event caused by negligence'. And if the defining process is continued by legal definitions of the terms employed on the previous ones, eventually the definitions will in the end have to answer to ordinary meaning—otherwise law would be isolated. Hence law uses 'ordinary language as regards phonology, syntax, etc., interspersed only with some special terms or words which assume a meaning in judicial discourse which differs from the meaning they have in everyday speech. The idea of an "autonomous" legal discourse or of an operatively closed system would be inconceivable when considered purely in relation to language, since of course, this language and its discourse takes place in society'[383]. We could then accept that for law's operation the relevant meaning is the 'legal' meaning, but such legal meaning will usually and always ultimately be the natural meaning of the propositions employed by law. Therefore, the way in which legal rules are related in the operation of law will depend on the identification of the inferential relations that exist in ordinary language between the propositional contents of those rules and that of other legal rules that regulate the application and relations between them.

My aim in the next section is to use Brandom's theory of language to explain how propositional content is conferred to expressions by way of a structure of inferential relations. Because he internally relates propositional content with justification, his work provides unique and valuable analytical tools and distinctions to thematise our

[383] Luhmann (2004), 74.

current dilemma, which lies, precisely, on identifying propositions or intra-language movements (inferences) that do not stand in need of justification. After that, I will translate Brandom's categories to the position of a constitutional court that has to decide on the constitutionality of a law, identifying the commitments that it would undertake if it were to assert the unconstitutionality. This will allow me, in the subsequent sections, to analyse to what extent those commitments can be vindicated from a judicial position. This is where Wittgenstein's remarks will be useful—to specify the type of propositions that the constitutional judge can legitimately employ.

3. Inferential semantics

Our focus will be the analysis of the conceptual content within intra-linguistic movements and not language-entry/exit transitions. The reason for this lies on the duality that characterises the pragmatic force of assertions: as we'll see, only once the nature of assertions is understood we can make sense of their capability of both representing the world (and with it, the possibility to perform W-L transitions) and justifying actions (that allows to explain L-W transitions). This will be a somewhat extensive and therefore arduous course, one that will extend throughout 12 points through which the interlocking of an inferential approach to semantics and a pragmatic approach to normativity is achieved, thus rendering a theory of propositional content in which meaning depends on inferences that are in turn governed by a deontology that rests ultimately in the implicit attitudes of the language-game players—an inferential semantics that answers to pragmatics.

3.1. Inferences

In an inferential approach, the meaning of each assertion depends on the set of inferential relations in which that assertion has a role to play in the social game of asking and giving reasons, game in which each reason corresponds yet to another

assertion. Meaning, then, is configured by the inferential role an assertion plays[384] as a premise for other assertions or as a conclusion that follows from other assertions. I will use simple examples for now, but once the theory is fully explained I will move to more complex ones. Let us look at the following inferences to explain the point: we start with 'it is raining', and from there we move to 'everything that is not covered will get wet', from which we infer that 'the pavement will be slippery'[385]. Here, the meaning of 'everything that is not covered will get wet' is explained by its role both as a conclusion that follows from 'it is raining', this is, its 'conditional normative significance'—i.e., the conditions under which it is appropriate to use them; and as a premise to conclude 'the pavement will be slippery', this is, its 'consequential normative significance'—i.e., the consequences of their appropriate use[386]. It arises, that is, from the reasons that support it and from what it supports as a reason.

These inferences, which with Sellars can be called 'material inferences', are sound not in virtue of their logical structure, but in consideration to the content of their nonlogical vocabulary[387], so they operate through 'content-based reasoning'[388]: it is the content of the concepts involved what makes the inferences correct[389], so the force of the transition comes not from formal principles, but from material rules of inference. Thus, we can legitimately infer both 'everything that is not covered will get wet' and 'I shall open my umbrella' from 'it is raining', and 'thunder will be heard soon' from 'lightning is seen now'—they stand because in our world it is true that thunder follows lightning and rain gets the streets wet[390]. Here Brandom follows Sellars steps closely. For the latter, material inferences instil meaning—Sellars defended these movements as sound inferences arguing that 'there are

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[384] Peregrin (2007), 258.

[385] Regarding the non-monotonic nature of material inferences: footnote nº 360 of Ch. 3.

[386] Klatt (2008),128.

[387] Brandom (1998), 131.

[388] Brandom (1994), 101.

[389] Brandom (1994), 98.

[390] Bransen (2002), 381; A. deVries (2005), 32.

material as well as formal principles of inference, so that instead of merely being an abridged edition of a formally valid argument, "It is raining, therefore the streets will be wet" might well be as it stands a valid argument, though warranted by a material principle of inference'[391].

These material principles (or rules) are modelled by Sellars on Carnap's 'transformation rules'—which 'determine under what conditions a sentence is a *consequence* of another sentence or sentences'[392]: material rules of inference, just as extra-logical transformation rules, authorise an inference that would require an additional premise in order to be logically valid[393]: from 'that car is red' follows 'that car is coloured', 'that car is not blue', etc.,—the inference hinges on 'an extralogical or material rule of inference in our language that is partially constitutive of the meaning of "red" and "colour" and that licenses this inference'[394]; so 'endorsing these inferences is part of grasping or mastering those concepts, quite apart from any specifically logical competence'[395]. These types of inferences are the ones that I will track when analysing a declaration of unconstitutionality. By doing that, we will be in position to assess the court's possibilities of vindicating those inferences in a *judicial* manner.

All this serves to configure a three-step argument: propositional content comes from what is pragmatically assertable, what is assertable is something that both constitutes a reason (a premise) and is in demand of reasons (a conclusion)[396], and therefore asserting can only be understood in relation to inferences.

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[391] Sellars (1953), 313-5.

[392] Carnap (1937), 27.

[393] Sellars (1953), 319: while '(x) px—>qx, px, therefore qx' is a logically valid inference; 'px, therefore qx' is a materially valid inference.

[394] A. deVries (2005), 32.

[395] Brandom (1994), 98.

[396] Brandom (1994), 171.

3.2. Deontic statuses

The inferential relations of an assertion are determined by the deontic status that speakers have as a consequence of asserting it. Thus, the inferential relation between 'it is raining' and 'everything that is not covered will get wet' is explained by the fact that, by asserting the first, the speaker acquires the status of being committed to the latter; and the same stands between that last one and 'the pavement will be slippery'[397]. Asserting something thus involves taking a commitment, which is 'articulated by consequential inferential relations linking the asserted sentence to other sentences'[398]. But, besides acquiring the deontic status of being committed, asserting also entails the acquisition of entitlements—and here the direction is reversed: while asserting 'everything that is not covered will get wet' commits to the conclusion 'the pavement will be slippery', claiming the latter entitles to assert the former. Using a different example: claiming that 'J moves' entitles me to claim that 'J runs', and claiming that 'J runs' commits me to 'J moves' (a deeper explanation of the type of relations in which predicates and singular terms can stand will be the subject of Section 3.6). This allows to differentiate a subclass of commitments: those to which the speaker is *entitled*[399].

Distinguishing these two statuses, Brandom differentiates three types of inferential relations among assertions. 'Commitment-preserving inferential relations'[400] stand between assertions that take place in either a deductive logical inference or a good material inference. Here, commitment to the antecedents commits to the assertions that follow as their consequential normative significance. 'Entitlement-preserving inferential relations'[401] stand between assertions that take place in inductive empirical inferences: if you are entitled to the assertion 'this is a dry, well-made match', then you are entitled—but not committed—to the assertions that follow as

[397] Brandom (2001), 192.
[398] Brandom (2001), 193.
[399] Brandom (2001), 193.
[400] Brandom (1994), 168.
[401] Brandom (1994), 168-9.

its consequential normative significance: 'the match will light if struck'. Finally, since a commitment to a claim can preclude an entitlement to another[402], a relation of incompatibility arises by combining the two statuses: you are not entitled to an assertion if you are committed to another assertion that has a materially incompatible content with it: being committed to the assertion 'that object is red' precludes the entitlement to assert 'that object is colourless'. These relations will be crucial to identify the commitments involved in the declaration of unconstitutionality: by endorsing a relation of incompatibility between the legal and constitutional provisions, the court will be endorsing a commitment-preserving relation between an explicitly stated right, and an allegedly implicit one.

So, by asserting something the speaker acquires the status of being committed and entitled to different assertions, and those status are what define the inferential relations between the assertions, these latter being what serves to configure the meaning of the assertions involved. Now, what needs to be explained are the source of these deontic statuses.

3.3. Deontic attitudes: the problem of naturalism

Having certain deontic status corresponds to a normative fact, and normative facts are—for Brandom—dependent on our practices and, in particular, on our attitudes: 'Before creatures started taking and treating each other as committed or entitled to do various things, there were no such things as commitments and entitlements'[403]. Thus, the status of being entitled or committed to something has to be explained in terms of deontic attitudes, exhibited by the players in the game of '*taking* or *treating* someone as committed or entitled'[404]: 'The notion of normative status, and of the significance of performances that alter normative status, is in turn to be understood in terms of the practical deontic attitude of taking or treating someone as committed

[402] Brandom (1994), 169.

[403] Brandom (2002), 365.

[404] Brandom (1994), 166.

or entitled'[405]. And since this is a pragmatist approach, then the relevant question has to do with *what is done* when we treat someone as committed or entitled. Brandom's answer resorts to the notion of sanction: to treat a behaviour as correct or mistaken is exhibited in rewards and punishments, so in its simpler form consists in positive and negative reinforcements[406]. Attitudes, then, hinges on a disposition to apply sanctions.

But there is a risk involved in moving in this direction: defining normative attitudes in terms of dispositions to apply sanctions can lead to reduce the normative to the nonnormative, to regularities. This would be the case if attitudes correspond to a pure disposition, to a 'psycho-social product of positive and negative behaviour reinforcement'[407]. This naturalism leads to the problem of gerrymandering, of identifying '*the* regularity that is being reinforced', conflating what is done with what ought to be done. If sanctioning is just a disposition aligned to a regularity, then the idea of sanctioning *correctly* is lost: 'If the normative status of being incorrect is to be understood in terms of the normative attitude of treating as incorrect by punishing, it seems that the identification required is not with the status of *actually* being punished but with that of *deserving* punishment, that is, being *correctly* punished'[408].

The way out of this conundrum requires to allow for the possibility of sanctions that have only a normative significance[409], and so we must distinguish between different types of sanctions: suppose a community in which the infringement of a practical norm that requires to display certain leaf in order to enter a specific hut, consist in beating the infractor with sticks. This way of acting shows what the members of the community '*take* to be appropriate and inappropriate conduct', and the assessment they make can be described in nonnormative terms. But the sanction can adopt a

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[405] Brandom (1994), 166.

[406] Brandom (1994), 34.

[407] Klatt (2008), 120.

[408] Brandom (1994), 36.

[409] Brandom (1994), 43.

purely normative form, one that consists in granting an extraordinary privilege or in withholding a licence to do something else. In Brandom's example, the sanction could consist in making inappropriate to attend a festival, attendance that was appropriate until the subject entered the hut without displaying the leaf—the response being a punishment is decoupled from a disposition to refrain of performing the action that elicited it: 'the normative significance of transgression is itself specified in normative terms (of what is appropriate…)'[410]. In this second case, the normative attitude is expressed through a sanction that alters the normative status with respect to a different norm[411]. And these relations between statuses can be further expanded: performing the second action to which the subject was, but is no longer entitled to do, can be sanctioned by the alteration of yet another status, forming 'complex webs of interdependent normative statuses'[412].

With these internal sanctions available, normative attitudes of treating or taking someone as committed or entitled to a performance, understood in terms of dispositions to apply sanctions to whomever does what is not entitled to do and refrains from doing what is committed to do, allows to ground normative statuses in a way that is not reducible to the nonnormative[413]. These attitudes constitute 'the horizon within which both discursive statuses and conceptual contents are to be understood'[414]: conceptual content depends on and is explained in terms of inferential relations, those inferences depend and are explained in terms of normative status, and those normative status are explained in terms of deontic practical attitudes of the speakers consisting in dispositions to apply *internal* sanctions.

This relation between attitudes and statuses serve to configure the basis of the linguistic practice: in Brandom's model, participants in a linguistic game *keep score*

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[410] Brandom (1994), 43.

[411] Brandom (1994), 44.

[412] Brandom (1994), 44.

[413] Brandom (1994), 42.

[414] Demoor (2011), 68.

of the commitments and entitlements that are distributed in consideration to assertions. They keep score, that is, of the deontic statuses that themselves and other players have as a consequence of asserting something, and this score is kept by adopting and altering their deontic attitudes. In other words: the alterations of deontic statuses depend on the way speakers *treat* or *take* each other in relation to an assertion—the idea is aptly expressed by Brandom in the following terms: while 'deontic statuses are the counters in terms of which the score is kept, the adoption and alteration of deontic attitudes constitute the activity of scorekeeping through which those statuses are instituted'[415]. Normative attitudes, then, constitute an implicit normativity out of which deontic statuses arise, and with them, the significance of an assertion is cashed out in terms of the difference it makes in the deontic statuses of the participants in the game—the difference depends on the 'practical deontic *attitude* of taking or treating someone as committed or entitled'[416].

These deontic attitudes, in turn, come in two flavours, the first one being that of *attributing to someone else* the deontic status of being committed or entitled to something (in this case: to an assertion) as a consequence of having done some other thing (having asserted something). The second attitude refers to *oneself* and is that of *acknowledging* or *undertaking* a commitment or an entitlement to something (again: to an assertion) as a consequence of a previous performance (that of asserting something). In this scheme, the set of *undertaken* commitments is not co-extensional with the set of *acknowledged* (or self-attributed) commitments: attributing a commitment to oneself 'is only one species of that attitude' since 'an interlocutor can count as having undertaken a commitment (as being committed) whenever others are entitled—perhaps in virtue of that interlocutor's performances —to attribute that commitment'[417]; thus for someone to undertake a commitment 'is

[415] Brandom (1994), 593.

[416] Brandom (1994), 166.

[417] Brandom (1994), 596.

to do something that makes it appropriate to attribute the commitment to that individual'[418].

Distinguishing between attributing and acknowledging inferential commitments allows to differentiate between the intrapersonal and interpersonal use of a claim. By asserting something, not only the statuses of the speaker are modified, but his performance also has significance for interpersonal communication: the speaker is making the assertion available for others to use it in their inferences. 'Acknowledging the undertaking of an assertional commitment has the social consequence of licensing or entitling others to attribute that commitment'. Once the speaker claims 'it is raining', he or she is making 'that sentence available for others to use in making further assertions'[419]—by attributing the commitment to the speaker, others can undertake a commitment to it[420].

When we discuss the objectivity of language—in Sections 3.11 and 3.12—we'll see why, of these attitudes, 'attributing is fundamental'[421]. More importantly, the notion of *attributing* will allow us to see how, by declaring unconstitutionality, the court does something that entitles the attribution of a particular commitment regarding the relation between the subsentential terms of the legal and constitutional provisions at issue (this type of commitment between subsentential expressions will be addressed in Section 3.6).

3.4. Responsibility

We have seen that asserting *authorises* further moves, but it also entails *responsibility*. The consequential normative significance of the assertion is only authorised, both to the speaker and others, if there is an entitlement to it, entitlement

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[418] Brandom (1994), 162.

[419] Brandom (1994), 170.

[420] This interdependence allows Julius to claim that 'Conversation is a site of solidarity'—Julius (2016), 200.

[421] Brandom (1994), 166.

that in turn depends on its conditional normative significance. Thus, by claiming, the speaker undertakes the commitment to vindicate the original claim by showing that he is entitled to make it. From this follows that the commitment that is undertaken by asserting involves the responsibility to justify what is claimed, so the assertion both licenses further assertions and commits to justify the original claim. This constitutes a 'task-responsibility' that in this case consists in demonstrating the entitlement to the claim 'if that entitlement is brought into question': 'If the commitment can be defended, entitlement to it demonstrated by justifying the claim, then endorsement of it can have genuine authority, an entitlement that can be inherited'[422]. And since 'only assertions one is entitled to make can serve to entitle anyone to their inferential consequences'[423], an *internal* sanction is attached to a failure in vindication: the un-vindicated assertion does not entitle further moves and it is itself taken as an untitled assertion.

There are two ways of fulfilling this responsibility: the speaker can justify her assertion by providing a reason for it, reason that in turn consists in making a new claim. Speakers who accept the justification accept that the newly offered claim serves as premise from which the original can be correctly be inferred as conclusion[424]. The other way is by appealing to the authority of another speaker. This possibility is to be explained in terms of the interpersonal use of a claim: by asserting something, the speaker licenses others to reassert it and discharge their responsibility to vindicate the entitlement by invoking his authority—who reasserts can discharge her responsibility by invoking the authority, and thus 'passing the buck', to the original asserter'[425].

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[422] Brandom (1994), 172.

[423] Brandom (1994), 171.

[424] Brandom (1994), 174.

[425] Brandom (1994), 175.

These two forms of vindication will be considered in order to assess the Court's possibility of living-up to the responsibility involved in declaring the unconstitutionality.

3.5. The priority and pragmatic force of asserting

This double binomial—two statuses, two roles—serves as the dynamic force that defines the speech act of asserting, its pragmatic force: what makes a performance an assertion is the fact that such performance is both 'givings of reasons, and themselves also performances for which reasons can be asked'[426]. They are justifiers and justified, premises and conclusions, and '[t]hat it plays this dual role, that it is caught up in justificatory inferences both as premise and as conclusion, is what makes it a specifically propositional (= assertible, therefore believable) content at all'. In other words, what characterises a certain *doing* as an assertion is the way in which those doings are treated and used: as a type of action that plays this dual role. So instead of explaining the use of concepts in consideration to their content, Brandom is explaining the content in consideration to their use[427] —to their inferential properties.

This allows us to explain the analytical priority of intra-linguistic movements *vis-a-vis* language-entry and -exit transitions: regarding the capability of an assertion to represent, we are to explain it in consideration to our use of it—to its inferential role. The first step, then, is not to look at the 'picking-up' of an aspect of the world by an expression or its representational purport, but to look at what we *do* when we take a thing to be thus-and-so[428]: 'It is only insofar as something can be taken to be a representation that it can purport to be one' [429], it is only because we understand that something is a *representation* that such thing can represent. Here lies

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[426] Brandom (1994), 173.

[427] Bransen (2002), 375.

[428] Demoor (2011), 65.

[429] Brandom (1994), 73.

Brandom's pragmatism: instead of arguing that it is because an assertion represents something that we can properly use; he claims that the way we use it is what provides representational purport to the assertion—representational purport is explained in terms of inferential properties[430]. Semantics must answer to pragmatics, and in this way of doing it, Brandom can give an account of Putnam's semantics and go beyond it: for assertions with empirical content, their conditional normative significance include the verification of nonlinguistic factors—since the meaning of an assertion depends on its role in language, meaning includes and goes beyond inferential, intralinguistic movements[431]. So, Putnam is right in noticing that the properties of the extension of concepts serve to define their meanings[432], but ignores the properly linguistic inferential articulation of them—it 'looks at reference as *sufficient*[433] condition for explaining meaning'[434]. Nonlinguistic, empirical conditions that serve to constitute the conditions of appropriate use are integrated in the broad inferential articulation of propositional content.

The status of being a representation is grounded on our attitude of treating it as such. The basis of representation is then to be found on *intentionality*, 'a specific feature of propositional attitudes, namely their property of being representationally *directed* to an object or being *about* an object'[435]. The world itself—a state of affairs—can constitute a reason, but on its own it cannot be *in demand* of a reason, the duality is only achieved at the level of language: language-entry transitions include a 'world-part' of which we can only talk about once we put it into words and thus turn them into intra-linguistic moves; therefore, a language-entry transition that 'picks up' a fragment of the world only attains meaning if it can be connected with another expression by way of an intra-linguistic movement[436]. Expressions that

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[430] Demoor (2011), 65.

[431] Peregrin (2007), 269.

[432] He is right, that is, in remarking that the meaning of 'dogs' depend on the properties of actual dog—Peregrin (2007), 269).

[433] My emphasis.

[434] Klatt (2008), 31.

[435] Knell (2005), 75.

[436] Peregrin (2007), 269.

refer to the world, only express a *concept* if they can be used—by way of intra-language movements—in the game of giving and asking for reasons. Here we find the distinction between a purely responsive classification of something and a conceptual classification by way of which such classification plays a role in the practice of making claims and giving and asking for reasons[437]: 'A word does not express the concept of dog unless it can be used as part of sentences which can in turn be used for reasoning, i.e., from which other sentences can be inferred and which can be themselves inferred from other sentences'[438]. Only when the response gets caught in practical properties of inference and justification it becomes a conceptual matter: all concepts that have reporting uses must also have non-reporting ones[439]. And the priority of intra-linguistic movements is confirmed regarding -exit transitions, once actions (their world-end) are understood as just as 'performances for which it is appropriate to offer reasons': actions are not intelligible without a context that includes assertions. So, both *representation* and *action* depend on asserting, and 'the significance of assertional performances can be filled into a considerable extent before it is necessary to look at the role of assertions as reasons for anything other than more assertions'[440].

3.6. Subsentential terms

In Brandom's semantics, the meaning of subsentential terms is derivative, for it depends on the inferential articulation of sentences—it is based on the latter that the conceptual content of the expressions that occur in them can be explained[441]. Just as the meaning of an assertion is given by its net of inferences, the meaning of subsentential expressions is determined by the set of other words with which it can be substituted without changing the content of the assertion in which they are being

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[437] Brandom (1988), 260.

[438] Peregrin (2008), 1216.

[439] Brandom (1988), 260.

[440] Brandom (1994), 171.

[441] Brandom (1994), 364; (2001), p. 40.

used[442]. So once the inferential relations between assertions is defined, we can figure out what changes can be made at the level of subsentential expressions whilst preserving the correctness of the inferences in which they occur: two or more subsentential terms constitute their meaning reciprocally to the extent that one can be substituted for the other maintaining stable the inferential relations of the sentences that include them in their content, or, in other words, they 'share semantic content just in case substituting one for the other preserves the pragmatic potential of the sentences in which they occur'[443]. Thus, to explain the meaning of subsentential expressions, Brandom moves one step down from *inferential* relations among sentences, to *substitutive* relations regarding singular terms and predicates.

The possibility of performing these non-altering substitutions, and with it, connecting in a meaning-constitutive way subsentential expressions, depends on the correctness of 'substitution inferences', in which there is an inferential movement from a premise in which one term occurs, to a conclusion that corresponds to an identical claim as the first, except from the substitution of the term at issue for another one. The typical example is the inference from 'Benjamin Franklin invented bifocals' to 'The first postmaster general of the United States invented bifocals'[444]. This inference, in which what is substituted is a singular term, is a *symmetric* substitutional inference, being good in both directions; but when it comes to predicates things are different: from 'J runs' we can infer 'J moves', but not the other way around—some predicates are substitutionally weaker than others, conforming *asymmetric* substitutional inferences[445]. This allows to group singular terms 'into equivalent classes by the good substitution inferences in which they are materially involved, while predicates are grouped into reflexive, transitive, asymmetric structures or families': the circumstances that configure the conditional normative significance of 'J runs' form a proper subset of those of 'J moves'[446]—

[442] Klatt (2008), 136.

[443] Brandom (1994), 368.

[444] Brandom (1994), 370.

[445] Brandom (1994), 372; (2001), 134.

[446] Brandom (1994), 372.

singular terms, just as predicates, 'have an inferential role, represented by the set of terms intersubstitutable for them'[447].

These meaning-constitutive relations among subsentential expressions configure 'substitution-inferential commitments' that are made explicit by either identity claims, such as 'Benjamin Franklin is the first postmaster general of the United States', or by the use of quantified conditionals, such as 'everything that runs moves'[448]; so whoever endorses these substitution inferences undertakes commitment to the effect that the substituted terms stand in this type of inferential relation. Regarding asymmetric substitutional inferences, the commitment-preserving relation between 'J runs' and 'J moves', turns into a entitlement-preserving relation in the opposite direction: asserting that 'J moves' entitles but does not commit to assert 'J runs'; entitlement to the former is a necessary condition to be entitled to the latter, and, inversely, entitlement to the latter is a sufficient condition to be entitled to the former, so a lack of entitlement to claim 'J moves' entails a lack of entitlement to claim 'J runs'. These 'substitution-inferential commitments' are the type of commitment that I will claim the court undertakes when it declares the unconstitutionality of a law, a substitutional one between the contents of the law and the constitutional provision that the court takes to stand in a relation of incompatibility.

3.7. The problem of objectivity

Following David Lewis[449], Brandom understands that in the game of giving and asking for reasons each speaker is considered to have two deontic scores, one with the set of commitments and entitlements that he *acknowledges* or *undertakes* for himself and one with the set of commitments and entitlements that he *attributes* to other speakers, and '[f]or at any stage, what one is permitted or obliged to do

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[447] Brandom (1994), 620.

[448] Brandom (2001), 136.

[449] Lewis (1979), 339-59.

depends on the score, as do the consequences that doing has for the score'[450]. But even more, each scorekeeper can also distinguish within the score that he keeps for another interlocutor, what are the commitments that the interlocutor *acknowledges* and what subsequent commitments the other *actually has*, whether she acknowledges them or not. For example, if J tells K that she [J] had sexual intercourse with 'the boy that lives across the street', and K takes the boy to be only 14 years old and knows that J doesn't know his age, then K can distinguish in his score for J both the commitment J acknowledges—whose content would be that she had sex with the boy across the street —and also a commitment that J really has, but hasn't acknowledged—that she had sex with a 14 years old boy. And from there, K can continue mapping J's deontic status independently from what J acknowledges: since for K, but not for J, the latter is committed to have had sex with a minor, from the former's perspective J's actions had further consequences in her deontic statuses that she doesn't acknowledge—a big set of J's entitlements has precluded; entitlements that J will nevertheless keep in her own score.

In this scheme, the significance of a speech act consists in the way in which it modifies the deontic score, so grasping the meaning of an assertion is to be capable of mapping, according to the score, its conditional normative significance (circumstances of application) and its consequential normative significance (consequences of application); this is, to understand to what a speaker has to be entitled in order to be entitled to assert something (entitlement preserving inferential relations), to what else the speaker is committed by being committed to an assertion (commitment preserving inferential relations) and to what he is no longer entitled to be committed by committing to an assertion (incompatibility relations).

Each speaker has his own map of inferential relations for each assertion, and so the commitments and entitlements that work as premises and conclusions for an assertion do not need to be the same across agents: 'For to each, at each stage,

[450] Brandom (1994), 183.

different commitments and different entitlements are assigned. There may be large areas of overlap (…) But there will also be large areas of difference, if for no other reason than that everyone has noninferentially acquired commitments and entitlements corresponding to different observable situations (…) As a result, no two individuals have exactly the same beliefs or acknowledge exactly the same commitments'[451]. In other words, since the speakers have different collateral commitments, different consequences (entitlements and commitments) will follow for each speaker from the same assertion.

This perspectival nature of scorekeeping seems to entail a loss of objectivity in meaning, since each speaker will have different sets of commitments and entitlements inferentially related—and they are what defines the meaning of an assertion. For each speaker the score will be moved according to its own attitudes of treating himself and others as committed or entitled to certain moves, and therefore the propositional content of an assertion can only be specified from a perspective—a doxastic gap arises: 'the propositional content of a claim or commitment can be specified only from some point of view; that it would be differently specified in definite ways from other particular possible social perspectives'[452].

Despite this relativity, Brandom does not want to give up objectivity. After all, when we take part in the discursive practice and claim, after seeing a lighting, 'a thunder will be heard soon', we understand that we are actually entitled to such assertion whether others *take* us to be entitled to it or not; and if another speaker doesn't endorse the inference from 'it is raining now' to 'the streets will be wet', we understand that such movement is correct regardless of what she thinks. In the game of giving and asking reasons we assume from the get-go that we can *have* rights, that we can *be* entitled to something and not just *be taken* to be entitled. We presuppose a difference between our attitudes regarding our statuses and our actual statuses, so the challenge is to reconcile the objectivity of our deontic statuses with

[451] Brandom (1994), 185.

[452] Brandom (1994), 197.

the relativity of the deontic attitudes that lie on the base of the game. In line with this, Brandom is committed to the idea that some of the commitments undertaken by a speaker go beyond the commitments he *acknowledges*: 'These consequences are assumed to eventually transcend the doxastic horizon of the speaker'[453]. The speaker is not only committed to what he directly commits, to what he acknowledges, but, by virtue of their inferentially articulated contents, also to their consequences, to the claims whose contents are its committive inferential consequences. And the latter, consequential commitments may not be acknowledged by the speaker, but they are commitments nonetheless[454]. To be committed to something despite not acknowledging it, requires assuming that there is more than just individual attitudes and dispositions, it is necessary to assume a shared content that extends through different perspectives.

3.8. Subjective significance and objective content

To understand how objectivity is achieved, we must distinguish between the *subjective inferential significance* of an assertion and its *objective inferential content*. This difference coincides with the distinction between what a speaker *takes an assertion to mean*, and what the assertion *in fact means*.

The inferential significance of an assertion is the territory of deontic attitudes. It is therefore constituted by the inferential relations that the speaker *acknowledges*, and she acknowledges an inferential commitment from P to Q as far as she has the disposition to accept the inference from P to Q. The inferential content of an assertion, on the other hand, is the territory of normative statuses. It is, therefore, constituted by the inferential relations that the assertion actually has. It depends on its objective, valid inferential relations, whether they are acknowledged or not. While the inferential significance changes as we move from the doxastic perspective of one speaker to the other, since it is determined by the disposition of

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[453] Knell (2005), 74.

[454] Brandom (1994), 194.

the speaker to draw inferences (by her attitudes), the inferential content remains stable through different perspectives, depending on the conceptual norms shared in the linguistic community that specify which are the correct inferences[455].

The same is the case with subsentential terms: their inferential significance is given by the set of other subsentential terms which the speaker *takes it* to be intersubstitutable with—by the substitutional inferences he *takes to stand*. But its substitutional content is defined by the set of singular terms *it is correct* to substitute it with. With this, our problem regarding the relativity of social perspectives that characterises the meaning of assertions is mirrored at the subsentential level: if two speakers, J and K, endorse different substitutional inferences regarding the singular term 'Yuri Gagarin'—J accepts, but K doesn't, the intersubstitutability between such name and 'the greatest cosmonaut that ever lived'—then any assertion that employs 'Yuri Gagarin' will have a different meaning for each one: from the assertion 'Yuri Gagarin was Soviet', J will draw the inference 'the greatest cosmonaut that ever lived was Soviet', but K will not. And since the meaning of the assertion depends on its net of inferences, then communication seems impossible[456].

This distance between the inferential significance and the inferential content of assertions and subsentential terms, correlates with the difference we recognise, willy-nilly, between *being taken* to be entitled and *actually being* entitled to something, between deontic attitudes and deontic statuses. In order to communicate successfully, speakers need to navigate this distance, to cross the doxastic gap that arises from their different perspectives. This would be impossible if speaker and hearer take their discursive interactions to be irrational, if they didn't have the disposition to understand the words they use as instantiating the same assertion or subsentential expression. But that is not the case, they recognise themselves committed to a meaningful interaction; and so, an objective, communally shared

[455] Prien (2010), 436-7.

[456] Prien (2010), 442.

content—i.e. the existence of inferential content, and not just significance—is assumed as a presupposition of the practice itself. In other words, if different players map the same assertion with different inferences, then the very practice of mapping the expressions of others with our own inferences, can only make sense if we all assume that those expressions refer to the same world that we share. This assumption is implicit in the discursive practice[457].

Impossibility of communication would actually be entailed by the differences among speakers if only the players were not able 'to move back and forth between the point of view of the speaker and the audience'[458]. But we have linguistic expressions that allow us to do that, and with it, the discursive practice can be understood not as one in which there are different contents defined by different collateral and *acknowledge* commitments, but as one in which a shared content is specified from different perspectives:

> The difference in the inferential significance (…) should only be taken to mean that the content they both grasp (if all goes well in the communication of it) must be differently specified from different points of view. Conceptual contents are essentially expressively perspectival; they can be specified explicitly only from some point of view, against the background of some repertoire of discursive commitments, and how it is correct to specify them varies from one discursive point of view to another (…) Conceptual contents, paradigmatically propositional ones, can genuinely be shared, but their perspectival nature means that doing so is mastering the coordinated system of scorekeeping perspectives, not passing something nonperspectival from hand to hand (or mouth to mouth)[459].

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[457] Prien (2010), 450.

[458] Brandom (1994), 590.

[459] Brandom (1994), 590.

Having different scores is not an obstacle to communication, on the contrary, the possibility of navigating the doxastic gap—of 'mapping the repertoire of commitments of an interpreted interlocutor onto the repertoire of commitments of an interpreting interlocutor'[460]—lies on the base of communication. The key, then, is to understand how the linguistic expressions that allow such navigation work.

3.9. Recurrence

Communication is grounded on the disposition to communicate, and that entails the assumption that words in different mouths mean and refer to the same objects. This, despite different inferential significances, is not just an ungrounded or esoteric assumption. Inasmuch as both hearer and speaker were educated in the same community, they will have somewhat similar inferential and substitutive relations regarding the same terms, so although they will not use assertions and subsentential expressions in identical fashion, the differences shouldn't be large enough for the hearer to be unable of identifying, in his net of inferences, some that she can reasonable attribute to the speaker. The attributed collateral commitments will not be identical to the set of commitments acknowledged by the speaker[461], but that difference is what opens the door to a meaningful interaction, since the hearer can question the speaker about his inferences: using Brandom's example, suppose that the speaker claimed that 'J is a trustworthy man' and that the hearer takes J to be a 'pathological liar'—i.e. he endorses a substitutional inference between 'J' and 'a pathological liar'[462]. Being that the case, the hearer takes the speaker committed to the assertion 'a pathological liar is a trustworthy man'. But the hearer can do more than just *taking* the speaker to be committed to something, he can also assert it and tell his interlocutor that she is claiming something absurd. By doing this the prospect of navigating the doxastic gap—and thus making explicit the difference between their inferential commitments regarding one and the same subject—is

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[460] Brandom (1994), 485.

[461] Prien (2010), 443.

[462] Brandom (1994), 505.

open. In other words, the discrepancy between them pivots on both sharing a content, since the difference can be thematised as a discrepancy *about* one 'communally shared content, over and above the views of individual speakers as to what that content is'[463].

The obstacle they face lies on finding the adequate formulation of the attributed commitment: if the hearer claims 'the speaker claims *that* a pathological liar is a trustworthy man', then it is not clear who is endorsing the substitutional inference—it is not clear according to whose repertoire of inferences the content of the attributed commitment is being ascribed. But we have linguistic resources that allow us to distinguish between (1) the commitments that the ascriber attributes according to the collateral commitments undertaken by the speaker—in this case, that 'someone is a trustworthy man', (2) the commitments attributed to the speaker according to the collateral commitments undertaken by the ascriber—'that a pathological liar is a trustworthy man'—and (3) the commitments undertaken by the ascriber—an asymmetric substitutional inference between 'J' and 'a pathological liar'.

The possibility of achieving a meaningful interaction out of what until this point appears to be a structural misunderstanding, is mobilized by the notion of *recurrence commitments*. These are essential to explain the meaning of unrepeatable or token reflexive expressions—paradigmatically: pronouns—that occur in *anaphoric* chains. This move constitutes a second step 'down' from the level of *inference*: the first one descended from the latter to the notion of *substitution* in order to address meaning for subsentential expressions (singular terms and predicates) and introduced substitution-inferential commitments. This second step moves from subsentential expressions to unrepeatable tokenings, as 'the man' or 'it', using the notion of *anaphora* and introducing *recurrence commitments*—these devices will allow Brandom to address the meaning of unrepeatable tokenings ('the

[463] Prien (2010), 445.

use of a word or sing at a particular place and time'[464]) that instantiate repeatable expressions[465].

The paradigmatic case of *anaphora* is found in the use of a pronoun in an example as this:

> *Marxism* is taught every Monday; *it* is a difficult theory.

The meaning of the unrepeatable tokening is explained in consideration to the *anaphoric chain* that connects 'marxism' and 'it' in the previous example; chain that, linking tokenings of subsentential expressions, serves as a cross-reference mechanism that regulates a 'sort of inheritance of meaning': 'it', in the previous example, inherits its meaning from its anaphoric antecedent, 'marxism'—'it' refers to whatever 'marxism' refers, and means whatever 'marxism' means[466]. And since the meaning of 'marxism' corresponds to its role in 'substitution inferences', this role and the corresponding 'substitution inferential commitments' are inherited by 'it'. 'In other words, anaphora is construed as a special mechanism for the inheritance of substitution-inferential commitments'[467]— anaphoric commitments regulate how the meaning of the related tokenings is inherited.

By taking this step, we find that together with assertoric commitments between assertions, and substitutional commitments among subsentential expressions, *recurrence commitments* connect unrepeatable tokenings with their antecedents in anaphoric chains. These commitments 'determine which bits of discourse the scorekeeper ought to treat as belonging to the same anaphoric chain'[468], so they are *acknowledged* by a speaker by treating parts of a discourse as belonging to the same chain. Notice, of course, that co-typicality (being the same symbol or utterance) is

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[464] Prien (2010), 446.

[465] Regarding the need to go down to this level: Brandom (1994), 449.

[466] Loeffler (2005), 42.

[467] Brandom (1994), 283.

[468] Loeffler (2005), 43

therefore neither necessary nor sufficient for two tokenings to be part of the same anaphoric chain[469]: 'it' is a recurrence of 'marxism' in the previous example, but the same symbol 'it' (or different utterances of that same word) will not be instantiating the same expression when it is accompanied by a different pointing gesture.

This might be obvious, but in order to move forward, the crucial thing to advert is that speakers unproblematically agree on the anaphoric relations between linguistic performances, even though they disagree regarding the substitutional inferences of the terms employed: suppose that J and K both attend the same classes, and the former claims '*Marxism* is taught every Monday', there would be no confusion for them if K replies '*it* is a difficult theory'. In the terms that we are employing here, they would agree on the fact that 'it' is a recurrence of 'marxism', that it is governed by the same substitutive inferences. Here we can start identifying the basis for communication despite the doxastic gap: J and K will have different substitutional commitments for 'marxism', but they (and for that matter, everyone else who listens to their conversation) will agree on the anaphoric relations in their discourse, on the recurrence commitment between both tokenings, and on the fact that the meaning of 'it' is defined by the substitutional inferences in which 'marxism' stands, 'whatever they might be'[470]. In the same vein, even if one is a marxist and the other a neoliberal, J and K will take their tokenings of 'marxism' as recurrences of each other—the fact that they have different *subjective inferential significance* regarding 'marxism' will not prevent J from acknowledging a recurrence commitment between his utterance of marxism and K's, and viceversa. They will recognise tokenings from different mouths as being members of the same anaphoric chain. But if anaphoric chains regulate the way in which a tokening *inherits* meaning, if acknowledging a recurrence commitment is to take that the anaphoric subsequently inherits its substitutional role or meaning from the

[469] Brandom (1994), 450.

[470] Loeffler (2005), 46.

anaphoric antecedent[471], then the agreement regarding membership to anaphoric chains—i.e., agreement in recurrence commitments—entails an implicit agreement to the effect that tokenings uttered by different speakers have the same substitution inferential significance, and it entails this because endorsing a recurrence commitment 'implies sameness in meaning'[472].

Every participant understands that others accept recurrence commitments between tokenings, that K's 'it' in '*it* is a difficult theory' or '*marxism* is a difficult theory', stand in a recurrence commitment with J's '*Marxism* is taught every Monday'. This agreement in anaphoric chains entails that the participants implicitly agree that these tokenings, either co-typical or not, are governed by the same substitutional commitments. So in spite of doxastic gaps, 'interlocutors acknowledge recurrence commitments connecting tokenings of the hearer'[473]: I know that my net of inferences regarding 'marxism' is different from that of my friend, I know we will both make different inferences from assertions that employ such term—our deontic scores will not be altered in the same way. But I nevertheless take his tokenings as a recurrence of mine, and viceversa.

Despite the doxastic gap, the conversation will move forward in the background of an implicit agreement regarding the substitutional inferences of the speakers tokenings—it will advance non-problematically until the difference in collateral commitments regarding the same expressions become patent when one of the players makes an explicit substitution that is 'out of sync' with her interlocutor's acknowledged substitutional commitments regarding the shared anaphoric link. They will need to assess each other's acknowledged substitutional inferences 'in the light of the requirement of sameness in acknowledged substitutional commitment'[474] that is entailed by the agreement in anaphoric commitments. So anaphoric

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[471] Prien (2010), 446.

[472] Loeffler (2005), 46.

[473] Prien (2010), 447.

[474] Loeffler (2005), 46.

commitments link unrepeatable tokenings regulating the inheritance of substitutional inferences that govern the use of them[475]. Now it is necessary to explain how the linguistic practice allows to make explicit the different substitutional inferential commitments between speakers that, nevertheless, implicitly acknowledge a shared meaning.

3.10. *De re* ascriptions

Having set out the problem of communication, and the underlying assumptions on which it is possible, now it is time to address the linguistic device that allows speakers to map the different inferential repertories onto each other, whereby they make their differences explicit and thus successfully communicate. This is the task of *de re* ascriptions. An example can help explain how they work.

Some time ago I was talking to a friend about the role of property rights in Marx: exploitation, the extraction of surplus value—I was told—would be grounded on property rights over the means of production. But this central role of property rights didn't seem sound to me. Unlike my friend, most of what I knew of marxism came from a lecture concerning the preface of 'A Contribution to the Critique of Political Economy'. Because of our different backgrounds we had quite different understandings of the theory—what I took 'marxism' to stand for was almost completely defined by a certain reading of The Preface; while for my friend, such text was just one among many works that served him to constitute a more elaborated theory. This leads us to a disagreement.

As I understand it, the *materialism* of The Preface is incompatible with taking legal rights as the basis of material, production relations that bring about exploitation. I understood that according to a materialist approach those relations had to be defined by alethic modalities, and law could only operate defining deontic positions. As I

[475] Brandom (1994), 391.

see it, the compulsory force by means of which a material *impossibility* is related to the deontic status of *being forbidden* had to come from outside law. In other words, law (a superstructure), could not be what defined the relations of production (the structure); so the bourgeoisie is not the dominant class because they have property rights, but inversely, they have property rights because they are the dominant class; and they are the dominant class because they have *possession* (a material, not legal relation of control) over the means of production. Having that factual control, they would elevate their *possession* to the legal status of *property* that in turn serves as a legitimation device that serves as a vehicle for—but does not constitute—their power. Being in fact impossible for the workers to use the means of production without the consent of the bourgeoise, the latter has the upper hand in a material relation that allows them to validate such exploitation under legal institutions (private property over the means of production and waged labour) and thus use the deontic status of *forbidden* to conceal and legitimise the material impossibility that grounds it: it is because workers cannot use the forces of production that the bourgeoise can—by way of property rights—forbid them to do so.

My friend, with a different background, didn't agree with this understanding of Marxism. But mine wasn't a wild reading of The Preface—actually it was quite fair; after all, there Marx actually says that legal superstructures rise based on the structure constituted by material relations of production, that property relations are just 'the legal expression'[476] of existing relations of production—and the *expression* of something is not that something. Because of this, my friend actually agreed on my understanding of that short text. Whether we gave a fair reading of The Preface or not, our disagreement was not based on our understanding of it, but on the relation that each established between it and the theory in general. Given our different interactions with Marxist theory we actually did have quite contrasting inferential significances regarding 'Marxism'. But we were still communicating

[476] Marx (1904), 12.

about the same theory and the conversation seemed to us a perfectly rational activity. Even more, we were capable of finding the root of our discrepancy.

The way to make explicit the differences and thus navigating the doxastic gap can be explained in terms of the employment of *de re* ascriptions. When my friend said, 'Marxism takes property rights as the grounds of exploitation', I could have used *my* substitutive inference between 'Marxism' and 'The Preface' and make an ascription: 'you claim *that* "The Preface" takes property rights as the grounds of exploitation'. My friend, accepting my reading of such text, would have rejected such attribution. The problem of such form of ascription is that I'm employing my inferential repertoire to ascribe a commitment to the speaker by way of a formulation that does not allow us to distinguish which part of the attributed commitment is based on the acknowledged commitments of the speaker and which part depends on the acknowledged commitments of the hearer—we cannot distinguish between the commitment that is being attributed and the commitment that is being undertaken by attributing it. Here lies the basis of the problem: ascribing a commitment goes beyond *doing* something, for the agent is not just attributing a commitment (he is not just *treating* someone as committed to something), but also *claiming* it: 'Ascribing a doxastic commitment is explicitly attributing it'[477], so 'attributions are made explicit by ascriptions'[478]. And since it is a claim, and claims entail *undertaking* a commitment, the performance of ascribing a commitment plays a dual role: 'Ascription always involves attributing one doxastic commitment and, since ascriptions are themselves claims or judgments, undertaking another'[479]. In other words, the attribution of a commitment to an interlocutor entails self-acknowledging another doxastic commitment[480]. In the simplest terms: if I attribute to you a commitment to x, then I [the attributor] undertake a commitment to the effect that you are committed to x. On the one hand,

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[477] Brandom (1994), 503.

[478] Brandom (1994), 601.

[479] Brandom (1994), 505.

[480] Brandom (1994), 503.

a commitment is attributed, on the other, a commitment is undertaken. The hybrid nature of the deontic attitude of ascribing has to be unraveled.

To do this, we must first identify the location of the problem. The ascription of proposition attitudes is configured in three steps: first, we identify a *subject*; second, we specify the *performance* that is ascribed and then the *propositional* content of such performances is stated. The problem of the formulation 'you claim *that* "The Preface" takes property rights as the grounds of exploitation' lies on the third part, since both the identification of the subject (you) and the nature of the performance (claim) is accepted by the interlocutor. On that third part, my ascription constitutes a *de dicto* ascription, for the content ascribed is specified by all that follows after the expression *that* (in this case: 'The Preface takes property rights as the grounds of exploitation'). But stated like that what is attributed to the speaker is not acknowledge by him; and in order to communicate, I have to ascribe attitudes in a way that is coherent with the speaker's collateral commitments.

With a *de dicto* ascription, the ascriber is taking what was asserted by the speaker and then indexing *his* (but not necessarily the speaker's) collateral commitments to specify the attributed content in a way that does not make explicit who is taking responsibility for the substitutional inference—who endorses it: 'The substitutional commitments that govern the expressions used to specify the content of the commitment ascribed can similarly either be attributed to the one to whom the doxastic commitment is ascribed or be undertaken by the one ascribing it'[481], but the *de dicto* ascription impedes making this distinction: everything after the *that* is ascribed, but within such ascribed content a substitutional inference took place, and the ascription does not allow us to know whose inference that is, so it is impossible to make the distinction between the content of the commitment being attributed to the interlocutor and the commitment being undertaken by the attributor. To avoid

[481] Brandom (1994), 503

this confusion, the expressions occurring in the ascription must somehow specify both contents[482]. This is the task of *de re* ascriptions.

They operate, just as *de dicto* ascriptions do, in the third stage of ascribing—that of specifying the propositional content of the attributed commitment. While in *de dicto* ascriptions the content is specified in terms of what is *said*, *de re* ascriptions specifies what the commitment is *about*: they 'serve to specify what is represented by a belief rather than how it is represented' and thus 'any singular term that picks out the right object is all right; one specification is as good as another'[483]. It is only by isolating the object of which it is being talked about that interlocutors can map the different inferences that speaker and hearer make regarding such shared content. This is done by reformulating the ascription by way of including the preposition *of*, whose scope marks the substitutional commitment undertaken by the ascriber; and after it, the new formulation employs the preposition *that*, on whose scope the ascriber repeats the properties of the object originally asserted by the speaker—the expressions that occur in that last scope 'serve to specify how things are represented by the one to whom the belief is ascribed[484]. In Sebastian Knell terms: 'The producer of a *de re* ascription takes the singular term exported into the scope of the 'of' operator to be a legitimate *substitute* for *another* singular term—a term that, in connection with the predicate remaining within the scope of the 'that' operator, would form an assertional sentence through which the ascriber would be able to acknowledge the same commitment as the other person does according to the ascription'[485].

Now, if the speaker says 'Marxism takes property rights as the grounds of exploitation', and the hearer endorses an asymmetric substitutional commitment between 'Marxism' and 'The Preface', then we can go from *de dicto*:

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[482] Brandom (1994), 504.

[483] Brandom (1994), 502.

[484] Brandom (1994), 502-3.

[485] Knell (2005), 79.

> J claims *that* 'The Preface' takes property rights as the grounds of exploitation.

To *de re*:

> J claims *of* 'The Preface' *that* it takes property rights as the grounds of exploitation.

What the ascriber has done in this case was to take the singular term used by the speaker ('marxism'), replace it by a different term that the he [the ascriber] takes to stand in a substitutional-inferential relation with it ('The Preface') and then predicate of it the same property the speaker predicated of the original term. Now that we know whose substitutional inference is at work, we know who has to vindicate the corresponding substitutional commitment: the ascriber.

With this formulation the doxastic gap is crossed, for it allows unpacking the content of the ascription: first, that some theory takes property rights as the grounds of exploitation is part of the commitment *attributed* to the speaker; second, that such theory corresponds to 'The Preface', is the commitment *undertaken* by the ascriber; and third, the ascriber is explicitly endorsing a substitutional commitment between 'marxism' (the term employed by the speaker) and 'The Preface' (the term the ascriber indexes), commitment that does not need to be acknowledged by the speaker[486].

Thus, by using *de re* ascriptions we are capable of specifying and keeping track of the commitment attributed to the speaker from different points of view: from the

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[486] The example Brandom uses is the following: the defence attorney claims that 'the man who just testified is a trustworthy witness' to which the prosecutor replies in *de re:* 'the defines attorney claims *of* a pathological liar *that* he is a trustworthy witness'. In this case, 'that someone is a trustworthy witness is part of the commitment that is attributed by the ascriber; that that individual is in fact a pathological liar is part of the commitment that is undertaken by the
ascriber'. Brandom (1994), 505.

speaker's perspective, the content is that 'a theory takes property rights as the grounds of exploitation'—such content is specified in consideration to what the speaker acknowledges, so it corresponds to the speaker's deontic *attitudes*. But from the hearer's perspective things are more complicated, since on his score for the speaker he can distinguish between the commitments the speaker acknowledges and the commitments the speaker really has undertaken. While the first set is defined by the speaker's attitudes (by what the speaker *takes* himself to be committed to), the second depends on the speaker's deontic status. So, from the ascriber's point of view, the speaker has committed himself—whether he acknowledges it or not—with a commitment whose content is that '"The Preface" takes property rights as the grounds of exploitation'—he has undertaken such a commitment subsequentially, for it follows from the commitment the speaker explicitly acknowledges: '[t]he difference arises because one is committed to the inferential consequences of what one acknowledges, but one may nevertheless not acknowledge those consequences'[487]. In this way, the ascriber has undertaken a commitment to the effect that the speaker is committed to something (that '"The Preface" takes property rights as the grounds of exploitation'), but the ascriber is not committed with the speaker *acknowledging* such commitment: I may very well know that my friend does not acknowledge being committed to '"The Preface" takes property rights as the grounds of exploitation', but I have undertaken a commitment to the effect that my friend has undertaken such commitment.

De re ascriptions allow us to do something else: by specifying the commitment in that way, the ascriber is making explicit the reference to a shared content (which corresponds to what is referred by 'The Preface'), explicitation through which it is possible to distinguish between the objective/representational content of the commitment (the theory—marked by the scope of the preposition *of*) and the subjective attitude that the speaker has about it (that such theory takes property rights as the grounds of exploitation—marked by the scope of the preposition *that*).

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[487] Brandom (1994), 595.

De re ascriptions correspond to a form of speaking in which the assumption that we are talking *about* something has its grammatical origin, for they explicitly express a *directness* to a intersubjectively shared contents (in our case, a theory) that is marked by the operator 'of'[488]. The ascriber's substitution makes explicit that there is shared content that is referred by both his and the interlocutor's terms: they are substitutable for they refer to the same thing. This same model will be used in Section 4.1 to identify the responsibility entailed by the endorsement of a substitutional inference undertaken by the constitutional court in a declaration of unconstitutionality.

The disagreement can now be properly understood as a meaningful one: it is about whether such theory is 'The Preface', not about whether 'The Preface' takes property rights as the grounds of exploitation. We can now individuate a conceptual content that is 'objective in the sense of transcending the attitudes of the practitioners'[489], and we can do it because the interlocutors acknowledge recurrence commitments between the tokenings they employ.

Now that these distinctions have been notationally encoded and displayed[490], the game of giving and asking for reasons can be properly played, for the responsibility of vindicating the commitments has been clearly distributed: my friend has to defend that such theory takes property rights as the grounds of exploitation; I have to justify that such theory corresponds to 'The Preface', and thus give reasons to back my entitlement to my endorsed substitution.

3.11. Objectivity and perspectival content

Now, this assumption of an intersubjectively shared content, that is made grammatically explicit by means of *de re* ascriptions, doesn't preclude the

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[488] Knell (2005), 76.

[489] Bransen (2002), 386.

[490] Brandom (1994), 505.

perspectival nature of every specification of conceptual content. But the crucial thing to look at is the social practice that underlies these individual perspectives: the disagreement that arises from our different acknowledged commitments can only grow on the back of a previous agreement, so we must now identify what we are agreeing on. To do this the first step is to notice that we can understand ourselves as disagreeing because we keep track of both our commitments and those of others—each speaker carries two distinct scores, one for himself and one for every other interlocutor, and thus takes his inferences as correct and the inferences of others that do not match our own as incorrect: I took the inference from '"The Preface" takes property rights only as the *legal name* of a material underlying relation of factual power' to 'Marxism takes property rights only as the *legal name* of a material underlying relation of factual power' as a correct inference, as one that also precludes a right to assert that 'Marxism takes property rights as the grounds of exploitation'. Because of this, I took myself to be right and my friend to be wrong, he was only *taking* as correct an assertion that was objectively incorrect.

But the inverse was true from my friend's perspective. By making a *de re* ascription, I treat the ascription as 'specifying the objective representational content of the attributed commitment (as specifying the status in question, and what it is really about)'[491]—the author of the ascription takes the term used within the scope of the operator 'of' as the objective content of the speaker's commitment. In our example: I took 'The Preface' to be what was the objective content of my friend's commitment, the object regarding which my friend's claim could be true or false. What was specified in the scope of the preposition *that*, on the other hand, specified the subjective attitude of my friend about such previously identified object— 'that it takes property rights as the grounds of exploitation'. Therefore, I treated my *de re* ascription as expressing the objective deontic status of my friend: 'this is what you are *talking about*, and this is what you are claiming about it'. For the ascriber, then, what the speaker claims is just an expression of his deontic attitudes and of his

[491] Brandom (1994), 600.

acknowledged commitments; and it is the attribution what expresses the speaker's deontic status and his undertaken commitments. But from my interlocutor's point of view things are reversed: my *de re* ascription expresses simply my attitude, my version of my interlocutor's status—what was *attributed* (according to the speaker) was not the undertaken commitment and deontic status, but just what was *taken to be* the commitment and an expression of the ascriber's attitudes[492]. For the speaker, the *undertaken* commitments are not those *attributed*, but those *acknowledged;* for the ascriber, the *undertaken* commitments are not those *acknowledged*, but those *attributed*.

This allows us to make sense of the distance and relation between deontic attitudes and deontic statuses: the status of an interlocutor corresponds not to his immediate attitudes, but to those attitudes mediated by way of his consequential and not necessarily acknowledged commitments. Since a commitment can be undertaken not just by *acknowledging* it (which constitutes the *attribution* of the commitment to oneself), but also consequentially, as a consequence that follows in a materially correct inference from the acknowledged commitment, we can distinguish two deontic attitudes, the immediate ones and the *consequentially expanded deontic attitudes*. These last ones correspond to those attitudes that can be said that a speaker has as the result of a mediation by means of the collateral commitments of someone else. Thus, the *consequentially expanded deontic attitudes* constitute the deontic status of the speaker, and since the mediating function is performed by the attitudes of an interlocutor, then 'Brandom has given a version of normative objectivity that doesn't at any point treat deontic statuses as being ontologically independent of deontic attitudes. This is so, since deontic statuses *just* are mediated or consequential attitudes'[493]:

> The difference between objective normative status and subjective normative attitude is construed as a social-perspectival distinction between normative

[492] Brandom (1994), 601.

[493] Demoor (2011), 87.

> attitudes. In this way the maintenance, from every perspective, of a distinction between status and attitude is reconciled with the methodological phenomenalism that insists that all that really needs to be considered is attitudes—that the normative statuses in terms of which deontic score is kept are creatures instituted by the (immediate) normative attitudes whose adoption and alteration is the activity of scorekeeping[494].

So, the discursive practice entails a symmetry that implicitly constitutes the basis of our agreement, for an essential quality of the deontic score that each player keeps consists in the fact that it allows the scorekeeper to differentiate between assertions that are right and assertions that are only *taken* to be right, between the objective deontic status an interlocutor has and his subjective deontic attitude, between the commitments the interlocutor acknowledges and the commitments he really has undertaken. Each interlocutor maintains a distinction between the immediate normative attitudes of his interlocutors and their actual normative statuses. Since we all make this distinction, which in turn presupposes objectively correct inferences and objective deontic statuses, we share a common structure in which the discursive practice takes place.

The crucial point to be noted in order to avoid collapsing *being correc*t and mere *being taken to be correct*—what would make the attitudes of the ascriber the final word on how things really are, at least for him—, is that each player can apply the distinction to himself. So it must not just be the case that each scorekeeper distinguishes what others take to be correct and what is actually correct, but—more demandingly—what is required is the possibility to reflexively submit our own beliefs to the distinction: 'What Brandom needs to show is that it is possible for someone to recognise from their own perspective that there is a possible difference between what in fact is the case and what they take to be the case[495]. To be in position to recognise such distinction the speaker must exhibit the capability of

[494] Brandom (1994), 597.

[495] Demoor (2011), 88.

taking up the perspective of someone else who is keeping score on his discursive attitudes 'while simultaneously maintaining their own'[496], capability whereby the possibility of a new perspective is open—i.e. the possibility of 'taking up hypothetically a sort of third-person scorekeeping attitude toward my own present commitments and entitlements (much as I must do for my past commitments and entitlements in any case)'[497]. Each speaker that uses his perspective to distinguish between the commitments others *acknowledge* and those that they have actually *undertaken* is aware that his own perspective constitutes the object to which the distinction is applied to *from the perspective of his interlocutor*. Thus, to take this third-person perspective is to attribute commitments to an interlocutor consisting in his attribution to me of some commitments: I take him to be entitled to be committed to attribute me a commitment. This third-person perspective will become crucial, in Section 5.3, in order to explain secured universal propositions that can be employed by the constitutional judge.

To avoid collapsing *being correc*t and *being taken to be correct* is easier than it might seem or sound, for to deactivate the threat it is enough to show that we accept neither the 'No first-person ignorance condition'—i.e. that 'whatever is the case, I claim/believe it'— nor the 'No first-person error condition'—i.e. that 'whatever I claim/believe, is the case'. The rejection of those conditions is done precisely by assuming the position of an interlocutor who, from his perspective, judges my commitments. And this *re-creation* of a third-person's perspective within the first-person's perspective allows us to acknowledge a semantic difference between 'this is the case' and 'I claim that this is the case', the recognition of which is possible by means of tracking the inferences that this third party would make with those propositional contents: if the content of 'I claim that this is the case' and 'this is the case' where the same, then the assertions that would be incompatible with one would be incompatible with the other, but—and this is the crucial point—not just for me, but also for my interlocutor.

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[496] Demoor (2011), 93.

[497] Brandom (1994), 605.

In other words, I cannot take myself to be entitled to these two claims:

> I claim that the way in which 'Preface' understands property rights is the way in which is Marxism understands property rights,

and:

> The way in which 'Preface' understands property rights is *not* the way in which is Marxism understands property rights.

On my deontic score for *myself* those claims are in a relation of incompatibility. But that doesn't show that I take 'this is the case' and 'I claim that this is the case' to be semantically equivalent. That would be the case only if I took them to be incompatible also on my deontic score for *someone else*. But my hypothetical interlocutor can be entitled to them—that is, on my deontic score of *his* entitlements I can take him to be entitled to both. So, while if I were to attribute to myself both claims I would be attributing me incompatible claims, that is not the case when I attribute those claims to a third party.

I can take S to be entitled to a commitment with the following content:

> S claims that I claim that the way in which 'Preface' understands property rights is the way in which is Marxism understands property rights, and S claims that the way in which 'Preface' understands property rights is *not* the way in which is Marxism understands property rights.

On my score for S, they are not incompatible, for 'one involves what commitments S *attributes* to me, and the other involves what commitments S *undertakes*, and

these do not collide'[498]. So 'P is the case' and 'I claim that P is the case' have different semantic content because they entail different changes in the deontic score that I carry for my interlocutor. And if I acknowledge that they are not semantically equivalent, then I am not committed to 'if P is the case, then I claim that P is the case' - i.e. the no first-person ignorance condition.

And the same considerations take down the no first-person error condition: the antecedent of this condition would be 'I claim that snow is white' so its consequence would be 'snow is white'. Any claim incompatible with 'snow is white'—'snow is colourless' —is incompatible with the consequence, but not with the antecedent—there is no incompatibility between 'the snow is colourless' and 'I claim that the snow is white'[499].

3.12. No privileged point of view

All this offers us, as a corollary, an *I-thou* construal of intersubjectivity, one in which objectivity is built in the discursive practice, in the distinction that each interlocutor makes between *attributed* and *undertaken* commitments[500]. Objectivity is thus 'a reflection of the perspectival distinction between undertaking and attributing inferentially articulated commitments'[501]. This entails the assumption of a notion of '*objective correctness* of claiming and concept application that is *not* perspective-relative'[502]. But it also entails rejecting the possibility of a *privileged* perspective[503], so '[i]t makes no sense to specify or express a propositional or other conceptual content except from some point of view—which is subjective, not in a Cartesian sense, but in the practical sense that it is the point of view of some scorekeeping subject'.

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[498] Brandom (1994), 605.

[499] Brandom (1994), 606; (2001), 203.

[500] Brandom (1994), 599.

[501] Brandom (1994), 601.

[502] Brandom (1994), 594-5.

[503] Brandom (1994), 599.

4. The case of JRL

To take Brandom's approach to our present study is to translate the constitutional court's position into that of a speaker that has to make an assertion which, including the terms employed by the legal rule whose constitutionality is being discussed, follows as a consequence from the propositional content of the constitutional rules that serve to define the conditions for the distribution of the distinction between constitutionality and unconstitutionality. Regarding such hypothetical assertion or movement, the entitlement of the court to assert it must be scrutinised and, since entitlements have to be vindicated, the justification of the assertion reclaims front stage.

To carry this analysis forward I will proceed in two steps: first, my aim is to map the commitments the court *undertakes* by declaring the unconstitutionality, not necessarily the ones the court acknowledges. My goal is not to reconstruct the explicit reasoning that the court would put forward, but to give an account of the substitutional inferences to which the court would be subsequentially committed if it were to declare the unconstitutionality. I will be putting aside for the moment the possible ways in which those endorsements could be justified on the court's ruling.

Following the analysis done in Ch. 2, I will claim that if a court declares unconstitutional a piece of legislation, in consideration to some constitutional provision, then the court is committed to take both rules to be *incompatible*. Such incompatibility commits the court to the substitutional inference on which such declaration of unconstitutionality hinges: what I will argue is that, regardless of how the court grounds its decision, if it declares that a legal provision according to which 'unions can block the companies building sites' is unconstitutional *vis-à-vis* a right to 'provide services', the court is committed to take such right as serving as a premise to a right to 'not have building sites blocked by unions'; and such inference will commit the court to an asymmetrical substitutional inference between the terms employed by the law and the terms employed by the constitution or the Treaty.

On the following part I will analyse the possible ways in which the court can be entitled to those undertaken commitments.

4.1. The undertaken commitments in the declaration of unconstitutionality

I have argued that the unconstitutionality of a law depends on it being in a particular relation with the constitution, one that corresponds to what was identified in Chapter II as a normative *contradiction* (as opposed to what was identified as a normative *conflict*). The easiest way to make sense of a contradiction between constitutional and legal rules is resorting to the relation of incompatibility that was analysed as one of the three possible relations of inferential articulation among assertions: two rules are to be understood standing in a relation of incompatibility if a commitment to the propositional content of one precludes an entitlement to a commitment with the propositional content of the other. The most obvious case in which this preclusion can be grasped is that of two rules that share the same content, but each assigns to it incompatible deontic statuses. Allow me to start with some brief and trivial remarks: since a permission is the negation of a prohibition, then a permissive rule is incompatible with a forbidding rule if they have a common content; and the same is true, *mutatis mutandis*, between liberating and requiring rules, and forbidding and requiring rules—in a system of rules, the same *type* of action cannot be simultaneously permitted and forbidden, liberated and required nor forbidden and required. Therefore, a legal rule that requires performing P is incompatible with a constitutional rule that liberates from performing P: being committed to 'P is required' precludes an entitlement to 'P is liberated'. Thus understood, the property of a legal rule of being in contradiction to the constitution —its unconstitutionality—corresponds to a secondary property of such rule whose obtention depends on the verification of the primary property of being incompatible with one or more constitutional rules.

This is a simple starting point, but useful enough to move forward. Let's return to *Laval* to see how this serves to explain a possible reasoning and thus identify the undertaken commitments of a court. In *Laval* what was being analysed by the ECJ was the relation between the industrial action of a union that, in the context of a negotiation process with the company, blocked Laval's building sites. Laval claimed that such action infringed their right of freedom to provide services. Since that case was about a concrete industrial action, it corresponded to an instance of JRA. We could apply Brandom's model to it, but the commitments undertaken by the court could be vindicated by a justification that rested on an application discourse. This is to say that *Laval* is a case that can, in principle, receive a properly judicial answer, it just received a catastrophic one. To use it in order to assess a court's position in a JRL case, we need to change it in order to state a pertinent example. Suppose that instead of a particular action of blocking building sites, a member state enacted a law that allows unions to block the building sites of their employers. Suppose that one of the possibly affected firms claims that such law is to be struck down in consideration to the Treaty's right of freedom to provide services, and that—similarly as with *Laval*—either the ECJ or a national constitutional court ruled on their favour. How could we use Brandom's work to reconstruct the court's reasoning and map its undertaken commitments?

In our *Laval*-based example, there is no flagrant incompatibility, for both the legal rule and the treaty's right do not seem to share the same content: the first allows 'unions to block building sites' and the second refers to 'freedom to provide services'—these are not the same expressions, their substitutional inferences are different, and thus it seems that no incompatibility is possible. But, as I will argue in this section, if the court declares the unconstitutionality, it will subsequentially be undertaking a commitment to the effect that both terms stand in a asymmetric substitutional inference relation—it will undertake, as consequence of declaring the unconstitutionality, a substitutional commitment between those terms. The possible entitlement of the court to such commitment is going to be the object of the

following section—for now, what interests me here is to identify the court's commitments, not if it is entitled to them.

To identify the *undertaken* commitments, we must keep an eye on the double role of assertions: the declaration of unconstitutionality is the conclusion to which the court arrives, its propositional content configures the content of a commitment the court *acknowledges* (*attributes* to itself) and thus *undertakes*. Such commitment has consequences: if unconstitutionality corresponds to a relation of incompatibility, then by asserting the unconstitutionality the court commits itself to take the content of the Treaty's right to be incompatible with the content of the legal permission. This is a commitment the court *undertakes* consequentially—it follows from what the court has committed itself to (the unconstitutionality), mediated by collateral commitments the court doesn't necessarily have to acknowledge (the incompatibility).

This consequentially undertaken commitment, in turn, commits the court to something else, for if the court is committed to an incompatibility relation between the employers' right to 'freedom to provide services' and the union's permission to 'block building sites', then the court is either committed to infer, from the Treaty's explicitly stated right, a right whose content includes the content of the legal permission or, from the legal permission, a permission to hinder what the bearer has the right to do (or a combination of both). Here we need to explore only the first alternative, for the other can be reconstructed by inverting the terms—what matters is the substitutional commitment that is undertaken as a consequence of declaring the unconstitutionality, regardless of the specific route by which we arrive to it. Adopting this first alternative means that, by committing to an incompatibility relation between the legal permission and the Treaty's right, the court is committing itself to endorse an inference from the employer's explicitly stated right of 'freedom to provide services' to a right 'not to have their building sites blocked by

unions' (so we move from a *Von Wrightian* to a *Hohfeldian* right[504])—the court is therefore endorsing a commitment-preserving relation between both rights. And it has to endorse this inference and the commitment-preserving relation, because by committing to the incompatibility between right and permission, the court is committed to infer, from what is explicitly stated, implicit incompatible contents. This means that the court starts by taking the explicitly stated right of freedom to provide services as a claim that is put forward by the Treaty (an authorised speaker) for others to use. This corresponds to the *inter*personal use of a claim that was studied in Section 3.3: once the original claim is made, the judge (but also anyone else) can use it as a premise for his own inferences[505]—since the Treaty's assertion *authorises* subsequent ones*,* the judge can rest on the treaty's authority to take the original right and make further moves with it.

In this case, by way of an intralinguistic movement that starts with the original right, the court moves to a right 'not to have their building sites blocked by unions'; but when it does this, the court resorts to its own repertoire of substitutional

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[504] The first right is stated in Von Wright's terms, while the second formulation corresponds to Hohfeld's: for the latter, the strict correlative relation between right and duty—Hohfeld (1917)—entails that a 'claim-right can never be to do or omit something: it always is a claim that somebody else do or omit something' (Finnis (1972), 380), and this entails, in turn, that rights are to be specified expressively referring to the action whose performance or omission constitutes the content of the correlative duty: since there is only a duty not to gag me, my right is properly stated as *a right not to be gaged*, but not as a right to freedom of speech or to speak freely (Williams (1956), 1144-5). This has the undesirable consequence of entailing that our usual way of stating rights turns to be inadequate: instead of a 'right of way', we only have a 'right not to be prevent from passing'; and, in general, we wouldn't have rights to do things. Von Wright's understanding of rights allow us to conserve the correlation between rights and duties without preventing us from stating rights as *rights-to-do-something,* and this is done by breaking the identity between the right's and the duty's contents: a right arises by the combination of a permission with 'a prohibition to *hinder* or *prevent* the holder of the permission from doing the permitted thing'—Von Wright (1963), Ch. V. Here, the right entails a permission to its bearer to perform the action that constitutes the content of the right, so a right to pass entails that the bearer is permitted to pass, and the correlative duty is stated by the inclusion of the verb 'prevent' in its content, resulting in a prohibition to prevent passing. If the content of the right refers to an omission by the bearer, as it would be the case in the right not to speak, then it entails a liberation from performing the action, and the correlative duty is stated including the verb 'compel', resulting in a prohibition to compel speaking. So when Finnis, defending Hohfeld's terms, rhetorically asks, 'what could (logically) be the content of B's correlative duty if A had [per impossible] a claim-right to do (or omit) something?', the answer that Von Wright makes available is found in a duty not to impede or compel: rights enable their bearers to perform or omit something, and the correlative duties hinder others from hindering such enablement. Von Wright's model, as it should be obvious by now, has the inverse problem of Hohfeld's: it cannot appropriately express rights that refers to other's actions or omissions—it would be difficult to state the correlative duty of a right 'not to have building sites blocked by unions'. Since Von Wright's rights are a combination of a permission (absence of prohibition) or a liberation (absence of requirement) with a correlative prohibition, and they can be translated to Hohfeld's categories of privilege and duty, it shouldn't be problematic to endorse a dual understanding of rights.

[505] Brandom (1994), 170.

inferences and uses one of them to index it into the original right asserted in the Treaty: the court thus endorses an asymmetric substitutional inference between 'freedom to provide services' and 'not having its building sites blocked by unions' *as a consequence* of endorsing a commitment-preserving relation between a 'right of freedom to provide services' and a 'right not to have its building sites blocked by unions'; and it endorses the latter *as a consequence* of endorsing an incompatibility relation between the law and the Treaty's right.

Now, this is not to say that the court just *jumped* from one commitment or right to the other, it might even not recognise nor explicitly mention the second one. But what matters now is to identify the commitments the court necessarily undertakes when declaring an unconstitutionality. In other words, how the court can justify such commitment—what other premises it would put forward—is not to be tackled here. What matters now is to identify the court's undertaken commitments, not its entitlements; we want to clarify the substitutional inferences that are endorsed by claiming an incompatibility between a right and a permission, regardless of the correction of those inferences. And since it might not be clear at first sight that the court, by committing itself to the incompatibility relation, is implicitly endorsing a substitutional inference between 'freedom to provide services' and 'not to have their building sites blocked by unions', some simple examples can be useful: suppose a set of two rules, one that grants foreign companies a right to buy national mackerel from the state, and one liberates the state from selling fish to anyone. If the court *undertakes* a commitment to the effect that they are incompatible, then the court would be inferring a 'liberation from selling mackerels' from the 'liberation from selling fish', and therefore it would be (correctly) undertaking a commitment to an asymmetric substitutional inference between 'mackerel' and 'fish'. Notice that the same commitment would be undertaken if the court were to take a rule that liberates the state from selling dolphins to be incompatible with a right to buy fish from the state. These are trivially not incompatible rules, but if a court were to *undertake* a commitment to the effect that they are in fact incompatible, then such

court would be (wrongly) undertaking a commitment to an asymmetric substitutional inference between 'fish' and 'dolphins'—such court would be committed to infer the right that would actually be incompatible with a liberation from selling dolphins, i.e., a 'right to buy dolphins from the state': such right entails that the state is required to sell dolphins, requirement that is incompatible with the state being liberated from selling them. It doesn't matter if the court's inferences are good or bad, the underlying substitutional inferences are consequentially endorsed.

If we move away from deontic statements, the substitutional inference is even clearer: suppose that a speaker asserts that 'J is a dolphin' and another one claims that 'J is a fish'. If a third player takes both claims to be incompatible, it is because she takes that 'J is a dolphin' stands in a commitment-preserving relation with 'J is not a fish', assertion that is obviously incompatible with 'J is a fish'; and by doing this, the third player will be endorsing a substitutional inference between 'dolphin' and 'not a fish'. This substitutional inference is correct: 'p *incompatibility-entails* q just in case everything incompatible with q is incompatible with p'[506], and in this example 'dolphin' actually entails 'not a fish' since everything incompatible with 'not a fish' is incompatible with 'dolphin'. But notice that the correction of this inference is irrelevant to the identification of the undertaken substitutional commitments: the same pattern would be replicated if someone takes 'J is a dolphin' to be incompatible with 'J is not a fish': who is committed to the incompatibility would be wrong, but he would nevertheless be endorsing a substitutional inferential relation between 'dolphin' and 'fish'. The substitutional inferences between the contents are endorsed independently of the correction of the alleged relation of incompatibility—independently, that is, of the court's entitlement.

In our *Laval*-based case, if from the right of freedom to provide services, a right not to have building sites blocked by unions *is not* inferred, then the permission to

[506] Brandom (2008), 121.

unions to block building sites is not incompatible with the employer's right of freedom to provide services. On the contrary, if a right to not have building sites blocked by unions *is* inferred from the right of freedom to provide services, then the inferred right stands in a committive-preserving relation with its correlative duty, i.e. a 'prohibition to unions to block the employer's building sites'. Now there is shared content between the legal prohibition and the inferred Treaty's right, so with this prohibition at hand the Court endorses an incompatibility relation between the Treaty's right and the legal permission: it cannot both be permitted and forbidden 'to unions to block the employer's building sites'. Throughout these intra-linguistic moves, the court has arrived to its minor premise in the legal syllogism: 'a law that allows unions to block the employer's building sites is incompatible with the Treaty's right of freedom to provide services', which taken together with the major premise that I've been using since Chapter 2—'laws that are incompatible with the Treaty's right to provide services are void'—, commits the court with the following conclusion: 'the law that allows unions to block the employer's building sites is void'.

So, on the basis of the court's declaration of unconstitutionality we find a substitutional commitment between the content of the law and the Treaty's right. As it was shown in Section 3.10, since the court is committed to a substitution inference, we can employ a *de re* ascription to track the undertaken, acknowledged and attributed commitments involved on the court's reasoning and thus identify the responsibility that weighs on the court in all of this—we can take the Treaty as the speaker and the court as the hearer/ascriber: the speaker claims 'freedom to provide services is a communitarian right'. To this, the hearer replies, in *de dicto*, 'the speaker claims *that* not having its building sites blocked by unions is a communitarian right'. We can see that there has been a change, for the speaker in his assertion never used the expression 'not having its building sites blocked by unions', but it is not clear whose substitutional inferences are being used to specify the content of the attributed commitment. *De re* ascription solves this:

> The speaker claims *of* not having its building sites blocked by unions *that* it is a communitarian right.

This is an ascription which the court has committed to, even if it doesn't acknowledge it: the court has to be committed to an inference *from* 'the right of freedom to provide services is a communitarian right' *to* 'not having its building sites blocked by unions is a communitarian right': otherwise the court cannot be committed to an incompatibility between the legal permission to block building sites and the right of freedom to provide services; and it has to be committed to such incompatibility since otherwise it cannot be committed to the voidness of the law at issue *vis-à-vis* to the Treaty's right of freedom to provide services

Now, with the *de re* ascription formulated, we can properly distribute the task-responsibility of vindicating the assertions by means of distinguishing between the scope of the preposition *of* and the scope of the preposition *that*: first we have the content of the commitment that the court has *attributed* to the Treaty, commitment that from the court's own inferential repertoire is specified as 'not having its building sites blocked by unions is a communitarian right'. The court claims that the Treaty has *undertaken* such commitment subsequentially, for it follows from the commitment it explicitly *acknowledges*—that 'freedom to provide services is a communitarian right'—taken together as a premise together with the court's own substitutional inferential commitments.

But that is not all: since the court is *ascribing* a commitment to the Treaty, and by way of ascriptions commitments are both *attributed* and *undertaken*, the ascription entails the undertaking of a commitment on the court's side. By replicating the distribution of commitments that was analysed in Section 3.10, regarding the *de re* ascription 'J claims *of* "The Preface" *that*...'[507], we can assign responsibilities in the

[507] Which was based on Brandom's ascription: 'the defence attorney claims *of* a pathological liar *that* he is a trustworthy witness'. In this case, 'that someone is a trustworthy witness' is part of the commitment that is attributed by the ascriber; that 'that individual is in fact a pathological liar' is part of the commitment that is undertaken by the ascriber'.

following way: that ‘something is a communitarian right’ is part of the commitment that is attributed by the court; that ‘that something is in fact “not having its building sites blocked by unions”’ is part of the commitment that is undertaken by the court —the possible entitlement to it will be analysed in the next section.

All this can be succinctly expressed in the following terms: the acknowledgement of the unconstitutionality commits the court to an incompatibility relation between the Treaty’s right and the legal permission; incompatibility that, in turn, commits the court to infer from the Treaty’s right a right whose content is incompatible with the legal permission, and thus endorses an asymmetric substitutional inference between the terms employed by the right and the terms employed by the law. If all this follows from the declaration of unconstitutionality, then such declaration is a *sufficient condition* for undertaking all these commitments; and inversely, the undertaking of all these commitments is a *necessary condition* of the declaration. This means that the commitments we are identifying by mapping the court’s consequential commitments that follow from its declaration of unconstitutionality, serve as premises the entitlement to which entitles the court to declare the unconstitutionality: a commitment to the incompatibility entails a commitment to the substitutional inference; but, it is an entitlement to such substitutional inference what entitles the court to be committed to the incompatibility[508].

In other words, what has been identified is the content of the commitment whose entitlement the court must vindicate— ‘not having their building sites blocked by unions is a communitarian right’. I have argued that the court must take such content to be entailed or inferred by the Treaty’s explicit rule in which it is grounding the unconstitutionality: if the judge claims that a certain piece of legislation is unconstitutional in consideration to a constitutional provision, it is by such claim committed to the effect that they [the constitutional provision and the

[508] Moving downwards an antecedent leads to a consequence by way of commitments—‘asserting the antecedent commits us to asserting the consequence’; and moving upwards, a consequence leads to an antecedent by way of entitlements—‘asserting the antecedent entitles us to asserting the consequent’— Bransen (2002), 385.

legal rule] stand in a relation of incompatibility, for if it took them to be compatible, then in what possible sense it can claim that the legal rule is unconstitutional *vis-à-vis* that one constitutional rule? What would *unconstitutionality* even mean if an unconstitutional law is understood as being compatible with the constitutional rules in which the unconstitutionality is supposedly grounded? So if the court asserts that a rule according to which 'is permitted to unions to block the building sites' is unconstitutional when contrasted to a certain constitutional provision, then it has undertaken the commitment that either the explicit content of such constitutional rule is incompatible with the law at issue, or that such explicitly formulated content entails a propositional content that is incompatible with the law that it takes to be unconstitutional.

Since—as we saw in Section 3.3—*undertaking* a commitment is explained in terms of doing something 'that makes it appropriate to attribute the commitment to that individual'[509], the court has *undertaken* such commitment precisely by declaring the unconstitutionality, it undertakes the commitment with the previously specified content (that what the Treaty establish as a communitarian right is in fact 'not having its building sites blocked by unions') regardless of how the court arrives to the decision of unconstitutionality, regardless of the way in which it explicitly justifies it.

Once the judge's commitment has been specified—once the assertion in which the decision in favour of the unconstitutionality pivots has been identified —, the task is to scrutinise the court's entitlement to such assertion. Only by being entitled to such assertion, others that follow from it are authorised, most notably the declaration of unconstitutionality itself. The *authorisation* for subsequent assertions hinges on the *responsibility* to vindicate the entitlement for the antecedent assertions. And the

[509] Brandom (1994), 162.

problem that we face is that such vindication cannot consist in a *justification*, on pain of the court's decision constituting an instance of legislation[510].

4.2. The problem of vindication

Having mapped the undertaken commitments by the court, what comes next is identifying the conditions in which an entitlement to them hinges. If the court is not entitled to its undertaken commitments, then it is not entitled to declare the unconstitutionality. What we'll be analysing are the limits of JRL, and for this, the notions of inferences, entitlements and commitments (that we took from the discursive practice) have to be interlocked with those of justification and application discourses (that we took from our theories of legislation and adjudication). The aim is to identify the margins within which a declaration of unconstitutionality can be adopted employing *judicial* resources that would prevent the decision from constituting an instance of *legislation*.

We have seen that the declaration of unconstitutionality rests on the asymmetrical substitutional inference between the terms of the Treaty and those employed by the law, substitution that can be made explicit in the assertion 'not having their building sites blocked by unions is a communitarian right', or, as we saw in Section 3.6, by a quantified conditional: 'every employer who has right of freedom to provide services has a right not to have building sites blocked by unions'. Since such formulation is nowhere to be found in the Treaty, by declaring the unconstitutionality the court implicitly or explicitly inferred it from the explicitly established right: it took it as a conclusion that follows from a substitutional

[510]The same structure of analysis is applicable and adequately explanatory of other kinds of relations between legal rules and constitutional provisions. If we move away from of regulative rules, and address a constitutional-constitutive ones as 'whoever gets more votes is the president' and a piece of legislation that asserts that 'whoever is appointed by congress is the president', then, if the court were to declare the unconstitutionality of the latter, it would still make an inference from the assertion contained in the constitutional provision to 'whoever is appointed by congress is not the president'—it would have undertaken a commitment to the effect that the explicit constitutional rule stands in a commitment-preserving relation with the inferred one, commitment that can be aptly identified by a *de re* ascription: 'the constitution claims *of* whoever is appointed by congress *that* he is not the president'. In this case, by the inclusion of not inside the scope of 'that', the ascriber is ascribing to the speaker the negation of the property that the latter originally predicated of the substitut*ed* term.

inference that has the Treaty's acknowledged right as a premise. By the dual pragmatic nature of assertions, this inferred right then serves as a premise from which the court arrives to her minor premise in the legal syllogism: the law is incompatible with the right of freedom to provide services. This latter assertion, taken together with the collateral commitment 'laws that are incompatible with the right of freedom to provide services are void' leads to the conclusion that asserts the voidness of the original legislated rule.

This allows us to present the court's reasoning according to the following syllogism:

> (1) laws that are incompatible with the right of freedom to provide services are void,
>
> (2) permitting unions to block building sites is incompatible with the right of freedom to provide services.
>
> (3) the law that permits unions to block building sites is void.

While the entitlement to (1) can be vindicated discharging responsibility in the Treaty's authority, entitlement to (2) ultimately hinges on the entitlement to assert 'not having their building sites blocked by unions is a communitarian right'.

Now we can connect the judge's position with the problem to which we arrived after the previous chapters: the judge is not entitled to propositions or premises regarding which the vindication of the entitlement to them requires to engage in a justification discourse—if a vindication for the assertion 'not having their building sites blocked by unions is a communitarian right' is appropriately required, and the only way to satisfy the undertaken task-responsibility is by providing a justification discourse, then the judge's minor premise 'permitting unions to block building sites

is incompatible with the right of freedom to provide services' is one that demands a justification discourse—i.e. one to which it is committed, but not entitled to[511].

This means that the very nature of *jurisdiction*, and its relation with *legislation*, defines the scope of premises that are available for the judge: the entitlement for an assertion like the one the judge inferred can be vindicated, in the ordinary discursive practice, by putting forward any other claim or set of claims that stand as a premise for it; but—as it was argued on the previous chapters—that is not the case when it comes to the particular *language game* of law and legal reasoning: a claim like 'there is a right to not have building sites blocked by unions', if it is going to play a role in the definition of legal statuses in general, and in the adjudication process in particular, is one that demands a particular justification—a *justification discourse*: this is the only response available that justifies such proposition as one that is to define the outcome of a judicial decision. And precisely for that, precisely because the justification of those premises—by means of a justification discourse—is *presupposed* at the judicial moment, such form of vindication is not one available for the judge: she is playing with discursively justified propositions, and thus is not entitled to propositions that are in demand of a justification discourse. Thus, the set of available assertions for the judge to employ is not only defined by the competence rules that serve to configure its institutional position (i.e., the rules that define what can the judge say in a courtroom and when, the ones that establish the conditions under which an attribution of culpability or the expiration of term are appropriately assert, etc.), but also by the implicit structure of adjudication itself: it is this structure what prevents her from using universal propositions that not being justified stand in demand of a justification.

The very idea of jurisdiction and the constrainments that constitute it are expressed through a curtailment of discursive possibilities, as unavailable premises. While the

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[511] While the Court would be consequentially committed to 'not having their building sites blocked by unions is a communitarian right' as a consequence of being committed to the incompatibility relation, it's entitlement would depend on the possibility of vindicating such claim by means of a justification or a discharge—Section 3.4.

infringement of competence rules entails the possibility of depriving a judicial decision from its ordinary effects, the infringement of these intrinsic rules of adjudication prevents the decision from being a properly judicial one. This allows us to characterise the role of the judge in the legal discourse in consideration to the set of propositions that are available for her and thus define its horizon of possible moves within the legal game. And the claims paradigmatically available to her are those whose justification lies on *application discourses*. But, since neither the inferred right nor the minor premise of its syllogism refers to any radical particular, since they do not have the form of a language-entry transitions, but can only correspond to intra-linguistic movements, such a justification is unattainable: there are no concrete subjects or interests in which to ground that type of justification.

But not everything is lost, and Alexy's dispute with Günther gives us the key to move forward. As we saw in the previous chapter, Günther claimed that if the judge faces a normative conflict between two or more valid (justified) rules, he can assert a new rule that deactivates the conflict without having to engage in a justification discourse. Alexy replied that such a move was illegitimate, that the new rule does stand in need of a justification discourse, *unless* it is already contained by already justified rules. And Alexy is obviously right: any rule whose content is entailed by justified rules is to be taken as justified, so the judge is entitled to use it because such rule does not demand a new justification.

Relating Alexy's critique to Günther with Brandom's distinctions leads us back to the different ways in which the responsibility of vindicating can be fulfilled: besides *justifying* the entitlement, alternative that is blocked to the judge regarding propositions that demand a justification discourse, the entitlement can also be vindicated by appealing to the authority of another speaker[512]. This alternative corresponds to the possibility noticed by Alexy of employing those universal propositions that are 'contained' or entailed by the already discursively justified

[512] Brandom (1994), 175.

ones. Regarding these, the judge is in position to discharge her responsibility on the constitution or the Treaty itself—the commitment to them is not one that needs to be vindicated by means of a justification, so the entitlement of the judge to employ them is not precluded by her institutional position: if the Treaty were to declare that the prohibitions established on some annex or previous decision are to be taken as constitutive parts of the right of freedom to provide services, and in this other text or decision it is established that it is forbidden to unions to block building sites, then the court could assert a right to not have building sites blocked by unions and just *pass the buck* to the Treaty.

This explains why the analysis regarding the court's entitlement cannot be circumscribed only to its entitlement to the previously identified minor premise in the legal syllogism: just by identifying the court's commitment to 'permitting unions to block building sites is incompatible with the right of freedom to provide services', we still don't know if the court is entitled to it or not—despite being a universal proposition, if the inferred right from which the minor premise depends were to be entailed by other rules of the Treaty then the court would have it at its disposal.

But if that is not the case, if the inferred right is a claim for which it is appropriate to demand a vindication and the responsibility to provide one cannot be satisfied by appealing to the authority of the Treaty itself, then such assertion stands in demand of a justification discourse and therefore is not one with which the judge can play in the courtroom. However the court reasons in order to explain and justify this right to not have building sites blocked, and regardless of how convincing the proportionality test is, the conclusion that there is an incompatibility between the law and the Treaty is one that would be blocked by its institutional position: if the previous arguments are sound, then the unavailability of the conclusion does not depend on how well grounded its external justification is, but on its nature.

If this is our problem, then it must be noticed that Brandom's theory does not provide us with a suitable exit through a recourse to objectivity. In the game of giving and asking for reasons we assume a distinction between objectivity and subjectivity whereby we treat our propositions and concepts as expressions that must 'answer for the ultimate correctness of their application (…) to what actually is the case'. So, the game itself grows on the back of a presupposition, that of a shared world whose properties are independent from us and thus constrains our uses, not just for individuals, but also for the whole community[513]. But the assumed existence of an objective common world, though it provides the reference for the notions of *correct* and *incorrect* to be meaningful, does not serve the judge: 'Conceptual contents, paradigmatically propositional ones, can genuinely be shared, but their perspectival nature means that doing so is mastering the coordinated system of scorekeeping perspectives, not passing something nonperspectival from hand to hand (or mouth to mouth)'[514].

This means that an appeal by the court—or anyone in its defence—to the (objective) correction of the inference (from a right of freedom to provide services to a right not to have building sites blocked) has no axe to grind against the structural lack of entitlement, for even if the way in which the world actually is were to define that the inference is correct, any assertion regarding the way in which the world really is configured, is a perspectival assertion: while the world

[513] Brandom (1994), 594.

[514] Brandom (1994), 590.

must be understood as nonperspectival in a strong sense, there is no nonperspectival possibility of talking about it[515].

5. A way out

The route out of the judge's blockage is to be found if we go back to the responsibility to vindicate assertions in the general discursive practice.

5.1. Avoiding the regress

Both *justification* and *deferring to another speaker* are ways to vindicate an assertion that operates by *inheriting* an entitlement[516]—they show the entitlement to an assertion by relying on a previous one, so neither of them is apt to create an original entitlement, and thus the threat of a regress arises (either of assertions or of speakers)[517].

But the regress problem vanishes once it is noticed, with Wittgenstein, that 'to use a word without justification does not mean to use it without right'[518]. In other words, our dilemma arises only if it is understood that 'the default entitlement status of a claim or assertional commitment is to be guilty until proven innocent': the problem arises 'only if the entitlement is never attributed until and unless it has been

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[515] This rules out the alternative presented by Coleman & Leiter (1993): they claim that 'what is the case' in law depends on what seems right under ideal epistemic conditions—so legal facts are to be determined by what a panel of judges would resolve under those conditions (624). But the very specification of these would be a matter that can only admit being themathised from a perspective. And something similar applies to Postema (2001): he tries to anchor objectivity in the possibility of other subjects taking up the position of the judge and confirm his judgement (109), so the relevant quality of legal decisions lies on them being supported by reasons that can be publicly articulated by competent subjects in a public deliberation process (117). But, as we've seen, that amounts only to the capability to navigate the doxastic gap. It is for that reason that the objectivity presupposed by a moral realist stance—according to which the employment by the constitution of morally charged concepts constitutes to an invitation to the judges to engage en moral reasoning aiming to grasp the state of affairs on which hinges the truth of moral propositions (see: Moore (1992), 2471; (2001), 2092; Brink (1984), 111; (1988), 117; (2001))—is also inert for the judicial justification: the moral properties on which the decision rests might not be perspectival, but our talking about them is.

[516] Brandom (1994), 176.

[517] Brandom (1994), 176.

[518] Wittgenstein (1958), 289.

demonstrated. If many claims are treated as innocent until proven guilty—taken to be entitled commitments until and unless someone is in a position to raise a legitimate question about them—the global threat of regress dissolves'[519]. Whether or not a commitment requires to be vindicated—this is, if there is a *prima facie* entitlement to it before a vindication is offered—depends on the social practice. There are claims to which the interlocutors are entitled to as a default position. Regarding those commitments a question about entitlement can arise, but such question is itself in demand of vindication. This is, the challenge has to be appropriately made and therefore the responsibility to vindicate an assertional commitment is a *conditional* task-responsibility: 'It is conditional on the commitment's being subject to a challenge that itself has, either default or by demonstration, the status of an entitled performance'. In other words, the challeng*ing* assertion has no privilege status *vis-à-vis* the challeng*ed* assertion, so tracing the provenance of the entitlement of a claim through chains of justification is appropriate only 'where two *prima facie* entitlements conflict'[520]. This need to demonstrate an entitlement to the challeng*ing* assertion in order to trigger the corresponding vindication of a *prima facie* entitled claim, will be shown to be crucial in order to secure universal propositions for the judge.

The eternal regress problem, then, is a false one, for no new answer is always required—giving reasons, Wittgenstein claims, comes to an end, one which 'is not certain propositions' striking us immediately as true' but a form of 'acting, which lies at the bottom of the language-game'[521]; and despite the finitude of grounds, Wittgenstein continues, the lack of reasons is not a problem[522]. The *bedrock*[523], those *hinge propositions*, do not stand in need of justification, because they constitute the basis on which something can stand *as* justifications or *as* challenges, it configures the secure base that allows doubts to arise in the first place.

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[519] Brandom (1994), 177.

[520] Brandom (1994), 178.

[521] Wittgenstein (1969), 204.

[522] Wittgenstein (1958), 212.

[523] Wittgenstein (1958), 217.

5.2. Analyticity

Analytic propositions play a key role in this; they constitute the most conspicuous case of assertions that do not that stand in need of justification: no reason can be offered to justify that 'bachelors are unmarried men' other than that's just true according to the very meaning of the assertion. Because of this, they configure an ideal starting point in the analysis of claims to which we are entitled by default. Analytic propositions are to be understood as those that are true by reason of their linguistic meaning alone[524], that are guaranteed in consideration to the meanings they contain[525]. Therefore, 'a judgement is analytic if the meaning alone is sufficient for the speaker to be acknowledged as being entitled to make the proposition in the language game'[526].

From this follows that universal rules whose propositional content corresponds to analytical propositions, are rules that the judge is entitled to assert without need of justification. The question that now arises is if we can use the theory of analyticity in order to extend the scope of justified propositions beyond the originally reduced set of analytic truths and thus make more material available to the constitutional judge to engage in—our question is whether it is possible to identify analytic propositions regarding expressions that employ constitutional rights concepts.

Elizabeth Fricker's notion of OLOL analyticity is a suitable candidate to the task. Being 'OLOL' an acronym for 'our language is our language', Fricker's starting assumption is that our words cannot escape our control, that the meaning of our expressions is a supervenient property of our linguistic practice, and therefore our explanation of meaning has to be coherent with our semantic intuitions or *common sense semantics*—distinctions and assumptions that ordinary speakers are disposed

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[524] Klatt (2008), 168.

[525] Fricker (1991), 218.

[526] Klatt (2008), 177.

to make, statements about definitional synonyms, intuitive semantic notions, etc.[527]; and the case of analyticity is no exception: that a proposition is analytical also has to be dependent on our use of it—if analyticity depends on meaning alone, and meaning depends on our practice, then the property of being an analytical propositions do not come from outside, but has to be grounded in how we use and treat those expressions.

Within those coordinates, Fricker argues in a clearly Wittgensteinian fashion that the links between concepts (and with them, propositions) are schooled when learning a language, and a central element of this process corresponds to that of learning the platitudes of the *common sense semantics*. It is on the back of them that she will try to put forward a weaker, and thus more malleable notion of analyticity. She starts by analysing the properties of philosophically shallow concepts, like 'chair', and argues that even though we might disagree on whether or not chairs need to have legs, there is no discussion about them having to have backs; that they necessarily have to have them is a modal truth fixed by our linguistic practice of not counting backless-seats as chairs. We can translate this into Brandom's terms by saying that while the assertion 'chairs have legs' is not one to which we are entitled by default, 'chairs have backs' is. Our use of the expression in denoting things (we use 'that is a chair' to denote objects with backs) or the dispositions of common sense semantics (we stipulate that chairs have backs) establish a link between 'chairs' and 'backs' that authoritatively fixes what the term 'chair' applies to[528].

The challenge is to apply this strategy also when it comes to *deeper* concepts—like the ones employed by constitutional provisions. Fricker argues that our practice with them consists mainly in their theoretical links to other concepts, and not in their application to concrete events: deeper concepts are defined primarily by the theoretical commitments to other concepts that speakers uphold with them. In inferential terms: not by their role in language-entry transitions but by their intra-linguistic role in substituting inferential relations. From those theoretical

[527] Fricker (1991), 238.

[528] Fricker (1991), 242-4.

commitments Fricker makes a distinction between *primitive* constitutive truths about a concept and *derived* ones. The first corresponds to explicitly stated platitudes of common-sense semantics that establish a link between the concept at issue and others; and 'as such they are grasped, at least implicitly, by all masters of these concepts'[529]. This first set of links works as axioms that serve to configure an *a priori* argument, one that 'picks up certain links as central to the concept'[530]; and by taking them *a priori*—as an ungrounded base—we yield, through argumentation, *derived* constitutive truths. Regarding these latter, Fricker claims that in order to identify them we must engage in 'lengthy and difficult' arguments, and therefore, they 'are not obvious, and not guaranteed to be implicitly grasped by all masters of the concepts'[531].

For Fricker, both derived and primitive propositions can be taken as analytical, since they both express truths about a concept that is purely dependent of meaning, which in turn rests on the community's practice. He has extended the scope of analyticity, but he has done it at the cost of preventing some analytical propositions from being available for the judge: the derived ones are propositions to which we can only arrive by means of a theoretical discussion, and that means that the entitlement to them has to be vindicated—their truth might be analytical, but it is mediated by a process that within our scheme corresponds to a justification discourse. This is not necessarily problematic, what is relevant here is the possibility of identifying some secured inferences regarding those deep concepts, and Fricker's work does identify two constitutive features of primitive truths that provides enough material to move forward: on the one hand, since they express what can be taken as an *a priori* argument, they do not rest on a previous one to stand—like hinge propositions they constitute the background against which the justificatory process can get off the ground; on the other, they are grasped and shared within the discursive community. This characterisation is consistent with the

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[529] Fricker (1991), 248.

[530] Fricker (1991), 249.

[531] Fricker (1991), 249.

Wittgensteinian notion of *blind* reactions, with uniform linguistic responses that do not rest on argumentation, but, on the contrary, are the basis on whose shoulders the argumentation, disagreement and derived 'truths' stand. Both lack of reasons and shared understanding is taken from Wittgenstein to enrich and extend the notion of analyticity. And Fricker's work, resting on those Wittgensteinian remarks, allow us to move in the direction of philosophically deep and constitutionally relevant entitled inferences and assertions, the type that could play a role as a premise in JLR cases. It is now when Wittgenstein's work can prove to be a decisive contribution to get a better understanding of the role of *agreement* in our unjustified *doings* and *sayings* within the discursive practice.

5.3. Wittgenstein on agreement and justification

Wittgenstein's remarks about acting without reasons or justification but still correctly and entitled, serve to intersect the notions of *rule-following* (and therefore, appropriate language use), with the conditions of possibility of knowledge and doubt. Regarding the latter, against G.E. Moore[532] he rejects that it is appropriate to say that one 'knows' a proposition like 'I have two hands'. The reason for this is that one *knows* something as far as one 'is ready to give compelling grounds' for one's beliefs, but there cannot be anything like that to put forward in favour of a proposition like the one Moore claimed to know: 'if what he believes is of such a kind that the grounds that he can give are not surer than his assertion, then he cannot say that he knows what he believes'[533]. And, as Wittgenstein points out, there is nothing a speaker could be more confident in than the fact that he has two hands. For propositions like this, there are no possible reasons to offer, since whatever the speaker puts forward in their favour will be another proposition for which he is less sure than the one he is trying to back-up. This lack of grounds, however, does not lead to skepticism: just as there is no securer base for a justification to be presented, the doubt itself that could threaten our certainty is also

[532] Moore (1918).

[533] Wittgenstein (1969), 243.

deprived of a suitable pivot, for it is not just the *reason* for something what has to have a firmer ground than what it is aiming to support, but the *challenge* too: 'If the *true* is what is grounded, then the ground is not true, nor yet false'[534]—we cannot give a reason, but we don't need to do it either[535].

And something similar happens with following a rule and using a concept. Wittgenstein needs to escape the regress of interpretations[536] without falling prey to the image of an unmovable interpretation that works as a logical machine[537]. The key of rule-following is found in the combination of ungrounded, immediate responses with the notions of *custom* and *practice*[538]—it is the connection of both features what will lead Wittgenstein to a position similar to Brandom's: there is normativity, but not independent of our practices; or, in McDowell's terms: 'a performance can be an application of a concept only if it owes allegiance to constrains that the concept imposes (…) And being governed by such constraints is not being led, in some occult way, by an autonomous meaning (the super rigid machine) but acting within a communal custom'[539].

So, what matters to us is the way in which being governed by rules and concepts, being a proper language player, requires training and immediate-unjustified responses, as much as agreement in action. It is in the appropriate articulation of these features where lies the possibility of unjustified propositions to which both speakers in general and judges in particular are entitled, thus providing an exit to the regress problem of vindication and the structural impossibility of employing universal propositions in the adjudicative moment. The focus is on 'the importance

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[534] Wittgenstein (1969), 205.

[535] See Baldwin (2017), 140.

[536] Wittgenstein (1958), 198.

[537] Wittgenstein (1958), 193.

[538] McDowell, (1984), 342.

[539] McDowell (1984), 352.

of primitive natural responses shaped through training and other forms of conditioning'[540].

For Wittgenstein, being trained in a custom is not mechanically acquiring an immediate disposition to do something when faced to certain stimulus[541]: my training leads me to a reaction, but such training amounts to something more than a causal (not-normative) explanation: 'a person goes by a sign-post only in so far as there exists a regular use of sign-post, a custom'[542]. Obeying a rule is a custom, something that can only be done if it is embedded in a practice and relies on primitive, natural responses that are shaped through training[543]. We are thus trained to react in a certain way, and this is done in the context of a communal agreement among others that have been trained in the same way[544]: if someone were to ask me 'What time is it?' I would just look at my watch and tell him—my answer (as anyone else's in my position) wouldn't require any justification nor 'inner process of laborious interpretation; I simply react'[545], and we will all agree that I was entitled to my answer.

This is easily connected with Fricker's analyticity—we could claim that, given a common training, some movements and transitions will be shared (i.e., Fricker's *primitive* propositions). It is regarding these explicit *saying* that Wittgenstein claims: 'It is of the greatest importance that a dispute hardly ever arises between people about whether the colour of this object is the same as the colour of that (…) And one must say something analogous about proceeding according to a rule. No dispute breaks out over the question whether a proceeding was according to the rule or not (…) This belongs to the framework, out of which our language works'[546].

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[540] Fogelin (2009), 23.
[541] Wittgenstein (1958), 189, 198.
[542] Wittgenstein (1958), 198.
[543] Fogelin (2009), 24.
[544] Wittgenstein (1976), 58.
[545] Wittgenstein, (1974), 47.
[546] Wittgenstein (1978), 323.

This could move us into taking as *prima facie* entitled assertions those *sayings* on which we agree as a consequence of a shared training and for which we offer no justification.

But Wittgenstein's remarks allow looking for a deeper agreement, one that can be aptly explained by Brandom's work. When the latter argues that 'claims such as "there have been black dogs" and "I have ten fingers" are ones to which interlocutors are treated as *prima facie* entitled'[547], the relevant feature for their status is not that they constitute shared *sayings*, but they are *treated* in a certain way. There is some crucial *doing* underlying our shared inferences. Brandom's remark about the essential normative nature of linguistic behaviour is one that would have easily been subscribed by Wittgenstein: this rulishness 'is taken in the first instance to be *lived* in what the linguistic community *does*'[548]. In Brandom's inferential model, agreement among speakers regarding the meaning of '*that* is a black car' is agreement in what follows from it and what it follows from[549]; and for both him and Wittgenstein such consensus of *opinion* supervenes on a consensus in a particular kind of *doing*: that of *judging* the assertion as appropriate under those conditions and of *judging* that some other assertions appropriately follow from it. This points us to understand that the object of our training-based agreement, which for Wittgenstein constitutes the base of language's normativity, stands below what we explicitly *say*—it is at that deeper level that *agreement* turns into *custom* and becomes cousin of *rule*[550]: the possibility of taking someone's assertions and use them to make our own, rests on an agreement 'not only in definitions but also (*queer* as this may sound) in judgments'[551]. For Wittgenstein, below the explicit agreement in meaning that we experience when we communicate, we find an agreement in *doings*, i.e., in *judgements*. And Brandom's notion of *default entitlement* can appropriately express those shared judgements to which

[547] Brandom (1994), 177.

[548] Brandom (1988), 257.

[549] Brandom (2001), 48.

[550] Wittgenstein (1958), 224.

[551] Wittgenstein (1958), 242.

Wittgenstein is referring: it is our *taking* some moves as *prima facie* correct, our *judgement* to the effect that the speaker is entitled to them, what allows the process to start in the first place—and that's a *doing*, not a *saying*, in which we agree.

We've seen that Brandom's defaulty entitled assertions rests on them being *treated* as such, but he claims that the only thing that is shared by players is the structure of scorekeeping[552]—i.e., a capacity to navigate, traverse and 'specify contents from different points of view'[553]. The grounding agreement, the one that matters to him is just the underlying one about the practice of scorekeeping itself—what is fundamental is the shared structure that relates deontic statuses as the 'counters in terms of which discursive score is kept, and the deontic attitudes, whose adoption and alteration constitute the activity of scorekeeping'[554]. But if agreement is circumscribed only to a common structure in which we asses and make moves, then explaining a *collective* treatment within the practice becomes problematic. Such collective dimension, however, can be supplemented by Wittgenstein trained-based agreement: Brandom's notion of *collectively treating* some moves in a privileged way is explained in terms of Wittgenstein's notion of a common training that renders *agreement in judgement*. And this Wittgensteinian *judgement*, in turn, can be explained in terms of Brandomnian deontic attitudes—not as agreement in *sayings* and *opinions*, but as agreement in *treating* both *sayings* and *opinions* as *prima facie entitled*. Our common training, then, is not aimed to produce just converging explicit answers, more importantly, we implicitly agree on the entitled status of some performances—it is semantics answering to pragmatics. So—with Wittgenstein—on the bedrock what we find 'is not a consensus of opinion' but 'a consensus of doing the same thing'[555], and this doing includes, besides shared *sayings*, shared attitudes about the *prima facie* entitlement to certain movements. It

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[552] He does recognise that if communication is actually taking place and speakers share a practice, then they probably also share (besides the structure of scorekeeping) some set of inferences, but this is not essential.

[553] Brandom (1994), 485.

[554] Brandom (1994), 593.

[555] Wittgenstein (1976), 183-4.

is only because of those shared judgements that we can act, in some cases, *blindly*[556].

And it is crucial to notice that both levels of agreement do not have to stand in pristine correlation: we can make sense of someone who, having been trained in the linguistic community, would agree on the fact that certain claims are *taken* in practice as *prima facie* entitled ones, but that is not herself *committed* to those claims—e.g., a radical defender of animal's rights that doesn't refer to apes as 'animals', but as 'persons', can nevertheless recognise that calling them 'animals' is an entitled performance. If we look at her responses at the superficial level of *sayings*, we would find disagreement; but at the deeper level of *judgement* she can still take the asymmetrical substitutional inference from 'ape' to 'animal' as one that is *prima facie* entitled—even if she doesn't endorse it. As long as the speaker avoids collapsing the way in which inferences are treated in the discursive practice with the way she herself treats them, i.e., with her own deontic attitudes, the superficial disagreement does not endanger the *prima facie* entitlement. And, as we saw in Section 3.11 about objectivity, avoiding these conflations is secured by the capability of adopting an internal third-person perspective regarding her discursive attitudes. This will allow the disagreeing speaker to map her substitutional inferences with those of others that explicitly *say* things she doesn't: when someone else asserts that 'apes are animals', since she recognises that assertion as a *prima facie* entitled one, she will be capable of crossing the doxastic gap by indexing the speaker's claim with her own repertoire of substitutional inferences. It is at this level where Fricker's constitutive truths 'are grasped, at least implicitly, by all masters of these concepts'[557]. Thus, *prima facie* entitled claims are not those that are shared by all speakers jointly, but those to which interlocutors are jointly treated as *prima facie* entitled.

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[556] Wittgenstein (1958), 219.

[557] Fricker (1991), 248.

Since an entitlement to them is sharedly recognized, and it is sharedly recognised because of a common training of *taking* them as entitled movements (a custom), when we assert them we do not need to offer justifications and we can just say 'this is simply what we *do*'[558]. This is how these claims lay the basis for subsequent doubts: we can make sense of a doubt regarding if some particular object is 'black' because we share a common basis of what 'black' is—*we* have been taught, when faced with a crow or a piece of coal, that they are black. It is in contrast to those shared unjustified instances that disagreement can be meaningful. And the same is true, *mutatis mutandis*, when it comes to intra-linguistic movements: to move form 'there is a crow' to 'there is something black', or to assert 'crows and coil are black' are also entitled movements by default. The argument is thus threefold: from a deeper agreement regarding the practice of scorekeeping and judgements (structure and doings), we cash out an agreement regarding undoubted, explicit linguistic moves (asserting), and the grasp of them constitutes the entry point to the game of disagreeing and doubting if some other moves are acceptable.

Now, since language is not as rigid as logic[559], there will be disagreements about the status of both some language-entry transitions and—in what is key for JRL—intra-linguistic movements. But those disagreements imply that our 'judgments in straightforward cases' are correct[560]: some things need to stand unshakeably fast for others to be 'more or less liable to shift'[561].

None of this means that these entitled assertions cannot be challenged, and if that were the case a vindication could become necessary. But, as we saw at the beginning of this section, since a challenge is just another assertion, it requires an entitlement too. Therefore, unless the challenge also corresponds to a *prima facie* entitled claim, the need to vindicate the *prima facie* entitlement is conditional on the

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[558] Wittgenstein (1958), 217.

[559] Fogelin (2009), 46.

[560] Baldwin (2017), 142.

[561] Wittgenstein (1969), §144.

challenging assertion being demonstrated as an entitled performance[562]. And this connects with the judge's situation, since now the curtailment of discursive possibilities plays in favour of the court: demonstrating the entitlement to the challenging assertion could only be grounded on a justification discourse. And since this kind of demonstration is structurally impeded to take place at the judicial moment, the status of the *prima facie* entitled claim is thus secured—this cannot become a challenged assertion in the adjudicatory stage.

What we can take from this is that the default status of being entitled does not need to be reduced to the shallow concepts typically related to analyticity, that it can be extended to include some movements regarding politically contested expressions. If this is the case or not, depends on the discursive practice of the community, on how we treat some assertions regarding *equality*, *freedom* or *dignity*. And this practice includes—although it is obviously not reducible to—the constitutional debate itself.

6. Living constitutionalism

These last remarks direct us towards the role of constitutional tradition in the configuration of our constitutional commitments. A way to understand this role is proposed by the approach of the living constitutionalism: in its different modalities, the underlying idea is that our debates on constitutional rights commit us beyond what the constitution explicitly establishes, and if these commitments undertaken throughout the constitutional history are given constitutional status, then they can grant entitlements to assertions that are not included in the constitutional text.

The first challenge in this route is to identify what is to be counted as part of the tradition that serves to develop the constitutional commitments. David Strauss, endorsing the *common law* model, defends that the relevant history is that written by the USSC in its rulings[563]. For Jack Balkin, on the other hand, the proper way to

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[562] Brandom (1994), 178.

[563] Strauss (2011), 977.

understand constitutional provisions is by looking at the general activity of all governmental branches, implemented policies and, in general, state-building constructions by political branches that are later ratified by the judiciary[564]. And the same is true with Barry Friedman and Scott Smith: they claim that the actions of all those who have an official role in interpreting the constitution is to be taken into account[565]. In Bruce Ackerman's approach, constitutional commitments arise from successive cycles of popular sovereignty[566] in which The People expresses itself through an irregular and assumed privilege of proposing informal and unauthorised propositions. These forms of 'constitutional politics', configured by a series of decisive victories sustained in intense political debate and mass mobilisation, allow the representatives to speak—in name of the people and through 'legally imperfect bodies whose anomalous nature renderers their actions legally doubtful'[567]—a higher law from all three branches[568]. So it is on the back of informal manifestations of popular will that landmark statutes and superprecedentes crystallise fix points in the constitutional tradition and become equivalent to formal amendments[569], achieving a constitutional change beyond the scope of Art. V. of the Constitution (the constitutional rule of change) and thus constituting an *operational cannon* that exceeds the official one configured by the text of the constitution and its formal amendments[570]. Constitutional moments can therefore be understood as instantiating the amendment rules that belong to the *operational cannon*: a constitutional change is effected by the verification of a set of conditions defined by the latter.

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[564] Balkin (2012), 1136.

[565] Friedman & Smith (1998), 33-5.

[566] Ackerman, Living, 1758.

[567] Ackerman, Discovering, 1061. Law's reductive nature runs agains this possibility: if the constitutional moment effects a constitutional amendment outside the categories of Art. V, then how can a court recognise it?

[568] Ackerman, Discovering, 1059.

[569] Ackerman, Living, 1752.

[570] Ackerman, Living, 1750. Ackerman puts himself in a difficult position here: according to the *operational cannon*, the USSC has the power to ratify that a constitutional change has taken place (Ackerman, *Living*, 1779.), but by doing this he is impeded to simultaneously recognise The People the power to stand above the constitutional court, to enact a new constitutional principle according to which the court is devoid of such faculty.

To grasp the difficulty that this endeavour must overcome, we could start by accepting the living constitution approach to superprecedents: we could accept that *Brown* is now part of the constitution itself, being committed to attribute to the constitution that no segregation is compatible with equality, that any differentiated treatment between black and white people is void, and—even more—that the same stands for any race differentiation. But what do those commitments mean when it comes to an equality case not related with racial differentiation? The answer requires to attend the distinction between the commitments to which a speaker would be *entitled* and those to which such speaker would be *committed* as a consequence of committing to the new constitutional claim 'no differentiated treatment between races is compatible with the constitution'. This new constitutional commitment surely would commit us to declare unconstitutional a law that imposes an especially burdensome treatment to members of a certain race, but when it comes to a law that distinguishes between, say, nationals and foreigners, things are not that simple.

Suppose now that besides *Brown*, other super precedents about discrimination become constitutional law, and so now the constitution forbids differentiated treatment based on race, but also gender, sexual orientation and language. We could then look at what is common to all those commitments and understand that the constitution does not accept legal differences based on qualities that are not controllable by the subject that would be receiving an especially burdensome treatment. By doing this we are engaging in the type of reasoning that is expressed through inductive inferences, for the move that we are making is an attempt to 'make explicit, in a form that can be thought or said, what is implicit in what is done'[571].

The weakness of this process is that, as we saw in Section 3.2, inductive inferences correspond to entitlement-preserving inferences[572]: 'the premises of these inferences

[571] Brandom, 160.

[572] Brandom, 132.

entitle one to commitment to their conclusions (in the absence of countervailing evidence) but do not compel such commitment. For the possibility of entitlement to commitments incompatible with the conclusion is left open'. In this way, if all the previous rulings are taken as establishing new constitutional commitments, then we would actually be committed to the claim 'it is forbidden to establish differentiated treatment based on race, gender, sexual orientation and language'; but when it comes to a novel case that does not tap on previously identified categories, we find that this commitment only *entitles* to claim that 'it is forbidden to establish differences based on qualities that are not chosen'—it does not *commit* us to it, since it is compatible with understanding that differences based on nationality or VIH risk are justified[573]:

> one can be (taken to be) entitled to claims one is not (taken to be) committed to—these are conclusions one is entitled to draw but has not yet committed oneself to. In this way one may be entitled to each of two mutually incompatible claims, so long as neither has been endorsed and commitment to it undertaken. Either conclusion by itself could be defended, though one would cease to be entitled to it if already committed to the conclusion of the other argument[574].

The problem is replicated if we adopt a broader view and focus not just on particular decisions of the supreme court, but on the whole constitutional history. Suppose that we ignore 'the contestability of history'[575] and just rightly assume that the relevant bits of our tradition include the expansion of voting rights to black people and women, accepting them in universities, establishing policies of affirmative action in favour of minorities and natives, de-criminalising homosexuality and allowing same-sex marriage. Now we need to provide an

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[573] Brandom, 168.

[574] Brandom, 675, footnote 44.

[575] Friedman, 81.

assertion that allows us to describe all these events as instances of a regularity[576], but such description would only be available to the judge if the transition *from* observing those events *to* asserting the relevant description were to correspond to *prima facie* entitled language-entry transition—it would have to be as undisputed as it is to claim 'that is a black car' when we observe a black car. It is easy to advert why this is problematic: it is unlikely that a description of those events that is ecumenical enough to constitute a *prima facie* entitled assertion would constitute a commitment whose content is sufficiently precise to ground by itself, without resorting to further premises, the unconstitutionality of a law that establishes a differentiated and burdensome treatment to novel subjects: we could look back and claim that 'we are committed to an expansion of rights in favour of oppressed groups'. But what follows from such commitment regarding novel cases regarding foreigners coming from war-zones or LGBT+ adoption.? We would be more or less in the same position as we would be if we were discussing directly about *dignity* or *freedom* or *equality* and their relationship with our current constitutional questions. So even if we accept the demands of living constitutionalism and grant constitutional hierarchy to the previous steps in our emancipatory struggle (and assuming that we can identify this steps without resource to a justification discourse), we will obtain through induction a constitutional entitlement to further moves, but that will not entitle us to claim that the constitution has undertaken those commitments sub-sequentially.

7. Tradition and constitutional meaning

To properly understand the role of history in constitutional change, without falling into the problems and dilemmas that have been noticed, the events that constitute the constitutional tradition cannot be taken as instantiating the terms of a rule that defines the conditions for the modification of the constitution. And, as we just saw,

[576] Brandom (1988), 282.

it is also unworkable to employ inductive reasoning to frame those constitutional events in propositions and then assign them constitutional status.

The route that we should follow in order to explain the role of constitutional history is a different one: constitutional tradition is to be understood as part of the discursive practice in which the very meaning of constitutional rights and rules in general arises.

Time, and the political and constitutional debates and decisions that extend through it, alter the net of inferences that define the meaning of *freedom*, *equality*, *privacy*, *dignity* and all other concepts that are employed and debated in constitutional discussions[577]. Landmark legislations or super precedents are not to be taken as constitutional amendments, as *explicit* or formal changes in the constitutional order, nor as part of the *operational* constitution. But in absence of such constitutional recognition, they have still changed the way in which we speak of discrimination or privacy, and that's a change in *meaning*. Ackerman rightly points out that 'our constitution's explicit commitments to the institutions of contract, private property, and state's rights remain textually intact despite the retreat of the Old Court before the New Deal in the 1930's'; but from that obvious remark he infers that the meaning of those terms must remain intact, and this leads him to the conclusion that any interpretation that tries to 'avoid revealing these classic constitutional texts as hostile to the pretensions of the nationalistic welfare state of the last half-century'[578] has to be fraudulent. With Brandom and with Wittgenstein, we can reply that this is simply not true: we don't need to constitutionalise the New Deal to acknowledge that it effected a change in the constitutional scenario—regardless of any formal recognition of it, the 30's modified the way in which Americans understand private property (what is incompatible with it).

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[577] If 'fidelity to the text' is to be understood as 'fidelity to meaning', then the distinction between fidelity to text and to 'past constitutional practice' is unsound—Dworkin (2015), 1221.

[578] Ackerman, Discovering, 1071.

With *Brown* it is probably clearer. Because of that decision, and the debates that precede it and still continue, now we do recognise a *prima facie* inferential relation of incompatibility between discrimination and 'segregating students by race'. This means that the very meaning of *equality* has changed through time, and constitutional debates about it have been part of its development; it is in that sense that *Brown* is constitutionally relevant, not as if the constitution now has a new explicit rule that asserts 'impeding black people from entering schools is incompatible with equality', but as part of the discourse that implicitly establishes an incompatibility relation between equality and segregation. Instead of problematising the constitutional status of a precedent, a piece of legislation or instances of intense political activity—status which is dependent on the content of existing constitutional rules—the focus is shifted to the way in which those legal decisions and political actions alter how we speak about the contents of constitutional provisions, including the set of entitled assertions. So even if *Brown* was not justified at the time, it was still part of the debate that defined the meaning of *equality*. No explicit recognition is required to change the discursive status of expressions that were used to refer to African Americans, much less to identify the set of events through which those changes took place. Our discursive practice simply modified the meaning of those terms up to the point in which a speaker is no longer entitled to call a black woman as they used to be called in the 30's. Here we see why it is crucial that *prima facie* entitlements do not correspond to inferences shared by all speakers jointly: radical *Trumpists* that do not call themselves racists can *claim* that keeping blacks segregated is not discriminatory, but they would still *treat* the inference from segregation to discrimination, or the claim 'segregation is a form of discrimination' as one to which speakers are, as a matter of social practice, entitled—even if they don't endorse it, they would acknowledge that this claim is *treated* as such.

Let us go back to the constitutional judge's position to see how this translates to him: I argued that the set of assertions to be vindicated by means of a deferral and the set of assertions to be vindicated by means of a justification, are not jointly

exhaustive—not every universal proposition that is not entailed by the constitution stands in demand of a justification, since a justification is a way to live-up to the responsibility to vindicate an assertion *if* such vindication is needed. In other words, some universal assertions have to be vindicated by means of a *justification discourse*, others by means of a *deferral* and some others just don't need to be vindicated at all—only the first set is blocked to the judge.

The constitutional tradition serves to define the contours of this latest set, to alter it by way of its decisions—not in the sense of an explicit legal rule that defines what is to be taken as constitutive of *discrimination*, but as part of the context in which the term obtains its meaning. If a legal rule were to establish a prohibition to members of a certain race or gender to become students in a university, such law would justifiably be declared unconstitutional, and that would not count as an instance of legislation, since its underlying premise would be one to which every speaker is entitled: 'there is a right not to be excluded form educational establishments in consideration to race or gender'—this one just follows from the explicit constitutional commitment to equality. The judge does not need to vindicate this claim, it is no longer one that stands in demand of a justification discourse and thus is entitled to use it. An assertion like that has become part of those claims that now a speaker can assert as an immediate and share response within the discursive community. A commitment to equality is today incompatible with a commitment to segregation; and that is an achievement that can be attributed in part to decisions as *Brown.*

8. Meaning and reasons in JRL

The consequences of this last observation are twofold: on the one hand, it does open the door, within JRL cases, to a broader set of legitimate inferences that employ universal propositions. Constitutional debates are in no way the only factor, but they do contribute to settle the status of some claims regarding the expressions employed by constitutional rights clauses. But, on the other, it serves to establish the core of

the problem for the court in JRL cases, the caveat to the previous silver lining. Unlike ordinary contexts of discourse, the legal system in general and the judicial subsystem in particular deals mainly with disagreements, so if a query about the relation between 'freedom to provide services' and a right 'to block building sites' goes to the constitutional court, then it is quite unlikely that there is an extended agreement regarding what such relation is—the case probably wouldn't end up in court otherwise. While it is true that the *prima facie* status of some claims about minorities' right, women's role in public life, cruel punishments and other, has changed over time, the already answered questions are not the ones that are usually asked today. And in the scheme that is defended here, the court is in a sense impeded to provide a new answer but can only restate what is already justified[579]. Even more, the type of concepts and expressions that are usually at the center of constitutional cases (the content of constitutional and international rights and provisions) is likely to be more disputed than the average assertions with which we ordinary play—'essentially contested concepts' they've been called[580], so we should expect that the scope of the agreement regarding *prima facie* entitled inferences with *freedom of association*, *cruelty*, *equality* or *dignity* is smaller than the one we find when we debate in the ordinary discursive practice.

Taking these considerations to our *Laval*-based case leaves us with an answer that is to be celebrated, for it means that it is quite unlikely that we agree on taking as entitled the inference from a right of freedom to provide services to a right not to have building sites blocked by unions. But if the situation were inverted, and workers were to claim that some regulation infringes their right to engage in industrial action, it would be they who would receive a disappointing decision.

This is why judicial deference is not to be taken as an external constraint to the adjudicatory function in JRL cases, but as a consequence that follows from its

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[579] This disability on the court's part is not that far away from the role that Ackerman attributes to it, that of *ratifying* a past achievement—(2007),1779—and not of taking upon itself the 'instigation of a constitutional moment', as Michelman in (1988) at 1521 has remarked.

[580] Gallie (1955) 533.

intrinsic features—the court can only *ring the bells that still ring*, so it is structurally impeded to use the premises that a declaration of unconstitutionality usually requires: if the premise needed to declare a legal rule void is not within the judge's grasp, then he simply cannot declare the unconstitutionality and the law status will remain unchanged. This means that if the constitutional review system takes a law as valid unless its unconstitutionality is declared, then the structural impossibility of the judge to employ the premise that would ground its decision against the law entails the subsistence of its validity. These rules that distribute the default status of laws are the ones that perform the function of 'risk management' regarding the unavailability of premises, and also the ones that define what is the status of a piece of legislation that (unlikely as it is) stand in an incompatibility relation with a constitutional provision and at the same time in a commitment-preserving relation with another.

There is a richness in our discussions about these subjects, richness that is constituted precisely by our debates and the reasons that we can put forward to support our conclusions. But such openness is not available from the judicial seat, for its position is configured to be filled with language-entry transitions, to try to cope with the irreducibility of the concrete and particular. In JRL none of these sources of discursive value are within the court's reach: there are no particulars to engage with and, at the same time, the available intra-linguistic moves are reduced to those few that do not need to be justified. The reduction of alternatives that characterises JRL is therefore twofold: first, the institutional frame of adjudication is never filled with particularity, and second, the court is left just with basic, *prima facie* entitled linguistic moves to make. To grasp the magnitude of this discursive curtailment, the reduction of possible moves can be expressed in inferential semantic terms: since the meaning of an expression is constituted by its inferential net, by its role as premise or conclusion in inferences, in JRL the very meaning of our constitutional commitments is radically impoverished—and with this, the possibility to understand judicial context as one in which we engage in the practice of giving and asking for reasons is cut at the root: curtailment of meaning *is*

curtailment of reasons. So much for the 'forum of principle'[581]—for the court as 'exemplar of public reason'[582]. The opposite is the case: an inappropriate way to address constitutional issues, one deprived from key premises, is the only possible one for the judge to decide without becoming a constitutional legislator and thus living up to the promise of offering a *judicial* answer. The corollary we finally arrive serves to make explicit our predicament: either we give up the idea of deciding these problems from the judicial seat, or we give up the idea of deciding them appropriately.

[581] Dworkin (1981).

[582] Rawls (1993), 231; Michelman (1986), 24.

Bibliography

A. deVries, W. (2005): *Wilfrid Sellars*, Acumen.

Ackerman, B. (1984): 'Discovering the Constitution', *The Yale Law Journal*, 93:6, 1013.

— (1991): *We The People. Foundations*, Harvard University Press.

— (2007): 'The Living Constitution', *Harvard Law Review*, 120:7, 1737.

Adler, M. (1997): 'Judicial Restraint in the Administrative State', *University of Pennsylvania Law Review*, 145:4, 759.

Alchourrón, C. (1991): 'Conflicts of Norms and the Revision of Normative Systems', *Law and Philosophy*, 10:4, 413.

— (1996): 'On Law and Logic', *Ratio Juris*, 9:4, 331.

Alchourrón, C. & Bulygin, E. (1991): *Análisis Lógico del Derecho*, Centro de Estudios Constitucionales.

— (1998): 'The Expressive Conception of Norms', in: Paulson, S.L. & Litschewski-Paulson, B. (eds.), *Normativity and Norms*, Clarendon Press, 383.

— (2012): *Sistemas Normativos*, Astrea.

Alexander, L. & Schauer, F. (1997): 'On Extrajudicial Constitutional Interpretation', *Harvard Law Review*, 110:7, 1359.

— (2000): 'Defending Judicial Supremacy', *Constitutional Commentary*, 17, 455.

Alexy, R. (1989): *A Theory of Legal Argumentation*, Clarendon Press.

— (1993): 'Justification and Application of Norms', *Ratio Juris*, 6:2, 157.

— (2000): 'Derecho Injusto, Retroactividad y Principio de Legalidad Penal', *Doxa*, 23, 197.

— (2002): *A Theory of Constitutional Rights*, Oxford University Press.

— (2003): 'On Balancing and Subsumption', *Ratio Juris*, 16:4, 433.

— (2005): 'Balancing, Constitutional Review, and Representation', *I•CON*, 3:4, 572.

— (2010): 'The Construction of Constitutional Rights', *Law & Ethics of Human Rights*', 4:1, 20.

— (2014): 'Constitutional Rights and Proportionality', *Revus*, 22, 51.

Atiyah, P. (1986): *Essays on Contracts*, Clarendon Press.

Atria, F. (2001a): 'Inaplicabilidad y Coherencia', *Revista de Derecho*, 12, 119.

— (2001b): *On Law and Legal Reasoning*, Hart Publishing.

— (2004): *'Jurisdicción e Independencia Judicial'*, Revista de Estudios de la Justicia, 5, 119.

— (2012): 'Legislation and Adjudication', in: Ferrer, J. & Batista, G., *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford University Press, 327.

— (2016): *La Forma del Derecho*, Marcial Pons.

Azoulai, L. (2008): 'The Court of Justice and the Social Market Economy', *Common Law Market Review*, 45, 1335.

Baker, G. (1977): 'Defeasibility and Meaning', in: Hacker, P.M.S. & Raz, J., *Law, Society and Morality. Essays in Honor of H.L.A. Hart*, Clarendon Press, 26.

Baldwin, T. (2017): 'Wittgenstein and Merleau-Ponty on Knowledge and Certainty', in: Romdenh-Romluc, K. (ed.), *Wittgenstein and Merleau-Ponty*, Routledge, 137.

Balkin, J. (2012): The Roots of the Living Constitution', *Boston University Law Review*, 92, 1129.

Barnard, C. (2008): 'Employment Rights, Free Movement under the EC Treaty and the Services Directives', *Europa Institute Mitchell Working Paper Series 5/2008*.

— (2008): 'Social Dumping or Dumping Socialism?', *The Cambridge Law Journal*, 67:2, 262.

Bascuñán, A. (2000): 'Sobre la Distinción Entre Derogación Expresa y Derogación Tácita', *Anuario de Filosofía Jurídica y Social*, 18, 227.

Bayón, J.C. (2000): 'Derrotabilidad, Indeterminación del Derecho y Positivismo Jurídico', *Isonomía*, 13, 87.

Beatty, D. (2004): *The Ultimate Rule of Law*, Oxford University Press.

Bellamy, R. (2007): *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy'*, Cambridge University Press.

Bickel, A. (1986): *The Least Dangerous Branch*, Yale University Press.

Black, M. (1962): *Models and Metaphors*, Cornell University Press.

Boonin, G. (1966): 'Concerning the Defeasibility of Legal Rules', *Philosophy and Phenomenological Research*, 26:3, 371.

Borowski, M. (2007): 'Limiting Clauses', *Legisprudence*,1:2, 197.

Brandom, R. (1988): 'Inference, Expression and Induction', *Philosophical Studies*, 54, 257.

— (1994): *Making it Explicit*, Harvard University Press.

— (1998): 'Actions, Norms and Practical Reasoning', *Philosophical Perspectives*, 12, 127.

— (2001): *Articulating Reasons*, Harvard University Press.

— (2002): 'Facts, Norms, and Normative Facts', *European Journal of Philosophy*, 8:3, 356.

— (2003): 'Non-Inferential Knowledge, Perceptual Experience, and Secondary Qualities', in: Smith, N., *Reading McDowell: On Mind and World*, Routledge, 92.

— (2008): *Between Saying and Doing*, Oxford University Press.

— (2009): 'Pragmatism, Inferentialism, and Modality in Sellar's Arguments against Empiricism', in: A. deVries, W. (ed.), *Empiricism, Perceptual Knowledge, Normativity and Realism*, Oxford University Press, 33.

Bransen, J. (2002): 'Normativity as the Key to Objectivity', *Inquiry*, 45, 373.

Brink, D. (1984): 'Moral Realism and the Skeptical Arguments from Disagreement and Queerness', *Australasian Journal of Philosophy,* 62:2, 111.

— (1988): 'Legal Theory, Legal Interpretation, and Judicial Review", *Philosophy & Public Affairs*, 17:2, 105.

— (2001): 'Legal Interpretation, Objectivity and Morality", in: Leiter, B., *Objectivity in Law and Morals*, Cambridge University Press, 12.

Cappelletti, M. & Adams, J.C. (1966): 'Judicial Review of Legislation: European Antecedents and Adaptations', *Harvard Law Review*, 79, 1207.

Caracciolo, R. (2005): 'Una Discusión Sobre Normas Derrotables', *Discusiones: Razones y Normas*, 5, 87.

Carnap, R. (1937): *Logical Syntax of Language*, Routledge.

Christodoulidis, E. (1998): *Law and Reflexive Politics*, Kluwer..

— (1999): 'The Irrationality of Merciful Legal Judgement', *Law and Philosophy*, 18:3, 215.

— (2001): 'Law's Inmemorial', in: Christodoulidis, E. & Veitch, S., *Lethe's Law*, Hart Publishing, 207.

— (2004): 'The Objection that Cannot be Heard', in: Duff, A. *et al*., *The Trial on Trial*, Vol. I, Hart Publishing, 179.

— (2013): 'The European Court of Justice and "Total Market" Thinking', *German Law Journal*, 14:10, 2005.

Cohen-Eliya, M. & Porat, I. (2011): 'Proportionality and the Culture of Justification', *American Journal of Comparative Law*, 59:2, 463.

Coleman, J. & Leiter, B. (1993): 'Determinacy, Objectivity, and Authority', *University of Pennsylvania Law Review*, 142:2, 549.

Damaska, M. (1990): 'Reflections on American Constitutionalism', *The American Journal of Comparative La*w, 38, 421.

Davidson, D. (2001): *Essays on Actions and Events*, Clarendon Press.

Davies, A. (2008): 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', *Industrial Law Journal*, 37:2, 126.

Demoor, M. (2011): *Brandom and Hegel on Objectivity, Subjectivity and Sociality. A Tune Beyond Us, Yet Ourselves*, PhD Thesis, Vrije Universiteit Amsterdam.

Detmold, M. (1989): 'Law as Practical Reason', *The Cambridge Law Journal*, 48, 436.

— (2000): 'Legislation and Adjudication', *Adelaide Law Review*, 22, 87.

— (2001): ‘Impartiality: Judicial Power and Constitutional Integration’, *UNSW Law Journal*, 24, 760.

Dorf, M. (1994): ‘Facial Challenges to State and Federal Statutes’, *Stanford Law Review*, 46:2, 235.

Duarte, Luis (2015): *Allowing for Exceptions*, Oxford University Press.

Dummett (1973): *Frege. Philosophy of Language*, Harper & Row.

Duxbury, N. (2008): ‘Kelsen’s Endgame’, *The Cambridge Law Journal*, 67:1, 51.

Dwars, I. (1992): ‘Application Discourse and the Special Case-Thesis’, *Ratio Juris*, 5:1, 67.

Dworkin, R. (1978): *Taking Rights Seriously*, Harvard University Press.

— (1981): ‘The Forum of Principle’, *New York University Law Review*, 56:2, 469.

— (1986): *Law’s Empire*, Harvard University Press.

— (1996): *Freedom’s Law*, Oxford University Press.

— (2015): ‘The Arduous Virtue of Fidelity’, *Fordham Law Review*, 83:5, 2221.

Eisgruber, C. (1994): ‘The Most Competent Branches: A Response to Professor Paulsen’, *The Georgetown Law Journal*, 83, 347.

Elhag, A., Breuker, J. & Brouwer, B. (1999): ‘On the Formal Analysis of Normative Conflicts’, in: Jaap van den Herik, H., et al., (Eds.), *JURIX 1999: The Twelfth Annual Conferencez*, Gerard Noodt Instituut, 35.

Ely, J. (1978): ‘Toward a Representation-Reinforcing Mode of Judicial Review’, *Maryland Law Review*, 37:3, 451.

Endicott, T. (2000): *Vagueness in Law*, Oxford University Press.

Fallon, R. (2001): ‘Stare Decisis and the Constitution: An Essay on Constitutional Methodology’, *New York University Law Review*, 76, 570.

Fernandes, G. (2001): ‘Comparative Constitutional Law’, *University of Pennsylvania Journal of Constitutional Law*, 3, 977.

Ferrer, J & Ratti, G. (2010): ‘Validity and Defeasibility in the Legal Domain’, *Law and Philosophy*, 29:5, 601.

Fine, K. (1975): ‘Vagueness, Truth and Logic’, *Synthese*, 30:3/4, 265.

Finnis, J. (1972): ‘Some Professorial Fallacies About Rights’, *Adelaide Law Review*, 4, 377.

Fogelin, R. (2009): *Taking Wittgenstein at His Word*, Princeton University Press.

Frankfurt, H. (1971): ‘Freedom of the Will and the Concept of a Person’, *The Journal of Philosophy*, 68:1, 5.

Freeman, S. (1990): ‘Constitutional Democracy and the Legitimacy of Judicial Review’, *Law and Philosophy*, 9:4, 327.

Fricker, E. (1991): ‘Analyticity, Linguistic Practice, and Philosophical Method’, in: Puhl, K. (ed.), *Meaning Scepticism*, De Gruyter, 218.

Friedman, B. & Smith, S. (1998): ‘The Sedimentary Constitution’, *University of Pennsylvania Law Review*, 147:1, 1.

Gallie, W. (1955): ‘Essentially Contested Concepts’, *Proceedings of the Aristotelian Society*, 56, 167.

Gardner, J. (2012): *Law as a Leap of Faith*, Oxford University Press.

Goodhart, A. (1934): ‘Precedent in English and Continental Law’, *The Law Quarterly Review*, 50, 40.

Grice, H. P. (1989): *Studies in the Way of Words*, Harvard University Press.

Greenberg, M. (2014): ‘The Moral Impact Theory of Law’, *The Yale Law Journal*, 123:5, 1288.

Guastini, R. (2001): ‘Cinco Observaciones Sobre Validez y Derogación’, *Discusiones*, 2, 59.

— (2014): *Interpretar y Argumentar*, Centro de Estudios Políticos y Constitucionales.

— (2018): ‘Dos Concepciones de las Normas’, *Revus*, 35.

Günther, K. (1993a): ‘Critical Remarks on Robert Alexy’s “Special-Case Thesis”’, *Ratio Juris*, 6:2, 143.

— (1993b): *The Sense of Appropriateness*, SUNNY Press.

— (1995): ‘Legal Adjudication and Democracy’, *European Journal of Philosophy*, 3:1, 36.

Habermas, J. (1990): *Moral Consciousness and Communicative Action*, The MIT Press.

— (1996): *Between Facts and Norms*, The MIT Press.

Harrison, J. (1998): 'The Role of the Legislative and Executive Branches in Interpreting the Constitution', *Cornell Law Review*, 73, 371.

Hart, H.L.A. (1949): 'The Ascription of Responsibility and Rights', *Proceedings of the Aristotelian Society*, 49, 171.

— (1958): 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71:4, 593.

— (1983): 'American Jurisprudence Through English Eyes', *Essays in Jurisprudence and Philosophy*, Clarendon Press, 123.

— (2012): *The Concept of Law*, Oxford University Press.

Hartnett, E. (1999): 'A Matter of Judgement, Not a Matter of Opinion', *New York University Law Review*, 74, 123.

Herman, H. (1988): 'United States v. Salerno: The Bail Reform Act Is Here to Stay', *DePaul Law Review*, 38, 165.

Hilpinen, R. (1987): 'Conflict and Change in Norm Systems', in: Friindberg, A. & Van Hoecke, M. (eds.), *The Structure of Law: Proceedings of the 2nd Benelux-Scandinavian Symposium in Legal Theory*, Iustus, 37.

Hinghofer-Szalkay, S. (2017): 'The Austrian Constitutional Court: Kelsen's Creation and Federalism's Contribution?', *Fédéralisme Régionalisme*, 17.

Hohfeld, W. (1917): 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, 26:8, 710.

Holton, R. (2002): 'Principles and Particularism', *Proceedings of the Aristotelian Society. Supplementary Volumes*, 76, 191.

Hruschka, J. (2005): *Imputación y Derecho Penal*, Aranzadi.

Jestaedt, M. (2012): 'The Doctrine of Balancing', in: Klatt, M. (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford University Press, 152.

Julius, A.J. (2016): ‘The Jurisprudence Annual Lecture 2016—Mutual Recognition’, *Jurisprudence*, 7:2, 193.

— (2017): ‘Independent People’, in: Kisilevsky, S. & Stone, M. (eds.), *Freedom and Force Essays on Kant’s Legal Philosophy*, Hart Publishing, 91.

Kelsen, H. (1942): ‘Judicial Review of Legislation’, *The Journal of Politics*, 4:2, 183.

— (1973): *Essays in Legal and Moral Philosophy*, Springer.

— (1991): *General Theory of Norms*, Clarendon Press.

— (2005): *Pure Theory of Law*, The Lawbook Exchange, Ltd.

— (2015): ‘Who Ought to be the Guardian of the Constitution?’, in: Vinx, L., *The Guardian of the Constitution*, Cambridge University Press, 174.

Klarman, M. (1992): ‘Review: Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments’, *Stanford Law Review*, 44:3, 759.

Klatt, M. (2008): *Making the Law Explicit*, Hart Publishing.

Klatt, M. & Meister, M. (2012): *The Constitutional Structure of Proportionality*, Oxford University Press.

Knell, S. (2005): ‘A Deflationist Theory of Intentionality?’, *Pragmatics & Cognition*, 13:1, 73.

Kramer, L. (2004): *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford University Press.

Kumm, M. (2004): ‘Constitutional Rights as Principles’, *International Journal of Constitutional Law*, 2:3, 574.

— (2007): ‘Political Liberalism and the Structure of Rights’, in: Pavlakos, G. (ed.), *Law, Rights and Discourse*, Hart Publishing, 131.

— (2010): ‘The Idea of Socratic Contestation and the Right to Justification’, *Law and Ethics of Human Rights*, 4:2, 141.

— (2012): ‘Alexy’s Theory of Constitutional Rights’, in: Klatt, M. (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford University Press, 201.

Kumm, M. & Walen, A. (2014): 'Human Dignity and Proportionality', in Huscroft, Bradley Miller, B. and Webber, G. (eds), *Proportionality and the Rule of Law*, Cambridge University Press, 67.

Lawson, G. (1994): 'The Constitutional Case Against Precedent', *Harvard Journal of Law & Public Policy*, 47:1, 23.

Lawson, G. & Moore, C. (1996) 'The Executive Power of Constitutional Interpretation', *Iowa Law Review*, 81, 1267.

Leiter, B. (2010): 'Legal Formalism and Legal Realism: What is the Issue?', *Legal Theory*, 16:2, 111.

Letsas, G. (2012): 'Harmonic Law', in: Dickson, J. & Eleftheriadis, P. (eds), *Philosophical Foundations of European Union Law*, Oxford University Press, 77.

Leubsdorf, J. (1987): 'Deconstructing the Constitution', *Stanford Law Review*, 40:1, 181.

Lewis, D. (1979): 'Scorekeeping in a Language Game', *Journal of Philosophical Logic*, 8, 339.

Lindahl, H. (2013): *Fault Lines of Globalisation*, Oxford University Press.

Loeffler, R. (2005): 'Normative Phenomenalism', *European Journal of Philosophy*, 13:1, 32.

Loughlin, M. (2000): *Sword and Scales: An Examination of the Relationship Between Law and Politics*, Hart Publishing.

Loughlin, M. & Walker, N. (eds.), (2008): *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press.

Luhmann, N. (2004): *Law as a Social System*, Oxford University Press.

Lyons, D. (1984): 'Justification and Judicial Responsibility', *California Law Review*, 72:2, 178.

MacCormick, N. (1978): *Legal Reasoning and Legal Theory*, Clarendon Press.

— (2005): *Rhetoric and the Rule of Law*, Oxford University Press.

Mackie, J.L. (1985): *Persons and Values. Selected Papers. Volume II*, Clarendon Press.

Mañalich, J.P. (2014a): ‘Normas Permisivas y Deberes de Tolerancia’, *Revista Chilena de Derecho*, 41:2, 473.

— (2014b): *Norma, Causalidad y Acción*, Marcial Pons.

Marmor, A. (1990): ‘No Easy Cases?’, *Canadian Journal of Law and Jurisprudence*, 3:2, 61.

— (2001): *Positive Law and Objective Values*, Oxford University Press.

Marx, K. (1904): *A Contribution to the Critique of Political Economy*, Charles H. & Company.

McDowell, J. (1982): ‘Criteria, Defeasibility and Knowledge’, *Proceedings of the British Academy*, 68, 455.

McDowell, J. (1984): ‘Wittgenstein on Following a Rule’, *Synthese*, 58:3, 325.

Michelman, F. (1985): ‘Foreword: Traces of Self-Government’, *Harvard Law Review*, 100:1, 4.

— (1988): ‘Law’s Republic’, *The Yale Law Journal*, 97:8, 1493.

Möller, K. (2007): ‘Balancing and the Structure of Constitutional Rights’, *I•CON*, 5:3, 453.

— (2012a): ‘Proportionality: Challenging the Critics’, *I•CON*, 10:3, 709.

— (2012b): *The Global Model of Constitutional Rights*, Oxford University Press.

Montminy, M. (2016): ‘A Contextualist Approach to Higher-Order Vagueness’, *The Southern Journal of Philosophy*, 54, 372.

Moore, G.E. (1918): ‘The Presidential Address: Some Judgments of Perception’, *Proceedings of the Aristotelian Society*, 19, 1.

Moore, M. (1981): ‘The Semantics of Judging’, *Southern California Law Review*, 54, 151.

— (1992): ‘Moral Reality Revisited”, *Michigan Law Review*, 90:8, 2424.

— (2001): ‘Justifying the Natural Law Theory of Constitutional Interpretation’, *Fordham Law Review*, 69:5, 2087.

— (2003): ‘The Plain Truth About Legal Truth’, *Harvard Journal of Law & Public Policy*, 26.1, 23.

— (2010): *Act and Crime*, Oxford University Press.

— (2016): ‘Semantics, Metaphysics, and Objectivity in the Law’, in: Keil, G. & Poscher, R., *Vagueness and Law*, Oxford University Press, 127.

Moreso, J.J. (2008): ‘El Positivismo Jurídico, la Interpretación del Derecho y la Aplicación de la Constitución’, *Derecho y Humanidades*, 14, 37.

— (2012): ‘Legal Defeasibility and the Connection Between Law and Morality’, in: Ferrer, J. & Batista, G., *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford University Press, 225.

Mulhall, S. (2001): *Inheritance & Originality*, Clarendon Press.

Munzer, S. (1973): ‘Validity and Legal Conflicts’, *The Yale Law Journal*, 82, 1140.

Navarro, P. & Moreso, J.J. (1996): ‘Aplicabilidad y Eficacia de las Normas Jurídicas’, *Isonomía*, 5, 119.

— (2005): ‘Applicability and Effectiveness of Legal Norms’, *Law and Philosophy*, 16, 201.

Norval, A. (2006): ‘Democratic Identification. A Wittgensteinian Approach’, *Political Theory*, 34:2, 229.

O’Shea, J. (2009): ‘On the Structure of Sellars’s Naturalism with a Normative Turn’, in: A. deVries, W. (ed.), *Empiricism, Perceptual Knowledge, Normativity and Realism*, Oxford University Press, 187.

Ortíz de Urbina, I. (2008): ‘De Moscas y Agresores Muertos’, *InDret Penal*, 3/2008, 42.

Paulsen, M. (1994): ‘The Most Dangerous Branch’, *The Georgetown Law Journal*, 83, 217.

Paulson, S. (2017): *Metamorphosis in Hans Kelsen’s Legal Philosophy*, 80:5, 860-894.

Pavlakos, G. (2006): ‘Two Conceptions of Universalization’, *Panóptica*, 8, 441.

— (2009): ‘Practice, Reasons, and the Agent’s Point of View’, *Ratio Juris*, 22:1, 74.

— (2011): ‘Constitutional Rights, Balancing and the Structure of Autonomy’, *Canadian Journal of Law and Jurisprudence*, 24:1, 129.

— (2015): ‘On Second Order Morality’, *Jurisprudence*, 6:2. 276.

Peregrin, J. (2007): 'Developing Sellars' Semantic Legacy', *Poznan Studies in the Philosophy of the Sciences and the Humanities*, 92:1, 257.

— (2008): 'An Inferentialist Approach to Semantics', *Philosophy Compass*, 3:6, 1208.

Postema, G. (2001): 'Objectivity Fit for Law', in: Leiter, B., *Objectivity in Law and Morals*, Cambridge University Press.

Prien, B. (2010): 'Robert Brandom on Communication, Reference, and Objectivity', *International Journal of Philosophical Studies*, 18:3, 433.

Putnam, H. (1973): 'Meaning and Reference', *The Journal of Philosophy*, 70:19, 699.

— (1975): *Mind, Language and Reality, Philosophical Papers 2*, Cambridge University Press.

— (1981): *Reason, Truth and History*, Cambridge University Press.

— (1991): *Representation and Reality*, MIT Press.

Rawls, J. (1993): *Political Liberalism*, Columbia University Press.

— (1999): *A Theory of Justice*, The Belknap Press.

Raz, J. (1976): 'Critical Study: Kelsen's General Theory of Norms', *Philosophia*, 6:3-4, 495.

— (1980): *The Concept of a Legal System*, Oxford University Press.

— (1985): 'Authority, Law and Morality', *The Monist*, 68:3, 297.

— (1986): 'Dworkin: A New Link in the Chain', *California Law Review*, 74:3, 1103.

— (1995): *Ethics in the Public Domain*, Clarendon Press.

— (1999): *Practical Reason and Norms*, Oxford University Press.

— (2001): 'Reasoning with Rules', *Current Legal Problems*, 54, 1.

Rivers, J. (2006): 'Proportionality and Variable Intensity of Review', *The Cambridge Law Journal*, 65:1, 174.

Rodriguez, J. (1997): 'La Derrotabilidad de las Normas Jurídicas', *Isonomía*, 6, 149.

— (2000): 'Axiological Gaps and Normative Relevance', *ARSP*, 86:2, 151.

— (2012): ‘Against Defeasibility of Legal Rules’, in: Ferrer, J. & Batista, G., *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford University Press, 89.

Ross, A. (2004): *On Law and Justice*, The Lawbook Exchange, Ltd.

Ruiter, D. (1997): ‘Legal Validity qua Specific Mode of Existence’, *Law and Philosophy*, 16, 479.

Russell, B. (1932): ‘Vagueness’, *Australasian Journal of Psychology and Philosophy*, 1, 84.

Sabel, C. & Gerstenberg, O. (2010): ‘Constitutionalising an Overlapping Consensus’, *European Law Journal*, 16:5, 511.

Sach, C. (2014): *Intentionality and the Myths of the Given*, Pickering & Chatto.

Sager, L. (1990): ‘The Incorrigible Constitution’, *New York University Law Review*, 65, 893.

Schauer, F. (1987): ‘Rights as Rules’, *Law and Philosophy*, 6:1, 115.

— (1988): ‘Formalism’, *The Yale Law Journal*, 97:4, 509.

— (1991): *Playing by the Rules*, Clarendon Press.

— (1995): ‘Giving Reasons’, *Stanford Law Review*, 47:4, 633.

— (2003): ‘Neutrality and Judicial Review’, *Law and Philosophy*, 22, 217.

— (2008): ‘A Critical Guide to Vehicles in the Park’, *New York University Law Review*, 83, 1109.

— (2012): ‘Is Defeasibility an Essential Property of Law?’, in: Ferrer, J. & Batista, G., *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford University Press, 77.

Schmitt, C. (2004): *On the Three Types of Juristic Thought*, Praeger.

— (2008): *Constitutional Theory*, Duke University Press.

— (2015): ‘The Guardian of the Constitution’, in: Vinx, L., *The Guardian of the Constitution*, Cambridge University Press, 79.

Searle, J. (1995): *The Construction of Social Reality*, The Free Press.

— (2010): *Making the Social World*, Oxford University Press.

Sellars, W. (1953): ‘Inference and Meaning’, *Mind*, 62:247, 313.

— (1963): *Science, Perception and Reality*, Humanities Press.

Shapiro, S. (2011): *Legality*, Harvard University Press.

Simmonds, N.E. (1993): 'Judgement and Mercy', *Oxford Journal of Legal Studies*, 13:1, 52.

Spiliotopoulos, E. (1983): 'Judicial Review of Legislative Acts in Greece', *Temple Law Quarterly*, 56, 463.

Stavropoulos, N. (1996): *Objectivity in Law*, Clarendon Press.

— (2013): 'Words and Obligations', in: Duarte, L., Edwards, J. & Dolcetti, A. (eds.), *Reading HLA Hart's The Concept of Law*, Hart Publishing, 226.

Stone, A. (2002): 'Abstract and Concrete Review in the United States', in: Stone, A. & Shapiro, M., *On Law, Politics, and Judicialization*, Oxford University Press, 347.

Strauss, D. (2011): 'Do We Have a Living Constitution?', *Drake Law Review*, 59, 973.

Sunstein, C. (1985): 'Interest Groups in American Public Law', *Stanford Law Review*, 38:1, 29.

— (1986): 'Legal Interference with Private Preferences', *The University of Chicago Law Review*, 53: 4, 1129.

— (1999): 'Must Formalism be Defended Empirically?', *The University of Chicago Law Review*, 63:3, 636.

Supiot, A. (2017): *Governance by Numbers. The Making of a Legal Model of Allegiance*, Bloomsbury Publishing Plc.

Tomkins, A. (2005): *Our Republican Constitution*, Hart Publishing.

Tur, R. (2001): 'Defeasibilism', *Oxford Journal of Legal Studies*, 21:2, 355.

Tushnet, M. (2008): *Weak Courts, Strong Rights*, Princeton University Press.

Urbina, F (2017): *A Critique of Proportionality and Balancing*, Cambridge University Press.

Van der Walt, J. (2014): *The Horizontal Effect Revolution and the Question of Sovereignty*, De Gruyter.

Veitch, S. (2006): 'A Very Unique Case', in: Bankowski, Z. (ed.), *The Universal and the Particular in Legal Reasoning*, Ashgate, 143.

— (2007): *Law and Irresponsibility*, Routledge-Cavendish.

Vilajosana, J. (2010): *Derecho en Acción*, Marcial Pons.

Von Savigny, F. (1878): *Sistema del Derecho Romano Actual*, Tomo 1, F. Góngora y Compañía Editores.

Von Wright, H. (1951): 'Deontic Logic', *Mind*, 60:237, 1.

— (1963): *Norm and Action*, Routledge, London.

— (1983): *Practical Reason*, Basil Blackwell.

Waldron, J. (1994): 'Vagueness in Law and Language', *California Law Review*, 82:3, 509.

— (2006): 'The Core Case Against Judicial Review', *The Yale Law Journal*, 115, 1346.

Waluchow, W. (2007): *A Common Law Theory of Judicial Review*, Cambridge University Press.

Webber, G. (2009): *The Negotiable Constitution*, Cambridge University Press.

— (2013): 'Rights and the Rule of Law in the Balance', *Law Quarterly Review*, 129, 399.

Wechsler, H. (1965): 'The Courts and the Constitution', *Columbia Law Review,* 65:6, 1001.

Weinberger, O. (1998): 'The Expressive Conception of Norms', in: Paulson, S.L. & Litschewski-Paulson, B. (eds.), *Normativity and Norms*, Oxford University Press.

Wellmer, A. (1991): *The Persistency of Modernity*, Polity Press.

Westen, P. (1982): 'The Empty Idea of Equality', *Harvard Law Review*, 95:3, 537.

Williams, G. (1956): 'The Concept of a Legal Liberty', *Columbia Law Review*, 56:8, 1129.

Wittgenstein, L. (1922): *Tractatus Logico-Philosophicus*, Kegan Paul, Trench, Trubner & CO., Ltd.

— (1958): *Philosophical Investigations*, Blackwell Publishing.
— (1969): *On Certainty*, Basil Blackwell.
— (1974): *Philosophical Grammar. Part I*, Basil Blackwell.
— (1976): *Wittgenstein's Lectures on the Foundations of Mathematics*, Cornell University Press.
— (1978): *Remarks on the Foundations of Mathematics*, Basil Blackwell.
Wróblewsky, J. (1992): *The Judicial Application of Law*, Springer.