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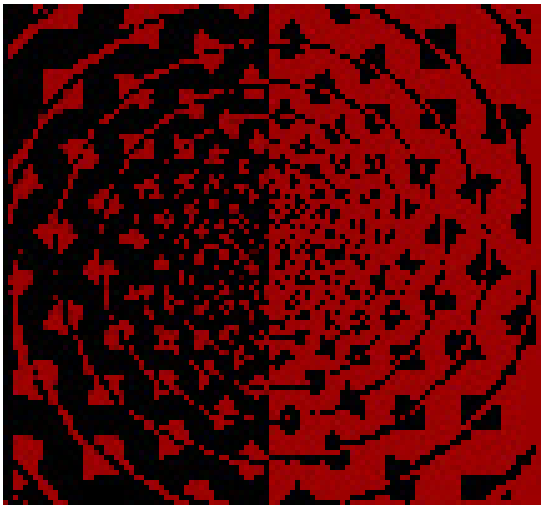

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Auteur: Philippe Coppens

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Collège Thomas More, place Montesquieu, 2 B-1348 Louvain-la-Neuve
Téléphone (32 10) 47 46 34 Fax (32 10) 47 24 03 E-mail : ewa.stasiak@uclouvain.be

THE MEANING OF LAW, ABSENT A SENSE OF JUSTICE

Philippe Coppens

Prof. University of Louvain

FNRS

I. Introduction

The concept of law is large and its meaning depends on the kind of questions one asks about the law. Questions can be about the nature and purpose of a practical rule that is to be followed in the conduct of human action. Some philosophers, like Marx or Benjamin, have analyzed the law as a factor of violence rather than as a mean of solving conflicts peacefully. And lawyers and judges often ask questions about the semantics of a legal concept, in the framework of their search for the specific meaning of a particular word or a given legal rule. Doing that, they often make strategic use of indeterminabilities in meaning to support their reasoning and/or to justify the application of a specific norm to the case at hand. Yet, by the term “law”, one might have “the legal order” in mind, the interest here being in the coherence and the logic of a system of norms and of a political organization. Even more simply, one may ask of oneself the meaning of it all. Why, from the origin, the myth and the logos have been striving to get the world in order by rules? And what meaning rules of action bear compared to scientific laws; and if they are different, how so?

Thus, there are at least two important senses for the term “meaning”. On the one hand, we look for the extension and the limits of particular concepts such as vehicle, real estate, residence, theft… This is a problem of linguistic indeterminacy of concepts, particularly of legal ones. On the other hand, what we often thereby try to do is to give a direction, a turn--a horizon--to our

thoughts. For instance, what does the "theft" of an apple *mean* when the "thief" is a man as poor as a church mouse? May we speak here of a *dishonest* appropriation of someone else's property and sentence the thief? Or are we to offer a different interpretation, give another meaning, to "theft" this time over, just because a more formal legal reasoning that would summarily sentence *this* thief would hurt our deeper sense of justice?

Most "thick" legal terms or entities – right, dignity, equality, proportionality, duty, society, institutions, democracy, state, corporation…– do not have counterparts in the world of facts. Hence, they do not ordinarily function as natural concepts such as stone, tree, water or atom. Nevertheless, we human beings have strong feelings about legal words. We deem them to be crucial in the conduct of our lives. It seems that we could not act without (following) them, for practically the same mysterious reasons we find ourselves unable to describe nature accurately without recourse to mathematical rules. It is as if legal words function as mediators between the life we have to live on earth (by acting inside and through legal institutions) and the idea of justice.

Our way of reasoning in the domains of law and morality, as in those of physics and biology, always seems to rely on rules and comparisons between words and things. This may well be the very first foundation for the epistemological method by which human reason functions. If the immediate purpose of this mode of reasoning is to make reliable predictions in a world of uncertainties, its ultimate purpose – indeed, the very meaning of all our works, pains, and anxieties – might well be to find relief and peace in the discovery of humankind's *just* place in the universe of the living.

This article therefore is conceived in two parts. In the first part, I cover the basics: the nature and the role of norms and, more precisely, the rule of law. I do this because the theory of norms and the philosophy of law is, necessarily, foremost a philosophy of action; and therefore to speak about rules and normativity consists in showing, for starters, what counts in the guidance of behavior and how a code of conduct set by a society can be realized by moral agents in concrete situations. The main idea here is as follows: in a nonhomogeneous society such as a pluralistic constitutional democracy, moral agents will accept a legal code of conduct only if the law incorporates impartiality as a requisite of justice with regard to all moral agents.

In the second part, I address two classical problems of philosophy of law and their relations to the prerequisite of justice. The first is the problem of *the*

existence of a rule. The specific modality under which a legal norm exists is the modality of validity. A norm exists if and only if it is valid. But then what is *validity*? And how far is the validity of a norm concerned with the question of its *legitimacy*? Might an unjust norm – say a partial and discriminatory norm – be a "rule of law"? The second is the problem of *interpretation*. Once we have a valid norm, how can a judge apply this norm in a particular context? We often have to give contextual interpretation to a norm. For instance, the norm of equality – the principle that says similar cases must be treated similarly. Yet what is the meaning of "equality"? Is it not the kind of concept, which typically requires moral reasoning to be applied in concrete cases? And when might one say that two different cases are similar cases requiring similar judicial decisions?

These different questions show that the meaning of law in general, and the meaning of legal rules and terms in particular, depend largely on the *context*(s) of their application (that is, of their use inside institutional frameworks) and on evaluative judgments in which the horizon of thought is the idea of a just solution to a social problem. Keeping that in mind, we could draw a parallel between the title of this chapter and the question of the meaning of physics, absent a sense of nature. From a narrow perspective, one might say that physics can be separated from the idea of nature in the same way as we may claim that the daily practice of law is not an ethical discourse about the idea of justice. We do not interrogate the ultimate finality of our action every time we do physics or every time a judge decides a legal case. But if one is asked why s/he does physics or why s/he is a lawyer, s/he will, I guess, say the following: even if I do not everyday theorize my practice, I do implicitly put this theory to the test in pursuing the unfinished process of the unification of nature, or in trying to give everyone his due, and playing my part in the unaccomplished hope of a just world. The rational quest for a unified concept of nature is certainly an important part of the meaning of physics. In the same vein, the reasonable quest for justice makes up a big part of the pragmatic meaning of law.

II. On rules and human action

Let us begin with two--or three--problems of epistemology. The principal aim of philosophy and its main task according to Bergson (1914, 1052) is "to embrace in a single vision the totality of things: to philosophize has usually meant to unify". For instance, in the earliest days of the history of occidental philosophy, Greek philosophers had the aim of "reducing the indefinite

multiplicity of individual things to a certain number of *concepts*, and these in turn to a single idea, which includes everything» (ibid). By such a reduction of global diversity to unity, we seek to represent our own identity as a natural element of the world in which we live; and hence the ensuing set up, as a coherent system for ourselves and for our others. But, time after time, the history of philosophy has been also one of rebellion against 'totality', because of the yearning for infinity that the life inside us manifests. This is particularly true in the case of thinkers like Kierkegaard, James or Wittgenstein. We humans have varieties of experiences in more or less the same ways that we have varieties of encounters with normativity.

Rules are formulated within a language, but their meaning is expressed through action. The function of rules is to allow us to anticipate the behaviors of our others and hence to guide our daily practices. It is therefore essential to see and to restore connections between *rules of reason*, on the one hand, and *practices of society*, on the other. Maybe the most important consequence of this connection is that, both, understanding the meaning and ascertaining the validity of a rule must rely on just and reasonable comparisons between men and things or legal entities. In law, the comparison is expressed by the concept of equality with the meaning of *proportional equality*. To grasp the meaning of a rule, the nature and the scope of a right, or of a liberty – for instance, the right of property or the freedom of speech – requires us to apply the concept of proportionality: to make comparisons with other subjects, and also with connections with the world that citizens share and are responsible for. Typically, proportionality is an applied concept. It is not a kind of word that contains an a priori definable meaning. Its meaning always depends on the concrete terms of that specific comparison; it may thus vary over time, notably through dispute resolution proceedings.

It is also out of comparisons that each norm in general, and every rule of law in particular, can emerge from at least two conditions for their possibility:

- First, no one can imagine any practical normativity of any kind, ethical or juridical, without the idea of an alter ego – the presence of others. Someone radically isolated on an isle from birth to death will have never known the concept of a "practical" rule – one that guides human action through time. Conversely, the presence of another human being in front of me and the immediate recognition that I am not him but that I am nothing without him, invites me to gratitude for my alter ego. And this is probably the first sense of

justice: the equal dignity of each human being. The main task of the law and of its actors is to realize this hope.

- Second, the most important task of a rule – and the very reason for its existence – is precisely to anticipate and to co-ordinate our behavior and those of our others in a reasonable way. In a pluralistic democracy, that is a society of persons divided by different values and religions but a society of citizens trying to live together beyond their differences, the reasonable way of making rules lies in fair procedures of public discussion. The idea is to overcome the divisions of persons in order that free and equal citizens may unify their differences towards a shared common good.

Through this process, over time, the rules restrain indeterminations and contingencies in our lives; hence, in this respect, albeit only to a certain extent, they free us from our existential anguish and from our bounded rationality.

It is hence not by chance that so many legal mechanisms and techniques express the idea of "legal security", i.e., the anticipation of the future. The rule of law always tries to secure continuity through time or, more exactly, through the existential time we live in, as human beings, i.e., through duration.

The legal system in a state of law has basic norms, each of which focuses on the idea of existential continuity. As all physical and practical rules do, a rule of law, too, conduces to certain kinds of prediction; it has to tell us something about what we can expect in the behavior of other people. But, contrary to a scientific rule, this practical "something" is not a certainty; rather, it is a behavior we are *entitled to expect* because of the very existence of the rule.

In addition to these two conditions for possibility – the presence of others, and the necessity of anticipation and coordination – there is another strange consideration for each practical norm. One might argue that, in order to comply with the rule of a law, we first must be able to know how we can break that law. A rule that could never be transgressed cannot be said to be a practical one; maybe, at most, a physical one, if all other conditions are satisfied. Consider the law of gravitation for instance : we do not have to "comply" with the law of gravitation because it would be senseless to suggest that we will (as if we could) act against it. To conform to a rule, or to break it, are expressions that make sense only inside the limits of practical norms – norms open to transgressions by actions. It is nonetheless just as important to remind ourselves that the practical rules we have to comply with because we can do so, enjoy their validity solely in the background of some other kinds of norms or principles that resemble

physical precepts only for having being deeply embedded for all too long in traditions or manners of living so customary as to be taken for granted by now.

The fact that a practical rule of law is broken hence shows us that it is not completely efficient or, should the occasion arise, that it has fallen in abeyance; but, in contrast to a physical rule, this state of affairs does not as such prove that the rule of law is wrong or that it has lost its validity.

There is another way of expressing this distinction. In his *Philosophical Investigations*, Wittgenstein discusses many different issues; one of these is about the specificity and the meaning of rules. The problem he wants thereby to resolve can be paraphrased by the query: what does it *mean* to follow a rule? Notice that we could have simply asked: what is a rule? But it is, I think, important that the problem is formulated in such "pragmatic" language: we are not questioning the rule *per se* but in fact asking whether that rule is something we *have to follow?* What sounds particularly interesting here is that our inquiry into the rule connects directly and promptly with the reality of action. Action is normally the result of choice; and choice is an issue of deliberation. But what we call deliberation is to a large extent 'reasoning about means and ends'. Lawyers are familiar with such deliberations, just as are economists for that matter.

In a certain sense, we can sustain that the more interpretations a norm affords, the less coercive the answers that the questions it poses will be. One could imagine, as some in the history of philosophy have tried to do, that every action one undertakes could always be viewed as complying, say, with the norm N_1, because consisting of one possible interpretation of this norm N_1. But this would create the paradox raised in *Philosophical Investigations*, §201 (Wittgenstein, 1953): if *every* thing would be made out to accord with a rule, then no course of action could be determined by that rule. The solution to this paradox is once again that we do not follow a practical rule *privately*. A legal system is an order of public rules addressed to rational persons and the interpretation of these rules are public as well. So, there is public control over the arguments of those who claim their behaviors comply with the legal rule. Hence, public control, organized by public rules of discussion and deliberation, is the way by which we can avoid the paradox without dodging the issue. This is the same in the field of law. The legal disputes are organized by a body of public rules of procedure, that is, of legal devices and mechanisms through which the citizens and the officials of a society hope to achieve just and efficient resolutions of their disputes. The aim and the meaning of procedural law, then,

consist in giving public tools to realize step by step and case by case the idea of efficient rights compatible with the principles of a just and equal proportionality.

III. To create and follow a rule in a legal system

Is the question of identification of law distinct from question of adjudication? Or are they two faces of the same problem? Let us first consider the definition of a legal system given by John Rawls in his *Theory of Justice* (1971, §. 38, 235): "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social expectations. When these rules are just, they establish a basis for legitimate expectations".

The first sentence is classic, even if it draws attention to the idea of social expectations – an idea which plays an important role in law. For instance, a plaintiff can claim that the breach of contract follows from the violation of some of his legitimate expectations (of his legitimate anticipation of the future) by the other contracting party. Or the Executive cannot reverse an official decision toward a person if such decision could break the course of action that this person could legitimately expect from the public authority. Hence, public rulers are bound by the right of citizens to security. This is also what we first and foremost mean by the rule of law: that citizens have a core of rights which protect them by proscribing some official decisions.

But the second sentence of the quotation may be more problematic. To claim that a rule is valid if and only if it is "just", and that it has to be just in order to create legitimate expectations, consists in providing an ethical criterion for the validity of the rule and, more generally, for the identification of the law. This claim is far from the idea of *Die reine Rechtslehre* of Kelsen (1960) or from a descriptive theory of law in the manner of Hart[1]. According to Kelsen, all legal norms are created by acts of human will; and these act(ion)s and events are taking place in space and time. So, a norm always originates in a voluntary social fact. But Kelsen, like all non-cognitivists, had a strong faith in Hume's

[1] Notice, however, that Hart has acknowledged--explicitly in the Postcript of the second edition of *The Concept of Law*--that the rule of recognition (whose function is to provide criteria for the identification of law) *may* "incorporate as criteria of legal validity conformity with moral principles or substantive values" (Hart 1994, 250). This is also a reason to qualify Hart's theory as Soft Positivism--"soft", in the sense that ethical considerations can be elements of the rule of recognition. Hence, they are no more extra-legal considerations to decide law but formal legal criteria. They have been, so to say, internalized by the legal system through the rule of recognition.

distinction between “is” and “ought” (“ist” und “soll”). Hence, a social fact could not become an “ought-proposition”, a norm with a deontic function, without any further process[2]. This is the role of interpretation, not in the sense of hermeneutics (which is ”eine *Interpretation*”) but as a pure formal operation (which is “ein *Deutungsschema*”). A social act of will gains normativity if and only if it is interpreted by another norm of the legal system which gives it the specificity of normativity – of a legal “ought”. The norm is thus a “Deutungsschema” that gives to the act of will the normative sense of a “soll”. Now, the transition from an act of will (so muss es sein) to a legal norm (so sollte es sein) via normative interpretation is only a *formal* operation, not a substantial one. This explains the very reason why, according to Kelsen, a norm can be legally valid even if it is unjust from an ethical perspective. As a pure formal category, the “soll” is, like a proposition of formal logic, compatible with *any* content of norms. This does not mean that the quest for justice is nothing of value. It only means that *a legal norm is fully valid, absent a sense of justice*. Kelsen and all legal positivists in general do not believe that a proposition could be said to be just or unjust, in an objective sense. In other words, there are no moral facts; only subjective moral judgments. Such is the credo of moral non-cognitivism.

One distinctive feature of a legal system is the fundamental claim it makes to priority over others practical norms, principles, standards or still other reasons to act. But this feature does not give us the criteria according to which the legal system can discriminate between the practical norms that are legally binding and those which are “merely” morally binding. Most of the time, the rule of law is general and abstract; and it affects the rights and duties of many people who find themselves in a variety of personal conditions and singular contexts. But, as we have seen, the very meaning of a rule of behavior is to be stable through changing circumstances. Hence, the practical norm provides an exclusive reason to act, and yet this reason might not be the best of all reasons that can be considered. This is one way to grasp the difference between the *reason to act*, in a legally valid system of rules of law and within the duration of a human being’s existence, and the *rationality of action* under the ideal conditions of marginal costs-and-benefits analysis. A reason to act acquires the properties of a *rule* only

[2] One of the main results of the Humean ‘strict separation’ thesis is that it is impossible to derive some “ought” propositions from factual premises alone.

when we feel bound by it even if the marginal cost of our following the rule happens to be superior to the corresponding marginal benefit.

Once again, this difference between the reason to act as a rule of action, and the rationality of action under particular circumstances comes from the internal necessity of law and ethics. By internal necessity of law and ethics, I mean that a practical rule cannot have meaning other than in a sense of a socially *intersubjective* fashion. This sets some pragmatic limits to the epistemological principle of methodological individualism according to which the rationality of action is *measured* in neo-classical economics[3].

What I have just uttered does not mean that, contrary to marginal economics, the rule of law would be radically impervious to the great variety of personal and social contexts. It is the specific role of a judicial interpretation to render compatible and to reconcile the stability of the text and the changing nature of the circumstances. But this kind of flexibility is also a necessity for the legislature in the law making process, at least if the legally binding norms pretend to a form of legitimacy.

One important question in most of the legal orders is: how far can the judicial participate in the law making process by interpreting law? More specifically: does a judge offend the idea of democracy if he interprets the law in the light of his conception of justice? Is a moral reading of the European Treaty or of the French Constitution an endless judicial task? Something bound to happen, or undemocratic judicial activism? Setting bounds between the Legislative, the Executive and the Judicial powers is not an easy task, and it also happens to define the different forms of democracy. At least for the last sixty years, the predominant feature of public law in Europe has been threefold: the increasing importance of the Executive over the Legislative; the strengthening of the control of the acts (norms) of both the Executive and the Legislative by the Judiciary; and the globalizing movement of the law and its fragmentation which goes with the spreading out of free trade.

On the issue of "validity in a first sense"

In a first sense, a norm in a legal order can be declared valid for having been edicted in compliance with all the conditions settled a priori by that legal order. From a very general point of view, a norm N_1 validly belongs to a legal

[3] This use leaves open the following question: how can the characteristics of rationality in economics be made compatible with those which the law emphasizes in its definition of the "normally reasonable" and "prudent" individual? Consider the strange question: Is it *economically rational* to act in *a reasonable manner* according to the legal standards?

system if and only if that legal system has a norm N_2 that authorizes the enactment of norm N_1. For example, a contract (*N1*) can create (subjective) rights and obligations if and only if the parties to the contract comply with the contract law (objective law, *N2*)[4]. But now we have to find out norm *N3* which authorizes the enactment of norm N_2. For instance, one traditional condition is that the norm must be taken – typically, legislation must be passed – by a majority, most of the time an absolute majority and in some cases a two-thirds majority. And now we have to distinguish a norm N_4 which authorizes norm N_3 and, by degrees, we follow the chain of the validity of a legal order in nearly the same way as we proceed towards the source of causation. But the very last element of the chain of validity must be, if anything, one norm. Or so it seems. And this possibility turns to be a necessity when a legal order happens to be (1) a *system* (since it belongs to the concept of a system to be closed and thus to be sheltered from infinite regress); (2) a system of *practical norms* (since--per Humean tradition--the impossibility to be derived from a fact – the classical ought-is distinction[5] – is in the very nature of the concept of practical norms); and finally, (3) a *legal* system (since all practical norms – specifically the norms of ethics – are not, as such, elements of a legal system. Hence, to fulfill these three conditions, we must be able to answer these three questions: 1) what is the criterion (or, should the occasion arise, the criteria) by which we can identify the norms of a legal order? 2) What is the element that makes a legal system coherent? And finally, 3) could it be the case that the norm which authorizes the creation of the basic norm (say, N_n) be identical with the basic norm (N_n)? So, step by step, from the validity of one norm to the validity of another norm that authorized the creation of the first and, hence, is hierarchically higher in the legal system, we reach the basic rule of a legal system. The name of this rule will be the Grundnorm in the *Reine Rechstlehre* and – with a more pragmatic, less formal function, however – the Rule of Recognition in the *Concept of Law*.

The fundamental idea expressed by these two kinds of basic rule is that only a legal rule can provide the ultimate criterion according to which a practical norm belongs to a legal system. The reason for this idea comes from the epistemological (but, in my opinion, controversial) claim of a sharp fact against a value distinction. The corresponding claim for this idea is that the value judgments are subjective because they do not make statement of facts; and that

[4] This is the sense of the famous article 1134 of the Civil Code: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites" (Agreements lawfully entered into take the place of the law for those who have made them).

[5] In our context, this means that: "(…) the objective validity of a norm, which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an is, but again from a norm authorizing this act, that is to say, from an ought", according to Kelsen, *Reine Rechtslehre*, 1960, p. 8.

they cannot make factual claims because *there are not factual values* in the universe.

On the issue of validity in a second sense.

But there is a second sense to this reasoning, according to which the validity of a legal rule is not entirely restricted to its conformity along a priori conditions for its legal validity: the law cannot be justified exclusively on grounds of a priori formal reasons. Something more seems to be needed if the Legislative expects citizens to follow the rule, and follow it not only out of fear from a sanction should they not comply with it, but because they sense that the law is binding for them as well. For citizens to internalize the law and to live it *like a shared social norm* something more must be added to the formal initial conditions of the norm. This extra something is the element of the *legitimacy* of that norm.

The legal order belongs to a political system the citizens would renounce, absent a legitimate justification of its existence. This means that the legal order has no great future, absent a sense of justice. But, following J. Rawls, we must distinguish between "a public basis of justification generally acceptable to citizens on fundamental political questions and the many nonpublic bases of justification belonging to the many comprehensive doctrines and acceptable only on those who affirm them" (Rawls 1993, xix). This distinction has to be done in every legal order which is built on the promise of a just democratic regime – a constitutional and pluralistic regime for "free and equal" citizens who do not share the same religious, philosophical and moral doctrines.

This notion of legitimacy deals with the fact that people usually dislike being tributary to a formal system for the duration of their whole life on earth. Most of the time, the reasons for their acts are, where not purely routine or out of habit, then owing to their interests, their moral attitudes, and their sentiments (feelings, emotions, beliefs affecting their judgment) of justice or injustice in certain situations met and through actions taken or faced. This is one reason why the legal rules are never self-fulfilling prophecies. The effective implementation of a rule in a social context needs that rule first to be justified. But which kind of justification is required? Here, we could simply add that the request for justification is basically a demand for a better *theory of representation*, and without doubt also a demand for a better *theory of representative democracy*, one which would give to forms, procedures, and contents their fair share in the

process of promulgating a law, proclaiming an edict, or interpreting a norm or a right.

The problem of unjust laws may arise when a legal rule does not treat everyone equally. In this case, it is not satisfactory to claim that such discrimination is justified because the legal rule is valid – i.e., because the rule has been edicted in conformity with all formal a priori conditions. Citizens expect more than that; they demand "impartiality". In fact, "We", citizens and officials are legitimately entitled to be treated with impartiality by all three of the State's classical branches. And forms, procedures and contents that characterize the legal institutions and their ways of acting are the very tools needed to effect impartiality in, by, and through law.

The concept of impartiality and its reverse, the concept of unjust discrimination, are not at first very easy to deal with, however. In order to be applied, they require another concept, one which plays a fundamental role in law: the concept of *proportionality*. To treat someone with impartiality is therefore to treat that person *in the same manner* in which we would have treated any other person *in the same situation*. Having no meaning per se, but only in comparison with some other situations, is no doubt a feature of countless legal concepts, which have to be explained in a practical context if they are to resolve the problems posed by a particular situation. An interpreter can grasp the meaning of impartiality best by the criterion of proportional equality. The meaning of rights and obligations always resides in a relation, in a comparison, between the concrete situations of a number of people. Put differently, the meaning of subjective rights is necessarily *intersubjective*.

On interpretation in law

The role of interpretation is usually to solve the problem of linguistic indeterminacy, either in a static fashion or in a dynamic way. The static method may be summarized as an interpretation of a formal model in which logicians seeks to reduce linguistic indeterminacy by using symbolic logic. At the beginning, the purpose was to achieve unity in the language of science by reducing indeterminacy in complex terms to simple fundamental concepts or functions displaying univocal meaning (Neurath, Carnap, and Morris, vol. 1 [1938] and vol. 2 [1939]). Hence, the pragmatic context of speech acts, that is the psychological and sociological aspects of language that are of crucial importance in legal interpretation, was put aside.

It is in reaction to this static fashion of reductionism that a dynamic way of understanding interpretation and meaning was developed during the second half of the twentieth century. A great part of the philosophical efforts of this period (through hermeneutics in continental philosophy, and the linguistic turn in anglo-saxon countries) has consisted in giving another formulation to this problem of linguistic indeterminacy. One could show that these two movements are not so different; that they both arose in the same German-Austrian culture and social surroundings (Dummett 1993). In fact, there are more than one "Familienänlichkeit" (family resemblance) between the existential phenomenology inspired by Heidegger's *Sein und Zeit* and the analysis of ordinary language inspired by Wittgenstein's *Philosophische Untersuchungen*. In sum, both currents have the same roots and the same ambition to understand the possibilities and limits of language, by proceeding from an analysis of human action –first and foremost, by the interactive and intersubjective *practices* of a language. These practices are of fundamental importance for understanding the development of interpretation in law and the basic idea that some cases can be decided only through a shared moral reading of rules of law.

Even if judges, officials, and lawyers agree about the criteria to identify the rules of law in a legal order, it is not always easy to apply valid laws in a concrete and contextual case. They can be convinced, for instance, that the most important criterion of legal validity is that the rule of law complies with the principle of equality before the law. This gains meaning only upon the materialization – later on – of cases in which judges or officials should not be seen to discriminate in favor of (or against) a person or group, unless they give a good reason for doing so. Conversely, 'equality before the law' also means that discrimination may occur, but only when there is good reason for discriminating between two persons and/or two situations. When judges do so, we usually say that they applied law "impartially". But an evident condition must be fulfilled in order to claim that they have acted impartially. By some means or other, we must be able to draw a line between what discrimination is and what it is not, before claiming that such discrimination is just or unjust.

In another example, let us look at taxation. We know that all states impose taxes. But what exactly is a tax? Is compulsory military service a "tax"? Beyond questioning the meaning of the word "tax", let us suppose that a judge rules that it is a tax. But now, yet another question arises: is it "just discrimination" between citizens, when women are deemed not to have to pay this tax – i.e., in this case, not to serve in the military – simply "because they are women"?

The fundamental principle here is the following: the uncertainty about the semantic limits of words and the ambiguity of rules of law (what we call the indeterminacy thesis) do not signify that words and sentences can mean anything. The first meaning of interpretation, just as the first meaning of a rule, is precisely that there are some reasonable limits to the indeterminacy thesis (Coppens, 1998). Put differently, judges cannot take into consideration each and every other reason they want, but only *"reasonable" causes according to the law*. There thus is a difference between an arbitrary and an impartial judicial interpretation of the rules, which in itself is a kind of judicial restraint. Conversely, it would be a mistake to presume that a judge routinely applies a mechanical rule in the manner of a syllogism. Public control of these limits normally consists of ensuring this difference, in virtue of the procedural requirement of the judgment's justification, by which judges must be convincing to the effect that their decision is grounded in law and does not appeal, say, to their emotions, whims, or value-based preferences.

Some important people, like Montesquieu and Beccaria, believed that a judge had only to be a pure mechanic: he should be satisfied with being "la bouche de la loi", the law's mouthpiece. Might they have strived to believe that because they were trying to protect, at any price, the ideal of a strict separation of powers? To be sure, the more creative and the more sensible to the social role of the law judicial interpretation is, the greater the overlap between the judicial and the legislative powers in the state can be. This is, for instance, the reason why the French "Assemblée Constituante" (Constituent Assembly) had passed the bills of 16-24 august 1790: it sought to get rid of the "gouvernement des juges" (Government of the Judges) of the Old Regime. In England, this idea of a mechanic judicial process was given another name: "the declaratory theory", directly associated with a jurist of the eighteenth century: Sir W. Blackstone (*Commentaries on the Laws of England*, 1765-1769).

However, this *separation thesis* has always been utopian, for at least two reasons. First, the meaning of words and rules often is not crystal clear. It often is capable several meanings at once (ambiguity) whereby the context of the case has to be defined by a process of legal reasoning and *interpretation*. Moreover, extant indeterminacy raises the question of how the existence (the very validity) of a norm could be separated from its meaning; as also the issue of where the sense of, and the interest for, such fictitious separation resides, insofar as the aim of a rule of law is to be applied, and that in order to be applied that rule must afford explicit meaning? Second, we need to remember that the ambition for

strict separation is not only self-deluding but also an empirically false utopian ideal at that. It is bad utopia because, as we will see below, dynamic interpretation often needs that judges integrate principles of justice in their decisions, most notably in cases where they must balance two conflicting rights, which empirically speaking is what they do in practice. Also, judges receive a legacy of interpretations, which they take over and revive toward resolving new cases. The construction of the European Union by the European Court of Justice over the last fifty years would have been incomprehensible (and, indeed, objectionable) if a strict separation thesis had held sway. Indeed, some of the most celebrated Supreme Court decisions in legal history were hardly models of judicial restraint. This idea has been expressed by R. Dworkin in the following : "Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments" (R. Dworkin, 1996, 3).

From this point of view, the core of a lawsuit resides not so much in the discovery of the empirical facts of the case but in the legal qualification of the facts, and in the choice to retain one meaning of the rule instead of another. In these judicial conflicts of interpretation, the interests at stake, and the very object of legal argumentation, are consequently over the different meanings of legal concepts (of the rules of law) and over the justification of the privileged meaning. This is the point where legal reasoning and moral judgment seem indissociable.

From the foregoing, we may claim that the privileged (but not the only) way of integrating principles of justice into law proceeds by bestowing meaning to the concept of 'equality before the law' in the context of a case. A point worth mentioning here is that we may find the standard criterion of practical equality as far back in Greek Philosophy as in *The Nichomachean Ethics* (Book V, §.6), wherein Aristotle develops the two faces of the concept of unjust discrimination, i.e., of unequal treatment. The first one appears when two persons in the *same* situation are discriminated instead of having the same legal treatment – the same set of rights and obligations. In the traditional sense, this is a case of flagrant discrimination. But there is also another form of it, which arises every time two persons in *different* situations are treated in the *same* way. In both cases, the inappropriate application of the criterion of proportional equality may give rise to a sentiment of unjust partiality and, where necessary, to downright litigation. Not surprisingly, these Aristotelian criteria often have been used by the

European Court of Human Rights for the application of Article 14 of the European Convention of Human Rights[6].

In a case *relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium*, [ECHR, *(Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64)* 23.07.1968] for instance, the Court ruled that: "In spite of the very general wording of the French version ("sans distinction aucune"[7]), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized. This version must be read in the light of the more restrictive text of the English version ("without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to warrant …. It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, following the principles which may be extracted from the legal practice of a large number of democratic States, the Court holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized » [ECHR, 1968, §.10].

Later, for instance in the case *Thlimmenos v. / Grece*, the same Court would add:

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification …. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to

[6] Article 14 of the Convention provides that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

[7] Literally: "without *any* distinction".

> treat differently persons whose situations are significantly different" (ECHR, *Thlimmenos v. Grece Application no. 34369/9, 06.04.2000, §.44*)

The same principles are often applied by the European Court of Justice as well. For example, in a case *Milk Marque and National Farmers' Union v. / Commission*, Case 137/00, §.126, the Court gave the following ruling:

> "With regard to the second subparagraph of Article 34(2) EC, that provision, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (see, in particular, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39, and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49)."

We can find a classic example of just discrimination in the different rates of income tax applicable on the income – the financial ability – of the taxpayer expected to contribute to the public services budget of the State, i.e., the case of taxation proportional to income. From this form of state intervention originates the idea of *positive discrimination* according to which the legal order may create some newer discrimination favoring a class of individuals in order to rectify *unjust inequalities* those persons are found to have suffered in the past. The officials or judges do so because they do not expect that a fair or stable equilibrium will be reached spontaneously and/or rapidly enough. This form of positive discrimination is thus a *normative affirmative action* which may be analyzed as a legal instrument aiming at the true protection of certain minorities or categories of people, who have been disadvantaged in their lifetime. An example of such positive discrimination is Article 141 (4) of the Treaty of European Union which reads as follows:

> "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

Jurists usually know that they have to make comparisons between diverse situations in order to find out if one or the other subject has been treated equally. But now we face yet another problem. For if comparisons are a necessity for applying the concept of proportional equality, which elements must then one compare, why, and how? Or, more precisely, on what grounds are two situations

similar enough to warrant an unbiased, justified and reasonable, comparison? This is a new difficult question and of crucial importance in the context of adjudication. But at this point let's just add one remark. The problem of the similarity between two or more situations and the question of the criteria of similarity have to be raised in order to explain the notions of continuity and discontinuity in a legal system and, hence, to explain the meaning of coherence that such a legal system (as any other "system" worthy of the name) requires. The historical reconstruction of decisions in the past is essential to that project and the evolution of the system is more often than not presented by judges and other officials as natural, continuous or unbroken, even if the new case at hand and the public and moral discussion on it during the judicial process appear in unprecedented light. Law is anchored in history, continuity and coherence. And when there is really an unforeseen event which would create a big gap in the narrative, the judges may still have recourse to legal fictions, to some "as if" sentences, to reestablish the discipline and the authority of the legal order.

IV. The meaning of law and the horizon of justice: final remarks

As I have tried to show, the meaning of "the meaning of law" is plural. But all the different senses have, as horizon of thought, a certain idea of justice. Moreover, primatologists believe today that our primary sense of justice originates in a very old story that we share with nonhuman primates. Hence, the meaning of *law*, absent a sense of justice seems senseless, even if we can find in one legal order or the other some unjust *rules* of law. One important reason of unjust laws in deliberative democracies lies in the fact that there is often a huge gap between the formally recognized rights by the state and their actual effectiveness for all social categories of citizens. Thus, the principle of equality before law frequently appears to be a utopia.

Usually, the search for meaning in law consists in what we usually name the signification of words and sentences. As a matter of fact, a great part of the legislative and the judicial functions consists in giving appropriate meanings to them. They can use some legal injunctions and philosophical tools for that; most notably, hermeneutics and the philosophy of ordinary language. A lot of legal words and propositions and, often, the most important of them - the "thick" concepts such as right, duty, liberty, equality, general interest, equal protection of the laws, freedom of speech, non discrimination, proportionality etc. – are abstract. That is, they have no sense as soon as they are abstracted from the

context in which they are used. Now, the officials who usually meet the abstract language of law in contexts are the judges who have to apply valid law in concrete legal disputes. One paradox of that is that what citizens and officials recognize as valid law – for instance, the equal protection clause or the prohibition of discrimination – does not have a strong and fixed a priori meaning. The meaning of words and rules evolve within the framework of the legal history, that is, through conflicts of interests between citizens, parliamentary clashes and class struggles.

Law is a dynamic process and we live in an uncertain world. As a system, however, the law gives us the illusion of certainty and continuity. To sum up, let me develop this idea a little further.

There is a dynamic through time and space which explains why the notion of a universal rule of law may be a matter of controversy. This in part explains why it may be difficult to justify the claim that societies all over the world should integrate identical ideals of deliberative democracy; or why most developing countries (some of them, like India, a large democracy) are firmly opposed to the labor standards that advanced countries, likewise members of the WTO, want to impose on international trade agreements; or why we may sustain that the United States is a well-functioning democracy despite the fact - not easily understandable - that the death penalty is still deemed constitutional even though that hurts the idea of human dignity shared by members of the European Union. As we have seen, the dynamic of the law in part originates in its relativity in space and time.

Yet there is another dynamic which originates in the fact that we, as human beings, have a bounded rationality. We cannot anticipate the future in ways permitting us to live in a world without risk; but our rational calculations can direct our behaviors and guide our actions only to a limited extent. Nevertheless, we as human beings cannot help but search for one more certainty and/or unity. This quest for certainty goes on as if our reason could not accept its own limits. Luckily, we all have some intuition, a feeling for justice, before we begin to rationalize our behaviors – say, by economic cost-benefit analysis. Individuals and collectivities often live together via informal but reasonable social practices. Some of the latter, like empathy and reciprocity, are shared with humans even by nonhuman primates (de Wall & Tyack 2003, de Waal 2005).

We behave in this way without really thinking about how we have to behave; we *understand* the world we live in, without *knowing* the causes and the

reasons for this understanding. And we are all very lucky that we are able to do so, that we can have empathy and a feeling for justice without rationalization. Consider, once again, Wittgenstein's proposition: "The aspect of things that are most important for us are hidden from us because of their simplicity and familiarity. One is unable to notice something, because it is always in front of our eyes. The real foundations of his enquiry do not strike a man at all" (Wittgenstein 1953, §. 129). Strawson expresses the same idea in the following manner : "I should like to say: there are things I know *too well* to have current reasons for believing them, too well to believe them *for reason"* (Strawson, 1992, 94). All this goes to show, so it seems, that the idea of the law as a whole, absent a sense of justice, is an illusion as important as that of an unbounded rationality. It necessarily belongs to the idea of human rationality that we are human animals albeit with feelings and customs, and empathy and facial expressions that "represent universally recognized emotions, including anger, disgust, fear, happiness, sadness and surprise" (Lisa A. Parr, 2003). These expressions (if they are not a ruse or a trick) provide accurate information about the state of mind of an individual and they allow the alter ego to react in an appropriate way. Law is a dynamic process of changes but we may live together in a society and a state without being constrained to rationalize *all* the norms we follow.

A legal order which organizes a State of Law recognizes a number of rights or liberties expressed in a very abstract language. The working democracies we live in also are characterized by conflicts of values about religion, bioethics, rights of property, requisites of solidarity, freedom of speech, etc.. The crucial idea here is that these conflicts cannot be resolved only by a process of linguistics. For instance, debates on the linguistic signification of the words "religion", "dignity", "solidarity", or "equal proportionality" are not solely of procedural nature. Here, we have reached the point where the quest for the meaning of a legal word meets the quest for the meaning of law in a liberal democracy as a horizon of justice. This explains why identical statutes may vary from country to country due to interpretation. As we have seen before, by analyzing the question of legal qualification of terms and entities, the interpretation usually provides words or sentences with meaning. But, in so doing, it provides a substantial extension on this word and that sentence as well. And this substantial extension is the real content of a right or a liberty. So, we could have the same words and sentences, the same textual rights and liberties in the American Constitution and, say, the German Bundesverfassung, albeit with

largely different contents. Indeed, people do not share the same moral convictions; and that explains why the political dialogue is so controversial in modern states. For instance, the fierce debates about the health care system in today's US seem unreal to a great majority of European people. In fact, most of them firmly believe that solidarity in this matter must be compulsory; hence, that they may infringe to some reasonable extent the right to property of healthy people. In other words, they believe that solidarity so understood belongs to the ideal of social justice and that it befalls the legal order to promote it. As seen, the interpretation of the words "solidarity" or "human dignity" thus has turned on a political controversy about the quest for social justice.

It is in part incumbent on working democratic institutions to create the conditions by which a sound public debate may be engaged either before enacting a norm or during a judicial procedure. This is the main role of constitutional law and of civil procedure law: the legal forms and procedures must provide citizens and parties at the case, with the opportunity to sustain their claims in the light of their own conception of justice. But all the same, for humans the main constraint of the law is time. When the procedural time for the controversial public debates is over, the authoritative time of the decision occurs. In this sense, one of the most celebrated rule in law, the rule according to which "res judicata pro veritate habetur" means the time in which the epistemological quest for certainty and the requisites of social justice have to meet.

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