to the courts as the final interpreters of the rules that confer legal power and authority on all the institutions, including the courts themselves.

All the relevant rules and principles of conduct can be seen as systematically interrelated because the courts, especially the highest courts, accept it as obligatory to implement only rules that satisfy common criteria concerning their origin or content. They do so in accordance with a shared interpretation of the relevant criteria. This view of 'system' is thus dependent on a court-centred view of law (other views are possible, for example, those focusing on legislatures, or the democratic underpinnings of a legislature's position). But the court-centred view is appropriate to those who study legal systems as such. This branch of study is essentially court-oriented, though legal systems are also dependent on the legislature for its output of enacted rules. Otherwise, activity within the legislature, and the interaction of legislature and executive, belong more to the political system than to the legal, though they do have to work within the given legal–constitutional framework.

Since states are territorial in character, their legal systems also have a geographical or territorial extent (what Hans Kelsen called a 'spatial sphere' of validity). This can be quite complex and layered, as one can illustrate by reference, for example, to the UK. There are three internal jurisdictions, namely England and Wales, Scotland and Northern Ireland. The legal system applicable in each internal jurisdiction (English law, Scots law, or Northern Irish law) comprises all those rules that the relevant courts are obligated to apply in trials and lawsuits arising within their jurisdiction. Some of these rules are peculiar to one region alone, deriving from institutional writings, from precedents of regional courts, or laws passed by the regional legislature. Others derive from legislation of the central legislature – the UK Parliament – expressed as having specific regional application. There are also rules laid down by that Parliament, which establish common rules applicable generally throughout the whole UK, or derived from precedents of courts exercising a similarly comprehensive jurisdiction.

As a Member State of the European Union (EU), which is a form of supranational legal order, the UK is bound to observe the treaties establishing the European Community (EC) and EU and any regulations or directives validly made under these treaties. Hence, the rules that UK courts must recognise as binding include those laid down in the treaties or in the exercise of legislative powers that they confer. Such rules are, in principle, EU-wide in their application, so laws binding in the UK are also binding in the same terms on all other Member States (though EU directives normally have to be incorporated into national law by specific legislative acts, and these may tailor general provisions to local conditions).

Most European states have also agreed to be bound by the rules laid down in the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms, which is a binding treaty under international law. It applies even more widely throughout Europe than just in the EC/EU. This is not 'supranational law' in the same sense as the law of the EU and Community. Since the Convention is an international treaty, its rules about fundamental rights do not have automatic direct applicability in states that are parties to it. This comes about only to the extent that a country's national constitutional law (as in the Netherlands) makes them so applicable, or to the extent that this is achieved by specific national legislation (as in the UK's **Human Rights Act 1998**, together with the **Scotland Act 1998**). In the contemporary world, states (especially in Europe) tend to have a complex and

layered form of legal geography. The illustration of this given here in respect of the UK and its several internal jurisdictions, applies to all other Member States of the EU in respect of the nesting of the national legal system within Community law and Convention law on human rights. In all the larger states with forms of federation or internal autonomies or schemes of devolution there is an internal geographical complexity analogous to that of the UK. Everywhere, a specific set of courts with a hierarchical structure of appeals lies at the heart of the legal system or sub-system, which is both the framework of their work and yet also its output.

Reading

For an expanded analysis of types of power, see MacCormick (1999) ch 8. On the idea of law 'making politics safe' see MacCormick (1989) and (2007) chs 10 and 11.

On law as institutional normative order see MacCormick (1999) ch 1 and (2007) chs 1–3. For a concise statement of Kelsen's thought on these matters see Kelsen (1992) chs V and VIII; and see 1.5 below.

For a fuller treatment of constitutionalism and citizenship see Part I 2.2.

1.2 Sovereignty

Sovereignty: a contested concept

Sovereignty, like so many terms that straddle the boundary between law and politics, is a concept denoting a cluster of related ideas rather than one single clearly defined one. Moreover, in nearly all its clustered elements, it is a contested concept, in the sense that different theoretical approaches dispute over its correct explanation or definition, usually also disagreeing about its practical relevance. Sometimes it is used mainly in a *political* sense, to denote a kind of untrammelled power of rulers over those they rule. Sometimes it is conceived of in *legal* terms, as a kind of supreme normative power or highest possible legal authority. It is not even agreed what kind of entity it primarily applies to. Some treat it as an attribute of a person, or entity or agency within a state, such as an emperor, a king, a dictator or a parliament. Some treat it as an attribute primarily of the state itself – a 'sovereign state' being one that is fully self-governing and independent of external control. Some treat it as mainly belonging to the people of a territory, on the ground that they are ultimate and self-governing masters of the institutions of the state established there. 'We the people' adopt a constitution and establish a state with constituted organs of government, limited by the terms of our grant of power to them. Thereafter, 'we' can exercise our sovereignty only through the constitutionally established organs of government, with their powers divided and limited according to the constitution whereby 'we' established them. Alternatively, but only in accordance with constitutionally prescribed procedures, we can exercise the constitutional power of constitutional amendment. In the moment of its exercise, absolute popular sovereignty transforms itself into limited constitutional sovereignty.

questions of political or moral values. They argue that what the law is, and what it ought to be, are different questions and require different kinds of answer. As Austin famously put it, 'The existence of law is one thing, its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry' (Austin 1954/1832, p 157).

The possibility of 'value-free' analysis was influential across diverse areas of intellectual enquiry throughout the nineteenth century in the emerging social sciences. It had philosophical roots in David Hume's observations that, first, there is a crucial difference between factual statements (that such and such *is* the case) and evaluative statements (that such and such *ought* to be the case), and secondly, that the latter cannot be logically derived from the former. For Hume, descriptive (factual) accuracy should not be conflated with (evaluative) desirability: 'The anatomist', he wrote, 'ought never to emulate the painter' (Hume 1978/1739, p 620). Taking the lead from Hume's insight, legal positivists sought to clarify our understanding of law – a description of what the law *is* – by freeing it from value judgements about what it ought to be.

Yet if this 'analytical jurisprudence' sought clarity, it did not disavow the very real importance to society of pursuing moral and political values, such as justice and equality and so on. In fact, the major legal positivist authors wrote a great deal about what such values were and how they may be best pursued, including through legal means. But this kind of enquiry, they maintained, was separate from the problem of identifying valid law. Moreover (and it sounds rather odd at first hearing), for legal positivists there were good *evaluative* reasons for pursuing a non-evaluative theory of law. If we could describe accurately which laws were in force in any given jurisdiction then we could make a clear and coherent assessment of them as a matter of independent critical evaluation. A legal system whose legislation was, for example, racially discriminatory would still contain valid laws (assuming they were procedurally enacted properly) even though many citizens and observers would consider them politically and morally abhorrent. To mix the undesirability of these laws from a political or moral point of view with the question of whether they were legally valid fused two different things: what the law is (here and now) and what it ought to be if it were more just and equal. And it was important to make this point not just for analytical reasons but because legal reform itself depended upon being able to give an accurate description of what the law is and how it is changed, in order to be able in turn to make it better. The anatomist, Hume concluded, is not expected to be creative like the painter is, yet he 'is admirably fitted to give advice to a painter . . . We must have an exact knowledge of the parts, their situation and connexion, before we can design with any elegance or correctness' (ibid, p 621). Hence conflating legal validity with moral or political judgement simply muddied the waters of analysis and potential reform.

It is important to realise that as an analytical project legal positivism is not appropriately comparable with what is commonly called the 'natural law' tradition. The goals of the two are quite different and hence it is not comparing like with like to set them in opposition to each other (Finnis 2007). The former is far narrower and technical in scope, while the latter is much wider in ambition and resources, and in which the question of legal validity is only a very small component of a far richer exploration of human values over times and contexts. However, although its

descriptive successes and the merits of its method of 'value-free' analysis have been widely criticised, legal positivism's analytical approach has been, and to an extent remains, influential. In the following sections we therefore set out some of the key ideas of Hart and Kelsen and consider some differences between the two. The lens through which we look at their theories here is specifically as part of a thematic concern with the role of political and moral values in the law. (We return to different aspects of their work later.) We conclude the section by highlighting some prominent criticisms of the work of the legal positivists in that regard.

Hart's concept of law

Sympathetic to Bentham and Austin's legal positivism, Hart nonetheless identified a number of problems in their analyses. For Austin, law 'properly so called', is the command of a sovereign backed by the threat of a sanction. He defined the sovereign as 'a determinate human superior, not in the habit of obedience to a like superior, [which] receive[s] habitual obedience from the bulk of a given society' (Austin 1954/1832, p 166). This 'command theory' of law, as Hart saw it, may well resemble common perceptions of the criminal law, but it was inadequate as a full description of law. One of the main reasons why is that there are different *kinds* of laws many of which do not operate as commands at all, but rather involve the conferring of powers. These powers may be found in the domain of public law, such as with jurisdictional powers – laws, for example, establishing or varying the jurisdiction of courts or tribunals – as well as in the myriad private law powers to make contracts or wills or establish corporations. In all such cases, and they are very many, it is not accurate, said Hart, to describe the relevant laws as commands. Nor is it appropriate to see their use as involving the threat of sanctions. For Hart, an alternative understanding was required if the legal positivist tradition was to remain persuasive.

This new understanding involved shifting attention from commands to *rules*. For Hart, a legal system was best understood as the 'union of primary and secondary rules' (see Hart 1961, ch V). Primary rules imposed obligations. Tax law, for example, or the law of negligence imposed on citizens legal obligations: duties to do, or refrain from doing, certain actions. These laws came in the form of rules, not commands. Importantly, there is something about the quality of rules that makes them different from commands: a robber in the street, argued Hart, may demand that you hand over your money. You may feel obliged to do so. But it would be wrong to say that you had 'an obligation' to do so. What a 'tax demand' did, by contrast, was precisely to impose obligations to pay money, and these obligations had their source in legal rules established by legislation. You may or may not feel obliged to pay your taxes. But that was different from saying you had an established legal obligation to do so. Primary legal rules of this sort were therefore duty imposing rules: rules that established binding legal obligations.

But as we have already noted, not all legal rules are of this kind. There were also, Hart argued, secondary rules. They were, 'on a different level from the primary rules, for they are all *about* such rules' (Hart 1961, p 92, original emphasis). The importance of these rules lay in their relation to primary rules in such a way that established a legal *system*. According to Hart, here are three types of secondary rules. First, there were those power, conferring rules that established who, or which

modern societies organise themselves with respect to what they think are justice's best guiding principles. These are utilitarianism, libertarianism, liberalism and socialism. We will assess some of their central ideas though we necessarily have to be selective. (For fuller engagement with the topic, the further reading should be a starting point.) But we should note one thing at the outset: these are *normative* theories; not in the sense that they are concerned with describing legal rules which govern actions, but rather in the sense that they provide arguments concerning why the view they promote *ought* to be adopted. These theories conflict – hence their *political* nature – and you should consider which, if any, you find more persuasive and why.

Utilitarianism versus libertarianism

A *utilitarian* approach to justice seeks to maximise average welfare in a society. Jeremy Bentham and John Stuart Mill were two of the most prominent advocates of this approach. The most famous expression of it sees the goal of increasing overall utility as being to achieve 'the greatest happiness of the greatest number'. It is a *consequentialist* theory: it tests for justice by reference to consequences. There are two main variations. Act utilitarianism considers whether any proposed *action* will result in increasing the average welfare. Rule utilitarianism asks what *rule* is best instituted to increase such welfare. It is in assessing the outcomes of putting the proposed act, or rule, into effect that the morally best or just thing to do becomes clear. The outcome is not just because it was the right act to do, or rule to follow: it was the right thing to do, or rule to follow because the consequences were perceived to maximise average welfare; to produce the 'greatest happiness of the greatest number'.

Hypothetical examples are often used to make this approach clear. Here are two. A person is detained because police have reasonable grounds to suspect that he has planted a powerful bomb somewhere in a densely populated city. If such a device goes off it is likely to result in mass injury and deaths. The detainee refuses to speak. Is it justifiable to torture him to try to find out where the bomb is? Is it, in other words, permissible, as a matter of justice, to commit harm against one person rather than risk harm to a greater number?

From the point of view of *act* utilitarianism, we are essentially only concerned with the justice – that is, the consequences – of the act in this instance. From the point of view of *rule* utilitarianism, we are concerned with the consequences – or justice – of instituting a rule that would authorise such behaviour. In either case note what we must do in our deliberation: we must add up the pros and cons of the consequences of allowing or not allowing such an act, or instituting the rule. We assess the possible harms and benefits and then, as it were, put them on a set of scales in order to determine what act or rule would maximise overall welfare. Reading off the result from the scales we find out what justice requires. In this example, there might seem something intuitively plausible about the idea that justice demands acting in such a way as to minimise the aggregate harms when we weigh the harm done to the detainee against the potential harms done to a large number of innocents. Surely a greater injustice is allowed by failing to act in such a way that protects many innocents from harm?

But is this utilitarian approach the correct way of reasoning? Consider what is negated should torture be permitted: factually, an innocent person might be being tortured: the detainee may be genuinely innocent because of a case of mistaken identity. This possibility is one reason why, in law, a presumption of innocence operates according to which everyone is presumed innocent until proven guilty in a court of law. Moreover, even on consequentialist grounds, applying torture is commonly seen to be less a reliable way of procuring evidence than it is a measure of how much pain a person can withstand. Does torture, that is, even get at the truth? And if the person is willing to plant a bomb on this scale are they likely to confess the truth? And so on. But perhaps the key, *non*-consequentialist objection to utilitarian reasoning here is that a decent society respects the 'inalienable' human right *not* to be tortured regardless of the nature of the circumstances. Prohibitions on torture, or on 'cruel, inhuman and degrading treatment', signal that 'To treat a person inhumanly is to treat him in a way that no human should ever be treated' (Waldron 2005, p 1745) On this view, we should in no circumstances even carry out a utilitarian calculation about outcomes: it is wrong to torture *regardless* of the consequences.

Consider then another scenario: a member of your country's air force is shot down while on a reconnaissance mission over a country with whom there are hostile relations. The enemy captors have reasonable grounds to believe that he has knowledge of imminent air strikes, likely to result in major civilian casualties. But he refuses to tell them what he knows about where the strikes are likely to be aimed. Is it justifiable to torture him to try to find out the location of the strikes? Would it be legitimate, as Harvard Law Professor Alan Dershowitz has suggested in the context of detainees held by American forces, to use 'a sterilized needle inserted under the fingernails to produce unbearable pain' (quoted in Waldron 2005, p 1685) in order to get the information and so help to save lives? Should the utilitarian calculation of harms and benefits allow such treatment? Even in the extreme circumstances of war, the international standard on the treatment of prisoners of war declares that it should not. Article 17 of the 1949 Third Geneva Convention states that 'No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.' On this, widely respected view, utilitarian calculations about claimed increases in aggregate welfare are *never* to be entered into: detainee's rights, to use Ronald Dworkin's metaphor, automatically trump any claims about possible consequences.

Consider now two additional concerns with a utilitarian approach to justice. First, to what extent is it possible to measure utility? That is, how can we assess what people's pain and pleasure consists in, in order then that we can calculate how it can be increased? What if people have different understandings or experiences of what for them counts as pleasure or pain? Moreover, are all desirable values – dignity, say, or liberty – reducible to one single measure – 'happiness' – in order that they can be weighed together and a clear solution reached? What our first two examples show is that in some, extremely important, cases we may be either unable or unwilling to make a commensurating calculation with values at all since it belittles notions of dignity or liberty to reduce them to a process of measuring 'more or less' happiness. This was a point noted by the Enlightenment philosopher Immanuel Kant, whose work represents a strong challenge to utilitarianism. Dignity, he argued, is not something on which a price can be put and thus measured against other values, in the way that we might calculate a market price on the value of cars or computers. He argued that 'In the kingdom of ends everything has either a price or a dignity. What has a

Thus understood, the time of 'foundation' does not of course confine itself to the time of revolution but spreads over continuous time. There survives in non-revolutionary times a tension between constitutional reason and democratic will, a will that must – in normal rather than revolutionary times – be expressed *within* the confines of that reason. This enduring and very 'ordinary' paradox finds its most urgent expression in the suspect legitimacy of constitutional review or, as Alexander Bickel put it, in the fact that judicial review remains a 'deviant institution' in democratic thinking (Bickel 1962, p 18). Because how can it be consistent with the democratic imperative that any Constitutional Court should be able to invalidate in the name of constitutional rights the decision-making capacity of *We the People*, as expressed through democratic legislation? Even if we accept that sovereign power straddles both *pouvoir constituant* and *pouvoir constitué* we still need to work out how *both* are kept at play *at once*, constituting (as democratic will) what presupposes itself as already constituted (constitutional reason).

But the stakes are even higher: this paradoxical articulation of will and reason underlies the concept of popular sovereignty and thus the identity of 'the people'. In other words: if the articulation of reason and will is what underlies sovereignty, the identity of the people as sovereign subject is the emergent property of that relationship. The difficulty is of course that as emergent property of a paradoxical articulation, the identity itself is thrown into turmoil. What comes to the forefront now in need of explanation is the inter-dependence, in fact inter-constitution, of this triad: will, reason and what is represented: the identity of a sovereign people. With this we return to the triangular relationship that we began with and with the stakes raised: the question is now that of the identity of a people that *must, yet apparently cannot*, be represented. That this replicates the initial paradox (and not a different one) in a further dimension is because of the internal connection between democracy and collective identity: a sovereign people can establish their identity by negotiating and deciding their constitutive commitments; democratic will substantiates the polity, it expresses who we are. Constitutionalism is the name for an intersection of law and politics. Viewed from the point of view of popular sovereignty and thus also from the point of view of the identity of the people assumed sovereign, constitutionalism balances identity on a difficult juncture. Because if we conceive of the demos as a dynamic ever-changing entity – and how could it be otherwise? – what conclusions are we to draw about the containment of its forever renewed will in constitutional reason that is overwhelmed by the need to institutionalise and thus to still, to induce permanence, to reduce contingency and mutation? The identity of the people must meet the exigencies of containment in the ideals of fixity, predetermination, stasis or not be represented at all. What is truly unsettling is that the paradox now pushes against the limits of representation.

Constitutional 'moments'

If there is one theorist who is closest to Jefferson in his concern with the injustice that 'only one generation should have it in their power to begin the world over again', that is Bruce Ackerman. His theory of 'constitutional moments' is a theory that spreads the act of 'foundation' over the entire scope of US constitutional past and future. (Indicatively, Ackerman, 1984 and 1991) Like Arendt's 'act of foundation', a

'constitutional moment' feeds off an ambiguity: these are moments of constitutional reason yet moments where democratic will re-embeds itself in constitutional reason, retrieving from within the constitution the recourses to express itself as *pouvoir constituant*, as foundational act. Constitutional moments are moments when the *will* breaks through, yet where *reason* serves as vehicle and guarantor. Intriguingly these are moments of reasserting an identity; they are moments that allow the citizens to experience and fulfil their identity as '*We the People*', which is the title that Ackerman gives to his three-volume US constitutional history.

The notion of 'constitutional moment' was introduced by Bruce Ackerman in his 1984 Storrs lectures (Ackerman 1984) and elaborated in much of his subsequent work. Against a liberal 'levelling' understanding of democracy Ackerman pits his own republican understanding of an elevated constitutionalism. The liberal 'leveller' fails to distinguish two quite distinct levels of political conduct, says Ackerman. The leveller's 'impoverished constitutional vocabulary' does not give form to those 'constitutional moments' in a people's history when 'the people sacrifice their private interests to pursue the common good in transient and informal political association' (1984, p 1020). It is during such moments that the true voice of 'the people' is heard. It is in such moments that citizens act in their capacity as sovereign populace. What is a constitutional moment? According to Ackerman's definition, it is an occasion upon which 'the people' exercise deliberative, 'considered judgements' regarding the rights of citizens and the permanent interests of the community' (Ackerman 1991, pp 240, 272–4). The appeal to the common good 'ratified by a mobilized mass of . . . citizens expressing their assent through extraordinary institutional forms' (1984, p 1042) defines Ackerman's republican vision. He is prepared to concede that these moments of exceptional politics occur rarely and 'should become pre-eminent only under well-defined historical situations'. During these moments of profound rupture, citizens re-claim their delegated sovereignty through direct popular action. Because the constitutional provisions do not license these moments of creativity, the amendment that the constitutional moment carries is not, legally speaking, democratically licensed. Yet they are democratic in a more fundamental sense as exercises of political sovereignty. These moments are moments of 'constitutional creativity' (1991, pp 314ff) and 'democracy reborn' (1991, pp 295–6), in the sense that the populace as sovereign periodically instigates transformations of such depth that they can be credibly claimed to have resituated the meaning of freedom, democracy and self-determination. Ackerman puts it in terms of the idea of a constitutional conversation, to which we will return:

> While established Constitutional Law did not always resolve America's deepest crises, *it has always provided us with the language and the process within which our political identities could be confronted, debated and defined* – both during the periods of normal politics and on those occasions when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose.
>
> (1984, p 1072)

There are certain problems that beset the theory, most importantly the identification of instances that do fulfil the conditions that Ackerman stipulates for his ideal type of

ship of state, measures by way of exceptions to normal constitutional propriety may be called for. Emergency powers have to be exercised. So who decides about this? Whoever decides, and makes that decision stick, said Schmitt, is truly the sovereign. All ordinary law really depends on this sovereign, whose presence may be unknown and unsuspected outside of emergency times. The exception not only proves the rule, it proves *the ruler* as well, as Schmitt might have said. For ultimately, the decision is the ruler's to make: it is by definition not governed by objective, legal criteria. There could be no legal tests about when the conditions of emergency apply; the concept of necessity is entirely *subjective* in that sense. It is a matter of political judgement, informed by considerations and criteria of dangerousness and of the efficiency of the response, that arise in the forcefield of politics and are aligned to the logic of conflict.

This is in some ways a tempting doctrine, seemingly well-fitted to the exceptional times that have prevailed since 2001. Yet it is worth noticing where it leads. It points to the conclusion that, despite appearances and theoretical constitutional limits, law is always in the last resort subordinate to politics, and politics is in the last resort a matter of raw power. Such power is doubtless enhanced through successful manipulation of law and legal institutions, but it is never constrained by law except on a strictly voluntary basis, that is, as a matter of appearance, but never of underlying reality. There is always, in this view, a residue or 'trace' of violence behind the civil mask of the most ostensibly consent-based State.

Let us conclude by linking what Schmitt says about the exception to the House of Lords decisions we discussed at the outset. Remember the reluctance of the judges to venture into this 'no man's land' between the political risk, fact and judgement on the one hand and constitutional law on the other. For Schmitt the state of exception was a total suspension, cancelling the separation between powers and subsuming all power to that of the sovereign. Unlike the situation in Weimar where the legal order was suspended in its entirety, the tendency in Western democracies has been to generalise security regulation to the point where effectively the constitutional protection of citizens is removed. In both cases the effect is similar. Is it not the case that when the judges refrain from a judgement as to whether there exists a threat to the nation and what should be done about it, that they approximate Schmitt's analysis over the logic of exceptionality and the submission of law to politics, and the Constitution, whose guardians the judges are, is reluctant to provide any guarantees to rein in political power? The alternative view that we saw in the initial sections of the 'general themes', above, conceptualised law and politics as genuinely distinct and genuinely interactive. The political activity of governing a state successfully can be carried on under the rule of law, and ideally is. There can be effective, if never complete, institutional arrangements for separation of powers, with resultant checks and balances, which check the tendency of power-holders to seek absolute power, and anyway normally prevent anyone from achieving it. Is it the case that crises and emergencies betoken an *absence* of law, rather than give an insight into law's essence? This is the question that Schmitt identifies as significant, and one that it is becoming increasingly urgent to address, as the so-called 'war' on terror forces us to rethink, assess and even defend the historical achievement that is the Constitution.

Reading

For works by Schmitt see in particular Schmitt (1985a/1922), especially the first essay for his account of sovereignty and the exception. For his conceptualisation of the political on the basis of the friend/enemy distinction see Schmitt (1996/1927). For the most complete account of his legal theory in English see Schmitt (2004/1932), and for his critique of liberal parliamentarianism Schmitt (1985b/1923), especially pp 22–32. His important early lectures on Constitutional law, the *Verfassungslehre*, have now also appeared in English Schmitt (2010/1928):

From the increasing secondary literature on Schmitt, see, in particular, Dyzenhaus's comprehensive and critical account in Dyzenhaus (1997), pp 38–101. Ewing (2010) explores questions of constitutionalism and rights in times of emergency; it looks at the corrosion of civil liberties between 1997 and 2010 and the difficulties that beset efforts to deploy legal rights to restrict the power of executive government. From a radical democratic perspective, see Mouffe (1999), especially the articles by Mouffe, Hirst and Zizek), and for a historical account see Muller (2003). See also MacCormick (2007) ch 10 s 6, and Paul Kahn (2011). For an excellent discussion of the contrasting theories of Schmitt and Kelsen, see Lindahl (2007).

On questions of constitutionalism and emergency see Finn (1991), for its origin in the democratic–revolutionary tradition, and for an insightful, but demanding analysis, see Agamben (2005). For a detailed and thorough constitutional analysis of emergency, see Dyzenhaus (2006), in which he defends the rule of law as capable of responding even to those situations that place the legal and political order under great stress.

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97. For these reasons I think that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed. Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

Questions

1 How do the two judges differ in terms of assessing whether or not there is a state of emergency?

2 Which institution – the court or the Parliament – has the ultimate right to determine whether there is a state of emergency?

3 How, in your view, should the judges decide the case before the Ukanian Supreme Court?

Corresponding Sections: Part I General Themes 1.1, 1.2 and Advanced Topic 2.4.

TUTORIAL 4 Law and politics (2)

Part 1

The oppressive government of the state of Ukania was toppled by a democratic revolution in 1997. The new government seeks to act in line with sound constitutional and legal principles such as might be found in European Conventions. One of these principles is that there should be no punishment without a law, while another is that no law is to be retrospective in its effect. The new constitution states that those suspected of gross violations of human rights must be brought to trial. It also states that citizens have the right to have justiciable disputes settled by a court of law.

In its final days the old Parliament passed an Act, it was claimed for reasons of maintaining peace and stability in the transition to the new regime, which gave immunity from criminal and civil liability to all functionaries of the former government.

Three cases are now being brought before the courts.

1 Two victims of torture are bringing a civil suit for damages against their torturer.

2 A prosecutor has decided to bring to trial the former head of the security services and the former Home Secretary for conspiracy to murder 83 political opponents who died as a result of security operations.

3 A former border guard is being prosecuted, despite his claim merely to have been following legitimate orders, for shooting two people who tried to escape the country.

You are the Minister of Justice and have been asked by the Cabinet for your opinion on these cases.

Part 2

The Pinochet 'episode' in British legal history is remarkable: not only did it place the House of Lords at the centre of a national and international political debate about the role of courts, but also because it generated a debate about the relationship between national and international legal orders and most importantly, for our purposes too, the nature of the relationship between law and politics.

In 1973 General Pinochet assumed power in Chile after a military coup that saw the overthrow of the democratically elected government of Salvador Allende; he became President of the governing Junta and

out the clash: more recent law repeals older law; constitutional law prevails over ordinary law and so on. All these sources *exist* as a matter of fact: they are enacted as laws, decided as cases, agreed as treaties, observed as custom. So if clear rules originating in the sources of law provide the solutions to questions of law and, in cases where these solutions conflict, provide solutions for that conflict in terms of formal tests (of repeal and constitutionality), what is there to disagree about in legal argument and how (and why) do morality and politics bear on legal argument? Is it not the case that while they do of course inform the kinds of debates we have over what law we want to enact, after that discussion is over and a decision is made (typically in our parliaments), the political disagreement ends at the point at which the law comes into being?

It is no less than the key organising principle of our constitutional systems, the separation of powers, that is at stake here. If political disagreements of the kind that are proper to Parliament, as the democratic forum, are not contained there but instead 'spill over' into arguments in courts, then the separation between the political enactment of law (in Parliament) and its legal application (in courts) is compromised. The fundamental principle of the rule of law, as we will see, is also jeopardised. Is this 'spill-over' or continuity between political and legal argument something that *can* and *should* be avoided, or might there be reasons why we might welcome it?

These are difficult but unavoidable questions, questions that frame the practice of legal reasoning even when they are not always at the forefront of our engagement with the law when we read, interpret and apply it. So before we move to these deeper questions that frame and inform the practice of legal reasoning, whether it is undertaken by judges, other state officials, teachers and students of law, or lay persons as they reason about their rights and duties under the law, let us distinguish analytically, in the way it is ordinarily done, between two moments of legal reasoning – that of reasoning about 'facts' and that of reasoning about 'rules'.

It is of course often the case that what gives rise to a dispute is a disagreement over facts. 'Fact-finding' impacts on legal reasoning, and gives rise to difficult questions over the processes and instruments we have in law for establishing what can be taken as evidence that a fact has occurred, what counts as proving that it has, according to what principles of admissibility and what standards of proof, and distribution of 'burdens' – what party, that is, carries the 'onus' of proving what. While much of this belongs to the branch of law called 'evidence' and will not be directly of concern to us here, it also of course impacts directly on what comes into view as the 'factual situation' that calls for legal response. To that extent it is of direct relevance to legal reasoning and we will discuss issues of 'fact-finding' in this part. But legal reasoning is of course also crucially concerned with the 'rules', how one reasons from the 'rules' that the sources of law provide, and how to understand the *interface* between the two: reasoning about facts and reasoning about rules.

When it comes to understanding the 'rules' and how to deal with cases where they are not clear, judges often resort to certain 'rules of thumb': the 'literal rule', the 'golden rule' and the 'mischief rule'. The first of these prescribes that judges first of all opt for the 'literal' meaning of a rule, and it involves judges taking to the dictionary to resolve ambiguities of terms. If this exercise at retrieving the 'literal' or 'ordinary meaning' of the rule yields unreasonable results, then the 'golden rule' tells them to deviate from it or, in extreme cases, to ignore it; then the 'mischief rule' is meant

to kick in and direct the judge to identify the 'mischief' that the rule was enacted to rectify, or to give effect to the law in the light of the purpose that guided its enactment.

For all their wide use these rules are obviously of limited value, either circular or, ultimately, question-begging. Only briefly, the 'golden rule' begs the question what counts as 'unreasonable' enough to trump the 'literal' interpretation; the 'literal' rule, in turn, misses the basic insight that what is the 'ordinary' meaning of any statement can only count as that *given a context*, and that the meaning of any statement that may be deemed 'ordinary' in some contexts is only relevant in those contexts. The 'purposive' rule either states the obvious – that a rule is enacted for a purpose which should inform its meaning – or points to very difficult questions over the 'original' intention of legislators or 'teleological' approaches to law, that a simple reference to 'purpose' merely elides. It is remarkable then that, as Francis Bennion puts it:

> Consult even the latest edition of almost any other book on statutory interpretation and you will find the same old parrot cry trotted out: 'the interpretative criteria consist of the literal rule, the mischief rule and the golden rule, and the court chooses between them.' It amounts to a serious breakdown in communication.
>
> (Bennion 2001, p 2)

He concludes:

> There is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative criteria. Fortunately, not all of these present themselves in any one case; but those that do yield factors that the interpreter must figuratively weigh and balance. That is the nearest we can get to a golden rule, and it is not very near.
>
> (Bennion 2002, pp 3–4)

In what follows we will look at theories of law and legal reasoning that have provided very different answers to the question of how one deals with 'hard' cases in law and in fact how the very distinction between hard and easy cases is drawn. It is these kinds of questions that theories of legal reasoning are concerned with, and to which we will now turn.

1.2 Legal formalism

What is formalism?

Formalism in an extreme form presents a picture in which law *is* and *should be* an entirely self-determining system, where judges are never faced with choices or alternative interpretations of a kind that would be resolvable only through extra-legal considerations, such as moral or political values. For a formalist, therefore, such considerations never enter into the determination of legal outcomes.

Many lawyers and statesmen in nineteenth-century Europe took the project of constructing such systems as a serious ambition. On the Continent, the great codes in

in which it is justified. Drawing an analogy with the physical sciences, 'discovery' is identified as the moment when a judge has an idea about what the outcome should be, a process that may well be non-syllogistic, involving hunches, personal views and possibly extra-legal considerations, including views about policy (just as great scientific discoveries may be unpredictable and inspirational – in 'eureka' fashion). But such insights have to be tested to see if they fall within the relevant sphere of legal truth, and only if they do can they be justified. Syllogistic reasoning only comes in at the second stage of testing and presenting the rationale. Jurisprudence is interested only in the justification process. So long as a decision may be justified by reference to an existing rule of law, then the judiciary has not exceeded their constitutional powers. But arguably this merely postpones the problem. Is this justificatory reasoning itself rational and determinate? The Realist criticisms apply here too.

Fact-scepticism

It has been argued that not only formalists, but also rule sceptics ignored the difficulties associated with facts in adjudication. The facts are an essential element in the application of the law, but to what extent is it the case that courts – judges, or lawyers, or juries – actually get at, or even can get at, the 'truth'? Much of a court's, and thus the lawyers' time, is spent on ascertaining or arguing over the facts, yet this has often been neglected when considering processes of justification in legal decision-making. Among Realists, it is the 'fact sceptics' who turned their attention to such matters.

They argued that we should look at the challenges that come from the world of the lower courts. From this perspective, the grand debates about legal interpretation appear remote and academic. This 'appeal court jurisprudence' concentrated on prestigious and intellectually stimulating 'hard cases', but thereby ignored many salient if more mundane aspects of the everyday life of the courts. So Jerome Frank, writing in the 1940s–1950s, chastised his fellow legal Realists: rule sceptics concentrated on a very limited aspect of the law in action, whereas most cases were decided on their facts. Like his fellow sceptics, he was extremely dubious about the predictability of legal outcomes. Moreover, the possibility existed that the facts as found by judge and jury did not correspond to actual facts.

At its simplest, Frank's scepticism can be understood in terms of the psychology of fact-finding. Witnesses' observations and memory may be extremely hazy, but they will be pressed to produce clear and confident statements in court. Pre-trial interviews with lawyers may even amount to a form of witness coaching in which the witness gets an idea of which version of the facts would best suit prosecution or defence stories. Then, under cross-examination they will be subject to many techniques of double-checking and discrediting. By the end of this process, which began in uncertainty in the first place, we may be many degrees from the truth. Ironically, even witnesses who are sure of the truth, and tell it as they saw it, may be 'bad' witnesses. In jury trials these psychological problems are compounded by the jury's complex reactions to witnesses and their capacity to be swayed by the oratory of the lawyers. Yet the jury is supposed to be the 'master of facts'. Even judges in this setting may be less than rational in their reactions and their influence on juries is not inconsiderable. This aspect of Frank's position has been developed subsequently by social psychologists' studies.

To counter such psychological instabilities of truth-finding, Frank called upon the expertise of psychology itself. Experts could be brought in to examine witnesses for the accuracy of their perceptual apparatus and their propensity to lie (with reference to standards of reliability and credibility). Juries should be abolished altogether but, failing that, there should be training in jury duties at school, and jury experts to accompany and advise the jury in the court. The confusing and emotional panoply of costumes and ritual should be eliminated. And judges should undergo psychoanalysis to control their projective tendencies.

Frank focused primarily on the adversarial process, which he likened to a trial by combat with each side's champions trying to do down the others – a 'fight' method of proof. While this may have made sense in the past, when we believed that God was on the side of justice and truth, it is not appropriate to the age of secular rationalism. Instead he proposed an inquisitorial system, which would include better training of legal officials, impartial government officials to dig up all the facts, specialisation of judges and state administrators to deal with the complex facts of modern society, and increasing use of expert witnesses.

Today, Frank's belief in the value of scientific expertise, free proof and managerial legal officials may seem naive, costly and politically worrying. But Frank's basic points have had considerable influence in disturbing the formalist presumption that 'law' divides neatly from 'facts' and that the jury can easily master them. Put polemically, the present system of proof seems self-contradictory. On the one hand, it is based on a presumption that ordinary people can assess and make inferences from the facts as disclosed. On the other hand, legal methods of getting at facts are far from everyday standards of perception or making sense of the world (and, for many, should be). Whether or not legal proof and procedure is as incoherent as Frank would argue, legal virtue and legal vice – confusion and protection, ordeal and ideal – are often embedded in the same legal rules and procedures.

The faith in science

With the knowledge provided by the social sciences, including what we might call today socio-legal studies, it would be possible for the law to be deployed rationally in the pursuit of specific goals: social protection, social inclusion, crime control and the multitude of other policy aims that drive regulatory states in the efforts to enhance social welfare.

It is worth quoting from 'The Path of Law' at some length here, from a passage of Holmes where the faith that law can learn from science (and the opposition to its learning from its history!) is unequivocally expressed:

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.
>
> What have we better than a blind guess to show that the criminal law in its present form does more good than harm? I do not stop to refer to the effect which it has had

is not merely that the law provides a wealth of possibilities for lawyers to argue any case either way, but that in fact our legal system acts both as passive enforcer of private transactions and in a paternalistic, active role as protector of vulnerable parties against economic predators. The law does not contain 'right answers' waiting to be discovered. Instead, the law's oppositions correspond to competing normative visions of human association present within law and that the presence of such clashing perspectives should be discussed openly, not least because the suppressed side of law's oppositions are taken to be the more politically progressive. Thus law is to be taken seriously as a means of effecting radical social transformation.

In subsequent work Unger (1987) has gone even further and spoken of the need to institutionalise further categories of rights, including 'solidarity rights'. Although very little is said about the precise content of these rights, one can assume on the basis of Unger's other writings that the content would be retrieved through playing up principles already present – if suppressed – in existing law. The mechanism and logic of this has been elaborated above. In 'Legal Analysis as Institutional Imagination' (1996) he renewed his call for a 'selective probing of institutions' through the 'dialectical exercise of mapping and criticism'. Unger's suggestion in all of this is for an interpretative method of reasoning that draws on and exploits strategically existing, if latent, institutional possibilities. In the case of solidarity rights, reconstruction would proceed from the protection of solidarity in existing law – of contract and delict basically – such as the protection of reliance and the protection of the disadvantaged party, general clauses of good faith and of abuse of rights, and so on, 'by which private law supports communal relations while continuing to represent society as a world of strangers' (Unger 1987b, p 537).

Hugh Collins describes a further model for deploying legal analysis in what he describes as a horizontal rather than the above vertical manner (Collins 1987b). According to the orthodox view of how law functions in society, one can discern broadly three spheres of social life with law applying differently to each. There is the sphere of public life and here our public law provides citizens with robust protection (in the form of civil rights) against the might wielded by the State, and organises the democratic system by guaranteeing political rights. Here the law acknowledges a certain asymmetry in the relations of citizen to State and thus affords the vulnerable party protection and guarantees. The second sphere is that of exchange and work. In this sphere liberal law typically treats parties as equal, providing the language and the categories to sanction their dealings with each other, but remaining neutral in the process. Finally there is the third sphere, the sacrosant private sphere of family and intimacy in which the law intervenes minimally in order to maintain it free of State intervention and secure privacy understood as negative freedom.

There are good, political reasons, claims the CLS movement, why this frozen picture of social life needs to be challenged as maintaining oppression rather than guaranteeing freedom, entrenching advantage rather than opportunity. Family relations, if not put under legal scrutiny, are free to harbour abuse, patriarchal privilege, domestic violence, violation of trust. The sphere of work and exchange is emphatically not a sphere where equal parties strike their deals, but instead where corporate giants manipulate individual workers and where economic predators prey on vulnerabilities of contractual partners.

Unger's agenda for radical political change to counter advantage uses law to renegotiate the boundaries between spheres, and manipulate the fragilities and porous nature

of those boundaries to stir up social change. More precisely, the horizontal application of 'deviationist doctrine' here, of critical legal doctrine, depends again on tracing the paired opposition of principle and counter-principle within each sphere and arguing the case for treating the counter-principle as significant. What gives particular credence to this argumentative strategy here is that what counts as counter-principle in one sphere is indeed dominant in another. For example: while in the sphere of public life we may have freedom to expose corrupt authority and to associate to pursue our claims, the very same rights are denied in the sphere of exchange. The very same activities draw very different legal responses in this sphere: 'whistle-blowing' is not protected and secondary picketing is criminalised. But the logic of this differential legal response is completely flawed and self-contradictory. The sphere of exchange is not a sphere of equality; corporations act increasingly in corrupt ways and their activities need to be exposed to scrutiny, particularly in an era where there are corporate actors who indeed wield much greater power than even Nation-States do; employees are one of the most vulnerable categories in the face of ruthless new management techniques and the threat of unemployment. So why not use the resources the legal system affords us in the form, here, of the protection of rights, and cross the boundaries between spheres, the autonomy of which is becoming increasingly unconvincing, imaginatively to deploy legal argumentation traditionally incongruent to any particular area of social life?

Unger's work is suggestive and radical, both as to its vision for the possibilities of legal analysis and its careful mapping of the ways in which the logic of law can be deployed to stretch those limits. Against an understanding of law as striving for the right answer on the basis of imputation of the one best principle, like Dworkin, CLS propounds the possibility of political choice through the imputation of 'counter-principle'. Hence the debate between Dworkin and the CLS movement is best understood against a background of political theory. CLS are attempting to feed the possibility of transformative political action into law. If law is indeterminate and has to be 'rationalised' each time, then it is a malleable vessel for political vision. What legal answer we see as appropriate is relevant to our politics. What reason is 'right' depends on our political choice of what political principle underlying it is right. Dworkin's project is motivated by a typically liberal concern to keep law clean of politics. He professes a theory that will elevate choices from the battleground of politics to the legal forum of principle. On Dworkin's account of it, law provides the politically neutral means of mediating between politically competing positions, so that what one perceives as the right answer in law does not necessarily identify with what one conceives to be politically desirable. The CLS movement on the other hand not only views it as impossible to avoid political choices in legal debate, but sees Dworkin's attempt to settle this as itself a political move.

Reading

For Unger's critique of 'formalism' and 'objectivism', see Unger (1983), pp 5–14. For a comprehensive introduction to the emergence of the CLS movement in its various strands, see Kelman (1987). For an accessible summary, see Altman (1993) ch 1.

In their pioneering early work on narratives in the courtroom, Bennett and Feldman analyse the form of stories in terms of central (a 'setting-concern-resolution' sequence) and peripheral action. Battles in court are about who can define the central action successfully and – they claim – success in this matter depends on:

- narrative strategies by prosecution and defence (definitional, inferential and validational; defence also uses challenge, redefinition and reconstruction as rhetorical strategies);
- the cognitive and social functions stories play in everyday life in organising complex information and codifying normative value. Apart from being used in 'narrativising' practices, juries also have stock stories that prosecution or defence may appeal to. Stories thus mediate between law and social life.

Thus, unlike MacCormick for example, they see social bias as a potential element in constructing narrative coherence – but this is no crudely realist account of prejudice distorting law from the outside (for example, gut reactions to individuals on the basis of class, race, sex and stereotypes). Rather, bias is structured into stories in terms of 'plausible' action.

Bennett and Feldman also look at another important aspect – *narration* – the way the story is told, particularly the success of witnesses in getting 'their' story across. They draw here on the work of sociolinguistics. From Bernstein (1971), they take the distinction between elaborated codes used in (middle class) formal languages and the restricted codes of (working class) public language. Elaborated codes involve many abstract terms with defined meanings and alternative words to convey and explain; the object of discussion is clearly specified (context-independent). Elaborated codes are thus more mobile in that everything in principle can be explained and defined. They are also more inner-oriented and individualistic. Restricted codes are seen as closed, inflexible and context-bound because they have a fixed vocabulary where knowledge of meanings often depends upon being a member of a particular group (for example, slang) and hence use of this code is also status-oriented. Supposedly, the language used in court by legal professionals is an elaborated middle-class code and working-class witnesses are therefore disadvantaged ('linguistically incompetent') in the courtroom. (But *is* law really an elaborated code? Perhaps a better use of Bernstein would be to see law as a restricted code.) Bennett and Feldman also draw a contrast between 'narrative' and 'fragmented' testimony styles – the extent to which the witness is permitted utterances long enough to constitute an independent narrative string, as against mere responses to questions, and find psychological evidence that the first style is more persuasive and successful.

There lies implicitly, and sometimes explicitly, in these theories of the trial a more radical, philosophical, objection to correspondence theories of truth that presuppose some single truth 'out there' waiting to be discovered, perhaps distorted by story forms and linguistic incompetence. For our writers, it is a naive realism that does not recognise that facts are constructed by and within different discourses and thus do not have an independent status. If witnesses suffer cognitive dissonance between their understanding of the facts and the law's understanding, then this is a clash between legal and everyday discourses. Writers from varied perspectives (and not just relativists and postmodernists) challenge the whole notion that there is a

distinction between law and fact, arguing that legal norms already determine what can count as legally relevant and indeed how that fact is defined. However, does this necessarily mean that law is a totally closed-off, sealed system? There still seems some plausibility in the idea that stories in the courtroom are mediating between legal and social discourses. Or, as Jackson argues (1988, pp 94–7), that there may be narrative structures that occur in both: he cites a judgment of Lord Denning's (*Miller v Jackson*) involving cricket and analyses, following Greimas, the story involved in terms of paradigms (community) and oppositions (young/old) and narrative sequence in which tradition is disrupted by newcomers. The narrative involves 'value-laden associations [which] are not legally relevant, yet they are inextricable from the narrative understanding of the situation'.

Trials, regulation and justice

Let us finally, in this section, take a step back from the level of interaction in the courtroom to the function of the trial and look at how the imperatives of State regulation have affected the character of the trial. The question that becomes central from this perspective is this: Is there a growing conflict between the bureaucratic organisational form and due process? For Weber, describing late-nineteenth-century State bureaucracies, there was not a conflict but a fruitful convergence between bureaucratic structure, the spread of formal rationality and the rule of law. These provided a social and administrative guarantee of formal justice and control of the judiciary. The hierarchy of supervision and division of labour was also the most efficient way to handle cases. The uniform and regular application of rules was an effect of the institutional structure. Conversely, however, this guarantee may turn into a threat to the rule of law, for the connection between efficiency and due process is only contingent. If the situation of the administration changes – for example, through increased volume of work – then formal rationality may cease to be the most efficient form of administration. The guarantee has no inherent stability.

Many contemporary analyses of legal administration have thus focused on a general trend towards mechanical regulation and bureaucratic goal displacement. Internal administrative goals conflict with due process. The increasing volume of work and decreasing resources put the legal system under severe pressure to increase productivity or even to maintain level 'throughput' in processing cases – 'conveyor belt justice'. The response is, on the one hand, to increase the pitch of the bureaucratic logic of standardisation where due process has to be observed in the trial and pre-trial decisions and, on the other hand, to seek ways of avoiding contested trials:

1. simplification techniques: no-fault liability; reducing the need to investigate the mental element in crime; standardising sentencing tariffs;
2. diversion techniques: pre-trial and post-trial diversion; decriminalisation; plea-negotiation; substantial shifts in decision-making powers to the 'paralegal' sphere – police, procurators-fiscal, social workers involved in production of social enquiry reports.

Critics argue that legal decision-making thus becomes almost a parody of formalism since legal outcomes will be increasingly uniform and predictable, while leaving the

things indeed that cannot be put into words. They make themselves manifest. They are what is mystical'). And as we shall see in the next paragraph, the mystic concern with ineffable origins can plausibly be said not to be the exclusive inclination of unique individuals. It is plausible to say that language itself posits, alongside the register of clarity and clear communication the register of an irrepressible curiosity regarding the mists and mysteries from which its clarity emerges.

These reflections on language and the deconstructive concerned with the boundaries of language provide a telling clue to what Derrida may have wanted to express with the title of the essay 'Force of Law: The "Mystical Foundation of Authority"'. We shall presently turn to this essay, but one more observation is important before we do so. Careful readers of everything said above might still want to raise the objection that *someone* is experimenting here; *someone* is picking at the seams of texts; *someone* is intervening to solicit the textual event; *someone* is doing deconstruction and using language or experimenting with language to do so. The old subject–object constellation of the metaphysics of presence, in terms of which language is nothing but the tool of a pre-existing subject, is still conspicuously present in all of this. Derrida's reply to this objection would be ambivalent. He would concede that this is correct to the extent that the language of the metaphysics of presence indeed holds us captive and constrains us to repetitions of its essential linguistic schemas. The philosophy of deconstruction, to make its point, also has to resort to language that is largely conventional and common. We have already mentioned this. There is indeed no transgression possible, not even for deconstruction and deconstructionists. But the language that holds us captive in this way remarkably also allows for, grants, and even solicits, the experimentation and exploration that resist this captivity. Deconstruction is not some extra-textual philosopher's brainchild. It is not just a smart idea or thought that one of the ingenious thinkers of our time plucked from his undoubtedly highly productive and creative mind. Derrida knew that deconstruction is the product of a language or languages that has and have been around long before him. His entire oeuvre consisted of painstakingly following and tracing leads already followed by other thinkers before him. He knew that his own creativity was a textually *provoked* creativity, a creativity *solicited* by the creative possibilities that the language of his predecessors (especially, as mentioned above, Heidegger, Husserl, De Saussure, Freud, Nietzsche, Marx and Levinas) offers. Deconstruction is an event of language, an event in which language gives itself, as it has done for ages, to the possibility of an impossible resistance to its own constraints. That this resistance of language to itself is as old as language itself is attested by ancient instances of mystic poetry, philosophy and theology that sought to explode or transgress language for the sake of a direct, or at least more direct, experience of existence. It has always been evident whenever significant poetry resisted conventional ways of saying in order to say what has hitherto remained unsaid. Heidegger found a telling instance of this mystic resistance to language in Parmenides' poetic probing of a thinking that would be close enough to existence to become *boundless* and to warrant the assertion of the *oneness of thinking and existence*, the oneness of *thought* and *Being* (Heidegger 1982). He also found this resistance to be evident in the work of several poets, especially in the poetry of Friedrich Hölderlin (Heidegger 1971). Derrida found and explored this resistance in the writings of the medieval mystic theologian/poet Angelus Silesius (Derrida 1995), and in the poetry of Paul Celan (Derrida 1986b), among many others.

The mystic and poetic resistance of language to itself has indeed all along been a regular feature of language, a regular feature of significantly innovating philosophy, theology and poetry. Might this mystic and poetic resistance of language to itself also be evident in, or pertinent for, legal theory and thinking about law? This is the question that Derrida's essay 'Force of Law: The "Mystical Foundation of Authority"' added to the concerns of contemporary legal theory. The lively response and wide acclaim that this essay found in contemporary legal theoretical scholarship would suggest that this is a worthy legal theoretical and jurisprudential concern. Is this so, or has a considerable contingent of contemporary lawyers and legal theorists just succumbed to the allure of something that is completely foreign to law and should have remained foreign to legal theory? Might one not argue that the concerns of legal theory are circumscribed by the clear language of law? Should legal theory therefore not confine its concerns to the register of clear communication and, at that, to a very clearly defined sub-category of this communication that complies with the even higher levels of linguistic clarity exacted by the demands of law and the ideal of the rule of law? Has the legal theoretical reflection upon the social and political origins of law in the course of the twentieth century (legal realism, sociological theories of law, critical legal studies, etc) not already bitten off more than it can chew by venturing much too far beyond the proper province of jurisprudence? Has it not already moved much too far beyond clear primary rules of legal obligation backed up by clearly defined secondary rules of legal recognition, application and change (Hart)? Has this introduction of political and sociological impurities not polluted the concern with pure law enough; has it not already introduced enough troubled water into the transparency of pure law, the transparency of legal norms that are clearly validated by higher norms and ultimately by a clearly defined foundational norm that insulates the law from all extra-legal impurities (Kelsen)? And if this circumscription of the domain of jurisprudence is perhaps too narrow, should one not then let the matter rest with the respectable and relatively transparent integration of some fundamental moral considerations into law and legal theory (Dworkin)?

The concern with a well-circumscribed domain of jurisprudence or legal theory that is reflected in these questions must surely turn into dismay when the question of deconstruction's relevance for legal theory comes to the fore, for deconstruction is not just concerned with the political, sociological and moral origins of law. As if these origins are not already worrying enough, deconstruction is concerned with the origins of these origins; the origins of the social, the political and the moral; the origins of social, political and moral languages. It is concerned with origins of origins, moreover, that can never be pinned down anywhere but are ever again displaced, suspended, deferred or supplemented by other originating moments; origins that are mere traces of traces that are lost in the mists of linguistic differentiation. No rule of recognition stands a chance here. No foundational norm and no moral principle can hope to arrest the abyssal chaos of the primordial event of language.

Had it not been for Agamben's challenge, one might not have needed to elaborate the matter to this extent. The mystic curiosity of deconstruction is mentioned right up there in the title of the essay that catapulted deconstruction into the concerns of twentieth-century legal theory – *the mystical foundation of authority*. Derrida was upfront and considerate enough to state the concern of the essay straight away. Anyone for whom the foundation of legal authority begins and ends with a rule of recognition,

where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

. . .

I have already pointed out that this distinction is unfounded in fact, for in Elliott v. Hall (4), as in Hawkins v. Smith (5) (the defective sack), the defendant exercised no control over the article and the accident did not occur on his premises. With all respect, I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care.

LORD TOMLIN

My Lords, I have had an opportunity of considering the opinion (which I have already read) prepared by my noble and learned friend, Lord Buckmaster. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to every one who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty; it is only a factor which may render it easier to bring negligence home to the manufacturer.

The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: 'For

example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle.'

LORD MacMILLAN

What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

I am happy to think that in their relation to the practical problem of everyday life which this appeal presents the legal systems of the two countries are in no way at variance, and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which appellant seeks to establish.

Discuss the following questions:

1 [General:]
   - Is the 'neighbour principle' a legal or a moral principle?
   - If, as Lord Atkin asserts, it is indeed 'found on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived', then in what sense is *Donoghue* a hard case?

2 [In relation to MacCormick:]
   - Is it any of the business of the courts to decide cases on the basis of consequences they may have?
   - Discuss the role of coherence in law on the basis of the arguments made by the judges in this case.

1.1 The advent of modernity

In this part of the book we change the focus of analysis to ask how some of the issues that have been addressed in the first two parts of the book might be understood as being specific to modern law. This requires that we ask whether there are legal issues or features of law that have developed only in the modern period, and what this can tell us about law as an institution. Further, if as many theorists have suggested, we are moving into a period of late- or post-modernity, this raises questions about how the functions of law might be changing and how we might need to revise our understanding of law. However, before we can begin to answer such questions, we must first consider what we mean when we talk about modernity, and more specifically, what we mean by the term legal modernity.

While the term 'modern' is often used in ordinary speech to describe something that is up to date or contemporary, the term modernity has a more specific meaning when used in social or political thought. In this context it is used to refer to a specific period of time (roughly the period from the European Enlightenment in the eighteenth century to the late twentieth century). This period saw the development of a specific set of beliefs or ideas that were manifested across the fields of knowledge and enquiry, characterised by a new freedom to contest what had previously been taken as given and removed from challenge. These in turn led to a radical change in the forms of political and social organisation.

The momentous changes that are ushered in with modernity include:

- In the field of ideas, scientific and philosophical enquiry:
  - The rise of science as no longer confined in doctrinal systems and hierarchies of authority
- In the field of material production and the economy:
  - The industrial revolution and the creation of markets in land, labour and money
- In the field of political organisation:
  - The separation of Church from State and the creation of the sovereign Nation-State in Europe and the entrenchment and deepening of colonialism.

Let us take each of these in turn.

We associate the Enlightenment with a shaking off of the shackles of tradition and with a belief in progress and in the capacity of rational thought to understand and organise the world. Enlightenment thinking challenged received wisdom as contained in doctrinal systems of thought with privileged interpreters of 'the truth', and instead sought to open these up to scientific and philosophical enquiry. In the field of science, for example, this led to the belief that the natural world operates according to natural laws (such as gravity, evolution and so on) as opposed to magical or mysterious forces, and that science can be applied to the understanding and eradication of particular social problems (such as disease or famine). This sets science and philosophy on a linear course of continuous progress, as mastery of nature and society.

Immanuel Kant's famous dictum *sapere aude* ('dare to know') captures something of the revolutionary moment in the field of knowledge and science. There was a new optimism pervading the 'Age of Reason' that the world could be deciphered in the sense of understanding the rules that underlie its function, tracking regularities, submitting phenomena in the world to scientific analysis and experimentation. This applied both to the natural and the social sciences. In the former, breakthroughs in physics (Newton), astronomy, biology and so on drove the efforts to establish the concepts, the rules and the measurements that would allow us to understand the natural world. The latter was driven by efforts to understand the regularities of social life, the underlying structures that determine how people interact in society. The study of society, 'Sociology – both word and thing – was created by Auguste Comte' wrote Levi-Strauss, and what is perhaps most remarkable about this invention is that to understand society, Comte draws directly on the natural sciences. The discipline of sociology was defined as 'social physics', deploying the logic of 'social statics' and 'social dynamics' directly from physics (the proper equilibrium of which determines the proper functioning of society); the concept of 'social disease' was taken directly from medicine; the understanding of 'social pathology' – as what transgresses the 'proper limits of variation' – from (evolutionary) biology. Moreover, the methodology of 'observation, experimentation and comparison', which was key to attaining scientific knowledge about society, its 'laws of solidarity and sequence,' as he put it, is of course the key method of the natural sciences. In philosophy, the shift was, with Descartes, towards introducing the principle of doubt at the heart of epistemology (the branch of philosophy that asks the question of what is knowledge) and, with Kant in particular, to understand the frameworks of thought that conditioned people's perception of reality, as well as the effort to delimit the concepts and categories in terms of which we understand what is good (ethics) and what is beautiful (aesthetics).

These developments in thought and science were linked to dramatic changes in the fields of production and the economy that have come to be known as the 'industrial revolution'. Driven in part by new scientific inventions, such as the steam engine and the mechanisation of production, the industrial revolution was a transformation of methods of production and a near-miraculous improvement in European societies' capacities to produce goods. However, at the same time, this also produced arguably the most catastrophic dislocation ever of the lives of the common people of Europe. It was in the period between the late 1790s and the 1840s in England that the industrial revolution first made its impact and saw its greatest acceleration; the rest of Europe followed later in the nineteenth century, and the impact was more gradual and for the most part politically managed to protect society from the full impact of rapid industrialisation.

Of course to understand the magnitude of both the massive increase in productive capacity and the scale of social dislocation one must go back in time to look at how the conditions of such a transformation were set, in terms of the 'enclosures' of the previous century in Britain. In the name of 'improvement', people's common property in land was abolished, as Acts of Enclosure were passed depriving people of access to the common land and its resources and thus depriving them of any means of subsistence other than to sell their labour to the owners of the factories. During this period which is sometimes referred to as the 'pre-history' of Capitalism, acts of 'enclosing' were coupled, in England, with the draconian legal prohibition of

solidarity. For Durkheim, then, law played an important role in the maintenance of social solidarity, but the way that it did so was fundamentally different in different types of society.

One can explore the points that Durkheim makes here through the use of an important typology that was introduced by Ferdinand Tönnies. This is the distinction between *Gemeinschaft* and *Gesellschaft*, roughly translatable as 'community' and 'society' respectively (and thus corresponding in broad terms to mechanical and organic solidarity). With these terms Tönnies attempted to track the transition between societal change and the corresponding legal change. While these forms appear very much as ideal types in the Weberian sense (see section 1.4 below), they each have dominated (as paradigmatic) an epoch in the evolution of our legal tradition.

In the *Gemeinschaft* form of social regulation the emphasis is on law as expressing the will, the internalised norms and traditions of a community, to whom each individual member is part of the social family. In effect there is no clear distinction between what belongs to the private realm and what to the public, what is a legal as opposed to a moral issue, what is properly politics as opposed to justice, religion, morality. The normative order is all-encompassing and unyielding. This form of law is, in Weber's terminology as we will see, characteristically substantive. The arbiter of justice does not act under a legal capacity somehow detached from his own moral views, social position and politics. Rather s/he adjudicates on the basis of a justice that is the community's – the sense of which s/he embodies – and s/he does so (again in Weberian terms) irrationally, not by deducing from general premises but in a casuistic, ad hoc, manner, as the case at hand demands.

Gesellschaft law is in many ways the exact opposite of this. We move here from the cohesive community to liberal society and its need to co-ordinate differences in social and professional roles and contributions of labour. Where, in the former, society as a whole imposed the dictates of law, *Gesellschaft* law is geared to individualism. This requires that in the name of protecting the individual, the law must keep society at arm's length. The emphasis is now on the autonomous individual, motivated by self-interest, who enters the public arena to strike deals that will further his/her own interest. The law is there to set up and guarantee that process of exchange as well as the equality of all before it, and in a sense limits itself to the role of passive enforcer of individuals' agreements. To achieve its function this law of liberal society must assume the form of a system of rules that are clear, predictable, general (applying equally to everyone) and self-contained; recourse to outside moral, political or social considerations would undermine legal certainty and moral and political pluralism. The distinction between the two types of law brings into relief competing images of the person. In *Gemeinschaft* law the person is intimately linked with the community to which his/her own sense of identity is intimately tied. In *Gesellschaft* law the person is atomistic, self-determining and limited only by the rights of other individuals; s/he is first and foremost a bearer of rights, that is a cluster of entitlements through which public exchange and public life is possible.

But what is the lever of change between the forms of law? The answer to this question depends on the concept of *legitimation* (we will also be better positioned to understand this once we have explored what Weber says about types of legitimation). But to anticipate the point, the question that legitimation answers is this: given that the bottom line of law is that it is a coercive order, is it merely the threat of coercion that motivates people to accept it? Or is there something beyond threat that makes law appear, and makes people act, as if it were binding – which creates an obligation to obey? This matters because, although compliance with the legal order can be secured to a limited extent by coercion, compliance over time may be guaranteed only if the existing order commands the support or loyalty of the mass of the population.

In *Gemeinschaft* law, legitimation is based on shared values and shared understandings. Legal rules (when law takes the form of explicit rules rather than custom) embody shared value commitments. Here society is held together through what Durkheim terms a '*conscience collective*' or shared set of beliefs and values, which is continually expressed and renewed through the operation of the law. (Weber will refer to the legitimation prevalent in *Gemeinschaft* law as being of the 'traditional' type.) The law is adhered to and respected because the opportunity to question it is absent: the social environment discourages dissent and rewards obedience. But the legitimation reaches deeper than mere external pressure. Allegiance to the rules derives from the fact that the rules give expression to the background common morality. With no dividing line between that morality and the legal expression of it no external measure of threat is needed to guarantee adherence to law. Since it is from this pool of common value that the community draws in order to make sense of the world in the first place, allegiance to law is guaranteed at the outset.

The changes, as analysed earlier, in economic and cultural conditions brought about a change in the legitimation process. The rise of the bourgeoisie in Europe, and the changed economic and social conditions, challenged the status society and subverted the *Gemeinschaft* form of law. As for legitimation, there arose due to the market as facilitator of exchange and of transaction among parties who did not share a world-view, a certain pluralism of values that undercut the sort of allegiance that was possible in *Gemeinschaft*. The logic of legitimation is reversed in *Gesellschaft* law: it no longer draws legitimation from shared substantive values, but instead from its very distance from those values. Religious or communal moral principles that grounded *Gemeinschaft* law are abandoned. *Gesellschaft* law frees itself from the sources from which a challenge to its legitimacy could originate, and appears as a rational system of self-justifying, neutral rules, which are independent of particular religious or moral beliefs. Law stays clear of promoting certain values against others, or certain ends against others, because that is the province of individual freedom of choice. Law merely fixes the formal framework within which individual wills will meet. It fixes common means to diverse ends, guaranteeing formal equivalence, the terms of exchange and the enforceability of the agreement. The legitimacy of law in the liberal era depends upon precisely its withdrawal to the formal side of the social interchange. In a society where there is very little agreement on substantive issues across the board, it becomes important to agree the rules of disagreement. The law draws its legitimation from merely fixing the framework for settling conflict and abstaining from taking sides, as it were, in that conflict. It merely provides the technical means of compromising between conflicting interests. At the same time it provides institutional backing to a market economy where, in principle, everything is subject to agreement and exchange according to the free will of the parties. Law becomes legitimate in guaranteeing that kind of freedom, and in performing that function brings into play a different *kind* of solidarity, that which Durkheim calls 'organic'.

development away from the classic model of economic liberalism. The State becomes an interventionist one, it undertakes the macro-management of the economy, is increasingly involved in redressing social inequalities, improving the living and working conditions of workers and extending social rights. In performing the tasks of redistribution of income and resources, regulation and planning ('social engineering'), it changes from the liberal state, the impartial guarantor, to the welfare state.

The hallmark of the welfare state, then, is that it dissolves the strict separation between state and society. In liberal society there were rigid boundaries between various social spheres – the economic, the familial and more generally the private – and the State and its law. The emergent welfare state moves into these spheres in the name of governing and regulating them. In the economic sphere, it supplements the market model with that of a state-regulated capitalism, for example through state demand for unproductive commodities, monopoly regulation and regulation of various forms of economic concentration. In the sphere of labour, the state provides protections for workers in the workplace and against dismissal. In the social sphere, the state provides education and health care through forms of national insurance. The state also replaces the market on occasions when it redirects capital investment into neglected sectors, or relieves capital of the need to amend certain social costs of production (by providing unemployment compensation, or assuming the costs of ecological damage).

But the interventionist role of the state is felt also in the transformations of modern law itself. Take contract law for example. The law of contract reflects this transformation from liberal to post-liberal law as it earlier reflected the shift from *Gemeinschaft* to *Gesellschaft* societies. Contract law was liberal law's paradigmatic form because it expressed the meeting of the wills of individuals, free to enter and shape the agreements. Contract law is now no longer the same. Think of the employment contract and the role of the state as a 'third' party to it: the fixing of the minimum wage, regulating for compulsory maternity and other leave, compensation thresholds and other interferences of all kinds from allocating rights of employment to regulating union membership, to policing the 'fairness' of contracts. In his analysis of contract law Thomas Wilhelmsson (1995) offers a conception of 'social contract law' as one which takes as its central notion not the freely reached agreement to satisfy individual *desires*, but the notion of (objectively) fair bargaining which satisfies (objective) *needs*. Drawing his examples from Swedish private law, he describes a system where judges have the power to rewrite the contract for the parties, and change unfair terms (rather than to declare them simply void), and where state agencies will intervene in negotiations with big companies to set standard terms which are in the public interest and which protect consumers. Unlike 'classical' liberal contract law which is content-neutral, welfarist contract law is content-oriented, with judges looking to interpret the contract in the light of legal policy and social interest. Where classical contract law is conceptualised as the expression of antagonistic tendencies in societies, the contract law of the welfare state may interpret contracts in the light of co-operation. Long-term contracts, especially employment contracts, become the role model of contract law and replace sales of goods. Another typical modern expression of this development is the idea of granting pressure groups, such as consumer organisations, legal standing to challenge companies in the name of 'the public'.

One might extend a similar analysis to property law. Classic *Gesellschaft* notions of ownership comprised the right to possess, to use, to manage, to destroy, the right to the capital, the right to the income of the thing, and an immunity from expropriation. By contrast, a welfarist understanding of property might limit these rights in the name of a common interest, for example in the environment, public access or communal water rights, in such a way that the owner is virtually unable to use the land in a profitable way. Societies where the liberal ideas of free ownership still predominate, such as the United States, will typically use forms of restrictions very reluctantly, and in the case of expropriation, grant the full market value as compensation. Societies in which the welfarist argument is predominant will use public law regulations intensively to guarantee that the use of private property is beneficial, or at least not detrimental, to the public.

We have taken these examples from private law as key 'indices' of the paradigmatic change that the regulatory welfare state ushers in. If in the *Gesellschaft* model, as we have seen, individuals could only be held liable for actions that could be attributed to them (criminal law and tort/delict) or transactions they freely entered into (contract), this principle becomes variably displaced or 'supplemented' by another, that of strict liability. Take the example of accidents in the workplace. Factory work carries risks and the question of who pays for the cost of injuries is crucial to our industries and economies. If the principles of welfarist legal systems commit to strict liability, and therefore the duty of employers to shoulder the costs of industrial accidents even when no negligence can be proven on their part, it is because it is assumed that those costs should not be borne by those less able to afford them, the workers, and because the social costs of production need to burden also those who most benefit from its organisation.

The more general question of our analysis here can now perhaps be posed in this way: how has the different function that law assumes as an instrument of regulation affected its form, and (in effect) the rule of law? Putting it in very general terms, we could say that the welfare state has changed law from formalistic to policy-oriented, and has shifted its concern from one with formal justice to one with substantive justice.

We might identify the following features as characteristics (and tensions) in the regulatory-welfarist form of law.

Bureaucracy, justice and instrumentalism

Most writers identify welfare state law with the growth of large state bureaucracies, which are viewed as increasingly expensive and inefficient – more likely to preserve themselves or apply rules in formal and mechanical ways than be sensitive to the needs of individuals. There is an interesting contrast here with Weber's view, which, in describing late-nineteenth-century state bureaucracies, saw not a conflict but a fruitful convergence between bureaucratic structure, the spread of formal rationality and the rule of law. Bureaucracies provided a social and administrative guarantee of formal justice and control of the judiciary. The hierarchy of supervision and division of labour was the most efficient way to handle cases and the uniform and regular application of rules was an effect of the institutional structure. Conversely, however, this guarantee may turn into a threat to the rule of law, for the connection between efficiency and due process is not straightforward. Many contemporary analyses of