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## **Making Sense of the Disagreements about the Nature of Law: The Puzzles of Legal Normativity and Human Autonomy**

The thesis attempts to make sense of the disagreements in legal philosophy about the relationship between legal norms and requirements of morality. In particular, it asks why positivists and non-positivists explain in opposing ways the moral requirements, if any, of legally valid norms. In the first part of the thesis I defend the idea of the rule of law, or legal normativity, as being based on an inherently moral phenomenon: substantive equality of those subject to legal power. I defend the idea that respect for this moral phenomenon inherent in the rule of law leads to compliance with principles of substantive justice which are inherently moral. I then show how failure to adhere to the requirements of legal normativity has led, in the British control orders saga, to failures of substantive justice.

In the second part of the thesis I explore in further detail the moral characteristic specific to legal normativity. I argue that legal norms necessarily possess binding force, or normative force, for those that are subject to legal power. I then seek to ascertain the source and extent of the normative force of law. I identify it in the moral idea of respect for human autonomy understood as the defining human ability to act for reasons. A legal community, I argue, can only exist in a community of autonomous beings. This explains and justifies, among other things, why the law acts through legitimate authority. It also explains the limits of the moral fallibility of law: the law can fail morally in several ways but it cannot fail to respect the idea of human autonomy. This explains the source of the disagreements in legal philosophy. Legal validity and moral requirements are inseparably related, but only in specific ways. It is the idea of human autonomy which links law to certain moral requirements.

**MAKING SENSE OF THE DISAGREEMENTS ABOUT THE  
NATURE OF LAW: THE PUZZLES OF NORMATIVITY AND  
HUMAN AUTONOMY**

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# INTRODUCTION

## 1. Disagreements in Law

Legal practice is fuelled by disagreements. This appears as a truism to most lawyers. Disagreements give rise to legal disputes; they occur during the resolution of disputes and carry on after disputes have been authoritatively settled in the form of contrasting criticisms of the outcomes. Individuals and corporations resort to the law with the hope of settling disagreements amongst themselves. Yet, when they speak to their lawyers they are confronted with another set of disagreements: disagreements about what the law says. The contracts they drafted with the intent of avoiding disputes can be interpreted in various and contrasting ways; the appropriate length of custodial sentences vary according to differing opinions of counsel and judges; what the constitution requires in a particular case is the subject of intense debate.

The aim of this thesis is not necessarily to understand the pervasive nature of disagreements in legal practice or to illustrate how lawyers settle disputes about what the law says. It is directed at a more abstract but nonetheless contentious issue about law. My aim is to understand the possibility of theoretical disagreements about the nature of law. Long before John Austin proclaimed that “the existence of law is one thing; its merit and demerit another”,<sup>1</sup> positivists and non-positivists had been disagreeing with each other and amongst themselves about the correct answer to the question “what is law?”. The crux of the disagreement seems to lie in the separation thesis, endorsed by positivists and denied by non-positivists, which claims in its most abstract form that law and morality are not necessarily connected. The generality of this thesis has itself been the source of much disagreement and confusion.<sup>2</sup> Thus, for the scope of this thesis it needs to be specified.

The confusion related to the general form of the separation thesis can be explained by making reference to at least two different sources. The first relates to what sort of connections between law and morality the positivist and non-positivist traditions are interested in denying or endorsing. The second concerns the different linguistic senses of “law” and “morality”. I will proceed with the second before tackling the first.

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<sup>1</sup> J. Austin, *The Province of Jurisprudence Determined* (W.E. Rumble ed., Cambridge University Press 1995).

<sup>2</sup> See for example the essay “The Argument from Justice” in J. Raz, *The Authority of Law* (2nd edn., OUP 2009) where Raz criticises the separation thesis as presented by Robert Alexy in R. Alexy, *The Argument from Injustice* (B. Litchewski Paulson and S. L. Paulson trs., 1st edn., Clarendon Press 2002).

Consider the following extracts: a) “Law is the union of primary and secondary rules”<sup>3</sup>; b) “Jurisprudence is the general part of adjudication, silent prologue to any decision at law”<sup>4</sup>; c) “[Hart] does not believe that the purpose of law is to provide a justification for state coercion”.<sup>5</sup> It might be clear that the different linguistic senses in which the different authors are using the word “law” here do not coincide. In a) “law” is used as a synonym with “legal system”, in b) it is used to indicate something similar to a “judicial decision” while in c) it is used to signify “legal theory”. These linguistic senses of “law” can be evidenced from the differing contexts in which they are used and vary accordingly within the same author. It is not surprising then that the variable linguistic meaning of “law” can sometimes create confusion in understanding what the disagreement on the separation thesis is about. Indeed a case can be made that debates about the nature of law have gradually shifted in emphasis from the relationship between legal systems and morality to a necessary connection between morality and adjudication and, more recently, to a necessary connection between theorising about the law and evaluative judgements (including moral judgements). Needless to say, the quality of the relationship between these different linguistic senses of “law” and morality are not identical.

In this thesis I will assume that the separation thesis is, unless when a contrary intention is expressed, concerned with “law” in its linguistic sense of “legal norm”. A norm expresses what acts ought to be performed in a given scenario. This proposition is necessarily left in a very general form in order to avoid a bias towards a positivist or non-positivist conception of legal normativity.<sup>6</sup> However, I think it is safe to state that both parties agree that jurisprudence is primarily concerned with the study of legal norms. It is by understanding the central features of legal norms that we can then properly make reference to related concepts such as legal systems, judicial decisions, rule of law and so forth. Positivists and non-positivists disagree precisely on the conditions for having legally valid norms. In particular, the dispute rests on the correct relationship between morality and legal norms.

While I have clarified that there are several linguistic senses of “law” and that the separation thesis needs to be read as primarily focusing on the relationship between morality and legal norms, I have not yet attempted to clarify the different linguistic senses of “morality”. It was Fuller who denounced the fact that “Definitions of law we have, in almost unwanted abundance. But when law

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<sup>3</sup> H.L.A Hart, *The Concept of Law* (2nd edn., OUP 1994) Chapter V.

<sup>4</sup> R. Dworkin, *Law's Empire* (Hart Publishing 2004) 90.

<sup>5</sup> J. Dickson, ‘Methodology in Jurisprudence: A Critical Survey’ [2004] *Legal Theory* 117, 141.

<sup>6</sup> Notice that I refer to norms instead of rules in order to overcome the distinction Dworkin made as a challenge to Hart that judges make use of legal rules and principles. See R. Dworkin, *Taking Rights Seriously*, (corrected edn., Duckworth 1978) essays 2 and 3. I believe that both rules and principles can in fact be referred to as norms without conceptual contradiction.



is compared with morality, it seems to be assumed that everyone knows what the second term of the comparison embraces.”<sup>7</sup> Indeed, it is extremely doubtful that there is a general consensus between theorists, inside and outside the discipline of jurisprudence and legal philosophy, of what the notion of morality is. Certainly, morality has something to do with what categorically ought or ought not to be done. Again, this is admittedly too general. However, just as similarly with “law”, in the context of the separation thesis, legal philosophers use “morality” to refer to all kinds of different things such as “justice”,<sup>8</sup> “correctness”,<sup>9</sup> “goodness”.<sup>10</sup> Even more curiously, “morality” has often been used by various legal philosophers in opposition to “wickedness” or “iniquity” instead of “immorality” or “amorality”.<sup>11</sup> “Wickedness” here usually refers to violations of the most basic standards of human rights as expressed in various international documents.<sup>12</sup>

How is one then to choose in what linguistic sense of “morality” the separation thesis ought to be framed? I will spend much time in defending an ethical system based on the concept of autonomy. However, I will not engage in the exploration of this ethical system until part 2 of this thesis. Instead, in part 1 I will assume that morality comprises the familiar institution of human rights as expressed in several documents. The justification of this assumption will be cleared in part 2.

Given the above, what sorts of connections between legal norms and morality are legal philosophers disagreeing about? Speaking on behalf of all positivists, John Gardner has declared that all positivists must subscribe to the following: “In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).”<sup>13</sup> Two points are to be noted. The first is that there is no mention of morality in Gardner’s formulation. Rather, like in Austin’s formulation of the separation thesis, “merits” is used. This formulation of the separation thesis appears to be wider than it needs to be. “Merits” here cannot be taken as a linguistic variant to “morality”. Indeed, as Leslie Green has argued, it means “any evaluative considerations that would argue in favour of making or sustaining a possible legal rule”,<sup>14</sup> including economic, sociological or political merits. In this thesis, I will confine myself to moral merits only as this is the main focus of non-positivism.

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<sup>7</sup> L. Fuller, *The Morality of Law* (Revised edn., Yale University Press 1969) 3-4.

<sup>8</sup> See for example the Radbruch formula, i.e. extreme injustice is not law, as in G. Radbruch (B. Paulson and S. Paulson trs.), ‘Statutory Lawlessness and Supra-Statutory Law’ [2006] OJLS 1, III.

<sup>9</sup> R. Alexy, n 2.

<sup>10</sup> As opposed to wickedness.

<sup>11</sup> D. Dyzenhaus, *Hard Cases in Wicked Legal Systems* (2nd edn., OUP 2010).

<sup>12</sup> See for example the essay “The Rule of Law and its Virtues” in J. Raz, n 2, 220-221.

<sup>13</sup> J. Gardner, ‘Legal Positivism: 5 1/2 Myths’ [2001] *American Journal of Jurisprudence* 199, 201.

<sup>14</sup> L. Green, ‘Positivism and the Inseparability of Law and Morals’, [2008] 83 *New York University Law Review* 1035, 1041.

The second point to be noted on Gardner's definition relates to a restriction of the arena of the dispute. It says that legal validity of norms does not depend on their moral merits but only on their sources. In keeping with the positivist tradition, a source here is to be regarded as a matter of social fact, a convention or custom which can be empirically ascertained and which authoritatively designates norms as legal ones (e.g. the practice of legislation, judicial precedent and interpretation, custom). As long as these sources or, in Hartian terms, "rules of recognition"<sup>15</sup> designate certain norms as valid, they are legally valid independently of the moral merits of their content.

Non-positivists deny that these sources, customs or rule(s) of recognition are exhaustive of the legal validity of norms. Note that they do not deny their importance in the creation of legally valid norms. However, they argue that norms that contradict sound principles of morality cannot be regarded as legally valid. Now, non-positivists vary widely in their views about the exact relationship between moral and legal validity of norms. Some will argue that immoral norms which have been sanctioned by legal sources are not legal in the focal sense,<sup>16</sup> while others will outright reject their validity.<sup>17</sup> The reasons for these different views within non-positivism will be outlined at the relevant time in part 2. At this point suffices it to say that non-positivists, notwithstanding their internal disagreements, homogeneously contend that legal sources are not exhaustive of legal validity of norms.

## 2. Objectives and Chapter Outline

In the previous section I outlined what I take to be the core of the disagreement between positivists and non-positivists about the nature of law. I identified the separation thesis as being the subject matter and restricted the contention to bear on the relationship between the validity of legal norms and morality. In this section I will proceed to illustrate my main objectives and illustrate how they are to be achieved in each section of the thesis.

I will divide the thesis in two main parts. In part 1 I will ask the following question: can an analysis of legal practice tell us a little more about the viability of the separation thesis? The source of this question lays in the abstract arguments often adduced by legal philosophers to sustain their positions as to the correctness of the separation thesis. While philosophical analysis is aimed at conceptual understanding of the elements under consideration, in the case of law, the element under consideration is one which is socially practiced. Therefore, because philosophical analysis attempts to make sense of that practice and to reveal its constitutive elements, ultimately it must

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<sup>15</sup> See Hart, n 3, V.

<sup>16</sup> J. Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980), XII. See also N.E. Simmonds, 'Law as a Moral Idea' [2005] *University of Toronto Law Journal* 61.

<sup>17</sup> D. Beyleveld & R. Brownsword, *Law as a Moral Judgement* (2nd edn., 1994 Sheffield Academic Press). Also Alexy, n 2, and Radbruch, n 8, in connection to extreme injustice.

also be susceptible to criticisms originating from closer observation of that practice. Consequently, I will challenge the intelligibility of the disagreements about the separation thesis by inspecting the practice of law in the context of counter-terrorism measures in the UK. The reason for focusing on this lays in the morally controversial nature of the UK counter-terrorism measures. A preliminary and intuitive moral judgement on some of these measures reveals that they defy common perceptions of principles of substantive justice and fairness. The morally suspicious character of these measures is therefore a good battle ground on which to investigate whether the separation thesis is to be upheld or rejected.

I will spend most of part 1 investigating whether the morally suspicious counter-terrorism measures were compatible with the rule of law. I will not directly tackle the question whether these measures were to be classified under positivist or non-positivist terms as legally valid or legally invalid measures. However, as I will show, they failed to comply with the rule of law. I will argue that non-compliance with the rule of law is a specifically legal failure as well as a moral failure. I will also show that norms which contravene our common sense of substantive justice are those that violate the rule of law as this is built on a substantive moral concept. I will conclude that a norm which emanates from the sources of valid legal norms and yet fails to comply with the rule of law fails to belong to a system of valid legal norms because incompatible with the overall system of norms. It fails to be systemically valid.

My discussion in Part 1 will reveal that disagreements about the separation thesis are often caused by neglecting features which an in depth analysis of existing legal practice would reveal. However, it would be misleading to think that it is mere empirical evidence that supports my conclusion. There are deep philosophical reasons why the rule of law is built on a substantively moral concept. In part 2 I will tackle these reasons. I will show that it is impossible to understand law as a normative institution without an understanding of the scope and sources of the normative force of law. Three issues will need to be answered. Firstly, do legal norms, to count as such, necessarily need to possess normative force for those to whom they are addressed? I will answer the question in the positive. Positivists that have answered the question negatively fall into a paradox by doing so.

I will then go on to investigate the source of the normative force of law. I will identify it in the idea of human autonomy. I will defend the idea that human autonomy is the specifically human ability of acting by calculating the consequences of prospective actions and pursuing the valued consequences according to a conception of human well-being. The idea of human autonomy lays the foundation for a sound ethical theory and helps us to resolve the problem of the normative force of law. I will show that norms, to be legally valid, must emanate from officials that recognise their subjects as

autonomous beings and make possible the exercise of their autonomy in a community. I will show that there are substantive moral requirements which flow from grounding the normative force of law in human autonomy. These substantive requirements explain why the rule of law is built on a substantive moral concept.

I will then conclude by asking whether grounding the normative force of law in a substantively moral requirement implies that law is not morally fallible. I will argue that the law is morally fallible in different ways. However, the law cannot fail the moral requirement of the recognition of autonomy. Non-positivists that have defended a thesis which is incompatible with the above either adopt a misleading methodological stance or subscribe to an ethical theory which restricts the scope of moral requirements.

The above paints a new picture of the source of the disagreements between positivists and non-positivists. It reveals that norms, to be legally valid, do and do not need to be morally valid. The law is morally fallible, yet only in some specific ways. The source of the disagreements ultimately lies in the all or nothing character of the separation thesis itself. Once we understand that law, to be such, can fail morality only in some ways we immediately grasp that the separation thesis is misleading. The separation thesis ought not to be the battle ground of disagreements in jurisprudence.

## PART 1

### TAKING LEGAL PRACTICE SERIOUSLY: LEGAL NORMATIVITY AND SUBSTANTIVE INJUSTICE

In disagreeing about the viability of the separation thesis, legal philosophers usually reason in the abstract. They ask and disagree about questions like these. Is the law morally valuable? Can the law do any moral wrong? What is the relationship between law and justice? To answer these questions they construct complex theories and then publish more complex books arguing amongst themselves. This is all well and good. Indeed, I myself will engage in a process of argumentation using abstract scenarios. Yet, this abstraction from legal reality, I will show, can do more bad than good to the arguments offered.

Take for example this process of argumentation offered by Raz:

“The definitional approach has to explain away many counter examples. We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties [...]. We also know of tyrannical governments pursuing evil goals through the machinery of law. Supporters of the definitional method would argue that though such cases are unfortunately all too frequent they fail to rebut their claim since by definition a bad law is not a law, or at any rate a government without moral authority is not law. This answer is, however, misconceived. All it shows is that the theory is consistent on this issue, not that it is correct. It is precisely because such obvious laws are ruled out as non-laws by the theory that it is incorrect.”<sup>18</sup>

Much can be said about the viability of the refutation Raz attempts to offer. But one thing jumps to mind. Raz speaks about the familiar set of laws which suppress basic individual liberties and of tyrannical governments pursuing evil goals through the machinery of law, without citing one real example of such laws or such tyrannical governments. One could say he need not. After all we are familiar with the horrors of the Nazi regime and the racially discriminating enactments of Apartheid South-Africa. This is granted. Basic knowledge of modern history reveals various examples which Raz can rely on. However, these examples are too general. They assume what Raz is trying to prove without examination and without offering evidence. For Raz to substantiate his point he has to offer a legal analysis of these familiar regimes and tell us how they succeeded in carrying out their immoral purposes through the machinery of the law.

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<sup>18</sup> J. Raz, *Practical Reasons and Norms* (OUP 1999), 164.

In this section I therefore attempt to depart from mere abstract reasoning and familiar examples which might be misleading. In so doing, I will take a more first person viewpoint and ask questions like the following. Is the law of my legal system morally valuable? Can the law of my legal system do any moral wrong? What is the relationship between the law of my legal system and justice? This is what I set out to do in the context of the British legal system. I will investigate the relationship between law and substantive injustice taking a special focus on the morally suspicious UK counter-terrorism response. To counteract the terrorist threat the British government adopted various measures which resonate closely with the familiar regimes Raz needs to rely on to prove his point. These UK measures permitted the restriction of substantive and procedural rights of several individuals without resort to much justification. I will give a legal analysis of these measures in hope of reaching some conclusions on the viability of the separation thesis. I will argue that the morally suspicious measures were carried out through what can hardly be defined as the machinery of the law.

My legal analysis will however have to be preceded by a defence of an idea articulated by Lon Fuller. Unlike various non-positivists, Fuller did not explicitly assert that immoral norms could not qualify as legal norms. Rather, he thought that a system of legal norms possesses a particular moral quality. He thought that a system of legally valid norms could possess this moral quality in various degrees, but complete lack of this quality resulted in something which could not be called a valid system of norms. Fuller's idea was not received without scepticism. Indeed, his idea has been ridiculed both by positivists, in particular Hart and Raz,<sup>19</sup> and its reach seriously underestimated by various non-positivists, including Dworkin.<sup>20</sup> So I need to reformulate his idea in order to meet the objections levied against it. Therefore I will first explain, reformulate and defend the idea of an internal morality of law and then show how British practice in the field of counter-terrorism supports the validity and wide reach of this philosophically underestimated idea. In particular, I will show that it is by undermining the normativity of law, which contains the moral property of law, that gross violations of substantive justice have taken place in the British counter-terrorism experience. This finding should support a non-positivist conclusion of the incompatibility of legal norms with substantive injustice. For the purposes of part 1 I will assume that sound principles of morality include the respect for human rights as outlined in various human rights instruments. References to substantive injustice will therefore mean disrespect for familiar standards of human rights. In the end, I will conclude that Fuller's idea shows that the separation thesis, as formulated by Gardner, needs not to be the central focus of jurisprudential disagreements.

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<sup>19</sup> HLA Hart, 'The Morality of Law' [1965] *Harvard Law Review* 1281; J. Raz, n 12. For other criticisms of Fuller's idea see the symposium published in [1965] *Villanova Law Review* 631-78.

<sup>20</sup> R. Dworkin, 'The Elusive Morality of Law' [1965] *Villanova Law Review* 631.

## 1. The Internal Morality of Law as Legal Normativity

In *The Morality of Law* Lon Fuller defended an idea consisting of two propositions which have been largely disputed by his contemporaries. Firstly, he argued that certain principles which make the existence of legal norms possible are also moral principles. Secondly, he asserted that compliance with this internal morality makes legal systems more likely to comply with sound principles of morality.<sup>21</sup> Fuller's first argument has been opposed mainly through the criticism that the principles of the internal morality are not in fact moral principles but merely principles of efficacy. The second argument has been rejected based on the finding that compliance with the internal morality is "unfortunately compatible with very great iniquity."<sup>22</sup>

But what are these allegedly moral principles internal and essential to the legal validity of a system of norms? Fuller identifies eight of them:

"(1) The first and most obvious lies in the failure to achieve rules at all, so that every issue must be decided on an ad hoc basis [...] (2) a failure to publicize [...] the rules [a party] is expected to observe; (3) the abuse of retroactive legislation [...]; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration. A total failure in any one of these eight directions [...] results in something that is not properly called a legal system at all [...]"<sup>23</sup>

While Fuller thinks that the most essential of these principles is the last one,<sup>24</sup> I will argue that it is instead a generalisation of the first principle which makes the strongest case both for the moral quality of these principles and the connection between them and sound principles of morality.

The first principle can be redescribed more aptly as a requirement for the normativity of legal norms. This might sound at first as a circular proposition until it is shown that normativity is a question of degree. In the introduction to this thesis, I said that a norm expresses what actions ought or ought not to be performed in a given scenario. This means that norms require compliance for actions in an established scenario. Consequently, in order to make actions compliant with norms we need to establish (1) what actions they prescribe and (2) to what scenarios they apply. It might

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<sup>21</sup> Fuller, n 7. The bulk of his argument is in chapters 2-3.

<sup>22</sup> Hart, n 3, 207. Hart, n 19, 1288.

<sup>23</sup> Fuller, n 7, 39.

<sup>24</sup> Ibid, 209-210 where he says that "Surely the very essence of the Rule of Law is that in acting upon the citizen [...] a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing."

be difficult to establish both (1) and (2) which will make it difficult to take norms as guide for actions. This difficulty can be illustrated through the classic Hartian example of a norm which prohibits vehicles in the park.<sup>25</sup> We might not have difficulties in understanding what action the norm prescribes, it is in fact a prohibition; however, we might not be certain whether the prohibition applies to children's tricycles while it might be evident that it applies to motor vehicles. This illustrates that norms can be more or less normative in the sense that they can be more or less able to guide our actions.

Note that there is also another way in which norms, or better, a system of norms can be more or less normative. Different norms belonging to the same system might have an impact on the same scenario and only a combined reading might be able to guide behaviour to a specific outcome. However, a norm might require that "criminal sentences should be imposed by an independent and fair tribunal" while another might say that "the Secretary of State can decide the minimum period which might be served by a mandatory life sentence prisoner". These two norms are obviously related. A judge who has to hand down a judgement will have to consider whether the Secretary of State can be considered as an independent and fair tribunal. He clearly sees that the Secretary cannot be considered as such. If he has to deliver a judgement without any further guidance, he will have to decide whether to follow the first or the second norm as both cannot be applied coherently. In fact the content of the second norm clashes with the content of the first so that a combined reading of both cannot coherently guide the judge to a decision.<sup>26</sup>

I have illustrated that norms and a system of norms can be more or less normative, in that they can be more or less able to guide actions in given scenarios. I will now explain how this relates to Fuller's idea of the internal morality of law. I said that a generalisation of the first principle is able to provide the best case for Fuller's contentions. However, I first need to show that the eight principles can be collapsed into a generalisation of the first.

Fuller's first principle of the internal morality of law requires that there should be legal rules. In my generalisation this can be translated into a requirement of legal normativity or, in other words, into a requirement that a legal system should guide the actions of its subjects through legal norms. In this generalisation the second to the eighth principles are nothing else but ways in which a legal system can undermine legal normativity. As I explained normativity can be a matter of degree. Thus failure to publicise legal rules, lack of clarity, retroactivity etc. are nothing else but ways in which legal normativity can be reduced and norms are less capable of guiding the actions of those subject to

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<sup>25</sup> Hart, n 3, 124-127.

<sup>26</sup> See *R v Secretary of State (ex parte Anderson)* [2002] UKHL 46.



them. The issue of retroactivity, for example, undermines the normativity of law by requiring an action in a scenario after the relevant actions have already taken place. In this way retroactive rules are incapable of being guides to the actions of their subjects at the most relevant time. Note, however, that retroactive rules are normative for the officials that are called to apply them. Along similar lines, the eighth principle, i.e. congruence between rules as announced and administered, can be equally redefined as undermining legal normativity. Incongruence in fact undermines the confidence of citizens that their legal norms are in fact to be taken as the accurate guide to their actions. It is thus fair to conclude that the eight principles fall within one which is a requirement for legal normativity.

Now I can turn to Fuller's contention that the principles of the internal morality are indeed moral requirements rather than merely requirements for efficacy as his critics so forcefully contend. The criticism in Raz's words runs as follows:

"The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such"<sup>27</sup>.

If this is to be translated into the terms I set out above, it means that legal normativity has by itself no moral value and is only instrumental to morality when legal norms prescribe morally valuable actions. This view has to face two challenges if it is to be viable. Firstly, it has to explain why legal normativity does not coincide with the moral principle of equality of individuals in a community. Secondly, it has to explain away the moral value of legal normativity in giving effect to moral principles which would otherwise remain in the world of ideas. I turn to each in order.

We cannot understand legal normativity without making reference to the context in which it operates. It is a social context in which individuals find themselves, willingly or unwilling, in constant interaction with each other and with the community personified in the modern state. In order for the community to be able to maintain its existence it must be capable of regulating the conduct of its members. The primary way it is able to achieve this is by setting general norms which establish what ought or ought not to be done in a given scenario. The consequence of this is that each and every member of the community that falls under the scope of the general norms is called to abide by them.

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<sup>27</sup> Raz, n 12, 226.

This is the germ of the morality of legal normativity: legal norms establish equal demands from their subjects and assume that they are all equally capable of performing their requirements.<sup>28</sup> The moral quality of governance through legal normativity is best understood in opposition to human discretion. While legal norms establish equal demands from all those that fall under their scope, discretionary governance can dispense with this notion of equality and arbitrate situations without substantive constraints and without consistency. The moral quality of governance of a community through legal norms therefore guarantees that there is at least one constraint to those who are invested with political power: all the individuals that fall under the scope of norms must equally be able to enjoy and be burden by legal normativity.<sup>29</sup>

Note that this notion of equality is not at all extensive and critics of the Fullerian principle will be fast to point it out. The equality of legal normativity does not necessarily say that all the individuals belonging to the same community have equal rights and duties. It only prescribes that all those subject to legal norms should equally abide by them. Thus it is possible that a system of legal norms will establish more rights only for a group of individuals while others will have more burdens. Each member of the separate two groups will be equal inside the group; however the two groups will be normatively unequal.

This leads to the second argument advanced against Fuller. His critics might accept that legal normativity has the moral value identified but then point out that the equality of subjection to legal normativity is compatible with substantive injustice: individuals might be equally slaves while others might be equally free.<sup>30</sup> Raz's criticism will re-echo in a new form. The moral property of legal normativity is instrumental to the ends to which it is put. It will be instrumental to substantive justice when this is the end to which it is put. However, it can also be instrumental to substantive injustice. Against this, Fuller himself had something to say.

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<sup>28</sup> That the idea of equality of individuals is a moral concept needs further clarification of what morality is. Until now I have refrained from a philosophical analysis of the concept of morality. If, as I have assumed until now, morality incorporates the respect of human rights as exemplified in various domestic and international human rights documents, the idea of equality before the law is cardinal to this regime. See for example art 7 of the Universal Declaration of Human Rights 1948.

<sup>29</sup> In 'On Formal Justice', [1973] Cornell Law Review 833, David Lyons termed the moral quality of legal normativity I identified as formal justice. He adduces this view to several prominent philosophers, including Hart, and dismisses it. His argument is that (at p 839-840) "*Formalistic notions of justice misplace value by valuing mere form, thereby obscuring the essential connection between justice and the treatment of persons. Acceptance of formal justice interferes with our attempts to understand justice and to determine whether there are, after all, any intersubjectively valid principles*". Quite clearly, his argument does not sting my discussion as, as I will show, formal justice is a pre-condition for substantive justice.

<sup>30</sup> Hart, n 3, 206. Where he says: "*though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice.*"

In his *“Reply to Critics”*,<sup>31</sup> Fuller argued that characterising the principles of the internal morality of law as merely instrumental principles reveals a misunderstanding of the special role attached to legal normativity in the governance of individuals. Legal norms in fact make possible the realisation in a community of the principles of substantive justice which would otherwise remain in a state of social abstraction. “Moral principles cannot function in a social vacuum [...]. To live the good life requires something more than good intentions [...] it requires the support of firm base lines for human interaction, something that [...] only a sound legal system can supply.”<sup>32</sup> In this functional role, legal normativity is therefore morally necessary. In this functional role, legal normativity is therefore morally necessary. But, one might ask, what are those moral principles that legal normativity makes possible? To answer this question we can take a look at a suggestion provided by Fuller’s most assiduous critic, HLA Hart.

## **2. The Minimum Content of Natural Law and Reduction in Normativity**

It was Hart who argued that legal systems do not necessarily need to reproduce requirements of substantive justice. However, although there is no strict necessity, legal norms usually respond to certain extents to the demands of morality.<sup>33</sup> The reason for this is that, given certain truisms about human beings, certain rules are necessary if a community of individuals is to live together and survive as a community. Consequently, although only a contingent matter, legal normativity usually fulfils the Fullerian role of giving practical effect to moral demands. Human vulnerability is one of such truisms and if a community is to survive some individuals must at least enjoy a legal right to physical integrity. Furthermore, if the community is to prosper, at least some individuals are to enjoy legal rights that go beyond the basic right to personal integrity. Consequently, legal norms must be established to secure the property, basic rights and legal remedies for some, but not necessarily all, of the members of the community. Following this line of reasoning, it could be argued that prosperity of a legal system is directly proportionate to its legal commitment to reproduce demands of morality.

How Hart could have thought that a minimum satisfaction of moral demands in a legal system is a merely contingent matter remains mysterious. The truisms he refers to about human beings, i.e. their vulnerability and limitations, are not contingent properties of human beings as such. One need not be an expert in anthropology to understand that vulnerability and limitations are ineliminable properties of our humanity. The following quotation should show where Hart went wrong:

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<sup>31</sup> Fuller, n 7, 187-242.

<sup>32</sup> Fuller, n 7, 205.

<sup>33</sup> For Hart’s discussion of the minimum content of natural law legal systems have to reproduce see HLA Hart, n 3, 193-200.

“Yet though [human vulnerability] is a truism it is not a necessary truth; for things might have been, and might one day be, otherwise. There are species of animals whose physical structure (including exoskeletons or a carapace) renders them virtually immune from attack by other members of their species and animals who have no organs enabling them to attack. If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: thou shalt not kill.”<sup>34</sup>

This requires three responses. The first is that human beings are not exoskeletons or carapaces and have not yet lost their ability to be vulnerable to each other. The second is that, should human beings evolve, in some futuristic world, into beings which cannot be harmed, they would lose that part of humanity which has been one of their most defining characteristics. Finally, and most importantly, denying that the nature of law depends on some of the defining properties of human beings can lead legal philosophers to an unforgivable mistake. Consider the following parallel reasoning: it is a truism, in the Hartian sense, that human beings are social animals. This is a contingent property, Hart would say, of humanity. Yet, it is this contingent property that makes law possible in the first place. It is the contingent but defining natural fact of human association that makes law necessary. Would it make sense to talk of legal systems constituted only of single individuals? I think not. Consequently, if the nature of law is intrinsically dependent on the nature of human beings,<sup>35</sup> it is a necessary characteristic of a community of human beings as such to provide norms which guarantee basic rights to their members. If these norms are legal norms then they will equally benefit those that are subject to them and will create an equal burden on those that have the responsibility of their fulfilment.

To this Raz and others might concede that legal normativity does in fact make possible the realisation of sound principles of morality in legal communities. In this respect Raz and others will point to the multiplicity of international human rights documents which make morally desirable policies effective in legal systems. They will, in the UK context, recognise the fundamental role of the Human Rights Act 1998 (HRA) which makes directly enforceable in domestic courts the European Convention on Human Rights (ECHR). However, they will continue to contend that legal normativity is also compatible with the realisation of sound principles of immorality. They will point, as they generally do, to the Nazi and Apartheid regimes and, to reinforce their point in a more familiar context, to various counter-terrorism measures adopted in the UK which allowed restriction of substantive and procedural rights of various individuals. To respond to this, one has to show that

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<sup>34</sup> Ibid, 194-195.

<sup>35</sup> For further developments of this thought see n. 143.

these measures were themselves not compatible with the requirements of legal normativity. This is what I set out to do in the rest of the part 1.

### **3. Legal Normativity and Substantive Justice: Pre-Belmarsh British Perspectives**

In the last section I argued that legal systems necessarily protect basic rights of some individuals and by doing so reproduce requirements of sound principles of morality. Equality, which is the moral property intrinsic to legal norms, requires that these norms apply to all individuals. One could then ask how it is possible that, even in contemporary and democratic legal systems, not every individual is able to benefit from these norms. Sarcastically pointing to the control orders regime, Fullerian critics will ask how the violation of basic rights on the basis of mere suspicion was legally authorised for some individuals of a community. My reply is that these violations are the product of two strategies which are themselves violations of legal normativity.

The first, which I will call the ostracism strategy, consists in casting out some individuals from the community by denying that certain basic legal norms apply to them. Nowadays, at least in democratic countries, no government can explicitly claim that certain individuals should be deprived of their basic rights. So a more subtle approach is undertaken. Governments claim that certain individuals enjoy full rights but they then fail, in a way or another, to apply the full normative value of these rights to the individuals. In the British context this translates into explicit or covert derogations from human rights regimes, in particular from the ECHR.

The second strategy, which I call the shallow normativity strategy, consists in framing the norms that cause substantive injustice in vague terms thereby reducing their normative content. From this follows the dominance of executive discretion rather than full legal normativity. To understand the concept of shallow normativity let me return to the requirement of normativity. As I said at various points, norms establish what actions ought or ought not to be taken in given scenarios. These norms can be more or less normative as they can give rise to doubts about their relevance and modality of application. However, there is another way in which their normativity can be diminished. They may in fact establish that in a scenario (x) what actions ought or ought not to be taken are to be established by individual (i). This individual might also be responsible for establishing the scope of (x). What such norms establish is nothing else but an institutionalisation of the discretion of (i). We cannot thus take them as guide to our actions because they rely for their normative content on the discretion of (i).

I will consider how each strategy has been adopted in the British counter-terrorism experience to produce substantive injustice. In this section I will confine myself to the anti-terrorism measures enacted under the Anti-Terrorism, Crime and Security Act 2001 (ATA) and to string of cases that preceded the seminal decision of *Belmarsh*.<sup>36</sup> In the successive sections I will consider the Prevention of Terrorism Act 2005 which created the control order regime.

After 9/11, the British Parliament enacted in fast and fury the ATA. Section 23 provided for indefinite detention without trial of foreign nationals who the Home Secretary reasonably suspected of being involved in terrorism-related activity. Even before ATA was approved by Parliament, the Government had relied on art 15 of the European Convention on Human Rights (ECHR) and sought to derogate from its obligation to respect art 5 ECHR (right to liberty and security of person). The Government thus issued the Human Rights Act 1998 (Designated Derogation) Order 2001 to issue an art 15 derogation from art 5 ECHR for the purposes of domestic law. Art 15 ECHR reads as follows:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation [...]”

This section illustrates two points. The first is that it permits what I have called the ostracism strategy. This section in fact explicitly deprives of any normative force the relevant provision which would have safeguarded the right to personal liberty of the detained. The right to personal liberty falls under what I have referred to above as the minimum content of natural law which is essential to the existence, survival and flourishing of a community. It is in fact a necessary consequence of the right to personal integrity. In the UK this right has been secured through the ancient writ of *habeas corpus* and enshrined, more recently, in art 5 ECHR which is domestically enforceable through the HRA. To achieve its morally suspicious purpose, the British Government had to deprive this fundamental legal norm of its normative content by explicitly seeking for a derogation. One might object that the Government was not in fact depriving art 5 ECHR of its normative force, but rather recurring to another legal norm, art 15 ECHR, which had full normative force. This objection brings me to the second point which art 15 illustrates.

In order to undermine legal normativity we can either simply refuse to take legal norms as guides to our actions by ignoring their applicability, or recur to a norm which has negative dependent normativity. I will explain this last concept by recurring to a similar concept I illustrated above.

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<sup>36</sup> *A and Others v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56.

Remember I said that in order to understand what actions we legally ought to take, we sometimes need to make reference to more than a legal norm. So, for example, the normative content of (a) “whatever the Crown in Parliament enacts must be applied by courts” is specified by (b) “fundamental rights can be violated by statutes only if Parliament uses unequivocal words to that effect”. Now note that (b) adds normative value to (a) in that it clarifies the conditions in which (a) guides our actions; (b) is dependent on (a) for its normative force and adds normative value to it. Therefore (b) has positive dependent normativity. However, art 15(1) ECHR has negative dependent normativity as its only normative value is depriving other legal norms of their normativity. It cannot then be said that an application for a derogation under art 15 ECHR was giving effect to a fully normative norm. This is because art 15(1) ECHR has no normative value of its own.<sup>37</sup> It can therefore be concluded that the substantive injustice of internment without trial was caused by depriving a fundamental norm of its normative value and depriving certain individuals of its benefit (the ostracism strategy).

The relevant provisions of ATA also illustrate the second strategy which leads to substantive injustice, i.e. shallow normativity. I said that norms that have shallow normative value merely institutionalise the discretion of an individual by allowing the individual to decide when a particular course of action is to take place or when or whether a norm applies at all. Consequently, unless the discretion is exercised, we cannot take the norms as guide to our actions. I contend that the statutory provisions which led to substantive injustice for the Belmarsh prisoners had this characteristic. The relevant sections of ATA are as follows:

“21(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

- a) believes that the person’s presence in the United Kingdom is a risk to national security, and
- b) suspects that the person is a terrorist.

[...]

23(1) A suspected international terrorist may be detained [without trial] [...]”

To understand how these norms have shallow normative value we need to look at the relationship between the two sections. It is sec 23(1) which makes legally possible the morally repugnant fact of

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<sup>37</sup> As will be shown shortly, this needs to be qualified. Although the main effect of sec 15(1) is to deprive other fundamental norms of their normative force, it enshrines some procedures when this negative dependent normativity can be given effect to. In fact it requires that the normative force of other norms can be annulled only to the extent strictly required by the situation. This was used by the House of Lords in Belmarsh, combined with a violation of art 14ECHR, to find that the derogation order had to be quashed.

internment without trial. However, it is sec 21(1) which determines the scenario in which the morally repugnant fact is authorised. However, does sec 21(1) actually tell us when that fact is authorised? It does not. It simply leaves it to the “reasonable” belief and suspicion of the Secretary of State. Sec 21(1) therefore does nothing but institutionalising a discretionary decision of an individual by delegating its normative content to his discretion. We therefore cannot use it as a guide to our actions until an actual decision is taken by the Secretary of State. In this sense it does not seem incorrect to say that the substantive injustice that resulted from the ATA was not caused by the norms therein contained but rather by the exercise of discretionary power of the Secretary of State.

Against this assertion two objections may be raised. The first says that the discretionary power is established by a legal norm so the cause of injustice is in fact the relevant norm. Against this, one only needs to remember that norms have varying degrees of normative value and that sec 21 has only shallow normative value as it does not tell us when the discretionary power will be exercised. The second objection denies shallow normativity to sec 21 because it clearly establishes that the discretion is to be exercised “reasonably”. However, this objection, if true, supports my thesis. In fact, if the discretion of the Secretary had been curtailed by a requirement of reasonableness, the normative value of the section would have increased and produced further procedural safeguards for the rights of the suspected terrorists. This issue will however remain as a moot point as none of the courts’ decisions in *Belmarsh*, whether at first instance or at appeal, considered the normative meaning of “reasonable” belief and suspicion. Rather, the courts were concerned with the strict necessity of the Secretary’s decision to apply for a derogation under art 15 ECHR. Surprisingly for the history of the British judiciary, the House of Lords was prepared to read art 15 ECHR, which I described earlier as a negative dependent norm, as not being also a normatively shallow norm. They were prepared to find that the Secretary of State did not have unfettered discretion and could not derogate from art 5 ECHR because it was not in fact strictly required by the exigency of the situation. By doing so they were creating opposition to the ostracism and shallow normativity strategies. I will explain why this finding was so surprising at the time (and perhaps even today) by making reference to a few decisions before *Belmarsh*.

In a relatively recent article, Adam Tomkins retells the features of a story familiar to most public lawyers.<sup>38</sup> It is a story which is set pre and post *Belmarsh*. Before this landmark case, it is said that the British judiciary had the habit of refusing to question the discretionary power of the executive when it came to determining issues of national security. People familiar with the story will point to

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<sup>38</sup> A. Tomkins, ‘National Security and the Role of the Court: a Changed Landscape?’ [2010] LQR 543.



the war time cases of *Halliday*<sup>39</sup> and *Liversidge v Anderson*,<sup>40</sup> then move on to illustrate the peace time cases of *Hosenball*,<sup>41</sup> *Cheblak*,<sup>42</sup> *GCHQ*<sup>43</sup> and the more recent case of *Rehman*<sup>44</sup> before finally arriving at *Belmarsh*. The central theme with variations in these cases is that determinations of what is in the interest of national security and the best way to respond to threats to the integrity of the nation is pre-eminently a political judgement better left to the executive and not to be interfered with by the judiciary. In essence, it is a political and not a legal question. Lord Hoffmann's words in *Rehman* summarise at best this judicial attitude:

"What is meant by 'national security' is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. [...]. On the other hand, the question of whether something is 'in the interest' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."<sup>45</sup>

Later on in his judgement he carried on outlining the various ways in which courts of law must refrain from interfering with the assessment of the executive. These limitations include dispensing with the ordinary standard of proof that apply in civil and criminal cases; not substituting the executive's assessment with the court's own unless *Wednesbury* unreasonable and generally allowing "a considerable margin to the primary decision-maker."<sup>46</sup> Curiously enough, he asserted that these limitations and the need for judicial restraint are "not based upon any limit to [judicial] jurisdiction." Rather, "The need for restraint flows from [...] common-sense".<sup>47</sup> These words strengthen my argument by showing two things. The first is that the British judiciary has traditionally extended rather than curtailed the scope of executive discretion in the area of national security, thereby decreasing legal normativity. The second is that it has done so without explicit authorisation of the law but merely on common sense requirements. These two points combined give rise to a conclusion which critics of Fuller cannot easily resist. If, as *Belmarsh* and other cases prove, cases involving threat to national security usually involve violations of basic principles of substantive justice, such violations cannot be reasonably said to result from compliance with legal normativity.

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<sup>39</sup> *R v Halliday* [1917] AC 260.

<sup>40</sup> [1942] AC 206.

<sup>41</sup> *R v Secretary of State, ex parte Hosenball* [1977] 1 WLR 166.

<sup>42</sup> *R v Secretary of State, ex parte Cheblak* [1991] 1 WLR 890.

<sup>43</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>44</sup> *Secretary of State v Rehman* [2001] UKHL 47.

<sup>45</sup> *Ibid*, [50].

<sup>46</sup> *Ibid*, [57].

<sup>47</sup> *Ibid*, [58].

Instead, they are the result of unrestrained executive discretion which is caused by judicial deference (the shallow norm strategy). They are also the result of non-legally authorised judicial deference which deprives individuals of the legal rights that would otherwise protect them (the ostracism strategy).

This leads us back to *Belmarsh* and to the reason it was so surprising at the time. In fact, breaking with its long deferential tradition, the House of Lords decided that the words “national security” would no longer automatically bar the courts from upholding the full normative value of the relevant legal norms. They were prepared to recognise the full normative value of Convention rights and interpret art 15 and 14 ECHR to dramatically curtail the discretion of the executive. In an 8 to 1 majority, the Law Lords found for the prisoners. The judges held that sec 23 ATA was not proportionate to its aims of combating terrorism within UK borders as it did not apply to UK nationals who posed a similar terrorist threat. It was thus not strictly required by the exigencies of the situation within the meaning of article 15 ECHR. Furthermore, it was not compatible with the prohibition on discrimination enshrined by art 14 ECHR. The Court thus quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 and issued a declaration of incompatibility under sec 4 HRA.

While the outcome of the case sent a strong political message both to Parliament and the executive, the ratio of the case was however inherently contradictory in approach. In fact the majority found (Lord Hoffmann dissenting) that while it could scrutinise the legality of the executive and legislative response to the terrorist threat, it was a political and not legal question to decide whether there was in fact “a public emergency threatening the life of the nation”.<sup>48</sup> By doing so the judges were recognising normative value to only half of the requirements of art 15(1) ECHR for an appropriate derogation. In fact art 15(1) ECHR required both (a) the existence of a situation of public emergency and (b) that measures taken to combat this emergency should be strictly necessary.<sup>49</sup> By recognising only the normative value of (b) but not (a), the judiciary was to give rise to a confusion which would partially cloak the successive counter-terrorism regime with a “thin veneer of legality”.<sup>50</sup> The British

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<sup>48</sup> Art 15 ECHR.

<sup>49</sup> In T. Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism’ [2005] MLR 655, Tom Hickman has argued that, on a proper reading of ECtHR jurisprudence, art 15 only required (a). He advocates a very high standard of review for (a) but denies that any derogating measures need to be proportionate. However, even if this were a proper reading of art 15 ECHR, it partially implies that the House of Lords was bound to take ECtHR jurisprudence as a ceiling to rights protection. But this is not what sec 2(1) HRA provides for. See Sir Philip Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine’ [2012] PL 253.

<sup>50</sup> See D. Dyzenhaus and R. Thwaites, ‘Legality and Emergency – The Judiciary in a time of terror’, in A. Lynch, E. MacDonal and G. Williams (eds), *Law and Liberty in the War on Terror* (2007 Federation Press), 9-10 citing Justice Sullivan in *Secretary of State v MB* [2006] EWCH 1000, [103].

government could claim that it was legally entitled to find that there was a situation of public emergency, while in reality that finding was not dictated by any legal norm but merely the result of its unchecked discretion. It is therefore the lack of legal normativity substituted by a discretionary choice which led the British government to the occasioning of more substantive injustice under the provisions of the control orders regime.

#### **4. Absence of Legal Normativity Post-Belmarsh: The Illegality of Control Orders**

The control orders regime was born as a consequence of the *Belmarsh* decision. The House of Lords had found that internment without trial of foreign nationals was in breach of Convention rights because discriminatory and not strictly required because not only foreign nationals could constitute a threat to national security. Consequently, the British Government withdrew its art 15 ECHR derogation and substituted ATA with the Prevention of Terrorism Act 2005 (PTA) introducing control orders for both UK and foreign nationals. This statute was, as its predecessor, rushed within Parliament, which could not scrutinise and discuss the Bill with the appropriate time. The consequence of this was that the provisions of PTA suffered considerably from shallow normativity. Furthermore, while the control orders regime gave the illusion of not having employed the ostracism strategy because no derogations from the Convention were required, I will argue that the only way to give effect to the normative content of the PTA was through a covert derogation from Convention rights. The executive, supported by the deferential attitude of the judiciary, largely succeeded in undermining the normativity of Convention rights.<sup>51</sup> Before I start my argument let me however present the essential features of the control order regime.

At the end of December 2011, the British government decided to repeal the PTA and substitute the control order regime with “terrorism prevention and investigation measures” (TPIMs). This is another story which is too undeveloped to narrate. The story I am interested in now begins in section 1 PTA where a control order “means an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.” Two types of control orders were ordained in section 1(2). The first, called derogating control orders, imposed obligations which required a derogation from art 5 ECHR and could only be imposed by a judge. I will not deal with these as no derogating orders were imposed during the life of the PTA. If they had been, I would have had more evidence to point out that substantive injustice was caused in the British counter-terrorism episode by the employment of the ostracism strategy. The second, called non-derogating control orders, could be imposed by a reasonable suspicion of the Secretary of

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<sup>51</sup> For an argument sustaining covert derogation see H. Fenwick and G. Phillipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond’ [2011] McGill Law Journal 864.

State (sec 2(1)) and did not require in appearance a derogation from art 5 ECHR as they could not result in deprivation of liberty of the suspects. Sec 1(4) PTA gave a non-exhaustive list of what obligations the Secretary of State could impose on a suspected terrorist. The following extract should suffice to paint the picture of their gravity:

“When the non-derogating control orders were introduced they were aptly said to involve deprivation of most of normal life. They included an eighteen-hour curfew (virtual house detention);<sup>52</sup> electronic tagging; house searches at any time; forced relocation (creating a form of internal exile [from friends and family]); geographical restrictions on movements; bans on visits by all non-Home-Office-approved persons; and prohibitions on all electronic communication.”<sup>53</sup>

The severity of the obligations which could be imposed through control orders was judged by the Parliamentary Joint Committee on Human Right (JCHR) to have far-reaching consequences for the Convention rights of the individual. The JCHR stated that:

“The unlimited range of restrictions that can be placed on a person under a control order implicate a range of human rights guaranteed by the European Convention on Human Rights (“ECHR”) and the Human Rights Act 1998, including Article 3 (inhuman or degrading treatment), Article 5 (liberty), Article 6 (fair trial), Article 8 (private and family life), Article 9 (freedom of religion), Article 10 (free expression) and Article 11 (free assembly)”.<sup>54</sup>

These extensive powers conferred on the Secretary of State allowed him in effect to subject to severe conditions individuals who had not been tried and found guilty of any wrongdoing whatsoever. This, if true, seems in clear violation of any reasonable standard of human rights protection. Yet, as I pointed out, control orders were imposed without the need to derogate from Convention rights. This indicates that they claimed to recognise the full normative value of Convention rights. If this claim was true, anti-Fullerians will be able to confidently affirm that substantive injustice was not a product of the ostracism strategy. They will point out that full normativity is compatible with great iniquity. Against this my reply will be twofold. Firstly, I will argue that the PTA suffered greatly from shallow normativity, so that if the claim of compatibility with Convention rights was true, substantive injustice was the product of unrestrained discretion of the Secretary of State rather than norms with high normative content. Secondly, I will argue that in fact the PTA was not compatible with Convention rights and the British executive succeeded, partly

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<sup>52</sup> 18 hours curfews are now impermissible without a derogation. See n 75 below.

<sup>53</sup> H. Fenwick and G. Phillipson, n 51, 877.

<sup>54</sup> JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, Twelfth Report of Session 2005–06 (2006 Stationary Office), 52.

helped by judicial deference, in undermining the normative value of Convention rights. I turn to these points in order.

#### **4.1. Shallow Normativity in the Prevention of Terrorism Act**

I already illustrated to some extent the wide powers that the PTA conferred on the Secretary of State. However, I was not quite precise as to the extent of the Secretary's powers. Recall from earlier discussions that norms suffering from shallow normativity are unable to be taken as guide to action because they institutionalise the discretion of an individual. I contend that the PTA devolved to the discretion of the Secretary of State both the decisions of (a) when non-derogating control orders were to be made and (b) the severity of the obligations to be imposed. If this is true, as I will now show, it means that any violation of human rights that resulted from the PTA were the product of the discretion of the Secretary and not of norms having high normative value. The fact that the PTA lacked normative value in respect to (a) and (b) is easily proven by looking at the wording of sections 2(1) and 1 (3-4) PTA. They are as follows:

"1(3)The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State [...] considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.

1(4) Those obligations may include, in particular-[follows a long list of the obligations which may be imposed]

2(1) The Secretary of State may make a control order against an individual if he—

(a)has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b)considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

I took the liberty to underline the relevant words that make clear that it is left to the Secretary of State's discretion as to whether any obligations will be imposed and the severity of those obligations. This should not be construed as a game of words. The wording helps us to understand that the norms in question have little normative value. In fact, reading the provisions, an individual who was worried about being subject to control orders would not be able to predict whether any acts he may or may not have committed might result in the imposition of any obligations. He must await the Secretary's decision. This discretion should not be confused with that usually exercisable by enforcing authorities who may legitimately decide whether or not to enforce a statutory

provision. Instead this entails whether or not the relevant provision applies at all to the individual. This is a clear disrespect for the essential moral property of legal normativity which I identified earlier: all the individuals that fall under the scope of legal norms must equally be able to enjoy and be burdened by their requirements. I think this is enough to illustrate that any substantive injustice which was produced by the control orders regime was a consequence of low levels of normativity and widespread discretion.

This finding should be reinforced by another one. The provisions of the PTA were not only normatively shallow but also, in serious respects, hypocritical. In fact section 3(1)(a) required that the Secretary of State, once he had decided whether or not to apply the relevant provisions, to ask and be granted permission by a court to make an order. This gives the illusion that, in some way, the discretion of the Secretary of State was curtailed by the principles of judicial review which would include giving effect to the HRA and Convention rights. Unfortunately, this was not the case. Whether a decision was taken to impose a control order rested almost exclusively on the discretion of the Secretary of State because the standard of judicial review, at the stage of imposition, was that his suspicion was not “obviously flawed” (sec 3(2)). This standard of review freed the Secretary of State in substance from the shackles of the principles of judicial review allowing him to make a decision virtually unencumbered (ostracism strategy coupled with shallow normativity).<sup>55</sup> Therefore, it can be concluded that it is the absence of decent levels of legal normativity in the PTA that made possible the imposition of non-derogating control orders and the breach of substantive principles of justice. This conclusion leads me to my second point, i.e. the employment of the ostracism strategy leading to substantive injustice.

The imposition of control orders, as I have argued, was possible because the Secretary of State could exercise virtually unencumbered discretion. However, the PTA provided for some procedural safeguards for individuals subject to control orders. After a judge, under sec 3(2), had done little more than rubber stamp the Secretary of State’s decision she had to “give directions for a hearing in relation to the order as soon as reasonably practicable after it [was] made”. This hearing was statutorily provided for under sec 3(10).<sup>56</sup> In the hearing, according to sec 3(11), “the court must apply the principles applicable on an application for judicial review”. However, the PTA provided for some considerable limitations for this hearing. In fact, suspects could not be provided with the evidential basis for the allegations made against them, not even in a summarised form, when the

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<sup>55</sup> Note that the principles of judicial review also do not apply when the Secretary of State was, because of the urgency of the case, unable to apply for the court’s permission for imposing a control order and could obtain that permission only after the obligations had been imposed. See sec 3(3).

<sup>56</sup> Section 3(2)(c) PTA. See also sec 3(10).

disclosure of the evidence would be contrary to national security and the public interest.<sup>57</sup> This provision was usually employed to bar the suspect from knowing the case made against him as most of the evidence was labelled as security sensitive material. While the PTA provided that some special security cleared counsel could inspect the closed material and could make submission for the suspect,<sup>58</sup> they could not communicate in any way with and take instructions from the suspect once they had seen the closed material.<sup>59</sup>

The resulting big picture was that some individuals were subject to severe obligations on the basis of a mere suspicion which they could hardly rebut because the basis of that suspicion was not made known to them. This appears to be in clear violation of any reasonable standard of human rights protection. Yet, by not introducing a derogation from Convention rights, the British Government was claiming to be giving full effect to the ECHR and not adopting the ostracism strategy. If this claim were true my argument that full legal normativity is not compatible with substantive injustice would be seriously undermined. I will now explain how my argument continues to survive unperturbed. I will show that the ostracism strategy was in fact adopted through a covert derogation in which the judiciary was a partial accomplice.

#### **4.2. Tampering with Normativity**

A British judge who is faced with the morally suspect provisions of the PTA will proceed on the orthodox view that she is bound to give effect to legal norms however immoral they appear to her. The relevant legal norms in this case are the provisions of the PTA and the HRA, in particular section 3 and 4. The HRA imposes on her the obligation to give effect to the normative force of the Convention rights. Yet, she clearly sees that the norms of the PTA are incompatible with any reasonable standard of human rights. If she is to proceed under the orthodox view, the only practical solution available to her is to dilute the normative value of Convention rights or of that of the PTA or of both in order to square them together in some way. Alternatively, if she does not want to compromise legal normativity, she must simply declare that the PTA is incompatible with the Convention under sec 4 HRA. Albeit in this way she would be resorting to the ostracism strategy and allowing the injustice to continue, she would be sending a clear message to the legislature that the draconian provisions of the PTA cannot be given effect to without a considerable reduction in legal normativity. Yet, British judges refused to embrace this route and preferred tampering with the normative value of both set of norms either by modifying the normative value of the PTA through

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<sup>57</sup> Sch. 1, cl. 4(3)(d)-(f) and Civil Procedure Rules 76.2(2) and 76.29(8).

<sup>58</sup> Civil Procedure Rules 76.23, 76.24.

<sup>59</sup> *Ibid*, rs 76.25, 76.28(2).

sec 3 HRA or by failing to recognise, to its fullest extent, the normative value of Convention rights. This is evident in the saga of *MB* which I will illustrate.

When the first series of control orders were imposed, Sullivan J. was called in the first instance case of *MB* to rule on their legality under a sec 3(10) PTA hearing.<sup>60</sup> He held that the normative value of the control orders regime could not be squared with Convention rights and made a declaration of incompatibility under sec 4 HRA. His ratio was that sec 3(10) PTA was incompatible with a right to fair trial under sec 6 ECHR because the courts were prevented from undertaking a full review of the merits of the Secretary's decision. He found that sec 3(10) PTA required him only to assess whether the material available to the Secretary of State at the time of his decision to impose a control order could give rise to a reasonable suspicion. Under that section he found that a judge was not authorised to quash the Secretary's decision even if, at the time of hearing, new evidence had emerged which discredited the reasonableness of the Secretary's suspicion. This, he held, could not be squared with the requirement of a fair trial enshrined in art 6 ECHR.<sup>61</sup> By issuing a declaration of incompatibility, rather than adopting sec 3 HRA, he was implying that he was not ready to compromise legal normativity and that Parliament needed to rethink its enactment. Yet, he acknowledged that the order would stand because it was authorised by an Act of Parliament which he could not void.<sup>62</sup>

The Court of Appeal<sup>63</sup> chose a different route which was later confirmed by the House of Lords. They admitted that:

"It remains theoretically possible, where a control order does not interfere with any Convention right, that section 3(10) could be interpreted so as to restrict the court's review to the question of whether, when he took the decision to make the control order, the Secretary of State had reasonable grounds for doing so. That, indeed, is the natural meaning of the wording which speaks of determining whether any of the decisions of the Secretary of State was flawed. There are, however, cogent reasons for not giving section 3(10) such an interpretation."<sup>64</sup>

Those cogent reasons were identified in a need of a consistent ability for the court to review control orders independently of whether they did or did not restrict Convention rights. Thus "we consider that section 3(10) can and should be 'read down' so as to require the court to consider whether the decisions of the Secretary of State in relation to the control order are flawed as at the time of the

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<sup>60</sup> *Secretary of State v MB* [2006] EWCH 1000, [2006] HRLR 29.

<sup>61</sup> *Ibid*, [79]-[87].

<sup>62</sup> *Ibid*, [104].

<sup>63</sup> [2006] EWCA Civ 1140.

<sup>64</sup> *Ibid*, 434-435.



court's determination."<sup>65</sup> The Court of Appeal thus preferred to remedy one of the many defects inherent in the PTA by adopting sec 3 HRA to modify some of the normative value of the Act and making it less incompatible with Convention rights. Yet, while this reading down might at first be applauded, it is insufficient.

Adam Tomkins has illustrated that the approach of the Court of Appeal was adopted in several first instance control order cases and has allowed the courts to quash orders which, thanks to material available at the time of a sec 3(10) hearing, made clear that the Secretary of State's suspicion was unreasonable.<sup>66</sup> Yet, he admits that this increased reviewing role of the courts was not adopted in regards to sec 3(1) hearings (those where the Secretary of State seeks permission to impose a control order in the first place) and modification hearings under sec 10 PTA. These modification hearings took place when the Secretary of State decided, on his initiative or on request by the suspect, to increase or reduce the severity of the obligations of a controlee. The role of the court was "to scrutinise the necessity for those of the obligations imposed on the controlled person".<sup>67</sup> Yet, unless the decision of the Secretary of State was either irrational or unreasonable, his assessment of necessity could not be interfered with.<sup>68</sup> This demonstrates that the approach of the Court of Appeal was merely a minor and insufficient mending of a statutory scheme which could not, unless modified in its entirety, claim to be compatible with the full normative value of the Convention. While minor modifications under sec 3 HRA of the normative value of the PTA could make it a little more compatible with the Convention, its core could be accommodated without distorting the normative requirements of Convention rights. That core, which I identified earlier, is the possibility that some individuals could suffer severe restrictions based on a suspicion of wrongdoing which could not be verified. I will argue later that this is the central issue which the courts should have had regards to. If they had done so properly, they would have realised that adopting sec 3 HRA to mend the normative value of some aspects of the control orders regime was completely beside the point. Yet they continued to take this approach in the last instance decision in *MB*<sup>69</sup> and the related decision of *AF (No 3)*.<sup>70</sup>

Throughout its *iter* in the various appeal courts, the central issue in *MB* was whether the refusal to disclose important evidence to the suspect on the grounds of national security and the procedure of

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<sup>65</sup> Ibid, 435.

<sup>66</sup> A. Tomkins, n 38, 556-559. He refers to *Secretary of State v NN and GG* [2009] EWHC 142; *Secretary of State v AT* [2009] EWHC 512; *Secretary of State v AV* [2009] EWHC 902 and *Secretary of State v Al Saadi* [2009] EWHC 3390.

<sup>67</sup> Keith J. in *Secretary of State v AM* [2009] EWCH 572, [7].

<sup>68</sup> Mitting J. in *AR v Secretary of State* [2009] EWHC 1736, [3]-[4].

<sup>69</sup> *Secretary of State v MB and AF* [2007] UKHL 46.

<sup>70</sup> *Secretary of State v AF (No 3)* [2009] UKHL 28.

the special advocates was compatible with art 6 ECHR. In the House of Lords the court found that, although the right to a fair trial required that a person be informed of the case against him and be permitted to respond to it, the ECourtHR had declared that it was not an absolute right and might be limited in the interest of national security.<sup>71</sup> However, any limitations had to be strictly necessary and could not deprive the individual of “a substantial measure of procedural justice”.<sup>72</sup> While the Court of Appeal had held that the presence of a special advocate making submissions for the suspect was sufficient to guarantee a fair trial, the majority of the House of Lords disagreed (again, Lord Hoffmann dissenting). The Law Lords held that, since the statutory scheme permitted that the core of the case against an individual to be withheld from him, this could not be sufficient to guarantee a minimum of procedural protection.

This decision was further clarified in *AF (No 3)*, a decision which followed shortly after an ECourtHR judgement, *A v UK*,<sup>73</sup> which itself clarified the normative value of art 6 ECHR. In *AF (No 3)* Lord Phillips stated that: “Where [ ...] the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be”.<sup>74</sup> Because the PTA, without modifications, could not be read as to always guarantee satisfactory disclosure to the suspect, it was held to be *prima facie* incompatible with art 6 ECHR. The court therefore had to decide what steps to take. They could have either issued a declaration of incompatibility leaving it to Parliament to amend the control orders scheme, or they could have modified this aspect of the PTA making it more compatible with Convention rights. They chose the latter and read into the PTA a requirement that the core of the case against a suspect needed to be disclosed to him. This was clearly a desirable outcome as it made some aspects of the PTA more compatible with reasonable standards of justice. However, my submission is that the court should have issued a declaration of incompatibility but not on the grounds identified in the case. I will explain why this is so.

#### **4.3 The Core of the Case Against Control Orders: Covert Ostracism Strategy**

I identified earlier that the core of the injustice emanating from the PTA resided in the possibility of imposing serious restrictions on the rights of an individual on the basis of a mere suspicion of wrongdoing which could not be substantiated. This core of injustice, before the intervention of the courts through sec 3 HRA, was made worse by a limited role of the court’s review

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<sup>71</sup> For a review of ECourtHR relevant case law see Lord Bingham’s judgement in *MB and AF*, n 69, [31]-[32].

<sup>72</sup> *Chahal v UK* [1996] 23 EHRR 413, [131].

<sup>73</sup> [2009] ECHR 301.

<sup>74</sup> *AF (No 3)*, n 70, [59].

powers under sec 3(10) and a failure to disclose the core of the case to a suspect who could therefore not challenge the Secretary's suspicion.<sup>75</sup> While eliminating these non-core adverse effects of the PTA was clearly desirable, it was not sufficient. By not addressing the core of the PTA the judiciary was in effect being an accomplice to the executive and Parliament in adopting a covert ostracism strategy. The judiciary was in fact implicitly claiming that the core of the PTA was compatible with the normative value of the Convention and that the rights which would protect the suspects had been exhausted. It is this implicit claim which I will now show to be untrue. I will argue that a proper reformulation of the argument that the imposition of control orders could amount to criminal charges provided the best case for showing how the core of the PTA was incompatible with the Convention, in particular with the civil limb of art 6(1).

One argument which was rejected in *MB* at the House of Lords was that the imposition of control orders amounted to a determination of a criminal charge.<sup>76</sup> In fact, and this is manifestly true, the Court established that the whole purpose of control orders was not to punish past criminal behaviour but to prevent the possible occurrence of serious future criminal behaviour (terrorism-related activities). The rejection of the labelling of control orders as criminal punishment meant that individuals who were subject to them could not avail of the normativity of art 6(2) ECHR which provides for the presumption of innocence and of art 6(3) ECHR which provides for several procedural guarantees. The fact that control orders were not labelled as criminal charges or that their purpose was not punitive is however, under ECHR jurisprudence, not a conclusive question. As acknowledged by Lord Bingham, what constitutes a criminal charge under the ECHR is in fact an autonomous concept independent of contracting states' intentions.<sup>77</sup> Ashworth and Strange have adequately summarised the ECtHR's jurisprudence in the following way:

"First, the court should look to how the proceedings are classified in domestic law--this will be a factor, but it is not determinative. Secondly, the court should consider whether the wrong requires proof of fault. Lastly, and most important, the court must have regard to the severity of the penalty that the person concerned risks incurring."<sup>78</sup>

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<sup>75</sup> The core of injustice was also made worse by imposing 18 hours curfews on suspects. The Supreme Court held that this amounted to a deprivation of liberty under art 5 ECHR and therefore not permissible without a derogation. However, the Court held that a 16 hours curfew did not amount to a deprivation of liberty unless other obligations the suspect was subject to were "unusually destructive of the life the controlee might otherwise have been living". See *Secretary of State v AP* [2010] UKSC 24, [4].

<sup>76</sup> See Lord Bingham's judgement at [19]-[24]. See also Lord Bingham and Baroness Hale's judgements in *Secretary of State v E* [2007] UKHL 47, [14] and [26]

<sup>77</sup> *Engel v Netherlands* (1976) 1 E.H.R.R. 647, at [82].

<sup>78</sup> A. Ashworth and M. Strange, 'Criminal Law and Human Rights' [2004] EHRLR 121, 121.

We already know that control orders were not classified under national law as criminal sanctions but as merely preventative measures. We must therefore turn to the second part of the test and establish whether the imposition of control orders required proof of fault. Quite clearly, they did not. In fact under sec 2(1) PTA the Secretary of State was entitled to make a control order when he had reasonable grounds for suspecting that an individual had been or continued to be involved in terrorism-related activities. He did not need to prove, not even in a sec 3(10) PTA hearing, that the individual had in fact engaged in any terrorism-related activity.<sup>79</sup> He merely needed to prove that his suspicion was reasonable. This might lead to the conclusion that the lack of an accusation of wrongful doing meant that the suspect was not being subject to a criminal charge but was only being the subject of some civil measures to prevent him from committing criminal acts. This was the conclusion reached by Lord Bingham in *MB*. His was the only judgement to deal substantively with the issue. He said:

“I would on balance accept the Secretary of State's submission that non-derogating control order proceedings do not involve the determination of a criminal charge [...] the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.”<sup>80</sup>

If we accept that the imposition of control orders did not constitute a criminal charge,<sup>81</sup> one must then ask whether they might have amounted to the determination of civil rights and obligations for the purposes of art 6(1) ECHR. Lord Bingham answered this question positively. He said:

“in any case in which a person is at risk of an order containing obligations of the stringency found in this case [...] the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences. This has been the approach of the domestic courts [...] and it seems to me to reflect the spirit of the Convention.”<sup>82</sup>

Now comes the crucial part. If we accept that control orders were only preventative measures then *any* conditions imposed must have been proportionate to the aim which they sought to achieve, i.e. preventing terrorism-related activities. These conditions did not only include the obligations which

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<sup>79</sup> Note that under sec 1(9) PTA “terrorism-related activity” includes not only “the commission, preparation or instigation of acts of terrorism” but, more widely, “conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so”.

<sup>80</sup> Lord Bingham in *MB*, [24].

<sup>81</sup> For a sustained view against this acceptance see the Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom, 4th – 12th November 2004, [19] – [25]. See also the JCHR, n 54, [46] – [53].

<sup>82</sup> Lord Bingham in *MB*, [24].

could have been imposed but also, and more importantly, the conditions under which they could have been imposed. I have already illustrated the extent to which the British judiciary considered the question of the conditions under which control orders could have been imposed. The Court of Appeal in *MB* established that those conditions must include wider powers of review for the courts in sec 3(10) proceedings and the House of Lord declared in *AF (No 3)* that they must have included a minimum of disclosure of the core case against a suspect. However, the British judiciary failed to address the proportionality of the basic condition under which control orders could have been imposed, i.e. the Secretary of State's reasonable suspicion. The relevant question which British courts failed to ask was the following: is it fair under 6(1) ECHR for a set of obligations which restrict several Convention rights of an individual to be imposed on grounds of mere suspicion of wrongful doing? This was what Lord Bingham should have gone further to consider in his judgement. Yet he failed to do so. Instead, he went on to consider, like the other Law Lords in that case, the fairness of the non-disclosure of the case against a controlled person during judicial review proceedings. I contend that, from a Convention perspective, had the question been asked, it required to be answered negatively. To understand this conclusion let me briefly illustrate some ECtHR cases with striking resemblances to the control order regime.

In *Raimondo v Italy and Guzzardi v Italy*,<sup>83</sup> the ECtHR decided that the imposition of terrorism preventative measures imposed on suspect mafia criminals did not constitute a criminal charge for the meaning of art 6(1) ECHR and was overall compatible with the requirement of fairness in that article.<sup>84</sup> These preventative measures obliged an individual:

“to lead an honest and law-abiding life; not to give cause for suspicion; not to associate with persons convicted of criminal offences and subjected to preventive or security measures; not to return to his residence at night after, and not to go out in the morning before, a specified time, except in case of necessity and after having given notice in due time to the authorities; not to keep or carry any arms; not to frequent bars or night-clubs; not to take part in public meetings, etc.”<sup>85</sup>

These obligations were, without doubt, extremely similar to those imposable under the control orders regime. They in fact allowed curfews, forced relocations and restriction on the use and enjoyment of property just as in the control orders scheme. The aim of the legislation was also similar because it sought to prevent the commission of terroristic acts (the Mafia is considered as a

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<sup>83</sup> *Raimondo* (1994) 18 E.H.R.R. 237. *Guzzardi* (1980) 3 E.H.R.R. 333.

<sup>84</sup> *Guzzardi*, n 83, [108]. Where the ECtHR stated that ‘Whether the right to liberty, which was at stake [...], is to be qualified as a ‘civil right’ is a matter of controversy; in any event, the evidence does not reveal any infringement of paragraph 1 of Article 6.’

<sup>85</sup> *Sec 5 of Act No. 1423 of 27 December 1956 as translated in Guzzardi, n 83, [49].*

terrorist organisation in Italy). One would therefore conclude that since the similar Italian regime was held permissible by the ECtHR under sec 6(1) ECHR so should the UK control orders scheme. However, before such hasty conclusion, we must ask the following question: under what conditions were the preventative Italian measures justifiably imposable from an art 6(1) ECHR perspective? The relevant Italian legislation and case law was summarised in the ECtHR judgement and is as follows:

“Section 1 [of Act 575 of 31 May 1965] states that it is applicable to persons—such as Mr Raimondo—against whom there is evidence showing that they belong to “Mafia-type” groups [...]. Because of their particular object, preventive measures do not relate to the commission of a specific unlawful act but to a pattern of behaviour defined by law as conduct indicating the existence of danger to society. As far back as 1956 the Constitutional Court ruled that in no case could the right to liberty be restricted except where such restriction was prescribed by law, where lawful proceedings had been instituted to that end and where the reasons therefore had been set out in a judicial decision. It subsequently ruled that preventive measures could not be adopted on the basis of mere suspicion and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and life-style of the person concerned.”<sup>86</sup>

The Italian legislation, which was held compatible with the Convention, had therefore two characteristics which the PTA seriously lacked. Firstly, preventative measures could only be imposed by a judge. Under the PTA control orders were imposed by the Secretary of State with a rubber-stamping permission of a judge. Secondly, and more importantly, the question to be addressed by the Italian court was not whether the relevant authorities reasonably suspected the individuals of involvement in Mafia-related activity. Instead, it was whether, taking into account past activities, present evidence, including circumstantial evidence which could be rebutted by the individual, the individual actually constituted a threat to public safety and would engage in Mafia-related activities if unsupervised. A recent decision of the *Tribunale di Napoli* (Court of Naples) usefully summarises what had to be established:

“Proof of dangerousness [or involvement in terrorism-related activities] of an individual [...] must be shown on the basis of symptomatic or informative elements of such dangerousness, obviously subsisting before the time of determination [in a court], which are based on objectively identifiable behaviour: in order to impose the preventative measures it must be shown that there are facts, which can be objectively evaluated and controlled, that lead to a judgement, on balance of

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<sup>86</sup> *Guzzardi*, n 83 [17]-[19], emphasis added.

probabilities, that the individual is a danger to society; *suspicion, inferences and speculation are therefore excluded.*[emphasis added by me]<sup>87</sup>

The legislation which was held compatible with the Convention therefore explicitly excluded the possibility of applying terrorism preventative measures on the basis of a suspicion that an individual might be a danger to the public. Instead, *Raimondo* and *Guzzardi* permitted imposing preventative measures after it was established that, on the basis of objective evidence, an individual was found to be, on the balance of probabilities and excluding suspicion, a threat to public safety. Needless to say, the PTA clearly fell short of this standard established by the jurisprudence of the ECtHR.

Lord Bingham in *MB* made reference to the Italian case law and saw that the Italian legislation was similar to the PTA in its preventative purpose and, to a certain extent, to the severity of obligations which could be imposed.<sup>88</sup> In *AF (No 3)* much of the Supreme's Court discussion focused on *Guzzardi v Italy*,<sup>89</sup> a case extremely similar to *Raimondo*. Yet, the courts failed to ask the right question and give the right answer. By focusing instead on the issue of disclosure of security-sensitive evidence rather than the fairness of a test based on suspicion Lord Bingham was depriving some individuals of the benefit of a legal norm which would protect them. In short, he was adopting a covert ostracism strategy. I am not accusing the British judiciary of an intentional disregard to the relevant question. Indeed, as Aileen Kavanagh has recently argued, there has been a constitutional change from an excessive judicial deferential attitude to a more inquisitive one in the context of national security.<sup>90</sup> However, whether intentional or not, the effect is the same: individuals who had in law a right not to be subject to substantive injustice were deprived of their legal right.

## 5. Conclusion: Re-evaluating the Separation Thesis

I have argued that the substantive injustice that occurred by hand of the British government in its response to the terrorist threat was made possible by undermining the Fullerian principles of the internal morality of law. I have gathered these principles under a single roof which I showed demand that a community of individuals be governed through legal norms as opposed to human discretion. I argued that legal normativity in such community necessarily includes norms that guarantee the basic

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<sup>87</sup> This is my translation of a decision of the Tribunale di Napoli, Division for the Application of Preventative Measures, deposited on the 21/06/2011. The extract is from page 4 of the judgement. The extract summarises the Italian jurisprudence which can be recollected from several decisions of the Italian Constitutional Court (n 2 of 1956; n 23 of 1964; n 113 of 1975) and the Supreme Court of Cassation (Section I, 20/03/1995, Cervino; Section I, 8/03/1994, Scaduto; Section I, 28/04/1995, Lupo; Section I, 31/01/1996, Giorgeri).

<sup>88</sup> *MB*, [21] and [23].

<sup>89</sup> *Guzzardi*, n 83.

<sup>90</sup> A. Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' [2011] *IJCL* 172.

rights of each individual. Disparity in rights and injustice are the occasion of undermining this necessity and ostracising some individuals from the legal community by depriving them of the normative value of norms which would otherwise protect them. I showed that the British government adopted this strategy either by seeking an explicit derogation from Convention rights or, with judicial contribution, by covertly undermining the normativity of Convention rights. Also, as I showed both in relation to the ATA and the PTA, substantive injustice was also a product of framing legal norms in ways which undermine their normative value and institutionalise human discretion. These norms cannot be taken as guides to actions and therefore possess only shallow normative value. Both strategies, as I showed, violate the moral characteristic inherent in all legal norms which is equality of rights and duties of the individuals who fall under their domain.

My discussion gives substantial weight to both of Fuller's contentions in a British context. It delineates the moral characteristic of legal normativity and shows the direct correlation between disrespect for legal normativity and occasioning of substantial injustice. However, one final argument might be thrown against my conclusion. It says, in Razian terms, that I have made a promiscuous use of the rule of law (or legal normativity) by conflating it to coincide in essence with the rule of the good law. Much of my discussion has in fact focussed on how the morally suspicious pieces of British legislation violated standards of human rights protection. However, the rule of law "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man".<sup>91</sup> It is merely the "principled faithful application of the law".<sup>92</sup> This argument does not sting mine in two respects. Firstly, legal norms in the British constitution do, in fact, include respect for democracy, justice, equality and human rights. The principles of the common law, the HRA and the domestically enforceable Convention rights have indeed transformed the rule of law to mean the rule of the good law in the British context.<sup>93</sup>

Secondly, and more importantly, the rule of law does always in substance coincide with the rule of the good law because, as shown, legal systems necessarily incorporate the minimum content of natural law. Inequality in rights is thus the product of unfaithful application of this minimum content and segregation of certain individuals from certain norms of the community. In order to counter this, anti-Fullerians must be able to demonstrate that legal systems do not necessarily need to incorporate the minimum content. I suspect that to find systems of legal norms that lack such content we might have to look, as Hart did, between communities of exoskeletons and carapaces.

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<sup>91</sup> Raz, n 2, 211.

<sup>92</sup> J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994 Clarendon Press), 373.

<sup>93</sup> Raz reaches a similar conclusion in *Ethics in the Public Domain*, n 92, 55.



This conclusion leads me back to the reason that inspired the detailed examination of the measures used in the UK counter-terrorism experience. Remember how Raz could easily make reference to the Nazi and Apartheid regimes to prove his point that legally valid norms can be used for morally abhorrent purposes. Remember also that he did not advance any legal analysis of those regimes or of others which have a similar character. I suspect that, if he had gone through the pain of an insightful legal analysis of the use of the law as an instrument of injustice, he would have found that in those regimes there existed a wide-spread disrespect for legal normativity. Several theorists that have gone through the pain of understanding how the Nazi and Apartheid regimes employed the machinery of law have reached my same conclusion.<sup>94</sup> So it seems that on closer analysis, both technically legal and philosophical, a system of legal norms, because to be such demands compliance with the moral property of legal normativity, is incompatible with a degree of substantive injustice.<sup>95</sup> If this is true it has insightful repercussions for the viability of the separation thesis.

Remember from the introduction to this thesis that the disagreement about the separation thesis rests on a disputed necessary connection between the legal validity of a norm and its moral merits. Gardner says: "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)."<sup>96</sup> Fuller's contention, in my reformulation, does not of necessity invalidate Gardner's separation thesis as its domain is wider. In fact it is mainly interested in the relationship between substantive injustice and a system of legal norms rather than a given norm. However, Fuller's contention calls for a redefinition of the separation thesis in an important way which I now proceed to illustrate.

A system of norms is composed of individual norms so, given Fuller's contention, in any system of norms there must be individual norms that make possible the minimum content of natural law. Yet, positivism tells us that in that system there might exist individual norms that are incompatible with the minimum content. If this is true, there might exist in the same system a group of norms that are incompatible with each other. The first group gives effect to the minimum content while the other contradicts it. The norms of the two groups are, says positivism, all legally valid because they all

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<sup>94</sup> See Dyzenhaus, n 11, for the Apartheid regime. See K. Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' [2009] University of Toronto Law Journal 65 for the Nazi legal system. See, albeit not with the same in depth level of analysis, C. Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' [2005] Law and Philosophy 239, for an application to the totalitarian regime present in Argentina.

<sup>95</sup> I only say a degree because, in Part I, I have referred to substantive injustice as violations of familiar standards of human rights and not to morality as a whole. It will be made clear in part II that valid legal norms can in some ways fail to be morally valid (i.e. comply with what the exercise of autonomy requires). However, legal norms, to be such, cannot fail the moral threshold of effective agency.

<sup>96</sup> J. Gardner, n 13, 201.

originate from the same legal sources. This intra-systemic incompatibility seems itself a violation of the requirement of legal normativity as subjects are not able, without contradictions, to take the norms of the system as guides to their conduct. However, one has to ask whether the violation of legal normativity arises via the clash of the two groups or, instead, whether it is the existence of the second group that violates the requirement of legal normativity. Clearly, it is the latter. Indeed, if Fuller's contention is right, a system of legal norms exists to give effect to the minimum content of natural law. It follows that norms that are incompatible with the minimum content cannot belong to that system without violations of legal normativity. I have in fact shown that the only way they can be accommodated is through the employment of the ostracism and shallow normativity strategies. In other words, norms that are incompatible with the minimum content of natural law are systemically invalid. So after all, the separation thesis as expressed by Gardner appears to be incorrect.

One strategy is open to positivists to defend their position. They can simply point out that the separation thesis is concerned with individual norms rather than a system of norms. They will point to the individual draconian provisions of the ATA and the PTA and claim that they were legally valid. This strategy however shows that the debate on the separation thesis is often carried on with blinders. On a positivist view, the provisions of the ATA and PTA may indeed be legally valid if taken in isolation from all the norms of the British legal system. However, as I have demonstrated, these provisions were incompatible with the overall system of legal norms in Britain. This means that, without any need to resort to a non-positivist theory along the lines of Finnis or of Beyleveld and Brownsword, these provisions were systemically invalid. Fuller's lesson is therefore that disagreements about the separation thesis need to be reformulated or dropped altogether. We should not have disputes about the legal validity of morally abhorrent norms without first considering whether they are in fact systemically valid. Only after we have ascertained that neither the ostracism nor the shallow normativity strategies have been employed should we debate about the legal validity of such norms.

## PART 2

# DISSOLVING THE CENTRAL DISAGREEMENT IN JURISPRUDENCE: GROUNDING THE NORMATIVE FORCE OF LAW IN HUMAN AUTONOMY

### 1. INTRODUCTION

I concluded part 1 of this thesis by showing that disagreements on the separation thesis are often conducted in a blinded context. Legal philosophers identify a single norm which they judge as immoral and disagree whether or not its immorality bans it from being counted as a legal norm. I argued, reinterpreting Fuller's principle of the rule of law, that that disagreement is often unnecessary. Immoral norms are often illegal. They might emanate from the valid sources of legal norms in a system, yet fail to be compatible with the overall system of valid legal norms. They fail to satisfy the principle of normativity I identified.

However, the reformulation of Fuller's principles of the rule of law into the requirement for legal normativity, which I advanced in part 1, carries with it more assumptions than I have endeavoured to disclose. Why should a legal system be capable of guiding the conduct of its subjects through norms? What does it mean when this principle refers to 'legal system'? Perhaps it refers to legal officials? Why does a particular principle of equality coincide with the moral property of legal normativity? Why does that moral property not coincide instead, as some have proposed, with a particular conception of freedom?<sup>97</sup> These and a few more questions are yet to be answered. This is what I set out to do in part 2.

### 2. DISAGREEMENTS ABOUT THE NORMATIVE FORCE OF LAW

I start tackling the philosophical puzzles of legal normativity by making a distinction between normative value and normative force of norms. As I will show these are two constitutive and inseparable parts of a norm, whether it is legal or otherwise. Until now I have referred to the requirement of legal normativity as the necessity for legal systems to be capable of guiding the conduct of their subjects through norms. However, this requirement goes only in one direction. It

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<sup>97</sup> See N.E. Simmonds, 'Law as a Moral Idea', n 16, pp 85-92.

goes from those that exercise political power in a legal system, i.e. the officials, towards those that are subject to that power.<sup>98</sup> However, normativity requires that those subjects be also capable of recognising the norms that the officials seek to impose on them. This requires, firstly, the satisfaction of the principles of the rule of law that Fuller articulated. However, it also requires a more basic element. It requires that the subjects have a reason to guide their conduct by the norms articulated by the officials. I call this requirement the normative force of a norm.

The existence and scope of the normative force of legal norms is the central issue which gives rise to disagreements about the separation thesis. Positivists deny that subjects in a legal system should always have reasons to guide their conduct by the norms articulated by the officials. Whether there are any such reasons is a second order issue. Non-positivists forcefully disagree. They argue that there are conclusive reasons of a moral character for the subjects to guide their conduct by the norms articulated by the officials. When those moral reasons are lacking, generally or in particular circumstances, subjects cannot comply with those norms. This needs a little more explanation and needs to be connected to the understanding of the separation thesis I have advanced until now.

It might be recalled that positivists recognise as legally valid only those norms that originate from the sources of a legal system. Hart thought that we could identify the relevant sources by looking at the practice of the officials. This observation reveals that the officials hold a critical attitude towards certain unspoken rules, the rule(s) of recognition, which are determinative of the validity of further rules. He thought that it was this critical attitude which is the source of the duty of the officials to abide by the rules which are validated by the rule of recognition. Yet, Hart argued that it is unnecessary, though it might be beneficial, for ordinary citizens to have the same critical attitude towards the rules of recognition or towards the primary rules validated by the rules of recognition. He denied that legally valid rules necessarily impose duties or obligations on ordinary citizens, though they necessarily impose obligations on officials.<sup>99</sup> He also thought that the obligations which were necessarily imposed on the officials by the rule of recognition were not necessarily moral in character, but merely conventional. For him the critical attitude of the officials towards the rule of recognition could “coexist with a more or less vivid realization that the rules are morally objectionable”.<sup>100</sup> Some post-Hart positivists have embraced and developed this conventionalist

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<sup>98</sup> Note that those that generally exercise political power, i.e. officials, can also be at the receiving end of political directives in their capacity as subjects.

<sup>99</sup> Hart, n 3, pp 116-117.

<sup>100</sup> Hart, n 3, p 257.

view of the rule of recognition.<sup>101</sup> Others, including Raz, Gardner and Green, have abandoned it.<sup>102</sup> Yet, contemporary positivists hold the common view that norms that are in some way obligatory for officials need not impose obligations on ordinary citizens.<sup>103</sup>

Raz has succeeded in convincing many that legal officials only necessarily need to claim that their norms impose obligations on their subjects. They need not actually impose any obligations. Furthermore, Raz believes both that the claim of the officials is a moral claim, a claim of legitimate authority, and that the obligations which are claimed to be imposed are exclusionary reasons for actions. This all means that, once the relevant officials have enacted a norm, through the relevant sources, they claim first that the subjects have a reason to perform the actions dictated by that norm. They also claim that all other considerations whether or not to perform the actions dictated by their norm are directly excluded by the fact that the norm has been pronounced by them.<sup>104</sup> One cannot stress enough that, according to Raz, the claim of the officials is not necessarily truthful. It might in fact be the case that subjects should never perform what the officials tell them to do. They will only have a real obligation to perform the actions dictated by the norms of the officials when there is in fact a sound moral obligation to perform such norms. Gardner explains it the following way:

“every legal norm [...] is a putative moral norm: it is a proposal, on the part of the law, for tackling and resolving one or more moral problems. If the legal norm does that job well, then in the process it is absorbed into morality. It becomes a moral norm as well as a legal one.”<sup>105</sup>

So both Hart and Raz, and their followers, believe that the norms which are dictated by the officials do not necessarily create an obligation for subjects to guide their conduct by them. In essence, they

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<sup>101</sup> See G. Postema, ‘Coordination and Convention at the Foundations of Law’ (1982) 11 *Journal of Legal Studies* 165. Also see A. Marmor, ‘The Conventional Foundation of Law’, in S. Berteau and G. Pavlakos (Eds) *New Essays on the Normativity of Law* (Hart Publishing 2011).

<sup>102</sup> See J. Raz, *Practical Reasons and Norms* (OUP 1999) in chapter 2. See J. Gardner, ‘How Law Claims, What Law Claims’ in M. Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012), 33, where he defends the idea that it is constitutive of the role of legal officials to claim that the law imposes moral obligations. See L. Green, ‘The Concept of Law Revisited’ [1996] *Michigan Law Review* 1687, 1692-1696. The original criticism was R. Dworkin, n 6, 48-58.

<sup>103</sup> J. Raz, n 102, 171 where he says: “The ideal law-abiding citizen is the man who acts from the legal point of view. He does not merely conform to law. He follows legal norms and legally recognized norms as norms and accepts them also as exclusionary reasons for disregarding those conflicting reasons which they exclude. It is not necessary for a legal system to be in force that its norm subjects are ideal law-abiding citizens or that they should be so (i.e. that legal norms are morally valid). But it is necessary that its judges, when acting as judges, should on the whole be acting according to the legal point of view.”

<sup>104</sup> See J. Raz, n 2, chapter 2 ‘The Claims of Law’. See also J. Raz, n 92, the essay ‘Authority, Law, and Morality’. Also published in (1985) *The Monist* 295.

<sup>105</sup> J. Gardner, ‘Nearly Natural Law’ [2007] *American Journal of Jurisprudence* 1, 12.

claim that legal norms do not necessarily possess normative force. But how is this possible? Gardner puts it the following way:

“If a norm is such that its existence doesn’t already entail that we have reason enough to engage with it, in what sense is it a norm? [...] The simple solution [...] is that something is a norm if it can be used as a norm. [...] what does it mean to use a norm? [...] one can use something as a norm by applying it as a norm, and since one can apply some norms in a detached way [...] there can be norms, the existence of which does not entail that we have reason enough to engage with them.”<sup>106</sup>

The possibility of detachment from the obligatoriness of legal norms entails that legal norms do not necessarily need to possess normative force. Positivists assume that sound principles of morality are the sources of obligations.<sup>107</sup> Sound moral norms, always provide a conclusive reason for their subjects to act, i.e. they possess mandatory normative force. It follows that if legal norms necessarily possessed normative force they would need to comply with sound principles of morality. However, precisely because they need not possess normative force, they need not comply with sound principles of morality. Hence, the separation thesis: immoral norms can be legally valid.

Needless to say, contemporary non-positivists deny this conclusion. Finnis’ opposition has its source in a methodological premise. In the first chapter of *Natural Law and Natural Rights* he denies that it is possible to give a value-free description of the law as a type of social institution. He says that

“A social science, such as analytical or sociological jurisprudence, seeks to describe, analyse, and explain some object or subject-matter. This object is constituted by human actions, practices, habits, dispositions and by human discourse. [...] But the actions, practices, etc., can fully be understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc.”<sup>108</sup>

He then wonders how there is to be a general descriptive theory of these varying practices. He borrows from the Aristotelian tradition of focal meanings or central cases and applies it to law.

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<sup>106</sup> Ibid, 10.

<sup>107</sup> Ibid, 2 where Gardner defends the inescapable morality thesis which says that “engagement with moral norms is an inescapable part of rational, and hence, human nature.” Hart was more much more sceptical about this commitment to morality and advocated that controversial philosophical theories about the general status of moral judgements should be left open. See Hart, n 3, 168; 253-254. I will show that Hartian moral agnosticism is untenable for a sound theory of law.

<sup>108</sup> J. Finnis, n 16, 3.

Controversially, he picks the central case of law in the instance where legal norms possess normative force, i.e. where legal and moral obligations coincide. He says

“If there is a point of view in which legal obligation is treated as presumptively a moral obligation [...], then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist’s description.”<sup>109</sup>

Finnis thinks that the term “moral” is of uncertain connotations so he prefers to use the term practical reasonableness. His central case is thus of those who appeal to practical reasonableness and are also practically reasonable.<sup>110</sup> Finnis’ main task is then to define the features of the practical reasonable person and apply the viewpoint of this person to the study of law as its central case.

It should be noted that Finnis does not affirm that non central cases of a concept are outside the scope of that concept in the first place. He explains that “there is no point in denying that the peripheral cases are instances [of the relevant concept] [...] Indeed, the study of them is illuminated by thinking of them as watered-down versions of the central cases.”<sup>111</sup> It comes then with no surprise that he does not acknowledge as problematic the allegedly Thomist slogan “lex injusta non est lex”.<sup>112</sup> For Finnis, and for his reinterpretation of the classic Thomist tradition, immoral norms can be legally valid, although in a peripheral, non central case, sense.<sup>113</sup> His non-positivism is therefore primarily methodological.

Yet, Finnis’ methodological choice is inspired by the belief that it is essential and primary to understand legal norms when they possess normative force for their subjects, i.e. when subjects have a reason to guide their conduct by the norms enacted by the officials.<sup>114</sup> Truthfully, the class of the subjects Finnis is interested in is that of practically reasonable subjects. However, implicit in this interest is the Fullerian idea that there is an essential component of reciprocity between legal

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<sup>109</sup> Ibid, 15.

<sup>110</sup> Ibid, 15.

<sup>111</sup> Ibid, 11.

<sup>112</sup> I say allegedly because Aquinas and the classic natural lawyers never used this slogan verbatim. See T. Kretzmann, ‘Lex Iniusta non Est Lex. Laws on trial in Aquinas’ Court of Conscience’ [1988] Am. J. Juris. 99, 99-102.

<sup>113</sup> J. Finnis, n 16, 363-366.

<sup>114</sup> See Finnis when he talks about the internal point of view of the participants in a legal system. Unlike Hart and Raz, he thinks that this internal point of view cannot be restricted to the practice of the officials. J. Finnis, n 16, 12.

officials and their subjects.<sup>115</sup> Fuller accused positivists of advocating a managerial role of legal officials in a legal system where subjects were only at the receiving end of the officials' norms. Instead Fuller held a reciprocity view; both officials and subjects are involved in a common enterprise, that of subjecting human conduct to the governance of rules, underpinned by a requirement of reciprocity.<sup>116</sup> I will later argue that Fuller was only half right and that positivists, by denying the necessity of the normative force of norms enacted by officials, are committed to a contradictory view that there is no active relationship between officials and subjects. For now, I want to briefly illustrate that Beyleveld and Brownsword, just as Finnis, are primarily interested in the ability of legal norms to have normative force for their subjects. However, they have approached the requirement of the normative force of law in a different way from Finnis which has led to a hard non-positivism.

Beyleveld and Brownsword are sceptical of Finnis' methodology. They agree that the central case of law has to be understood from the point of view of the practically reasonable person, i.e. a person who takes law as a guide to his action. This agreement already reveals their commitment to the Fullerian view that both officials and subjects are engaged in a reciprocal enterprise of governance through rules. However, they accuse Finnis of arbitrarily choosing as the central case a practically reasonable person who is already committed to the principles of sound morality.<sup>117</sup> They advocate instead that, if a theory of natural law is tenable, it must be shown that a commitment to sound principles of morality is necessary for any practically reasonable person.<sup>118</sup> This methodological stance is termed transcendental essentialism. Furthermore, Beyleveld and Brownsword argue that a particular conception of morality, illustrated by the moral philosopher Alan Gewirth,<sup>119</sup> is in fact a presupposition of any practically reasonable person.<sup>120</sup> It follows that this ethical Gewirthian system is at the foundation of the normative force of law. Violation of this ethical system by the norms enacted by officials results in something which cannot be called law simply because it lacks normative force. Thus the denial of the separation thesis: "A law is a rule which it is Morally legitimate to posit for attempted enforcement".<sup>121</sup>

From the above it can be deduced that the source of the disagreements concerning the separation thesis primarily rests on the question whether legal norms necessarily possess normative force for

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<sup>115</sup> For explicit evidence of this view in Finnis see J. Finnis, n 16, 8-9; 272-273.

<sup>116</sup> L. Fuller, n 7, 192-195.

<sup>117</sup> Beyleveld and Brownsword, n 17, 109.

<sup>118</sup> Ibid, 110.

<sup>119</sup> A. Gewirth, *Reason and Morality* (University of Chicago Press, 1978).

<sup>120</sup> Beyleveld and Brownsword, n 17, chapter 4.

<sup>121</sup> Ibid, 170.



the subjects to whom they are addressed. Positivists deny this necessity while non-positivists affirm it. Furthermore, both positivists and non-positivists believe that the possibility of the normative force of law is conferred by the conclusive normative force of sound principles of morality. Positivists can deny that legal norms necessarily have normative force for the subjects by focusing only on the obligatoriness of legal norms for the officials. Yet, as I have noted, there is still an ongoing debate within positivism as to the nature of the obligatoriness of norms for officials.<sup>122</sup> They reject that this obligation is exclusively a moral obligation and some argue it is only a conventional one. They are however unanimous in finding that the subjects are not under any moral obligation to guide their conduct on the basis of these norms. Positivists therefore reject the Fullerian idea, which non-positivists are committed to, of a reciprocal relationship between officials and subjects.

If we are to resolve the central disagreement in jurisprudence it is necessary to firstly ascertain whether legal norms necessarily possess normative force for subjects. In order to do this I will have to once again establish whether Fuller was right and whether it is essential for our understanding of the nature of law to be committed to a relationship of reciprocity between officials and subjects. I will argue that Fuller was right and that positivists, by denying this commitment, fall into an internal contradiction. I will call this argument the argument from community.

Secondly, having established that a communitarian view of law is necessary, I will move on to investigate the thesis, which both positivists and non-positivists rely on, that the normative force of law depends on the conclusive normative force of sound principles of morality. In order to do this I will venture into moral theory and ascertain what the source of moral obligation is and whether the law necessarily borrows from it. I will argue that the source of both moral and legal obligations lies in the idea of human autonomy and in its necessary pre-condition which is effective agency. Legal obligation is made possible by the recognition of the human autonomy and effective agency of the subjects of legal norms. I will show that legal obligation does not necessarily always coincide with moral obligation; rather a specific moral obligation is a necessary pre-condition for legal obligation. I call this argument the argument from normativity.

I will then conclude by making a methodological argument about the normative force of law. I will argue that the normative force of law, and hence legal validity, has to be understood from the perspective of those that are subject to norms enacted by officials. I will show that, from this perspective, the normative force of legal norms is variable. In a political system there might be

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<sup>122</sup> See n 101 and n 102.

individuals for whom these norms possess normative force and others for whom they necessarily cannot. Hence legal validity can vary between subjects in the same political system. I will call this the argument from the subjects' point of view.

I now proceed to discuss these three arguments in turn.

### 3. THE ARGUMENT FROM COMMUNITY

The argument from community starts by exposing a paradox which positivists encounter by defending the separation thesis. I will call this the paradox of effectiveness. I will show that contemporary positivists, by neglecting the communitarian view advanced by Fuller, fall into this paradox. If this is to be resolved, contemporary positivists will have to admit that legal norms necessarily possess normative force. I now proceed to show in what this paradox consists of.

#### 3.1. The Paradox of Effectiveness

Positivists have long drawn a distinction between the legal validity of norms and their effectiveness in a legal system. By effectiveness I mean that norms enacted by the officials are generally applied by the officials and complied with by the subjects. The exact relationship between legal validity and effectiveness, however, has been controversial. Kelsen thought that effectiveness is a pre-condition for legal validity. He said:

“[...] the validity of a legal norm [is] not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm are [...] the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective.”<sup>123</sup>

This fitted with his notion of legal validity. A norm was legally valid if, and only if, its mode of creation was in accordance with a higher norm. In turn this higher norm was traceable to another one in a continuous chain to the constitution of the legal system. The legal validity of this constitution was not authorised by a higher posited norm but only by a presupposed norm, the basic norm, which says that one ought to behave as the constitution prescribes.<sup>124</sup> While the basic norm is the ultimate source of legal validity and only a presupposition, it validates an actually posited constitution. In order to ascertain the content of the ultimate source of legal validity one therefore has to identify the constitution which is “established by legislative act or custom, and is effective. A

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<sup>123</sup> H. Kelsen, *Pure Theory of Law* (2nd edition, University of California Press, 1967), 211-212.

<sup>124</sup> *Ibid*, 198-201.

constitution is 'effective' if the norms created in conformity with it are by and large applied and obeyed."<sup>125</sup> So it is in this sense that, for Kelsen, effectiveness was a pre-condition for legal validity: the ultimate source of legal validity had to refer to a posited norm, the constitution, which was by and large effective; without an effective constitution we could not have the ultimate source of legal validity.

Hart was adamant in moving away from this model. He famously rejected the criteria of legal validity as a presupposed norm and, instead, replaced it with the rule of recognition, which is a socially practiced norm.<sup>126</sup> He also rejected the Kelsenian relationship between legal validity and legal effectiveness. For him a norm was legally valid only if it was effective within the practice (i.e. a social rule) of the officials and need not be effective amongst the population at large.<sup>127</sup> While he thought that the existence of a legal system depended on the effectiveness of legal norms both within officials and subjects,<sup>128</sup> he explicitly disavowed the view of a necessary conceptual relationship between the effectiveness of norms within the population and the legal validity of those norms.<sup>129</sup> As long as norms were recognised as valid by the rule of recognition, i.e. effective within the groups of officials, their ineffectiveness in the group of the subjects did not bar their legal validity. In Hart's words:

"It would however be wrong to say that statements of validity 'mean' that the system is generally efficacious. For though it is normally pointless or idle to talk of the validity of a rule of a system which has never established itself or has been discarded, none the less it is not meaningless nor is it always pointless. [...] One way of nursing hopes for the restoration of an old social order destroyed by the revolution, and rejecting the new, is to cling to the criteria of legal validity of the old regime".<sup>130</sup>

The above speaks for itself. Fuller was less than half right when he accused Hart of holding a managerial view of law. The extract just quoted indicates that for Hart it is perfectly possible, although not normal, to speak of legally valid norms that are addressed to no one, except the group

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<sup>125</sup> Ibid, 210.

<sup>126</sup> Hart, n 3, 292-293.

<sup>127</sup> Ibid, 294-295.

<sup>128</sup> Ibid, 116 where he says: "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and on the other hand, its rules of recognition specifying the criteria of legal validity [...] must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens need satisfy [...]" It is fundamental to note that the existence of a legal system and the criteria of legal validity, for Hart, are two distinct things. The latter could exist without the former.

<sup>129</sup> Ibid, 103-104;118.

<sup>130</sup> Ibid, 104.

of officials. Here lies the paradox: Hart's view of legally valid norms is compatible with a scenario where all the relevant officials of a legal system reside in a perpetually locked tower without the possibility of communicating with their subjects. The paradox does not only consist of the ensuing alienation of the subjects from their officials.<sup>131</sup> It consists in the fact that in this scenario it would be incoherent to speak of officials of a system at all. A simple dictionary search highlights the conceptual connection of an official to a representative. There can be no representatives without a body of people to represent. The only way it would be coherent to speak of officials in the locked tower scenario is by regarding the officials in both their capacity as norm makers and, at the same time, as the subjects of those norms. Yet, it is clear that they cannot be regarded as the officials or representatives of the group of individuals outside the locked tower. In essence, the paradox of effectiveness isolates the practice of officials from its purpose. That purpose, simply said, is to tell their subjects how they ought or ought not to behave. In more complex terms, the purpose of the officials is to provide their subjects with norms possessing normative force.

If Hart is to escape the paradox of effectiveness he has to move to a Fullerian communitarian view. This view says that officials and subjects are engaged in a common enterprise, that of subjecting human conduct to the governance of rules, with a requirement of reciprocity. This requirement entails that subjects have the possibility and reason to use the norms enacted by the officials as a guide to their conduct. This necessarily negates the possibility of the locked tower scenario. This also necessitates that legally valid norms possess normative force. Legal or perhaps moral and political philosophy will then have to define the scope of this necessary normative force. However, it is open to Hart to reject this step. He could join in with Raz and assert that officials need only to claim that legal norms possess normative force while the norms might in fact not possess any normative force. After all, it is perfectly intelligible to speak of a group of individuals who claim to be the representatives of a group while they fail, more often than not, in their representative functions. It would then be open to Hart a way to avoid the paradox of effectiveness. But this Razian way, as I will show, fails. In fact Raz's theory of the relationship between effectiveness and legal validity is incompatible with his theory of law's claim to legitimate authority.

Raz initially seems to endorse the Hartian conception of legal validity. For him legal validity is linked to a conception of effectiveness only in the group of law-applying officials. The following extract seems to indicate just that:

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<sup>131</sup> An interesting article in this respect is M. Wilkinson, 'Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law' [2010] OJLS 441.

“Efficacy, however, is relevant only in so far as it affects the practices of the law-applying institutions. If, for example, the courts consistently refuse to act on a law, that law is not part of the legal system the courts operate, despite the fact that it was lawfully enacted and was never repealed. [...] According to this approach, then, the existence of the law is logically related to the practice of the law applying organs. The condition of a law’s membership in a legal system is, however, counterfactual: if presented with the appropriate case the courts would act on the law. This may be true even though they are never - or seldom - presented with the appropriate case. [...] Therefore a law may be valid even though it is largely inefficacious.”<sup>132</sup>

It appears that Raz endorses the Hartian conception of legal validity and, with it, the paradox of the locked tower scenario where officials are incapable of communicating with individuals outside the tower. His reference to law applying institutions never been presented with cases to adjudicate seems to indicate that interpretation. However, this does not appear to be compatible with his fundamental thesis that officials claim to possess legitimate authority over their subjects.

“If the claim to authority is part of the nature of law, then whatever else the law is it must be capable of possessing authority. A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority. To claim authority it must be capable of having it [...]”<sup>133</sup>

The above seems to explicitly exclude the possibility of the locked tower scenario because the relevant officials, being unable to communicate at all with the individuals outside the tower, cannot claim authority over them. This is confirmed a little later in the text above when Raz excludes the possibility of trees claiming authority on the ground that they cannot communicate with anyone.<sup>134</sup> One must then conclude, given his thesis about legitimate authority, that Raz cannot coherently share Hart’s view of the relationship between legal validity and legal effectiveness because legal officials must intelligibly be able to make a claim to legitimate authority. Officials can only make that claim when they have subjects to address. It follows that norms enacted by officials, in order to be capable of possessing authority, necessarily have to possess normative force; i.e. they must provide their subjects reasons for taking norms as a guide to their actions. Unless Raz is prepared to drop the necessity of law’s claim to authority, he is already committed to a Fullerian view of a reciprocal relationship between officials and subjects. It follows that only norms that can be considered as having normative force for their subjects can intelligibly be held to be legally valid.

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<sup>132</sup> Raz, n 2, 88.

<sup>133</sup> J. Raz, ‘Authority, Law, and Morality’ [1985] *The Monist* 295, 300.

<sup>134</sup> *Ibid*, 301-302.

I might be accused of having missed Raz's point about the law's claim to legitimate authority. In fact Raz asserts that it must be intelligible to attribute a claim of legitimate authority to legal officials, not that officials necessarily possess legitimate authority. In fact, Raz himself argues that there is no general obligation to obey the law, hence subjects do not necessarily possess reasons to guide their conduct by the norms enacted by the officials.<sup>135</sup> The claim to legitimate authority only helps us to identify legal officials and consequently, by investigating the sources the officials rely on, legally valid norms. I accept that this is a correct statement of Raz's position. However, it is Raz himself that establishes a necessary link between the claim to legitimate authority and a requirement of reciprocity between officials and subjects. Consider the following extract:

"I will assume that necessarily law, [in] every legal system which is in force anywhere, has de facto authority. That entails that the law either claims that it possesses legitimate authority or is held to possess it, or both. I shall argue that though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority."<sup>136</sup>

So there is close conceptual connection between claiming legitimate authority and possessing de facto authority. Raz borrows the concept of de facto authority from the anarchist theorist Wolff who explains the notion of de facto states as follows:

"What can be inferred from the existence of de facto states is that men believe in the existence of legitimate authority, for of course a de facto state is simply a state whose subjects believe it to be legitimate (i.e. really to have authority which it claims for itself). They may be wrong. Indeed, all beliefs in authority may be wrong [...]"<sup>137</sup>

De facto authority is therefore a pre-condition of an intelligible claim to legitimate authority. But de facto authority already puts one in the Fullerian reciprocity view. In fact, de facto authority requires subjects to believe they have a reason, which might be illusionary, wrong or right, superficial or deep, to take the norms enacted by their officials as guide to their actions.

If the above is right, both Hart and Raz are committed, on pain of paradox or contradiction, to accept the Fullerian conception of reciprocity between officials and citizens. This view says that norms, to be legally valid, necessarily possess normative force for their subjects. It is important to make clear, however, that this communitarian view I have just established does not say that subjects are necessarily justified in holding that view. It explicitly says that the belief of the subjects might be, on

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<sup>135</sup> Raz, n 2, chapter 12.

<sup>136</sup> Ibid, 300.

<sup>137</sup> R.P. Wolff, *In Defense of Anarchism* (1970 Harper & Row), p 11.

closer inspection, morally wrong or unreasonable. If this is so, positivists ought not to worry as the separation thesis might still be preserved. Legal norms, while necessarily possessing normative force, might be incompatible with sound principles of morality. In fact the normative force of the norms enacted by the officials would not necessarily be based on sound moral principles but on a mere belief of the subjects in the legitimate authority of the officials. But any conclusion at this point would be too hasty. One has to first investigate the content of the subjects' belief of legitimate authority. In other words, one has to understand the possibility of the subjects taking the norms enacted by the officials as guide to their action. It might be that, on closer analysis, the content of this belief actually bars all immoral norms enacted by the officials from having normative force. Or it might not. In the next section I illustrate the questions that need to be answered in order to ascertain the content of this belief.

### **3.2. The Other Wills Question**

The last section concluded by showing that Hart is committed, on pain of a paradox, to the view that legal norms necessarily possess normative force for their subjects. It also showed that Raz is committed to the same view as his thesis about the officials' claim to legitimate authority is conceivable only where officials' already possess *de facto* authority. *De facto* authority entails that subjects believe that they have reasons to take the norms enacted by their officials as guide to their conduct. One then has to explain the possibility of this belief. Is it a false belief? What does it entail? I will put forward three possibilities. I will quickly discard the first. Cast doubts, but not totally reject, the second and then illustrate how the third has the most compelling power. I will call the third the other wills question.

Perhaps the reason subjects hold this belief is that they have developed a habit to do whatever their officials tell them to do. The norms enacted by their officials tell them not to kill, not to steal and to pay taxes and they do just that out of the long held habit that they ought to do what the norms enacted by their officials say. But this will not do. In fact habits, as Hart famously suggested,<sup>138</sup> cannot explain the normative force of law. The idea that subjects obey out of habit does not tell us how that habit formed in the first place. If the idea of habit implies unreflective and recurrent behaviour, as it usually does, it seems to conflict directly with the belief that there are reasons to take the norms of the officials as guide to one's actions. The conflict is therefore between unreflective behaviour and reasons. The requirement of the normative force of legal norms therefore directly excludes this possibility. At best, it allows that, once appropriate reasons for

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<sup>138</sup> Hart, n 3, 51-61.

taking the officials' norms as guides to action have developed, subjects do not usually reassess those reasons every time they encounter a new norm. But this can hardly be called a habit.

If habits cannot explain the normative force of law, we might turn to another suggestion which says that subjects believe they have a reason to take norms enacted by the officials as guides to their actions because they fear the threat of sanctions. If they do not do as the officials' norms tell them to do they will be thrown into prison, they will be beaten or might even be killed. We know that Austin proposed something similar to this view in his theory of law as commands backed by threats of sanctions and that Hart made his fame by rejecting it. Yet, and this is easily confused, Hart thought that the command theory was incapable of explaining the normative force of law for the officials, not for the subjects. Hart explicitly said that

“In an extreme case the internal point of view with its characteristic normative use of legal language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house”.<sup>139</sup>

The above would suggest that Hartian arguments against sanctions as the basis of the normativity of law cannot be of much help. Indeed, by embracing the idea that the normative force of law could be confined to the official world, as I have shown, Hart falls into the paradox of effectiveness. So there is a real possibility that sanctions could be at the foundation of the normative force of law.

Perhaps another argument might establish that sanctions cannot ground the normative force of norms enacted by officials. This alternative argument claims that sanctions are not inherent in the nature of law and therefore cannot ground the normative force of law. In brief, the argument says that the normative force of law, which is an essential property of legal norms, cannot be grounded in a non-essential property such as sanctions.

The majority of post-Hart positivists and non-positivists have denied that sanctions are conceptually necessary features of legal norms.<sup>140</sup> One common argument says that sanctions can at best be considered part of the law because human beings have a natural inclination to disobey orders (which are a special category of norms). However, so the argument continues, it is possible to imagine that

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<sup>139</sup> Hart, n 3, 117. See also L. Green, n 102, 1700-1702.

<sup>140</sup> For this argument see Raz, n 102, 159-161. J. Gardner, ‘Law’s Aim in Law’s Empire’, in S. Herschovitz (ed.) *Exploring Law’s Empire. The Jurisprudence of Ronald Dworkin*. (OUP 2008), 208-209. H. Oberdiek, ‘The Role of Sanctions and Coercion in Understanding Law and Legal Systems’ [1976] *American Journal of Jurisprudence* 71. L. Fuller, n 7, 55-56. J. Finnis, 16, 260-261. However, contrast this with R. Dworkin, n 4, 93. N. Yankah, ‘The Force of Law: The Role of Coercion in Legal Norms’ [2007-2008] *University of Richmond Law Review* 1195. F. Schauer, ‘The Best Laid Plans’ [2010] *Yale L.J.* 586.



human beings will evolve into different beings in the future or it is possible to imagine a legal system of angels where sanctions would not be needed.<sup>141</sup> It follows that sanctions are not essential elements of the nature of law but merely dependent on some contingent human properties. However, I have already shown that this kind of argument does not work as the nature of law is intrinsically linked to the defining features of humanity.<sup>142</sup> If, as all these philosophers seem to accept, a natural inclination to disobey orders is a defining feature of humanity, we cannot explain sanctions away as merely contingent properties of law. In fact sanctions will be an essential property of law as they are meant to countenance a defining feature of humanity (i.e. a natural inclination for disobedience of orders).<sup>143</sup> So there remains the possibility that the threat of sanctions might, all things considered, explain the possibility of the normative force of law. However, two arguments seem to limit this conclusion.

The first argument, which again was famously exposed by Hart, says that not all kinds of legal norms can be said to have threats of sanctions attached to them.<sup>144</sup> Norms conferring power to enabling the performances of contracts, wills and marriages are some of them. I do not wish to go much further into this argument. Even if it succeeds, the best it can do is to establish that some norms we

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<sup>141</sup> For this angels-based argument see Raz, n 102, 159-161. See also J. Gardner, 140, 208-209.

<sup>142</sup> See my discussion of the text referring to n 34. See also the note below.

<sup>143</sup> It might be useful to explain, as briefly as possible, my distinction between essential, contingent and defining properties of law and humanity. The essential properties of law are those characteristics that law exhibits anywhere and anytime it is to be found. Such an essential property is for example the fact that laws are norms. Contingent properties of law are those that the law may or might not exhibit whenever and wherever it is to be found. A contingent property for example is the modality of legal regulation of certain areas of human conduct such as inter-personal violence or commercial transactions. Defining features of law are those that a legal theorist cannot but explain about the law.

The law is a human institution. Perhaps a legal system has existed, exists or will exist in a non-human society. If this is so, it is not an essential property of the law, and it is therefore a merely contingent one, that it can only exist in human societies. However, because the law is a human institution, its explanation has to be based on those defining human properties that make law possible as a human institution. Defining properties of humanity, I believe, are its ability to act autonomously and its propensity to associate in community. Humanity's ability to act autonomously is also one of the reasons that human beings have a natural tendency to disobey orders. These defining properties of humanity are not necessarily essential properties of humanity. Certain human beings, for example, cannot reason (e.g. mentally disabled), therefore they cannot act autonomously and cannot have tendencies to either obey or disobey.

Human autonomy is a defining feature of humanity which makes law possible. Norms, legal or otherwise, can only exist in a community of entities that are capable of engaging with them through reasoning (i.e. autonomous beings). Therefore an essential property of law, that is expresses itself through norms, rests on a defining, but contingent, property of humanity. Therefore, it is a mistake to think that the essential properties of law have to be based on essential properties of humanity. Because law is a human institution we cannot separate the properties of law, essential or otherwise, from the defining characteristics of humanity.

<sup>144</sup> Hart, n 3, chapter III.

usually consider to be legal cannot be so considered.<sup>145</sup> In fact, if it is true that legal norms necessarily possess normative force, then if threats of sanctions are the source of that normative force, norms that lack threat of sanctions cannot be considered legal norms. This conclusion seems unsatisfactory, none the least because it conflicts with our common understanding of power-conferring norms. However, perhaps there is a way out. Perhaps, the normative force of law is not conferred by threats of sanctions after all. A Razian inspired argument may help with this conclusion.

Raz and his followers, as I have said at length, argue that law necessarily claims legitimate authority. They do not however believe that law necessarily possesses legitimate authority. In fact Raz believes that law can never possess the legitimate authority it claims over its subjects.<sup>146</sup> But let us, for sake of argument, assume that Raz and his followers are wrong. If, as non-positivists believe, norms to be legally valid necessarily possess legitimate authority conferred by their moral rightness, this legitimacy would be the normative force I have been looking for. Subjects would believe that the reason to take the norms enacted by the officials as guide to their conduct is because those norms originate from a source of legitimate authority. It would then be the role of the philosopher to clarify when legal officials can have the legitimate authority they claim and, therefore, to illustrate when the subjects' belief in legitimate authority is true. So, if moral correctness can ground the normative force of law, what would then be of the role of threat of sanctions? At best it would have a reinforcing role which would attach to the primary force given by legitimate authority.<sup>147</sup>

This conclusion however rests on two strong assumptions. The first is that legal norms are capable of possessing the legitimate authority they claim. The second is that legitimate authority is only possible when the alleged authority complies with sound principles of morality. These assumption need to be verified. But how can I accomplish this? I have to investigate the possibility of an individual acting on the will of another because he believes the other will has legitimate authority over him. I also have to investigate whether this submission is only possible when the norms of the authority comply with sound principles of morality. So I must also investigate what sound principles of morality are and how they are capable of transferring normative force to norms enacted by the officials. This requires a departure from the convention I have adopted until now to assume that sound principles of morality incorporate the principles of human rights we are familiar with. I will therefore venture into moral philosophy to answer some questions about legal philosophy. In sum,

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<sup>145</sup> I do not consider the Austinian response that power conferring norms might have attached to them the threat of nullity as a sanction. As I will briefly show, even if we could conceive of sanctions as providing the normative force of law, we would still have to analyse the possibility of legitimate authority providing the normative force.

<sup>146</sup> Raz, 2, essay 12 "The obligation to obey the law".

<sup>147</sup> I am here somehow adapting Raz's suggestion of sanctions as auxiliary reasons. See Raz, n 102, 161-162.

the question I must ask is whether and how it is possible for an individual (i.e. the subject) to justifiably submit to the will of another (i.e. the official) in order to guide his actions. I will call this the other wills question. The argument from normativity will try to answer it.

## 4. THE ARGUMENT FROM NORMATIVITY

### 4.1. A Conception of Autonomy

I start with a proposition which is primarily associated with Kant and, at first sight, seems to deny the possibility of answering the other wills question in the positive. This proposition says that human beings, as endowed beings with rationality, are capable of determining their actions according to principles they impose on themselves.<sup>148</sup> This proposition almost leads us to the familiar Kantian concept of autonomy. There are many strong metaphysical commitments attached to this proposition which, if I followed Kant, I would be anchored to. I do not think it necessary or correct to proceed on a metaphysical line. A more pragmatic one would do.

It is a common truism that the feature that perhaps most distinguishes human beings from other living creatures is their ability to curtail being driven by natural impulses. This common truism does not deny that natural impulses like hunger, libido, fear and others are capable of directing us to act in a way or the other. A world where, given the possibility, we never eat when feeling hungry or where we would never look for shelter when feeling cold, seems almost inconceivable. However, the truism merely says that human beings, unlike animals, are capable of acting in ways contrary to those impulses for reasons not dictated by those impulses. Consider a man who goes on hunger strike. His natural impulse is to eat, yet he refuses to do so. Can this be explained simply by pointing out to another impulse like a masochistic pleasure? No doubt this further impulse might be present. However, we would then have to explain why he is acting on one impulse rather than the other. But even if we could give a plausible explanation in terms of further impulses, we would be missing the purpose of his actions. He is calculating that his omission to eat will impact on the way other people perceive him and will influence how others act. It is this process of calculation which motivates him to deny acting on his natural impulse of hunger.

If the truism is in fact sound it means that human beings possess a faculty which is capable of mediating natural impulses. The faculty is our will and the process of calculation described above is reasoning. So, unlike other animals, we are capable of reasoning and, through our will, we are capable of acting on reasons. But how does our will work? Kant suggested that we must suppose

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<sup>148</sup> I. Kant, *Groundwork of the Metaphysics of Morals* (M. Gregor trans and ed., CUP 1997), Chapter III.

that we have a free will, meaning that our will is completely autonomous from all sensorial impulses. Our will belongs to a super-sensorial world, the noumenal world, from where it derives eternal and immutable laws which presents themselves to the will through reason.<sup>149</sup> Thus human beings, as long as they are endowed with reason, are capable of acting under the idea of the autonomy of the will.

Nowadays, not many philosophers can accept this metaphysical view. Firstly, it seems to be at odds with the modern scientific world view which dominates the common way we think about reality. The only worlds that can exist are those we can see through microscopes or observatories. The modern scientific world view might be wrong; but building a modern philosophical account of practical reasoning without it warrants more efforts than are here necessary.<sup>150</sup> Secondly, some philosophers think that the idea that we could act only by the presupposition of a free will is fallacious. Beyleveld and Brownsword offer the following argument:

“We may grant that a being with a will must regard its actions as under the control of its will. But to suppose that it does not possess free will (by supposing its will to be determined by causes external to it) is not to contradict the idea that it is a being with a will unless it is supposed (and what Kant is trying to show is that it must be supposed) that a being with a will not merely exercises causality through its will but that in so operating it operates as a ‘first cause’. However, a will would not cease to be an efficient cause of action just because it itself had an efficient cause; it would merely cease to be a self-sufficient efficient cause.”<sup>151</sup>

The above suggests that the idea of a free will is not necessary for action. What is necessary is instead the idea of regarding our actions as under the control of our will. This implies that our will needs not be totally independent from our natural impulses but it needs to be a separate entity from them. This, however, does not yet settle the question of how our will works.

Christine Korsgaard suggests a powerful idea. She says that the human mind (which I take to be a synonymous with the human will) is self-conscious in the sense that it is capable of reflecting on its own activities. This sets it the problem of the normative force of certain activities. She says that

“our capacity to turn our attention on to our own mental activities is also a capacity to distance ourselves from them, and to call them into question. [...] The reflective mind cannot settle for

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<sup>149</sup> Kant, n 148, 56-58.

<sup>150</sup> Stefano Bertea, although greatly influenced by Kantian discourse, relies on this point to distinguish his own position from Kant's. See S. Bertea, *The Normative Claim of Law* (Hart Publishing, 2009), 184-188.

<sup>151</sup> D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 103.

perception and desire, not just as such. It needs a reason. Otherwise, at least as long as it reflects, it cannot commit itself or go forward.”<sup>152</sup>

For Korsgaard, reasons are nothing else than the product of a successful reflection of the will. Unlike Kant, she does not think that the will has to act totally independently of our natural impulses. Instead, it needs to mediate our impulses and discover whether or not they provide enough reasons to act. Hence, the man who decides to go on a hunger strike has to calculate whether the natural impulse of eating possesses enough normative force to make him abandon his commitment to protest through that medium. So reasons are the result of a process of calculation of the will.

But one might ask where reasons come from. We know they cannot come exclusively from natural impulses because they mediate them. Also, I have already excluded that they derive from the laws of a noumenal world. A viable option is that they derive from the basic laws of the phenomenal world, which are cause and effect (or induction and deduction in the context of reasoning), power but also, and importantly, teleology. Let me explain. Reasoning involves calculation of consequences. Our will investigates the consequences of the actions required by our impulses through experience or imagination. “If I refrain from doing X then Y rather than Z will happen”. Yet knowledge of the consequences of doing X does not seem enough to motivate me to act in a way or another. It will only do so if I have a positive attitude towards the consequences of doing X. That is if I value the consequences of X and I want to bring them about.

This is where power and teleology come into place. Let’s leave aside teleology for a moment. Even if I were able to accurately calculate the consequences of doing X and valued its consequences, I would be unable to bring about those consequences through my actions if my actions did not have the power to bring about those consequences. Observe the following. “I value seeing the town beyond the mountains. Hence I ought to move the mountains”. Formally speaking, this form of reasoning is correct. It calculates the consequences of certain actions and determines, because it values the consequences, to undertake certain actions. However, it does not calculate the power available. As an individual human being, am I capable of moving mountains? Clearly not. So the form of reasoning above will need to be adjusted in the following way. “I value seeing the town beyond the mountains. Hence I ought to move the mountains. However, because I do not have the power to move the mountains, I will walk around them until I get to see the town”.

What about teleology? Valuing X appears to be what makes me act to bring it about. But where do values come from and why do I value Y rather than Z? The New Natural Law school has advanced a

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<sup>152</sup> K. Korsgaard, *The Sources of Normativity* (CUP 1996), 93.

suggestion which I think satisfactorily explains the concept of values.<sup>153</sup> Reworking the classic conception of human well-being, they have proposed that human action, when rationality is involved, is motivated to act because attracted by certain basic goods which are essential to human fulfilment. But what are the basic goods and how do we discover them?

“The most direct way to uncover the basic goods is by considering actions and asking, ‘why are you doing that?’ and ‘Why should we do that?’ and so on. Persisting with such questions eventually uncovers a small number of basic purposes of diverse kinds. These purposes arouse interest because their intelligible aspects are instantiations of the diverse basic goods.”<sup>154</sup>

The corresponding list of basic goods resulting from this continuous process of questioning is not always consistent in Finnis’ work, and for reasons I will expose shortly need not interest us too much. In *Natural Law and Natural Rights* he proposes the following: (1) *Life*, corresponding to the drive for self-preservation; (2) *Knowledge*, considered as desirable for its sake and not merely instrumentally; (3) *Play*, that is performance of an activity for no other sake than the activity itself; (4) *Aesthetic experience*; (5) *Sociability* or friendship; (6) *Practical reasonableness*, referring to the ability to bring one’s own judgement to bear on the variety of choices to make in life; (7) *Religion*, viewed as the quest for the relationship between human activity and ultimate purposes.<sup>155</sup>

In later works, written with Grisez and Boyle, Finnis appears to have modified this list of basic goods. The authors suggest that they are divisible in two groups which are substantive and reflexive. In the first category we have life, knowledge and aesthetic experience and some degree of excellence in work and play. In the latter group the existing goods are expressed as a search for harmony between different categories. So we have harmony between individuals and groups of persons (friendship); harmony within an individual and his personal life (inner peace); harmony between one’s action and one’s judgements (peace of conscience); harmony between oneself and more-than-human source of meaning and value (religion).<sup>156</sup>

This latter list appears to be more sophisticated and necessarily more complex, if not more elusive, than the list originally given by Finnis. But does this matter? For present purposes, not very much. The formulation of basic goods attempts to give an explanation of the phenomenal law of teleology. Teleology describes the fact that human beings purposely pursue things which they recognise as

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<sup>153</sup> G. Grisez, J. Boyle and J. Finnis, ‘Practical Principles, Moral Truth, and Ultimate Ends’ [1987] *American Journal of Jurisprudence* 99. See also J. Finnis, n 16, Chapter III-VI. I used the term New Natural Law school or New Natural Lawyers as drawn from R. George, *In Defence of Natural Law* (Clarendon Press 1999).

<sup>154</sup> G. Grisez et al, n 153, 106-107.

<sup>155</sup> Finnis, n 16, 85-89.

<sup>156</sup> Grisez et al. n 153, 107-108.

valuable according to certain categories which are reflected in the list of basic goods. These goods are linked together with the idea of specifically human well-being (or fulfilment, accomplishment) which is the ultimate end (purpose, objective) of human action. So if we have to learn anything at all from the New Natural Law theorists, it is that reasons intrinsically depend on values, values on human well-being, human well-being on the categories of the basic goods. Obviously, a complete theory of practical reason will have to ascertain and defend a coherent list of basic goods. However, I am here interested in the general category and especially in their relationship with reasons. I may therefore be excused from defending a particular list of basic goods.

To sum up my discussion until now, I have articulated a conception of human autonomy. Human beings possess a faculty which is capable of mediating the natural impulses they are subject to. This faculty is the will. The will is capable of mediating impulses by applying the basic laws of the phenomenal world. These are induction and deduction, power and teleology. So our will, through these laws, is capable of calculating the consequences of our actions and choosing the consequences it values according to a conception of human well-being. In this process it necessarily considers the property of our power to bring into being the consequences we value. This process is called reasoning and the results of the process are called reasons. Two questions remain. Firstly, are human beings capable of acting only through reasoning? Secondly, depending on the answer to the previous question, do we have to engage in the process of reasoning every time we have to act or are there any shortcuts? I turn to these questions in order.

Some philosophers tend to focus greatly on reason-induced actions. Indeed, some have built their entire legal philosophy on this particular kind of action.<sup>157</sup> This is not a criticism. In fact I agree this is to be done. Law is a human enterprise and it must rest on a defining human property.<sup>158</sup> The truism I opened this section with says that acting on reasons is a defining human property, so it seems more than reasonable, if not mandatory, to build a theory of law on a theory of practical reason. However, this does not warrant over-estimating reason-induced action. It is easy to incorrectly infer from Korsgaard's view that our will is essentially reflective, i.e. mediates our natural impulses, that the only worthy human actions are those that take place through reasoned action. Stefano Bertea goes as far as to call reason-induced action as *action par excellence*.<sup>159</sup> But this is unwarranted if it means that we should limit as much as possible non-reasoned action or if it means that non-reasoned

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<sup>157</sup> Beyleveld and Brownsword, n 17; Finnis, n 16; S. Bertea, n 150. Raz, n 102.

<sup>158</sup> See my discussion of the text referring to n 34, n 142 and footnote n 143.

<sup>159</sup> Bertea, n 150, 191.

action somehow debases mankind from its inherent worth, its dignity.<sup>160</sup> On the contrary, if human dignity has to mean anything, it must mean that we are *capable* of acting on reasons. Sometimes it is better that we should not engage in the process of reasoning if we lack the sufficient qualities to produce *good* reasons which are the correct calculation of the consequences of our actions supported by a coherent view of human well-being (more on this later). Sometimes we are simply incapable of acting through reasons, e.g. when we are asleep or otherwise unconscious, when the emergency of the situation does not allow engagement in reasons like during a fire, a vehicle incident, etc. The ability to act on reasons is a defining human ability; it is neither the only human ability nor the only human possibility.

From the above it follows that we do not only act on reasons.<sup>161</sup> Even when we produce good reasons, we sometimes do not have sufficient willpower, not to be confused with power, to act on them. Consider the following scenario. I have decided to go on a diet. I know there is a persuasive reason as I am abundantly over-weight and, if I do not go on a strict diet and avoid unhealthy foods, I might incur severe illnesses. On any reasonable conception of human well-being, the value of human health is included in the list of basic goods. So I know that there is a good reason to go on a diet and avoid unhealthy foods. Does this mean that I will never eat unhealthy foods until I am in good shape? It should, but I might not be able to always act on a good reason. I will only be able to do so if my will is capable of mediating the natural impulse of eating a delicious but unhealthy dish. But sometimes, when there is not enough willpower, the will might not be able to accomplish this task and it might not be able to lead me to act according to a good reason. I know what I should do but, notwithstanding, I am unable to do otherwise.<sup>162</sup> This phenomenon is so common in human experience that it hardly needs philosophical explanation.

I have said that human beings, while endowed with the ability to reason, do not always act on reasons. However, they are capable of doing so. Does this mean that humans always have to engage in active reasoning every time they intentionally want to act? Yes and no. If acting intentionally means engaging the will to mediate impulses, then it necessarily means being engaged in a process of reasoning. However, one can also adopt reasons which have been pre-constituted more generally

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<sup>160</sup> Stefano Bertea in calling reason-induced action *action par excellence* does not commit the mistake of over-valourising reason-induced action. I interpret him as meaning that reason-induced action is a specifically human modality of action, i.e. it is a defining characteristic of human beings.

<sup>161</sup> It might be possible to label reason-induced behaviour as 'action' and non-reason induced behaviour as simply 'behaviour'. However, this seems to me to be contrary to the standard linguistic usage of behaviour. Indeed 'behaviour' generally refers to both reason-induced and non-reason induced behaviour.

<sup>162</sup> The inaction here described due to lack of will-power can be categorised as an irrational action, i.e. an action that does not follow a good reason which is identifiable. This is to be distinguished from non-rational action. Non-rational action is attributable to beings that do not possess the ability to act on reasons and values (i.e. non autonomous beings).



and apply them to the scenario at hand. One of these pre-constituted and general reasons I call principles.

Imagine the following. I decide I have a good reason to go to church every Sunday. I value a possible relationship between myself and a more than human personality. To pursue that value I calculate that I have to go to church to deepen my knowledge of this super-human personality and discover what such relationship consists of. I also know that church runs on Sunday mornings. So I have a good reason to go to church on Sundays. Does this mean that every Sunday morning I have to reconfirm whether my reason to go to church is sound? Yes and no. No, because as long as I value a relationship with a super-human personality and I know that the way to develop that relationship is by going to church, I have already concluded my reasoning process and produced a reason which lasts temporally until the factors that induced it are dismantled. Thus, the reason needs not be renewed every single time. However, yes, because new factors might arise which might impede me from acting on a reason which I hold good. Imagine that on a Friday night I fall down the steps and break several of my bones. My doctor tells me to stay in bed for a whole month. In this new scenario, does my reason to go to church every Sunday morning still hold good? Certainly it does. Breaking my bones has not altered my value of a relationship with a super-human personality; it has only reduced my power to act on that value. So principles are nothing else than recurring good reasons which we might, given the circumstances, be unable to act on. Humans develop, over the course of their lives, a series of principles; the aggregation of these principles I call personality. Certain principles can be shed when the factors that induced them are no longer held good. So human personality evolves with time and with reflection on whether certain actions are motivated by good reasons.

Principles are not the only pre-constituted and general reasons we know of. Certain reasons apply and are held good for certain individuals simply because of the role, social or otherwise, these individuals occupy. Think about a doctor. There might be good reasons for non-professionally qualified individuals to know their science and biology and learn surgical skills that might save other people's lives. In fact these same reasons are those that are usually endorsed by individuals that want to become doctors. However, does a doctor, every time a patient enters into the surgical room, have to re-assess the factors that induced him into becoming a professionally qualified surgeon and calculate whether they apply to the current scenario? No. Just as with principles, the endorsement of certain roles carries with it certain attached reasons that are determinative of role in the first place. This, just as with principles, does not entail that doctors will always cure patients. There might be non-role considerations, such as work-induced stress, drunkenness or otherwise,

that might prevent the doctor from acting on the reasons that apply to his role. Yet, he knows that, but for these non-role considerations, there are recurring and general reasons to cure people's life. These general and recurring role-based reasons I call role-personality.<sup>163</sup>

The example of the role-personality of the doctor might induce to a misunderstanding. One might think that the general and recurring reason for doctors to cure patients is a derivation of the primary reasons that led individuals to undertake that role. This is a mistake. The primary reasons can only explain the act of undertaking training to become a doctor. Once this act is completed, the primary reasons are exhausted only to re-appear, perhaps, when an individual is considering whether there are good reasons to abandon a role. Role-personality is constitutive of a role, independently of whether the role is assumed voluntarily or not. Think about the role of children. They did not choose to be given birth to. However, merely because of the role they occupy, there are reasons which specifically apply to them and them only, e.g. listen to their parents simply because they are their parents. Without doubts, there might be instances where this role-personality cannot be acted upon (e.g. the parent is abusive). These will, however, only be countervailing reasons which will have to be calculated in the decision of acting on a role-personality.

#### **4.2. A Conception of Effective Agency: the Pre-Condition for the Exercise of Human Autonomy**

In the last section I sketched a brief conception of autonomy. I said that human beings are capable of acting through reasons by calculating the consequences of their actions and endorsing those consequences through a conception of human well-being. In so doing they constitute their personality. There is however a pre-condition for the conception of autonomy I sketched. Indeed, it is a pre-condition for any theory that advocates the exercise of autonomy. If an individual has to be capable of acting on his reasons, the individual has to be within an environment that guarantees the exercise of autonomy. I sketch in this section the content of this environment. The resulting picture will result in what I call the conditions of effective agency. Without the conditions of effective agency, human autonomy cannot be exercised in a social context.

If an individual is to form a personality which will guide how he acts, he has to be in a certain condition in order to do so. Gewirth acknowledged the truth in this proposition to the extent of deriving all of his moral theory from it.<sup>164</sup> He ignored the neo-Thomistic theory of basic goods and

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<sup>163</sup> The idea of role-personality, i.e. reasons that are constitutive of certain social roles, is also employed by Razian scholars to attribute a claim of legitimate authority to law-applying institutions. See n. 102 and n. 103.

<sup>164</sup> A. Gewirth, n 119.

focused on the pure concept of agency.<sup>165</sup> He said that an agent is an individual who acts voluntarily and purposively.

“By an action’s being voluntary [...] I mean that its performance is under the agent’s control in that he unforcedly chooses to act as he does, knowing the relevant proximate circumstances of his action. By an action’s being purposive [...] I mean that the agent acts for some end or purpose that constitutes his reason for acting [...]”<sup>166</sup>

This view of action largely coincides with the conception of autonomy I advanced, however, with an important exception. The agent acts for whatever purposes he values and Gewirth does not proceed on the basis of the agent valuing basic goods; the agent must simply regard as good his purposes on his personal conception of what is good. Here follows an important step. If the agent is to act autonomously, he must necessarily value as good his ability to act voluntarily and purposively.<sup>167</sup> This almost appears as a banal circular statement. Indeed, if autonomy includes acting voluntarily and purposively, it is obvious that the agent, when acting autonomously, must want acting voluntarily and purposively. Otherwise, the agent would not be acting autonomously. This apparent circularity can be broken by showing two things. Firstly, an agent’s valuing as good his voluntariness and purposiveness is different in quality from his pursuit of various actions dictated by his personality. Secondly, voluntariness and purposiveness are concepts which are extremely rich and reveal their true sense in a social context. I explore these two points in turn.

In the conception of autonomy I advanced I said that human beings, as beings endowed with a will, are capable of acting according to reasons and principles. The formation of reasons requires the ability to understand the consequences of certain actions and endorse those consequences through a conception of well-being derived from a list of basic goods. It is this endorsing, or valuing, of the consequences of actions that motivates human beings to act. The process of reasoning therefore includes acting voluntarily, i.e. engaging in a process of reasoning which reveals the possible consequences of certain actions, and purposively, i.e. forming a conception of well-being that enables endorsing the consequences of those actions. When Gewirth says that the agent must necessarily value his voluntariness and purposiveness he must mean that an agent, if he understands what is to be an autonomous agent, must value his voluntariness and purposiveness. This process of

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<sup>165</sup> The fact that Gewirth did ignore the Thomistic tradition of basic goods does not mean that he was insensitive to the fact that human beings act according to values they uphold. Indeed, his project of defining the supreme principle of morality can in fact be best understood as a research for the supreme value that every human being necessarily ought to endorse, by merely being an entity that necessarily needs values in order to act.

<sup>166</sup> Ibid, 27.

<sup>167</sup> Ibid, 52

valuing is fundamentally different from the one engaged in the process of valuing certain actions under a conception of well-being. Without endorsing the value of his voluntariness and purposiveness an agent cannot conceptually build any conception of his well-being and produce reasons to act on, because it is these two qualities that allow him to do just that.

The above seems unduly mysterious. The mystery can be dispersed once I show that purposiveness and voluntariness are non empty concepts but have substantive meaning in a social context. Take the example of a slave. He is a human being and he is endowed with a will. As such he has the ability to act on reasons and develop principles and his personality. However, his ability to translate into actions the reasons he develops based on his conception of well-being is severely limited by the power of others towards him. He might be his principle to go to church every Sunday morning to deepen his relationship with a super-human personality, yet he cannot. He cannot because his masters deprive him of the power to translate reasons that are good for him into actions. They tie him down every Sunday morning and force him to be immobile so that he will be able to work effectively for the rest of the week. His conception of well-being is judged and treated as irrelevant. It follows that, if the slave is to have the possibility of acting autonomously, he must, if he can, take steps to ensure that he can act on his own conception of well-being and that he is not deprived from doing so. This is what valuing his purposiveness entails: an individual must be in a position to make his conception of well-being have an effect on his actions if he is to act autonomously.

What about voluntariness? Take the example of a prisoner who is used as a human subject in a series of experiments. Before being captured he had developed his personality and, consequently, had a mature conception of his well-being. However, as a prisoner, he is not in the position to decide whether taking part in the experiments fits with his conception of well-being. Whatever his view on the matter, it is irrelevant. He will be induced to take all sorts of drugs which will endanger his life. The irrelevance of his conception of well-being is not to be confused with the negation of his consent. Even if his conception of well-being had been compatible with taking some experimental drugs, e.g. to discover a cure that could save humanity, this view is not taken into any consideration by those that detain him. It follows that, if the prisoner is to have the possibility of acting autonomously, he must, if he can, take steps to ensure that he can engage in a process of reasoning about the consequences of certain actions and proceed to act on his conception of well-being. So, this is what valuing his voluntariness entails: an individual must be in a position to engage in a process of reasoning with the possibility of acting on the results of his deliberations.

If the above is correct, it means that voluntariness and purposiveness are pre-conditions of the exercise of autonomy in a social context. To exercise our autonomy we must be in an environment

where our choices count and are capable of influencing our actions. It could be said that effective agency is a pre-condition of autonomy in the sense that it makes our valued prospective actions realisable outside of our minds (i.e. alter our external environment through action). It makes no sense to talk about autonomous action when these two conditions are absent simply because without them endorsed prospective actions, whatever they are, cannot be translated into real actions. The presence of the two conditions I call effective agency. If an individual is to act autonomously he necessarily has to value his effective agency. Effective agency should be sharply distinguished from perfect agency. No human possesses the latter. We can define perfect agency as the ability to bring about whatever our will settles upon. This would require infinite power as commensurate with the ability of our will to imagine and endorse all sorts of actions. Obviously, as humans we lack infinite power. So we must focus instead on effective agency which is the condition under which we can bring about the consequences of our valued prospective actions that are commensurate with our powers. Note that it is merely an attempt that is in play. I might have the power to run an Olympic race with the intention of winning it. My power does not however guarantee that I will in fact win the race and accomplish my purpose. Possession of effective agency merely signifies that it is not irrational to attribute to me the possibility of bringing my endorsed actions into reality.

#### **4.3. On Sound Principles of Morality: Joining Autonomy and Effective Agency**

I ventured into the conception of autonomy and effective agency in order to answer the other wills question. That question asks when an individual can act on the will of another because he believes the other will has legitimate authority over him. Non-positivists think that the question can be answered positively, in the legal context, when the will of officials complies with sound principles of morality. So I need to discover what these are and then ascertain whether the non-positivist claim is sound. This is what I set out to do in this section. I will argue that allowing individuals to pursue a life based on their personality is included in an account of what is morally required. Not all personalities are, however, morally permissible. Some fail to allow other individuals to pursue their own personalities. Moreover, some personalities are more justifiable than others because they originate from a conception of basic goods with integrity. It follows that sound principles of morality ultimately require non-interference with autonomous action which originates from a conception of human well-being with integrity.

It is perhaps part of collective imaginary that the demands of morality are made on us by others. When we think about what morality requires we imagine the familiar authorities, our parents, religious guides or various personifications of the moralist, admonishing us to behave in a way rather

than the other. If there is any truth in this common imaginary it is simply that moral claims have a bearing on our relationships with other individuals, including with ourselves.<sup>168</sup> If this is correct, as I assume it is, it presupposes that we are capable of acting in a way or another and that, once we understand what morality requires from us, we can act accordingly. Moral demands therefore presuppose the notion of responsibility of actions. We cannot conceptually think of a beast acting morally if not only by metaphorical extension. A beast is the product of his nature and cannot act differently from what its nature impels it to do. It is unable to guide its actions otherwise. But, differently, humans endowed with a will can. The conception of autonomy I advanced says just that. Human beings, as beings endowed with a will, are capable of mediating their natural impulses and acting through reasons and principles they themselves develop. This is as much as we can get from the collective imaginary.

Perhaps we need a reversal of perspective. This means that whatever morality requires from us does not emanate from external demands. Instead it emanates from where moral responsibility comes from, that is from the structure of our will. If this reversal is permissible, it follows that moral claims are those that the requirements of our own autonomy imposes on us. I have however shown that we cannot have a sensible talk about autonomy without taking into account the concept of effective agency. When the New Natural Lawyers talk about moral demands they fail in just that respect. I will show just that in a moment. However, we first have to understand how they get from a conception of practical reasoning to a conception of what we morally ought or ought not to do.

The New Natural Lawyers said that we can get to understanding what we morally ought or ought not to do simply by investigating how the process of autonomy works. Acting morally means acting on good reasons. But how does one produce good reasons for action? The principle of good reasoning aims to answer that question. This principle is composed of two sub-principles which are the principle of non-contradiction and the principle of the pursuit of basic goods.<sup>169</sup> These two principles are inherent in autonomous action in the following way: avoiding self-contradiction is inherent in the notion that we discover the possible consequences of our prospective actions which are proportionate to our powers through the laws of induction and deduction; pursuit of basic goods is inevitable if we are to endorse the consequences of our prospective actions which best fit a conception of human well-being . The two sub-principles together indicate a third principle of good reasoning which is the prohibition of pointless action. This third principle simply says that every

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<sup>168</sup> As I will make clear below morality does not only regulate how to conduct interpersonal relationships. Its domain is much wider. It is for this reason that I say that morality involves how we categorically ought to behave with each other.

<sup>169</sup> Grisez et al, n 153, 119-120.

voluntary action has to be reason-induced. However, this does not tell us very much about what we must or must not do and certainly does not fit with intuitions about what is morally permissible or not. For example, killing a baby because it is crying too loud seems not to fail the prohibition of pointlessness. The New Natural Lawyers acknowledge this:

“Even morally bad actions have their point. One chooses to do what is morally wrong for some reason, and like any other deliberate action, the reason for which one acts immorally must ultimately be reduced to the basic goods. So far forth, even an immoral act responds to [the prohibition of pointless action].”<sup>170</sup>

So how do we get to understanding what we ought or ought not to do? In the following way:

“However, morally wrong acts do not respond to this principle as perfectly as morally good acts do. To see why, one must consider the relationship between the principles of practical knowledge and those of morality.

In prohibiting pointlessness, the first principle of practical reasoning as it were demands: Take as a premise at least one of the principles corresponding to the basic goods and follow through to the point at which you somehow instantiate that good through action. This demand is minimal and leaves one free to do anything from which one can anticipate any benefit whatsoever.

One can imagine another principle making a far stronger demand: Insofar as it is in your power, allow nothing but the principles corresponding to the basic goods to shape your practical thinking as you find, develop, and use your opportunities to pursue human fulfilment through your chosen actions.

This stronger demand is, not only that one be reasonable enough in one's practical thinking to avoid pointlessness, but that one be entirely reasonable in such thinking. This stronger demand is inconsistent with many possible choices consistent with the weaker demand. The possible choices excluded by the stronger demand are those which are immoral, for the stronger demand is a way of expressing the first principle of morality. This expression of the first moral principle makes it clear that to be morally good is precisely to be completely reasonable. Right reason is nothing but unfettered reason, working throughout deliberation and receiving full attention.”<sup>171</sup>

The above long quote explains that what morality requires from us is to be completely reasonable; that is, in the pursuit of what we ought or ought not to do, we should correctly calculate the

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<sup>170</sup> Ibid, 121.

<sup>171</sup> Ibid.

consequences of our actions and give equal concern to all the basic goods in a conception of human well-being with integrity. A conception of human well-being with integrity does not require that when we are reasoning about what to do we should only act on reasons that are inspired contemporaneously by all the basic goods; rather, morally permissible actions are those that do not go against one or more of the basic goods. Acting morally thus means that all our actions, while not always carried out in pursuit of all basic goods, do not involve the notion of acting against any of the basic goods. In other words, acting on a conception of human well-being with integrity requires that none of our actions be criticisable from the perspective of anyone of the basic goods.<sup>172</sup>

This view of moral demands as those that the structure of our will, hence our autonomy, makes on us is highly attractive. It gives a common denominator to all human beings endowed with a will against which we can measure our actions from a moral point of view. So when we say ‘this action is immoral’ we simply mean “this action is not the product of good reasoning which you, as a human being endowed with a will, are capable of”. This explains the common intuition that children, mentally deficient individuals and beings without a will cannot be regarded as moral agents. If they are not capable of reasoning, they cannot be capable of producing good reasons and even less of producing a conception of human well-being with integrity. Furthermore, this moral view explains the complexity of moral demands and why and how individuals can fail to act morally (i.e. completely reasonably). So an individual, while possessing a personality based on a mature conception of human well-being, might still fail to determine or predict the correct consequences of his actions by lack of knowledge or disregard of certain facts. Otherwise, even if he did possess knowledge of all the possible consequences of his actions, he might not have developed a mature conception of human well-being where all basic goods are treated with respect.

I believe the New Natural Law theory of morality to be essentially sound. However, for reasons I now advance, I believe it is incomplete. Indeed, it fails to articulate the consequences of the pre-condition of autonomy, i.e. effective agency, on its moral theory and on what is or is not completely reasonable. It might be, and I will show that it is, that once the conditions of effective agency are taken into consideration, we emerge with a clearer picture of what we ought or ought not to do.

I said earlier that effective agency is a necessary pre-condition for the exercise of autonomy in a social context where individuals make choices and act in ways which have an impact on how much we can act on our own principles and personality. We cannot exercise our autonomy if we do not possess or are deprived of voluntariness and purposiveness. So each individual endowed with a will, to be capable of acting autonomously, must make a claim on other individuals, not to be deprived of

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<sup>172</sup> Grisez et al, n 153, 126. See also Finnis, n 16, 118-125.



his effective agency. The addressees of this claim are other individuals with a will because, as I have explained, only they can control their actions through a process of reasoning. But why should these other individuals care about this claim or act according to it? Simply because, just by being individuals endowed with a will, they themselves necessarily make this claim on others. Thus certain actions are categorically prohibited simply by recognising that every human being endowed with a will, including the agent, necessarily makes the same claim (i.e. to retain his effective agency) and regards that claim to be a pre-condition for his autonomy.

The above opens up new possibilities that the New Natural Lawyers did not consider. When one says 'this action is immoral' it appears that there could be two meanings. It either translates into 'this action is not the product of good reasoning which you, as an autonomous being, are capable of' or 'this action does not comply with the claim to retain effective agency that every autonomous human being, including yourself, must make and endorse'. But there is in fact no duality. The second proposition is a pre-condition of the first as effective agency is a necessary pre-condition for the exercise of autonomy in a social context. So claims about what we morally ought or ought not to do already presuppose that an individual possesses effective agency and, thus, is capable of good reasoning. It follows that actions that interfere with the effective agency of individuals cannot *a priori* be considered as reasonable. Actions that do not interfere with effective agency but are not supported by a conception of human well-being with integrity cannot be held as morally permissible.

Let me develop this idea a little further and give another argument why autonomous beings are rationally required not to interfere with the effective agency of each other. The argument proceeds on the basis of certain basic epistemic assumptions. It says that certain things are true of the world independently of our beliefs and actions. Such truths might be basic scientific ones like the fact that the earth is not a flat disc or that water is H<sub>2</sub>O. Other truths might be aesthetic ones as the inestimable value of the *Mona Lisa* or of various musical outputs of JS Bach. One of these truths is that autonomy is a defining condition of humanity. Indeed, I have been proceeding on this basic assumption throughout. If this fact is indeed true of the world it necessarily imposes a condition on the exercise of human autonomy and impacts on what we can call a good reason for action. Let me explain why.

I said that a good reason for action follows from endorsement of the consequences of prospective acts through a conception of well-being with integrity. From this follows the simple fact that one must be capable of understanding the consequences of one's actions. This, as I said earlier, entails, among other things, a calculation under the laws of induction and deduction of the following type: If I do x then y will happen; if I do z then y will not happen. This entails that in order to ascertain the

consequences of our actions and to consequently produce good reasons for action through a conception of well-being with integrity we must take account of and act accordingly to certain truths about the world (e.g. by doing x then y will happen). Now, I have assumed that human autonomy as a defining condition of humanity is one of these truths. It follows that, irrespective of our convictions about certain human beings (e.g. blacks or Jews), it is true that they are capable of reasoning (and are therefore autonomous) simply given the fact that they belong to the human race.<sup>173</sup> Given this truth, failure to act consistently with it results in failure to correctly apply the laws of induction and deduction. Therefore no reason for action produced by acting inconsistently with this truth can produce a good reason for action. This none withstanding that one might have developed a mature conception of human well-being with integrity. But how can one fail to act consistently with the truth that human beings are autonomous beings? I suggest that this failure can take place through the idea of a performative contradiction. I have said that effective agency is a pre-condition of autonomy in the sense that it makes the exercise of autonomy possible in a social context. An action that interferes with effective agency therefore denies the existence of the exercise of autonomy and, consequently, contradicts the truth of human autonomy. Acting consistently with the effective agency of others is therefore rationally required.

Let me add an aesthetical remark to the above argument. The argument might in fact appear a little mechanical and formalistic in its attempt to ground the rational imperative of acting consistently with human autonomy in certain empirical truths. This formalism should be excused. The aim of the argument is to give a rational basis to the more familiar, and less formalistic, principle of respect for others and things. It is commonplace to hear that we should respect fellow human beings, animals and the environment. If we are to ground such respect in something substantive we have to identify the characteristics that humans, animals or nature have which demand our respect. The relevant characteristic in humans, I argue, is their possession of a will and therefore their ability to act autonomously.<sup>174</sup> But “respect” cannot mean anything substantive if it does not mean “to act in recognition and consistently with” a given thing. So respect for humans, I argue, simply means acting in recognition and consistently with the truth that human autonomy is a defining condition of

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<sup>173</sup> Remember that human autonomy is a defining condition of humanity and not an essential one. Therefore, some blacks or Jews might in fact not be autonomous beings. However, given that human autonomy is a defining condition of the whole humanity, one which is not affected by race or ethnic origin, human autonomy is also a defining condition of black and Jews, simply given the fact that they belong to the human race.

<sup>174</sup> It is beyond the scope of this thesis to identify the characteristics which non-humans (i.e. animals, environment etc.) possess that demand respect from humans. I believe that once these characteristics have been identified in non-humans we can ascertain the scope of our moral obligations towards non-humans.

humanity. Translating this respect for human autonomy in a social context requires prohibition of interference with effective agency.<sup>175</sup>

If all the above is correct it means that the New Natural Lawyers wanted to explain more than they could with their theory of practical reasoning. They had to take into consideration the element of effective agency and articulate the rational requirement of respect for human autonomy. It also implies that Gewirth, and with him the neo-Kantian tradition, has to articulate a theory of practical reasoning which defends in full the idea that humans act in pursuit of human well-being by attempting to instantiate through action the basic goods. What I have attempted here is the unification of two moral philosophical traditions: the neo-Thomistic or Aristotelian tradition with the neo-Kantian one. They have been separately subject to severe criticisms.<sup>176</sup> However, a theory that attempts to unify both, as I have done, shows that they are not only compatible but that they are necessarily complementary.<sup>177</sup>

#### **4.4. The Normative Force of Law: First Steps towards Answering the Other Wills Question**

In the previous section I illustrated that morally permissible actions are those that are in accordance with the effective agency of individuals and are built on a conception of human well-being with integrity through the exercise of autonomy. What is morally prohibited is therefore interference with humans' effective agency and actions not supported by a conception of well-being with integrity. My venture into moral theory was motivated by the non-positivist belief that norms, to possess normative force, cannot sanction what is morally prohibited. Now that we have a clearer picture of what is morally prohibited we can investigate with greater precision that claim and answer the other wills question.

The other wills question asks how and why should a group of subjects act on the norms enacted by a group of officials. I advance the following answer which I will defend in greater detail. A group of subjects can act on the norms of the officials, and justifiably do so, when the norms are the product of the necessary mediation of the personalities of those subjects with the purpose of maintaining a community of autonomous individuals. The pre-condition of maintaining the community of autonomous individuals is the recognition and protection of their effective agency. It follows that it

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<sup>175</sup> Remember that effective agency does not coincide with any specific action. Rather effective agency, as the unification of voluntariness and purposiveness, enables specific action. Therefore respect for autonomy does not require non-interference with specific actions. Indeed, interference with specific actions (e.g. theft or homicide) might indeed flow from a good reason for action.

<sup>176</sup> Bernard Williams separately criticises, perhaps unfairly, each tradition in B. Williams, *Ethics and the Limits of Philosophy* (Harvard University Press 1985), chapters 3 and 4.

<sup>177</sup> See par 5.1 below for a more detailed discussion of why the neo-Thomist and neo-Kantian tradition have to be amalgamated.

is by recognising and protecting the effective agency of their subjects and mediating their personalities that officials provide norms possessing normative force for their subjects. This all sounds too mysterious and complicated. However, it is by unravelling this complexity that we discover that the separation thesis is extremely misleading: legally valid norms can be immoral, but only in certain ways. Norms that emanate from officials who do not recognise that their addressees are autonomous beings who necessarily make a claim to retain their effective agency cannot be legally valid. They cannot be legally valid simply because these norms cannot have the necessary normative force for subjects. I proceed to expand on the elements of this answer to the other wills question.

In the argument of community I said that norms, to be legally valid, necessarily need to possess normative force for their subjects, otherwise we fall into the paradox of effectiveness that Hart's theory of legal validity suffered from. The argument also established that Fuller was right and that officials and subjects are engaged in a common enterprise, that of subjecting human conduct to the governance of norms, which necessitates a requirement of reciprocity. But, one should ask, what does this requirement of reciprocity consist in? It consists in the following: both officials and subjects are members of a community of autonomous individuals. This should not sound mysterious at all. In fact legal systems are made of human beings. We already know that human beings, differently from other animals, possess a will through which they are capable of guiding their actions. To do so they develop reasons and principles and consolidate their personalities. But, one might ask, if legal systems are made of autonomous beings, then why should a group of those beings, i.e. the subjects, curtail their autonomy and act according to what another group of human beings, i.e. the officials, tell them to do through norms? While advancing the other wills question I proposed two possibilities for this question. One was the threat of sanctions and the other was authority. I casted doubts on the previous and said that authority would be workable if it can be shown to be legitimate.

Wolff argued that the authority of the state (which for present purposes we can assume to coincide with the authority of the officials<sup>178</sup>) can never be held legitimate because it conflicts with the moral duty of individuals to be autonomous. In his words:

"The moral condition demands that we acknowledge responsibility and achieve autonomy wherever and whenever possible. Sometimes this involves moral deliberation and reflection, at other times,

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<sup>178</sup> The authority of the state and the authority of legal officials do not always coincide. We can say that the latter category is always included in the former but not always the other way round. Positivists, as I have shown, argue that the relevant legal officials are law-applying institutions (courts, tribunals, etc.). Necessarily law-applying institutions are a part of the state's machinery; however, they are not always the only political institutions. Think for example of law-making institutions like parliament or law-enforcing institutions like the police.

the gathering of special, even technical, information [...] The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between the authority of the individual and the putative authority of the state. Insofar as a man fulfils his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him."<sup>179</sup>

It is important to stress that Wolff does not think that this insoluble conflict between authority and autonomy means that an individual should never do as he is told; instead he should never do as he is told only because he has been told to do so. He should only do as he is told when, by deliberation, he concludes that it is the right thing to do. If Wolff is right then, on reflection, the norms enacted by the officials cannot possess normative force given by authority, simply because authority can never be legitimate as it is immoral. But Wolff is wrong, and fundamentally so. Morality does not demand of us to exercise our autonomy; it is the exercise of autonomy that makes morality possible. Moral claims demand that we exercise our autonomy in a correct way. Let me explain.

In my discussion of what morality consists in, I said that we could not have any conception of morality without the idea of the responsibility of our actions. Human beings can determine the way they act because they are in possession of a will through which they can mediate their natural impulses and act on reasons. I also said that human beings can act autonomously but do not always do so; certain human beings, children and the mentally incompetent for example, are not endowed with working or well developed wills. So we cannot attribute any moral responsibility to them. It is the presence of a will and our autonomy that makes morality possible. Does it follow that we are under a moral obligation to always exercise our autonomy? The question does not make much sense. If it is answered in the positive it has some drastic effects. We would have a moral obligation not to sleep and to engage in sophisticated reasoning under periods of emergency. Even children and the mentally incompetent could be said to be under the moral obligation of exercising their autonomy to the extent they are capable of it. Again, this does not make much sense. Morality is not about exercising autonomy; rather it is about how our autonomy is to be exercised. I said that morally prohibited actions are those that are not completely reasonable, those that involve a miscalculation of the consequences of our actions or that are not supported by a conception of human well-being with integrity. If authority can help us to engage in the correct calculation of what are good reasons for actions, then it cannot be immoral. Morality does not care whether we reach the good reasons independently from other people, it cares that we reach the good reasons. So Wolff is wrong when he says that our moral duty is to be autonomous individuals.

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<sup>179</sup> Wolff, n 137, 17.

My conclusion is not far from Raz's who tells us, through the service conception, when an authority can be held to be legitimate. He asks: "how can it be consistent with one's standing as a person to be subject to the will of another in the way one is when subject to the authority of another?" He replies:

"The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition)."<sup>180</sup>

So these two conditions tell us that an authority is legitimate only when we reach better reasons overall by complying with authoritative utterances rather than engaging in the reasoning process ourselves (the normal justification thesis). This is consistent with what I said earlier. Morality demands that we reach the correct decision, so if complying with authoritative utterances can help us do that, the authority will be morally legitimate.

From the above it appears that the legitimate authority of norms enacted by the officials is a real possibility. However, the service conception cannot provide a satisfactory legitimisation test necessary for legal norms. This is so because, under the service conception, the officials would almost never be able to emanate norms possessing normative force for their subjects. Consider the following. The service conception says, among other things, that authoritative norms enacted by the officials are justified when they provide subjects with morally good reasons for action. I have said that morally good reasons for actions are those that follow from calculating the consequences of our actions and choosing those consequences that follow from a conception of human well-being with integrity (i.e. a conception of well-being which cannot be criticised from the perspective of any of the basic goods) . If authoritative utterances are thus to be justified then authorities must know, better than their subjects, what the possible consequences of the actions of their subjects are and what conception of human well-being with integrity supports those actions. But authorities can hardly know this better than their subjects, because the goodness of reasons depends on the situation of those that are engaged in a process of reasoning. A reminder of a reasoning process will suffice to prove the point.

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<sup>180</sup> J. Raz, *Between Authority and Interpretation* (OUP 2009), 136-137.

Remember the example of an individual who decides to go to church every Sunday to deepen his relationship with a super-human personality. He produces a recurring and general reason to this effect which I called a principle. However, principles are only good generally not particularly. In fact, having broken his leg and having been advised to stay in bed for a month, he re-engages in a process of reasoning and decides that he cannot act on his principle of going to church every Sunday because the circumstances that produced it have change, i.e. he does not have the power of going to church as he is bed-ridden. So, ultimately, good reasons for actions are circumstances-dependent. If this is true, norms enacted by officials cannot produce good reasons for action for their subjects unless they can predict and accommodate all the relevant circumstances of their subjects. But this is hardly plausible. It appears even more implausible when we consider that the officials have to be capable of predicting and accommodating all the possible circumstances of all their subjects and enact norms that can accommodate all of them at the same time. This would require divine predictive and norm-drafting abilities. The best officials could do is to produce norms that work well as principles. But, as I have said, good principles do not produce good reasons without accommodation to the circumstances.

So the service conception cannot explain the normative force of the norms enacted by the officials. Actually, endorsement of it will lead us to the idea that norms enacted by the officials will only rarely be justifiable because incapable of providing good reasons. But could we not just say that norms enacted by the officials will be legitimate, hence legally valid, if they are capable of providing good principles for their subjects? This appears as a workable solution. There would obviously be a compromise. The officials' norms will not always be completely reasonable, i.e. they would not always comply with what morally ought to be done, as they would not necessarily match the circumstances of their subjects. However, they would provide their subjects with general reasons, i.e. principles, to guide their conduct. But, even if officials' norms could be considered as principles for their subjects, we would still have to understand what justifies them. Obviously, the service conception would no longer be workable as it is concerned with reasons and not principles. So we need to know what could justify the practice of taking norms enacted by officials as principles. I will suggest that it is the idea of maintaining a community of autonomous individuals who necessarily make a claim to retain their effective agency that justifies this practice.

#### **4.5. The Normative Force of Law: Making Autonomy Possible in a Community**

Social interaction instantiates a basic good. It is something the pursuit of which needs no rational justification. This needs not arouse any scepticism. It is part of experience that certain kinds of social relationships are intrinsically worthy and that an individual that does not participate in these kinds of

relationships misses out on a fundamental aspect of his well-being. Take friendship as an example. We do not seek friends merely because they can provide us with certain tangible benefits such as assistance in time of need, or comfort in time of tribulations. We seek friends because our interaction with each other makes us better and more fulfilled individuals. The tangible benefits we receive from our friends are dependent on this intrinsic value. Friendship also requires something we are all well familiar with in order to develop; it requires reciprocity of actions and attitudes. Each individual must treat the well-being of his friend as if it was his own and take actions to ensure that his friend acts according to good reason. So friends offer each other advice about what ought to be done and engage in a process of reasoning together. It is because of the intrinsic value of the relationship that friends often act on the reasons offered by each other and, even when they fail to act accordingly, none the less hold dear the reasons offered. So the normative force of the norms offered by friends as advice lies in the intrinsic value of friendship. All this is familiar to common experience and sensible.<sup>181</sup>

Can the model of friendship extend to more complex social interactions like that between officials and subjects and hence become the foundation of the normative force of norms enacted by officials? There are serious doubts about this. Let's call the relationship between officials and subjects a political one and expand on the ways in which friendship is different from a political relationship. Firstly, unlike friendship, it is much more difficult to prove that a political relationship is intrinsically valuable. Secondly there seems not to be the same requirement of reciprocity that exists in friendship in a political relationship. Finally, a political relationship proceeds on the basis of authority rather than advice. If we are to ground the normative force of the norms enacted by the officials in something like that existing in friendship, we have to overcome these difficulties. I think this can be done and proceed accordingly.<sup>182</sup>

The intrinsic value of friendship was not hard to state as it is part of general experience. Yet, it seems that we cannot borrow from this common experience to prove that a political relationship is in itself

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<sup>181</sup> For an analysis of practical reasoning in friendship and friendship as an intrinsic good see Finnis, n 16, 141-144. Let me, for sake of completeness, indulge in the analysis of intrinsic and instrumental value. Something is instrumentally valuable if it is valuable as a means to something else. Something is intrinsically valuable if it is valuable as an end, i.e. not simply valuable because it helps to achieve other things. In a way all things, including friendship, are instrumentally valuable. They help us achieve human well-being which we pursue through the categories of basic goods. But basic goods are no mere platonic ideas. They are instantiated in the activities we engage in. Engaging in certain enterprises (e.g. friendship) reveals itself as a realisation of a basic good and thus leads to human well-being. This is the reason why I say later, in the text accompanying n 195, that even playing chess has moral implications.

<sup>182</sup> Some of the discussion below is inspired by the idea of associative political obligations as defended by R. Dworkin, n 4, 195-216 and J. Horton, 'In Defence of Associative Political Obligations: Part Two' [2007] *Political Studies* 1. See also S. Perry, 'Associative Obligations and the Obligation to Obey the Law' in S. Hershovitz (ed), n 140, 183-312.



valuable and conducive to human well-being. Certainly, we could say that some forms of political relationships actually lack any intrinsic value. We can think about the political relationship present in Nazi Germany or any more recent political societies where those in political power ignore the basic rights of their subjects. But this kind of reasoning is deficient. After all, the value of some forms of friendships is highly disputable. Who would want his child to befriend a drug dealer or a member of a gang? We are not interested in whether some realisations of friendship or political relationship are intrinsically valuable. Rather, we are interested in the question whether a general idea of political relationship is intrinsically valuable. If it is, then we can judge various examples of political relationships and evaluate whether they possess this intrinsic value. I propose that the intrinsic value of such a relationship lies in its enabling property to provide that each member of a society pursue his own life according to his own personality in a way that is conducive to co-habitation with other autonomous individuals. This appears at first as an instrumental value but reveals its intrinsic value through its importance in the development of human well-being.

The development of human well-being is only possible in society. This might appear as a controversial claim but, at closer analysis, is indeed a truism. We are not born outside of society in a science fiction type world absent of interaction with other human beings. All the objects of human fulfilment are placed or are susceptible to interaction with other individuals. Think about friendship. If it is true that it is intrinsically valuable, its realisation requires the presence of other human beings. Or think about the fulfilment of the goal to get acquainted with the ultimate end of existence. Religious practices have a fundamental social aspect. It is not merely that certain religious practices require worship in community; rather, their social aspect is that we engage in the process of investigation of ultimate ends through the various forms that are presented to us in society either by embracing them or by rejecting them. So the truism reveals that social interaction has an enabling property. It enables us to pursue, through forms that are presented to us in society, the instantiation of the various abstract forms of the basic good. Our reasons, principles and personalities therefore develop as a response to the particular social interactions we encounter.

However, it should not be thought that social interaction has only this positive aspect of enabling our autonomy. It has a powerful negative one. The fact that we live in society implies that our actions necessarily interfere with that of others and the actions of others interfere with ours. Simply said, our autonomy has to take consideration of others. This is not necessarily only a moral issue about how we ought or ought not to treat each other. It is also a matter of power. We simply cannot bring about the consequences of certain actions we value simply because the presence of other individuals prevents its realisation. Think about the pursuit of creating a physical space where

reflection and meditation is made possible through permanent silence. In our attempt to create this space, we would necessarily have to consider the existence of other individuals and investigate how to overcome the possibility of them discovering it and disrupting the meditative space. So the presence of other individuals always changes the calculation of power and, necessarily, limits the scope of our autonomy. We are simply not free to make certain choices.

There is another way society might have a negative impact on our autonomy. Other individuals might, through their actions, interfere with our effective agency and thus prevent us from exercising at all our autonomy. This negative impact is different from that I described in the previous paragraph. In my discussion of autonomy, I described the impossibility of perfect agency. Our agency is made even more imperfect because of the necessary interferences with the calculation of power that the presence of other individuals entails. However, the presence of other individuals also gives rise to the possibility that their actions will interfere with our effective agency which is a precondition of the exercise of autonomy.

So there is a challenge. We cannot but be in society to exercise our autonomy; however, our presence in society both limits the scope of our autonomy and can threaten its exercise. So we need a way out. We need a way that is both compatible with autonomy in society and ensures its existence. That way, I suggest, is through a particular idea of political relationship based on authority in a community of autonomous individuals. The exercise of such authority is conducive to the creation of a community where each member is equal in the possession of the opportunity to develop his own reasons, principles and personality on which he acts. Such development is however limited by the fact that other members of the community are involved at the same time in the same task of developing their personality. An authority is therefore needed to limit the ways each member can undertake that development in a manner that is conducive to the maintenance of the community. The officials must therefore undertake two interwoven roles. Firstly, ensure that there are common standards that do not allow the interference with the effective agency of the members of the community. Secondly, set standards for the development of personalities which can be said to be common.

This ideal of political relationship is nothing else than the communitarian view of law advanced by Fuller with a particular reference to human autonomy. That communitarian conception sees officials and subjects engaged in a common enterprise, that of subjecting human conduct to the governance of norms, with a requirement of reciprocity. The requirement in this ideal of political relationship is that both officials and subjects acknowledge that the group is formed of autonomous individuals and that each is entitled to a society where autonomy can be exercised. The requirement of reciprocity is

substantive. As a minimum it requires that the effective agency of each member is secured. It must be secured both from interference from actions of subjects and both from interference from actions of officials. Indeed, there could not be a community of autonomous individuals without the existence of its pre-condition which is effective agency.

So, just as in the case with friendship, the political relationship in the communitarian view is intrinsically valuable in making autonomy possible in society. Furthermore, just as in friendship, there is a requirement of reciprocity which is the recognition of the autonomy of each member of the community and a mutual need of non interference with effective agency. One might then ask why this community of autonomous individuals necessitates a political relationship based on authority rather than threat of sanctions, or as in the case of friendship, mutual advice.<sup>183</sup> To respond let us remind ourselves of how authority works.

In Razian terms, authority requires that individuals refrain from engaging in a process of reasoning and defer to the authoritative statement to guide their conduct. Authoritative norms directly exclude the exercise of autonomy and offer reasons for action which are calculated by the authority rather than the addressees. Therefore, if it is the exercise of autonomy that makes morally wrongful acts possible in a society, including acts that interfere with the effective agency of others, it is the autonomy-excluding nature of authority that is capable of blocking that process. Advice and sanctions do not aim to block the exercise of autonomy. They only aim to alter the reasoning process either by showing how the reasoning process ought to be conducted to reach good reasons, in the case of advice, or, in the case of threat of sanctions, by creating further specifications of the consequences of possible courses of actions (e.g. if you disobey the law this evil will be inflicted on you). Authority is therefore the most effective means to ensure that members of a society do not engage in a process of reasoning which will lead them to act in ways which violate the maintenance of a community of autonomous individuals.

At closer inspection the communitarian view of law is therefore similar to that of friendship. Its intrinsic value is in promoting a community of autonomous individuals. Its requirement of reciprocity is the recognition that each member of the community is an autonomous individual and requires protection of his effective agency. The political relationship in the communitarian view also requires authority as it is the most effective way to ensure that the members of the community do not produce reasons which induce them to act in a way contrary to the maintenance of the community.

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<sup>183</sup> This is in fact a powerful critique made by L. Green, *The Authority of the State* (OUP 1988), 200 where he says: "To concede that the conditions of human development require society is not to concede that they require authority, unless we repeat Hume's error of holding that the former is impossible without general recognition of the latter".

Therefore, just as with friendship, the normative force of the norms enacted by the officials is to be found in the intrinsic value of the maintenance of a community of autonomous individuals.

So the other wills question appears to have its answer. A group of subjects can act on the norms of the officials, and justifiably do so, when the norms are the product of the necessary mediation of the personalities of those subjects with the purpose of maintaining a community of autonomous individuals. The pre-condition of maintaining the community of autonomous individuals is the protection of their effective agency. It follows that it is by recognising the autonomy and protecting the effective agency of their subjects that officials provide norms possessing normative force for their subjects.

The answer I have given to the other wills question has serious implications for the separation thesis and helps to explicate the various suppositions I adopted when discussing Fuller and the requirement of legal normativity. I disentangle the remaining issues in the next sections.

#### **4.6. The Limits of the Moral Fallibility of Law**

We can only speak of legally valid norms in a community where officials and subjects are engaged in the common enterprise of subjecting human conduct to the governance of norms with a requirement of reciprocity based on the recognition of the autonomy of each member. I have already shown that Hart falls into a paradox when he talks about legally valid norms that are addressed to no one and which no one has reasons to take as guide to their conduct. Speaking about legally valid norms only makes sense when those to which the norms are addressed have reasons to engage with them, i.e. possess normative force. Legal officials claim the authority to tell their subjects how to behave through norms. They therefore must assume that they are addressing individuals who can engage with those norms and alter their balance of reasoning by engaging with the same norms. Therefore legal officials, when making a claim to authority, impliedly acknowledge that their addressees are autonomous individuals. In fact, it is precisely the fact that subjects are autonomous individuals that requires that the officials make a claim to authority. I have shown under what conditions that claim can be regarded as legitimate and, therefore, when subjects have good reasons to engage with the officials' norms. It is under those conditions that we can sensibly speak of legally valid norms.

Norms enacted by officials that do not recognise that their addressees are autonomous individuals cannot be legally valid because they cannot possess any normative force for their addressees. This is, on reflection, uncontroversial. Imagine a society where human beings started legislating for a group of dolphins or horses expecting them to behave how the norms prescribe. We would clearly not need to engage in philosophical disputes about whether those norms are legally valid or not. They are simply senseless. But imagine a situation which appears only a little less paradoxical. Imagine a society where those in political power enact norms that prescribed that their subjects, human subjects, be taken one after the other, irrespective of consent, to the slaughterhouse and be killed until their total annihilation. Hart thought that this could be described as a legal system and that the norms of this society could be regarded as legally valid.<sup>184</sup> But this is senseless. The officials cannot be regarded as officials of the subjects simply because the subjects are not regarded as autonomous beings with the ability to govern their lives, accept or deny claims to authority, or regulate their actions through norms. There are no obligations, duties or practical reasoning. Claims of legitimate authority are senseless. There is only brute force. Hartian positivism survived through an equivocation. Only those that are called to create and enforce these norms are regarded as autonomous beings. We could then speak about a legal system and legally valid norms within this restricted group of norm-makers and norm-enforcers. However, just as in the case of the legal system of dolphins and horses, it would be senseless to speak of a legal system and legally valid norms when we take into consideration the individuals that are destined to the slaughter-house.

Does Razian positivism fare any better? Raz says that officials necessarily claim legitimate authority over their subjects while they may fail to have it. The claim to authority helps to identify who are the relevant officials in a legal system and, by analysing the sources of the norms enacted by these officials, we discover the sources of law in a legal system. Only the norms emanating from these sources can then be held to be legally valid. Raz's analysis proceeds in the following direction: from the claim of authority to the sources of law. Yet he fails to consider the opposite direction of enquiry and to consider whether it squares with his results. If necessarily legal officials make a claim to authority we must consider who they make that claim on. Perhaps dolphins and horses? Clearly not as dolphins and horses cannot engage in reasoning so cannot understand claims to authority. We need not investigate any further this rhetorical question. Claims of authority can only be made on autonomous individuals, beings capable of engaging in a process of reasoning. So if legal officials necessarily make a claim to legitimate authority they must necessarily acknowledge that those they are addressing with their claims are autonomous individuals. But we know that acknowledging that

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<sup>184</sup> See text accompanying n 139.

others are autonomous individuals carries with it a moral duty of non interference with their effective agency. Indeed, as I have shown, we cannot have a sensible talk about autonomy without the pre-condition of effective agency. So if legal officials necessarily make a claim to authority on autonomous subjects they also necessarily have to recognise the effective agency of those subjects and assume a moral duty of non-interference with it. It follows that, if the law necessarily claims legitimate authority, it also necessarily claims that it does not interfere with the effective agency of its addressees.

However, I have said that understanding law through a claim of legitimate authority alone is not enough. The law cannot merely claim authority. To be capable of claiming legitimate authority, it must have de facto authority, i.e. its addressees must believe that the law possesses the legitimate authority it claims. So the central philosophical task is describing under what conditions subjects can reasonably hold this belief. I have described under what conditions subjects can regard law as possessing legitimate authority. I rejected Raz's service conception and advanced the communitarian view of law. This communitarian view says that authority is legitimate when it is used to maintain a community of autonomous individuals. Maintenance of the community requires norms that prohibit interference with the effective agency of their members. So, there cannot be legitimate authority when officials enact norms that interfere with the effective agency of their subjects.

In the end, when we understand that legal validity cannot be explained by claims alone, Razian positivism fails. Law is not whatever sources say it is. Norms cannot be legally valid when they interfere with the effective agency of the members of a legal community. Razian positivism fails to appreciate that in order to talk about law we have to talk about community. Law is not simply the projection of the state of mind of a group of people (the officials). It is a common enterprise between a community of autonomous individuals who are all interested in pursuing a plan of life and developing their own personalities.

So let me recall Gardner's definition of the separation thesis which positivists defend. "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)."<sup>185</sup> The thesis is false in two respects. Firstly, it ignores that a legal system is not composed of only officials. A legal system is a community composed of various autonomous individuals with various roles. Legal validity cannot sensibly be restricted to a section of that

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<sup>185</sup> Gardner, n 13.

community alone. Such restriction leads to the paradox of effectiveness. Secondly, Gardner's thesis seems to exclude the fact that norms of a given system necessarily need to possess normative force for their subject. This much, as I have argued, is entailed by the thesis that law claims legitimate authority which Gardner himself is committed to.<sup>186</sup>

It follows that identifying legally valid norms in a community requires engagement in a moral question. The question is the following: does a norm emanate from a group of officials who recognise their subjects as autonomous beings? The question requires a positive response if the norm is to be counted as valid in a community.

#### **4.7. On the relationship between Legal Normativity and Normative Force**

The discussion on the normative force of law sheds important lights on the discussion in part 1 on the requirement of legal normativity or, as I will refer for sake of clarity in this section, on the requirements of the rule of law. I said that the principle of the rule of law requires that a legal system be capable of guiding the conduct of its subjects through norms. I also argued that the moral quality which underpins this principle is a particular conception of equality that requires that legal norms establish equal demands from their subjects and assume that they are all equally capable of performing their requirements. My discussion on the normative force of law gives substantive weight to those theses. I therefore flesh out in this section the relationship between the two concepts.

Why must a legal system, through its officials, be capable of guiding the conduct of its subjects through norms? Simply because norms, in particular authoritative norms, can only be addressed to autonomous beings who are the members of a community. Officials that are incapable of communicating with, and are incapable of guiding the conduct of, autonomous beings cannot enact legally valid norms. I have explained the rationale for this conclusion in the argument from community and, in particular, by exposing the paradox of effectiveness. So the principles of the rule of law exposed by Fuller tell us how legal officials can accomplish that conduct-guiding task adequately through prospective norms, non contradictory norms, etc. But Fuller did not fully articulate a conception of the identity of the subjects of a legal system. Acknowledging that they are autonomous beings in fact opens up a new series of requirements that I have discussed in considering the normative force of law, in particular the requirements of effective agency.

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<sup>186</sup> Gardner, n 102.

Understanding that the subjects of a legal system are autonomous beings also helps us to understand the moral property that is essential to the rule of law which I identified to be that of equality. Nigel Simmonds, who defends the non-positivism of Fuller, has instead proposed that that moral property is that of liberty. He says:

“[...] the value served by the rule of law is the value of liberty. [...] In claiming that the rule of law is intrinsically linked to liberty, we rely upon the same concept of liberty that is invoked in treating slavery as intrinsically violative of liberty. [...] When a citizen lives under the rule of law, it is conceivable that the duties imposed upon him or her will be very extensive and onerous, and the interstices between these duties may leave very few options available. Yet, if the rule of law is a reality, the duties will have limits and the limits will not be dependent upon the will of any other person. [...] To be governed by law is to enjoy a degree of independence from the will of others.”<sup>187</sup>

It is important to note that for Simmonds the liberty essential to the rule of law is not an unrestricted one. Instead, it relates only to those areas where officials have not enacted norms and therefore allow their subjects optional conduct. Simmonds then develops the idea that protecting the areas of optional conduct for subjects is the essential moral characteristic of law. He says:

“To make its governance effective, and to retain a substantive monopoly over the use of force, a regime must prohibit potentially coercive interferences, and it will thereby create a protective perimeter for the said domains of optional conduct. To the extent that the law leaves me with such options, it renders the existence of those options secure and independent of the will of others. Similarly, to the extent that the law grants me certain protections against interference (a 'protective perimeter' of claim rights, for example) the existence of those protections is secure and independent of the will of others.”<sup>188</sup>

This theory of the moral property of the rule of law as freedom is compatible with that of equality I advanced. Indeed, once I have identified that Simmonds' moral property of equality coincides with the recognition that the subjects of a legal system are all equally autonomous beings, Simmonds' theory must presuppose mine. In fact I have said that legal validity in a community rests on the acknowledgement by the officials that the subjects are autonomous and are capable of pursuing a plan of life based on their respective personalities. It is this recognition that necessitates the enactment of norms that restrict interference with the effective agency of the subjects and which

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<sup>187</sup> N. Simmonds, n 16, 86-88.

<sup>188</sup> *Ibid*, 90.



requires the officials to mediate the reasons that apply to the subjects with the view of maintaining the community. This already commits one to acknowledge that the members of the community are all equal in one substantive respect: they are all autonomous beings.

As I have argued, it is exactly the property of autonomy that requires and ultimately justifies the use of authority. Authority attempts to exclude subjects from acting on reasons they develop themselves in order to ensure that they act instead on common standards in view of maintaining a community. Authority therefore appears as antithetical to freedom of action. However, and this is the crux of Simmonds' argument, the use of authority ensures that in areas where common standards have not been set, each member of the community is free to pursue his own actions based on his own personality. Indeed, it is the existence of norms which guarantee the effective agency of the subjects that allows them to pursue their plans of lives in the absence of common norms. In fact, as I have repeated at length, effective agency is the pre-condition for the exercise of autonomy. It follows that Simmonds' identification of liberty as the moral property of the rule of law is better read as a corollary to the moral property of equality I proposed. In fact, without the recognition that all the subjects are equally autonomous beings and its substantive implications, the liberty Simmonds advocates cannot be made possible.

The relationship between the normative force of law and the normativity of law (or rule of law) is therefore almost indistinguishable. The earlier lays the foundation for the latter. Understanding the intrinsic relationship between the two concepts also explains why, contra Raz, the rule of law conceptually does coincide *with* "equality (before the law or otherwise), human rights of [some] kind or respect for persons or for the dignity of man".<sup>189</sup> The rule of law is not a formal or merely instrumental concept exactly because the normative force of law rests on a particular conception of equality and rests on the respect for the dignity of man, understood as the ability to act autonomously. The rule of law is a morally loaded concept. So, ultimately, positivism fails also in this respect.

## 5. THE ARGUMENT FROM THE SUBJECTS' POINT OF VIEW

In the argument from normativity I established that legal validity of norms depends on satisfaction with a moral requirement: recognition of the autonomy of the members of a community. I therefore showed that, by endorsing the separation thesis as presented by Gardner, positivists commit a

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<sup>189</sup> Raz, n 2, 211.

fundamental mistake. In this section I want to take a critical stance towards non-positivism as expressed by Finnis and by Beyleveld and Brownsword.

When I answered the other wills question I showed that the normative force of law is not determined by its compliance with sound principles of morality. Indeed, by explicitly rejecting Raz's service conception as the basis for the normative force of law, I endorsed the view that legally valid norms can, all things considered, fail to satisfy what morality requires from us. Morality, as I argued, demands that we act on reasons that follow from a conception of human well-being with integrity. Acting in a way which interferes with the effective agency of others is *a priori* immoral. The argument from normativity established that satisfaction with a specific moral requirement, i.e. recognition of the autonomy of the members of a community, is a condition of legal validity. This is the way law cannot fail what morality requires. However, it can fail morally in other ways. I illustrate two senses in which norms can fail what morality requires and still be held legally valid.

The first says that the officials can fail to tell their subjects what they morally ought to do. Indeed, because law makers are not omniscient, at best they can produce good principles and not necessarily good reasons. The second way law can fail morally is by excluding certain members of a political system from the legal community. The resulting picture is that in the same political system we can have a group of individuals for whom it is sensible to talk about legally valid norms, whereas it is senseless to talk about legal validity for others. These two ways law can fail morality are given by considering the effect legal norms have on their subjects. Indeed, if the normative force of law is established by considering the relationship between officials and subjects, the relationship between legal and moral validity has to be understood in the context of this relationship.

### **5.1. How Law Can Fail Morally: Not Telling Subjects what they Morally Ought to Do**

It might be recalled that Finnis' non-positivism is primarily methodological. According to him, a legal theorist can only give an adequate description of law when he understands its impact on the practical reasoning of those that are practically reasonable. The theorist must therefore decide who the practically reasonable person really is. It turns out that this person is the moral person: an individual who acts on reasons that follow from a conception of human well-being with integrity. It follows that the central case of law is determined by what a moral person can decide to do. In Finnis' words:

“If there is a point of view in which legal obligation is treated as presumptively a moral obligation [...], then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist’s description.”<sup>190</sup>

Finnis’ methodology is not satisfactory in two respects. He can be accused of cherry-picking the point of view that most suits a non-positivist theory without giving an adequate explanation for this choice.<sup>191</sup> But more importantly, Finnis is to be criticised as he too quickly concedes to positivism that norms can be legally valid, albeit in a non central case sense, when they do not comply with what morality requires. But this, as I have argued, cannot be the case. To speak about law we have to speak about a community of autonomous individuals. From the recognition of the autonomy of the members follows the need for authoritative norms in order to ensure the continuing existence of the community. But from the recognition of autonomy follows also substantive limitations of what norms can be legally valid. These are indeed moral limitations. It is therefore inconsistent with the communitarian view of law, which I have given evidence that Finnis himself is committed to,<sup>192</sup> that Finnis can accept legal validity of norms, albeit in a non-central case sense, when they prescribe interference with the effective agency of the members of a community.

From the above it follows that we ought not to speak of the central case of law as coinciding with the point of view of the moral person or indeed of the practically reasonable person. Rather, we can only sensibly speak of the law in a community of people capable of practical reasoning. The difference is subtle but from its elucidation follows very important points. Non-positivism cannot succeed if it arbitrarily picks the description of the social phenomena of law in a moral point of view. Indeed, such methodological move drastically weakens the necessary connection that legal validity has with morality, and in particular, with the exercise of autonomy. Once we understand that it is already in the nature of law that it cannot act immorally in an important way (i.e. interfere with effective agency therefore making talk of autonomy senseless), we can no longer embrace Finnis’ methodological commitment as it transforms that necessary moral limitation into a contingent one based on what point of view we adopt.

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<sup>190</sup> Ibid, 15.

<sup>191</sup> See Beyleveld & Brownsword, n 17, 107-108; see also Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001), Chapter 3, for a Razian critique of Finnis’ methodological stance. See also, M.C. Murphy, ‘Defect and Deviance in Natural Law Jurisprudence’ in T. Klatt (ed.), n 102, 48-54.

<sup>192</sup> See text accompanying n 115 above.

If non-positivism is no longer linked to determining legal validity from an arbitrary methodological point of view, we immediately understand that legal and moral obligation do not necessarily coincide. Rather, a special kind of moral obligation, i.e. recognition of autonomy, is a pre-condition for the notion of legal obligation. We already know that recognition of autonomy is only a limited, albeit fundamental, part of what morality requires from us. It follows that if law cannot fail this moral limitation it might quite understandably fail other moral requirements; and it often does so. Let me use the usual example of the Sunday morning church-goer to illustrate my point.

The officials of a community recognise that all their members are autonomous beings and ensure that each member is capable of exercising its autonomy. They however genuinely believe that pursuing a relationship with an extra-human personality will be conducive to the well-being of the entire community. They therefore decree as a norm that all their subjects must go to church every Sunday morning. We know that such a norm has normative force as it flows from officials that recognise and make possible the exercise of autonomy in a community. But does this norm comply with what morality requires? Not necessarily. This decree will be all things considered reasonable (hence morally permitted) only if the extra-human personality the officials promote actually exists and is worthy of devotion. Would it be reasonable to promote the cult of flying carpets and fridges? Obviously not. Would it be reasonable to promote the devotion of one of the monotheistic religions we are acquainted with? Let us leave to one side the fact that a norm which makes mandatory the pursuit of religious practices entirely misses the point of those practices. Such mandatory decree would however only be reasonable if it mandated the devotion of a deistic personality that existed and wanted to be pursued. We doubt that such personalities exist and some philosophers have insisted that gods are the creation of man.<sup>193</sup> If gods are truly the creation of man then devotion of gods is unreasonable and morality would require us not to spend our time in such illusory practice. A mandatory decree in this respect would therefore be immoral. But would it cease to be legal?

If we adopted Finnis' methodology we would say it was a legally valid norm, albeit not in the focal sense. But we know that we do not have to adopt Finnis' methodology as it deprives us of the necessary relationship between law and human autonomy. So we would say it is a valid legal norm albeit, all things considered, not morally permissible or irrational. But this conclusion, which follows from all that I have said, seems to be at odds not only with Finnis' theory but also with that of Beyleveld and Brownsword. After all, did they not say that "A law is a rule which it is Morally

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<sup>193</sup> See for example B. Williams, n 176, chapter 3.

legitimate to posit for attempted enforcement".<sup>194</sup> I accept that my view creates an irresolvable tension with the non-positivism of these authors. It is inevitable because the ethical vision at the heart of these theories of law is different. Once this difference is shown, it will be possible to understand, and indeed it will be necessary to defend, the idea that legal officials can fail through legal norms to tell their subjects what they morally ought to do.

Let us recall the ethical foundation of Beyleveld and Brownsword's non-positivism. I illustrated that they owe much to Gewirth's ethical theory which proclaims that we can determine the content of what morality requires from us from the simple analysis of voluntariness and purposiveness which are at the foundation of agency. I myself relied on this analysis to obtain substantive requirements which make talk of autonomy sensible. However, I refused to acknowledge that the entire scope of morality can be limited to the principles inherent in effective agency. I said that morality is the way we ought to exercise our autonomy. It is the structure of our will, in particular the acknowledgement that all autonomous human beings are engaged in the same enterprise, that imposes limits on what count as good reasons for action. We are all engaged in the pursuit of our well-being through participation in the basic goods. Good reasons for action are thus those that follow from a conception of our well-being which gives equal respect to the basic goods, i.e. a conception of well-being with integrity. As I have said, this does not mean that a good reason for action is one that is motivated by all the basic goods contemporaneously. Simply, a good reason is one which can be said not to contravene any of the basic goods.

This ethical system therefore necessarily builds on Gewirth's insights but does not coincide with it. Indeed, on further analysis, this ethical system might lead us to the assertion that every practical choice we make is a moral choice. In fact, as long as we are autonomous beings and engage in voluntary action, all our actions flow from our conception of well-being. So whether we are deciding what moves to make in a chess match or whether we are considering assassinating our neighbour, we are engaging in a practical choice which can be observed through moral lenses. But this appears paradoxical. It is part of common understanding that morality has to do with important choices and that there is no sense in talking about the morality of playing chess. Indeed Beyleveld and Brownsword build on this common understanding and assert that

"Reasons for action can, of course, be given which are not specifically moral. When a chess player makes a specific move in a game and his reason is to force checkmate, to consolidate his pieces, to

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<sup>194</sup> Beyleveld and Brownsword, n 17, 170.

defend against a winning attack, etc., then this is not a moral reason. [...] In each case the reason is an instrumental reason, a reason which states that the action performed is a means to a specific end.”<sup>195</sup>

But this does not square with what I have said. One has to ask why a certain individual is engaged in playing chess in the first place. The posing of this question reveals that engagement in certain activities is a way to construct our well-being, is a way to instantiate in material and observable circumstances the abstract concepts of basic goods. If this is so, it follows that every exercise of autonomy, including decisions to engage in trivial activities, can be judged by how well they instantiate the basic goods they are pursuing. It also follows that every process of reasoning can be judged from a moral perspective. So we can sensibly ask the following moral questions about a chess game. Will moving the queen in that direction and hence forfeiting the match give you a worthwhile experience of the basic good of play? Would your experience not be better realised by moving the pawn instead and creating the occasion for a checkmate? If the second move will create a more worthwhile experience, why are you not making it? Perhaps, because you do not realise that you can make it? Or perhaps for sake of friendship (another basic good), you wish to forfeit the game and enhance the confidence of your adversary? Trivial choices and activities have moral implications as do important ones. We cannot escape this fact as long as the decision to engage in actions is motivated by a conception of well-being. Trivial and important actions mainly differ in the extent in which they contribute to human well-being. The theory of autonomy I have advanced tells us just that.

The above conclusion might be looked at by some with sceptical eyes. Some might argue that I misunderstand the whole scope of what morality requires. This criticism has two parts. Firstly, it says that morality regulates actions that have an impact on the well-being of others. It seems that the ethical theory I have defended applies even when the actions of an individual have no implications whatsoever for other individuals. Indeed, from the notion that we are engaged in moral action whenever we act voluntarily it follows that voluntary actions which cannot possibly impact on other individuals have moral repercussions. The second part of this criticism builds on the first. It says that once it is established that morality regulates inter-personal activity, any substantive requirements of moral action must be expressed in terms of duties. I have been ambiguous about such terminology. Sometimes I refer to moral obligation (which is commonly used as synonymous for duty), other times I refer to what morality requires from us. Usually I refer to good reasons for action. If both

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<sup>195</sup> Beyleveld and Brownsword, n 17, p 142, footnote 23.

criticisms are merged together they say that morality has to do with duties individuals owe categorically to each other.<sup>196</sup>

The source of these criticisms can be perhaps traced back to the Kantian tradition. In the *Groundwork* Kant expressed the supreme principle of morality in the following terms: “Act in such a way that you treat humanity, whether in your own person or in that of another, always at the same time as an end and never merely as a means”.<sup>197</sup> Gewirth thought he could give more substantive content to this abstract formulation and, by analysing the concept of agency, articulated the supreme principle of morality in the following way: “Act in accord with the generic rights of your recipients as well as yourself”.<sup>198</sup> If the Kantian tradition is right,<sup>199</sup> and morality has to do with duties individuals categorically owe to each other, then I must be wrong in asserting that every voluntary action, even one that does not have repercussions on other individuals, is in effect a moral action. But I do not think I am wrong. Let me explain why.

The moral question has its foundations in human autonomy. We know that it is senseless to attribute moral responsibility to non autonomous beings. It is senseless because they cannot act otherwise as their natural impulses direct them to. It is because autonomous human beings possess a will and are capable of reasoning that human beings have the problem of how they ought to act. This practical ought, however, is not restricted only to concerns towards other autonomous beings. Indeed, it is concerned with all possible courses of actions, which obviously include, but are not restricted to, courses of action that will affect other individuals. So if the moral question has its foundations in human autonomy, its scope must also be that of the exercise of autonomy. Since we can sensibly ask how we ought to act in every course of action that is within our powers, it follows that the entire scope of the exercise of autonomy is subject to the moral question. The Kantian tradition, within which Beyleveld and Brownsword fall given their connection to Gewirth, has confined the moral question to a limited scope, the interpersonal one. The moral permissibility of non-interpersonal actions is then judged on the basis of the permissibility of interpersonal ones.<sup>200</sup>

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<sup>196</sup> I call this a terminological criticism but, as will appear below, it is not an issue confined to the mere explanation of words. Instead, it is a conceptual issue which requires an exploration of the scope and force of moral duties.

<sup>197</sup> Kant, n 148, section III.

<sup>198</sup> Gewirth, n 119, p 139.

<sup>199</sup> I refer here only to Kant and Gewirth. However, the criticism can be derived from a variety of philosophers including Korsgaard, n 152 and T. Nagel, *The Possibility of Altruism* (Paperback edition, Princeton University Press 1978).

<sup>200</sup> This is evident when Gewirth says that agents are allowed to pursue whatever purposes they desire unless these purposes are incompatible with the supreme principle of morality which he labels the PGC. Korsgaard employs the same strategy when she tries to convince us of the moral limitations of actions between humans

But this cannot do. While it is important to ask what we categorically owe each other, this question does not resolve the more global moral question of what we ought to do in this or that situation. So the Kantian tradition has to go back to Socrates' question which asked 'how should one live?'<sup>201</sup> I have defended the idea that one should live on the basis of reasons which flow from a conception of human well-being with integrity.

The above induces me to make a further distinction which will appease the criticism about moral terminology. I said that morality governs any purposeful action, including those that are trivial. Yet, it seems paradoxical to talk about a moral duty to play chess well. I admit the possibility of this paradox. However, the source of the paradox lies in the instinctive concept of morality as confined only to interpersonal relationships. Once this notion of morality is abandoned, as I have advocated it should, we can discover and endorse a distinction which Fuller advanced in his moral philosophy but which has been largely neglected. Fuller opened his *Morality of law* by advocating two views of morality. He said that morality has to be understood as comprising a morality of duty and a morality of aspiration. The second has to do with "the morality of the Good Life, of excellence, of the fullest realisation of human powers."<sup>202</sup> The first "lays down the basic rules without which an ordered society is impossible [...] it does not condemn men for failing to embrace opportunities for the fullest realisation of their powers. Instead, it condemns them for failing to respect the basic requirements of social living."<sup>203</sup> Let me explain how this distinction fits within and resolves the terminological issues concerning duty of an ethical theory based on autonomy.

I have said that morality requires from us to live a life based on reasons which flow from a conception of human well-being with integrity. Disrespect in our actions for any of the basic goods cannot be morally justified. This is therefore the scope of the morality of duty. Unlike what Fuller might seem to suggest by speaking of the morality of duty as setting down "basic rules without which an ordered society is impossible", I do not think that the morality of duty ought to be confined only to inter-personal relationships. I have already explained above why this is so. Yet, if we think about the fact that basic goods are diverse, incommensurable and can be realised in our actions in degrees of excellence, one immediately understands that morality cannot be confined only to what

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and non-humans on the basis of practical identity. She says that we owe moral duties to non-humans on the basis that we can feel their pain and, given that it is a constitutive part of human practical identity to avoid pain, we have a moral duty towards non humans not to inflict gratuitous pain. See Korsgaard, n 152, chapter 4.

<sup>201</sup> Plato, *Republic*, 352D.

<sup>202</sup> Fuller, n 7, p 5.

<sup>203</sup> Fuller, n 7, p 5-6.



ought or ought not to do, hence mere duties, but it expands into the dimension of which purposes one ought to pursue and how one ought to realise these purposes.

This further dimension of morality cannot be expressed in mere terms of duties. One has to take into account the skills, inclinations and powers that nature endows on each individual in enabling him to lead a life in pursuit of well-being. This automatically translates into an aspirational dimension of morality. It also translates into a subjective dimension of morality. Each subject endowed with moral responsibility (i.e. autonomous human being) is capable of specifically human fulfilment in a way that, given his abilities, powers and inclinations, is specifically his. Yet people can fail to realise their potential and to live life at its fullest. We can criticise them accordingly. It would be awkward to say that they have failed their moral duty, in the sense of disrespect for basic goods. Rather, we can say that they have failed the moral aspiration to live life at its fullest and to realise their potential.

If we ultimately wanted to retain talk of morality in terms of duties we could talk about absolute and aspirational duties. Absolute duties coincide with the moral requirement of a conception of well-being with integrity. Aspirational duties coincide with the subjective dimension of human fulfilment.

The differences between the ethical system I defend and that of Beyleveld and Brownsword's explain why, unlike them, I think law can fail morally. We both recognise that law cannot fail its absolute duty to ensure effective agency. But morality is much more than claims to effective agency. Moral claims are present in all voluntary human actions. Legal validity of norms cannot be based on the correct prediction and catering of all possible human actions. At best, legally valid norms aspire to tell their subjects what ought morally to be done in specific circumstances and therefore aim to function as good principles. They aspire, but can fail, to direct subjects to realise their aspirational duties. So the law can fail to act morally when legal norms do not prescribe what we morally ought to do. We already know that officials cannot fail to ensure the effective agency of the members of their community in recognition of their autonomy. This is as much as they cannot fail morally. But the officials can fail to regulate what ought to be done in particular occasions because every autonomous human activity engages complex moral calculations which are inherently subject and circumstances-dependent. The moral duty of the officials is to ensure the effective agency of their subjects. Their moral aspiration is to tell them how they ought to act in this or that scenario.

## **5.2 How Law Can Fail Morally: Not Including Certain Individuals in a Legal Community**

The last section helped us to realise that legally valid norms, i.e. norms possessing normative force in a community of autonomous individuals, can fail to prescribe what morality requires. It seems therefore that the central thesis of contemporary non-positivism has to be discarded. This is only partially true. While law can fail morality, it can only fail in certain ways. Recognition of the autonomy of the members of a legal community is a moral requirement that legally valid norms cannot fail. It is a substantive requirement that necessitates officials to ensure non-interference with the effective agency of the members of a community and to set common standards of behaviour. This is the special way the law cannot fail morality. In this section I want to illustrate an important way in which law can fail morally. I will defend the notion that a legal community does not necessarily coincide with a political system. In the same political system there might exist a group of subjects for whom the norms of the officials possess normative force, hence are legally valid. However, in the same political system, another group of individuals might exist for whom the mediating role of the officials cannot be said to be performed. For this second group, given that the officials' norms cannot possess normative force, one cannot say that a system of legally valid norms applies to them.

The above appears, at best, as unduly mysterious. How can it be that in a political system one can speak of the same group of norms as being at the same time both legally valid and legally invalid? Does this not reveal a great confusion of thought and, in the end, a complete failure of the theory of legal validity I subscribe to? After all, disagreements about the separation thesis are always expressed in terms of legal validity or invalidity of norms. No one has advanced an absurd-sounding theory of relative legal validity. This is conceded: a theory that reveals that legal validity is a relative concept departs from conventional discourse in jurisprudence. However, as I will show, it is not incorrect.

Let me use an historical political system to prove my point. The Nazi regime has been used by positivists as conclusive proof of the separation of legal and moral validity. In part 1 I said that this cannot do. It cannot do because positivists do not offer an analysis of the ways in which the Nazi regime used the machinery of the law to fulfil its wicked purposes. Furthermore, if it is true that the law can fail morally in some ways, then it appears that generally pointing out to the Nazi regime cannot be used as proof of anything. One has to pin-point the ways norms enacted by the Nazi regime failed morality. I will very briefly illustrate the fact that the wicked purposes of the Nazi regime were not compatible with the machinery of the law. This substantiates once more the conclusion reached in part 1 of this thesis. However, whether or not the law was a suitable instrument for the Nazi regime, it is uncontroversial that the norms enacted by the Nazi officials

could not possess normative force for a series of individuals that were under the political control of the regime. The regime targeted the effective agency of Jews, Roma, non-Jewish Poles, Jehovah Witnesses, political dissidents, mentally and physically disabled individuals and others. Speaking of legally valid Nazi norms for this group of individuals is as senseless as speaking of legally valid norms addressed to a herd destined to the slaughter-house.

Consider the following measures enacted by the Nazi regime. The *Law for the Restoration of the Professional Civil Service*<sup>204</sup> was aimed at purifying the civil service from non-Aryans and political opponents of the regime through a compulsory retirement scheme. Along similar lines, the *Law Against the Overcrowding of German Schools and Institutions of Higher Learning*<sup>205</sup> limited non-Aryan participation in education. Other Nazi enactments excluded Jews from cultural and entertainment enterprises,<sup>206</sup> inheritance of agricultural lands<sup>207</sup> and from editorial work in the press.<sup>208</sup> The two infamous Nuremberg Laws respectively deprived Jews of full German citizenship and prohibited marital and extra-marital intercourse between Germans and Jews.<sup>209</sup> Without doubts these Nazi measures contravened any reasonable conception of equality. Now consider art 109 of the Weimar Constitution which was in force at the time of these Nazi measures. In clear terms it said: "All Germans are equal in front of the law."<sup>210</sup> One then wonders how these discriminatory measures were made constitutionally permissible. The answer lies in the *Enabling Act 1933*. I set out the relevant sections.

"The Reichstag [the National Parliament] has enacted the following law, which is hereby proclaimed with the assent of the Reichsrat [the Parliament representing the German states], it having been established that the requirements for a constitutional amendment have been fulfilled.

Article 1: In addition to the procedure prescribed by the constitution, laws of the Reich may also be enacted by the government of the Reich. [...]

Article 2: Laws enacted by the government of the Reich may deviate from the constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remain undisturbed.

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<sup>204</sup> 7 April 1933.

<sup>205</sup> 25 April 1933.

<sup>206</sup> *The Reich Culture Ministry Law*, 29 September 1933.

<sup>207</sup> *The Reich Entailed Farm Law*, 29 September 1933.

<sup>208</sup> *The National Press Law*, 4 October 1933.

<sup>209</sup> *Reicht Citizenship Law and the Law for the Protection of German Blood and Honour*, 15 September 1935.

<sup>210</sup> *The Reich Constitution* of August 11th 1919 (Weimar Constitution).

Article 3: Laws enacted by the Reich government shall be issued by the Chancellor and announced in the Reich Gazette. [...]"

It was thanks to this Act, in particular art 2, that the Nazi regime was authorised to enact measures which were unconstitutional because discriminatory. Thanks to the analysis undertaken in part 1 of this thesis, we know that the *Enabling Act* was a measure which violated the requirement of legal normativity. In fact, it is clear that the Act possessed negative dependent normative value which led to an explicit derogation from constitutional rights.<sup>211</sup> This Act, which had no normative value of its own, permitted the ostracism of the individuals persecuted by the regime by not making available to them their legal right to non discrimination. If this is true, the persecutory Nazi measures were not compatible with legal normativity and therefore were systemically invalid. As for the concentration camps and the horrors of the holocaust, we know that these were not legally authorised and formed part of a series of extra-legal measures under the direction of the SS.<sup>212</sup> All this shows, once again, that respect for the rule of law is not compatible with substantive injustice.

The brief but significant analysis undertaken above was necessary in order to prevent a criticism which my thesis about the moral fallibility of law might make me vulnerable to. I have subscribed to, and I am in the process of refining, the thesis that law is morally fallible in certain ways. This thesis should not be interpreted to mean that legal normativity (or the rule of law) is compatible with substantive injustice. I have spent the entirety of part 1 defending that incompatibility. The moral fallibility thesis which I am now defending relates to the relationship between a legal community and a political system. The individuals the Nazi persecuted, through the use of systemically legally invalid norms and through extra-legal means, were members of the Nazi political system. However, they were not members of the legal community existing in Nazi Germany. In fact, once the Nazi officials had started their campaign of persecution and extermination, their norms could not have normative force for these minorities. These minorities, to make it clear, were not part of the Fullerian legal community where officials and subjects are engaged in a common enterprise with a requirement of reciprocity. Why were these minorities not part of the legal community? Simply because, by aiming to their complete annihilation, the Nazi officials did not recognise and protect the exercise of their autonomy. The SS, under authorisation by the Nazi elite, enslaved and exterminated these minorities and therefore interfered with their effective agency. Because recognition of autonomy, with its pre-condition of effective agency, is the basis of the normative force of law it is senseless to speak about legally valid norms in relation to these minorities.

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<sup>211</sup> For the concept of negative dependent normative value see p 17.

<sup>212</sup> K. Rundle, n 94, 75-76.

While the Nazi political system did not recognise the autonomy of the persecuted minorities, it certainly recognised the autonomy of the majority and ensured their effective agency. Indeed, the Nazi propaganda against the ethnic minorities, in particular against the Jews, was built on the alleged dangerousness of these minorities for the survival and flourishing of the Aryan majority.<sup>213</sup> We know that this was nonsense. Yet, clearly, between Nazi officials and the majority of the subjects there was a relationship based on a Fullerian requirement of reciprocity. For the majority, in sum, the norms enacted by the Nazi officials had normative force.

Appreciating that a political system and a legal community do not coincide is crucial for our understanding of the moral fallibility of law. A legal community might fail to incorporate in its membership individuals that are part of the political system in which it exists. This is a moral failure. As I have argued, morality requires that we recognise the autonomy of others and therefore demands that we should not interfere with their effective agency. The Nazi legal community failed, for several individuals, this moral duty. Yet, it retained its legal character because it respected that moral duty for others. Further reflection reveals that a legal community which fails to incorporate in its membership a minority will also fail to respect the rule of law. Indeed, if the moral quality of the rule of law lies in the equality of individuals and the equality of these individuals further lies in the equal possession of autonomy, non recognition of autonomy will result in failure to comply with the rule of law. This sounds complex but is in fact very simple. Consider what I have already said. The Nazi officials did not recognise the autonomy of the minorities under their political control. They wanted to use the law as an instrument of persecution. They could not as the German system of norms fulfilled its role of enabling the autonomy of each individual. Indeed the Weimar Constitution prohibited discrimination. The Nazi therefore had to violate the rule of law, by employing the ostracism strategy, in order to achieve some of their persecutory purposes.

Legal philosophers have been concerned for far too long as to whether there was law in Nazi Germany.<sup>214</sup> They have also been asking the wrong question. Without doubts, given the discussion above, there was law in Nazi Germany. The relevant question that ought to have been asked is the following: for whom were Nazi norms legally valid? The answer, as illustrated above, is that there was a system of legally valid norms for those subjects whose effective agency was not interfered with by the Nazi officials.

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<sup>213</sup> Hitler's *Mein Kampf* was built on this thesis.

<sup>214</sup> See for example the Hart/Fuller debate in HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] Harvard Law Review 593, IV. L. Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart' [1958] Harvard Law Review 630. Dworkin, n 4, 101-104.

The above conclusion brings me to endorse the view that the idea of legal validity is a relative or subjects-dependent concept. Once we understand that a political and a legal system do not coincide, non-positivists no longer need to be embarrassed by the deployment of the Nazi political system as a conclusive example of the viability of the separation thesis. They need not be embarrassed in any case because, as I have shown, the discriminatory Nazi measures were systemically invalid. Yet, my conclusion might be the source of some embarrassment as it departs from the canonical understanding of law as either existing or non-existing. Fuller spent some time trying to install in legal discourse the idea that legality can be a matter of degree. He was largely unsuccessful and, pushed by Dworkin, modified his account by saying that respect for the value of legality can be a matter of degree.<sup>215</sup> I have endorsed this approach in my discussion of the requirement of legal normativity. However, any such compromise in discussing the notion of legal validity is to be resisted. Talk of legal validity is senseless without the establishment of the grounds of the normative force of law. Once we understand that the normative force of law cannot be explained through detached statements, empty claims or mere beliefs but is to be found in the recognition of autonomy, all political relationships can be judged on the basis of that criterion. It follows that the absence of that criterion in certain instantiations of political relationships, e.g. the relationship between Nazi officials and the persecuted minority, signifies that we cannot classify that political instantiation as a legal one.

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<sup>215</sup> Fuller, n 7, pp 198-200. Dworkin's criticism can be found in R. Dworkin, 'Philosophy, Morality, and Law. Observations Prompted by Professor Fuller's Novel Claim' [1965] *University of Pennsylvania Law Review* 668, 677-678.

## CONCLUSION: MAKING SENSE OF THE DISAGREEMENTS

I have defended the idea that legal validity is intrinsically linked to the idea of human autonomy. This is, on close inspection, not a surprising claim. Legal norms aim to guide human behaviour through authority. However, the idea of authority lies in the idea of autonomy. Why would we demand that others behave the way we prescribe if they could not behave otherwise? It is the specifically human ability to act autonomously that makes possible acting otherwise. Therefore the idea of autonomy is conceptually prior to that of authority. If law is necessarily authoritative it follows that it must exist in a community of autonomous individuals. Talk of autonomy makes sense only when individuals enjoy effective agency, when they are in the position to pursue a plan of life based on a conception of well-being. So effective agency and autonomy are what make the authoritative nature of law possible and necessary.

From the analysis of the concept of autonomy and its relationship with the authoritative nature of law one understands that law is morally fallible, but only in certain ways. If this is true it means that the separation thesis is not only false but also misleading. Only when one articulates an ethical theory based on human autonomy is one capable of understanding the relationship between moral and legal validity. Positivists like Hart fail to articulate that ethical theory and suppose that commitment to moral agnosticism is compatible with the quest to ascertain the relationship between law and morality. But how can one understand how law and morality are related if one does not know what morality requires? Any defence of the separation thesis that proceeds on ethical agnosticism is doomed to fail. It necessarily fails because it cannot understand the necessary relationship between morality and autonomy and between autonomy and law.

Other positivists like Raz who have engaged in their writings on ethical problems fail to connect the threads. If law's claim to authority is a moral claim that itself puts one in moral territory. However, the law cannot merely claim authority. It must be capable of having it if it claims it. When one understands that the law can have the authority it claims only when it makes autonomy possible in a community, the idea of legal validity reveals itself as inextricably linked to morality.

The moral link between law and autonomy is of a specific kind. Law does not collapse into morality. Rather, a special moral duty is a precondition of legality. The idea of the rule of law and the idea of legal validity both reveal themselves as grounded in the moral duty of non-interference with effective agency and in the recognition of autonomy. This is the specific way the law cannot be morally fallible. Non-positivists do not recognise that the moral fallibility of law is limited. Because they aim to ground the normative force of law in morality they commit a mistake by excess. The fact

that the normative force of law is indeed to be grounded in morality does not mean that the law is not morally fallible. Morality has a wide scope. Its scope coincides with the scope of the exercise of autonomy. Within this wide scope lays the more limited domain of the moral duty of recognition of autonomy of individuals, which is specific to the law. It follows that while the law must abide within the moral scope of recognition of autonomy it can transgress the other requirements of morality. And it often does.

The above reveals and shatters the source of the disagreements about the separation thesis. Ultimately, the source lies in the thesis itself. Legal validity depends on a specific moral duty and not more. Because the separation thesis is both false and true in different respects it is misleading. Therefore, it ought to be abandoned. The relevant question, if any, which positivists and non-positivists ought to disagree about is the specific way in which legal and moral validity are connected. Surely, they are connected. I have advanced the way in which they are. The idea of human autonomy is the necessary connection.



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