

2. Law, Democracy, and the Rule of Law

Mireille Hildebrandt

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Mehretu, Julie (b. 1970): 'Untitled from Landscape Allegories' 2004.

One from a series of seven etching, engraving, drypoint, and aquatints, plate: 11 13/16 x 15 7/8" (30 x 40.3 cm); sheet: 19 x 21 3/4" (48.3 x 55.2 cm). Publisher: Ridinghouse Editions, London, The Project Gallery, New York. Printer: Burnet Editions, New York. Edition: 35. Anna Marie and Robert F. Shapiro Fund, Miranda Kaiser Fund, Marnie Pillsbury Fund, and Patricia P. Irgens Larsen Foundation Fund. Acc. no.: 427.2004.7. New York, Museum of Modern Art (MoMA). © 2019. Digital image, The Museum of Modern Art, New York/Scala, Florence

Mehretu's work is deeply layered, demonstrating that a global picture may not give you the information you need to understand local realities. Simultaneously, remaining at the level of the local is myopic, missing out on the interactions between different levels of engagement. Law is both systematic and casuistic; how it is organised makes a real difference, both at the level of individuals and at the various levels of societal institutions.

Some people believe that law is a set of orders backed by threats, but this raises issues with legal rules that determine when a marriage is valid. Nobody is ordered to

marry, there are no threats when you don't. It is just that you cannot get married if you don't follow the rules. Others like to think of it as a bran-tub of social norms, but many social norms are not legal norms. Shaking hands may be a social norm, but in principle it is not required by law. Many assume that law is a system of legal rules, but what does this say for the principles that ground these rules and the policies that refine them? If these principles are not law, and these policies not under the rule of law, what are they? Still others may claim that law is simply a subset of moral rules (those with teeth), but that would imply morality in driving either right or left.

This chapter will squarely face the question of law's 'mode of existence', by asking what law does – and how. This means checking on the sources of law, the nature of legal reasoning and the question of the relationship between law, democracy and the Rule of Law.

2.1 What is Law?

'Trying to define law is like trying to hammer a pudding to the wall', wrote legal historian Uwe Wesel. This does not mean that we have no idea what law could be, but rather that our knowledge is implied or tacit knowledge. Such knowledge may lose part of its meaning when translated into the straitjacket of explicit or positive knowledge. In the end, the proof of the pudding is in the eating: 'the life of the law has not been logic but experience' (as Supreme Court justice Oliver Wendell Holmes wrote).

The fluidity of the legal pudding is also the result of the dynamics and complexity of the environment that modern positive law interacts with. This may be a feature, rather than a bug, as the need for iterant interpretation that is core to written law requires flexibility in the face of changing circumstances. Legal certainty, one of the core values of the law, is not about fixating the meaning of legal norms once and for all. Instead, legal certainty targets the delicate balance between stable expectations and the ability to reconfigure or contest them.

To prevent us from nailing the legal pudding to the wall (a rather unproductive project), legal philosopher Gustav Radbruch defined law in terms of three constitutive values: (1) legal certainty, (2) justice, and (3), instrumentality. To qualify as law, a normative framework must aim to sustain, develop and balance these values – even though they may be incompatible in concrete cases. This requires a combination of analytical thinking, well developed argumentation and a keen acuity as to the

implications of interpreting the law one way or another. We will return to this point at the end of this chapter.

2.1.1 Sources of law

A source may be a spa that provides for refreshing mineral water, an archive to be used for historical research, a witness queried by a journalist, or an encyclopaedia with information about whatever subject or topic. More generally, a source of knowledge refers to where or how we can find the answer to questions such as: what is the capital of France?, where can I find good wine?, what is the structure of DNA?

In law, the term ‘source of law’ has a very specific meaning. It refers to both more and less than a source of knowledge about the law, as the sources of law are constitutive of law. A source of law (1) provides legal norms with authority based on their origin, and (2), makes legal norms binding in their effect. First, it refers to the origin or provenance of valid legal norms, that can only be derived from specific sources that thereby give authority to legal norms. For instance, a newspaper article with information about the law is not a source of law, and neither is a Wikipedia article or the website of a law firm. To ensure legal certainty, only a limited set of sources ‘count’ as sources of law: international treaties, legislation, case law, doctrine, fundamental principles and customary law. Only these sources provide legal norms with authority and make them binding in a specific jurisdiction (either national, international or supranational).

1. **Treaties** bind the states that have signed and ratified them. They constitute law between those states and – depending on the type of treaty – they may also bind citizens and other legal subjects within those states. In chapter 6 we will look into the binding effects of treaties in more detail.
2. **Legislation** (including the **Constitution**) imposes general legal norms on those that share jurisdiction (e.g. within a national state). These norms enact prohibitions and obligations, including obligations not to interfere and rights to such non-interference or rights to specific actions by others. Legislation is binding for all those subject to its jurisdiction. A written Constitution has a special status, as it normally defines the powers within the state (legislative, public administration, courts; the relationships between e.g. the national level and sub-national levels, such as a federation and the states, or the central government and provinces and municipalities). Often the Constitution also contains a set of constitutional rights that aim to protect citizens against the state, comparable to human rights and fundamental rights.

3. **Case Law** is the result of judgments made by courts. These judgments are simultaneously the result of applying binding legal norms, and a source of legal norms. This is the case because legal norms must be interpreted in the light of the case at hand, which may differ from prior cases – requiring a new interpretation of existing law.
4. **Doctrine** is a body of texts published by lawyers of standing. These texts, restatements, treatises, articles or monographs, develop a specific interpretation of a part of the legal framework. This is done either to provide a systematic introduction to and overview of relevant legislation and case law, or to develop a new line of argument with regard to specific issues (e.g. breach of contract in the case of eCommerce, presumption of innocence with regard to predictive policing, consent in data protection law).
5. **Fundamental principles of law** are the principles that are implied in other legal sources, as they inform the applicability and the application of legal norms. They do not function as ‘rules’ that either apply or do not apply, but as an implied philosophy of law that must be taken seriously when deciding the law. One can think of the principle that equal cases must be treated equally and unequal cases must be treated unequally to the extent that they are unequal. Or of the principle of fair play in administrative law, meaning that government agencies should be impartial when deciding on policy and decision-making.
6. **Customary law** is at stake in the absence of written law, when legal subjects (often states in the realm of international law) have acted in a consistent way thus raising legitimate expectations as to how they consider themselves bound. In principle it requires *usus* (a habit of acting in one way rather than another) and *opinio necessitatas* (a shared opinion that this habit is actually based on a duty to act in such a way). Some states do not have a written **Constitution**, though the powers of the state are nevertheless defined and restricted (as with written Constitutions). In that case the Constitution is part of unwritten customary law.

2.1.2 What law does

2.1.2.1 Legal effect

If sources of law are not merely containers of information ‘about’ the law, what are they? What does it mean to say that law actually ‘does’ things? Let us return to a civil servant declaring a man and a woman ‘man and wife’ and add examples such as a

court sentencing a defendant to 5 years of imprisonment, or a legislature enacting a speed limit. In all these cases 'the law' attributes 'legal effect' based on specific conditions being fulfilled. When the law speaks (by mouth of the administration, the court or the legislature) it actually performs what it says.

This is a prime example of speech act theory, that discriminates 'locutionary speech acts' (Tim and Paula are married) from 'illocutionary speech acts' (I declare Tim and Paula to be lawfully married). A locutionary speech act is propositional or descriptive (a is p), whereas an illocutionary speech act is performative since it achieves what it declares (I declare a to be p). The 'achievement' that is 'performed' actually consists of what lawyers call 'legal effect': if all legal conditions for a valid marriage are fulfilled, including the declaration by the civil servant or the registration of the marriage in the civil registry, then the legal effects that positive law attributes to a marriage apply. The precise legal effects will depend on national law. For instance, whether or not a marriage entails a community of property by default, differs depending on national law. Dutch law – until 2018 – had 'community of property' as a default, whereas across the systems of the UK there is a 'separate property system' by default. In both cases one can sign a prenuptial agreement with a notary public to change the default. In the case of a community of property, the legal effect consists in both partners being liable for debts incurred by the other, meaning their assets can be seized to compensate for debts of their spouse.

The difference between moral norms, habits on the one hand and legal norms on the other, resides in the specificity of legal effect that is not inherent in moral norms or habits. Legal effect is not contingent upon the moral inclinations of the person addressed but takes effect depending on the stipulations of positive law. In that sense law is not 'soft', and the study of law is not a 'soft science'. The law has real effects that make a difference in the real world. If murder is defined one way, you may go free, if defined slightly differently, you may go to jail for 10 years. In law, definitions have legal effect, they make a difference that makes a difference. The reach of such definitions is determined by whoever gets to define the meaning of a norm. Under the Rule of Law the legislature determines the law but the court has the final say on the meaning of the law. This does not imply that definitions are easy.

In 2012 the US Supreme Court decided the case of *US v Jones*.¹ The case was about the lawfulness of GPS tracking of a car by the police, after the warrant expired. The question was whether the evidence gathered thanks to this tracking was lawfully obtained or had to be excluded as illegally obtained. The defendant claimed that GPS

tracking without a valid warrant violates the Fourth Amendment of the US Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This amendment basically grants people (1) a right to be secure against unreasonable searches and seizures, (2) meaning that searches and seizures require a specified warrant, which can only be granted in case of (3) probable cause. Up until this decision, it was unclear whether the Bill of Rights prohibits GPS tracking unless a warrant has been given. Clearly, when the Bill of Rights was enacted in 1791, GPS tracking did not exist and no such thing was foreseen by its authors. The Supreme Court had to decide whether GPS tracking nevertheless constitutes a search in the sense of the Fourth Amendment, which is unreasonable without a valid warrant.

The Court unanimously voted that GPS tracking was indeed a violation of the Fourth Amendment, with the effect that any evidence obtained based on such tracking could not be used. Three types of Opinion can be written by Supreme Court judges to explain their position with respect to a judgment: (1) the Opinion of the Court, explaining the reasoning behind the decision (2) a Concurring Opinion, explaining the same decision based on another reasoning and (3) a dissenting Opinion, explaining the reasons for dissenting with the majority about the judgment. Since the Court was unanimous in its verdict that GPS tracking constitutes a violation of the Fourth Amendment, there was no dissenting Opinion. However, next to the Opinion of the Court, a concurring Opinion was written, endorsing a different underpinning for the same decision.

The Opinion of the Court, written by Justice Scalia, describes the privacy violation in terms of a physical intrusion upon the property of the defendant (the car), relating this to the tort of trespass. What matters here is the violation of a property right. The Concurring Opinion of Justice Sotomayor describes the privacy breach in terms of a violation of the reasonable expectation of privacy, which is directly related to the mobility pattern that can be derived from the location data collected by the GPS tracker. Though both Opinions reach the same conclusion and thus underlie the same decision, the implication for new cases will be different. Whereas the defendant may not care about the reasoning, as long as the evidence is excluded, lawyers will be more interested in the reasoning than the outcome. To the extent that future cases are

similar to the case at hand, the reasons given in the Opinion of the Court will determine their outcome. In fact, a lawyer will even be interested in the argumentation of a dissenting opinion, because these arguments provide reasons that may be relevant in future case law. This is because the Supreme Court may decide to overrule its own previous line of argument, following the argumentation of a dissenter (in previous case law). The reasoning of Justice Scalia has a limited reach for other cases, because it seems to require physical trespass upon the property of another. The reasoning of Justice Sotomayor has a broader scope, as it does not depend on such trespass, and instead considers the far-reaching consequences of mobility profiles for the legitimate expectations of privacy. This reasoning could also uproot the so-called ‘third-party doctrine’ that has severely restricted the right to privacy in the US, and will be discussed briefly in chapter 7.

The legal effect of this judgment is far reaching but nevertheless subtle. First, the decision clarifies that the police need a warrant to place a GPS tracker under a car. This has far reaching consequences for the practice of policing and obviously for the protection of the privacy of US citizens. Second, if the reasoning of the Concurring Opinion gains traction in subsequent Supreme Court decisions, future cases may offer more effective protection in the online world.²

In 2014, the Court of Justice of the European Union (CJEU) decided a case that questioned the validity of the Data Retention Directive 2006/24/EC.³ This Directive aims to harmonise the law of the member states (MSs) of the EU, with regard to the retention of telecom data by telco providers. The goal is to ensure that such data remain available for police investigation of serious crime and terrorism. The Directive only concerns metadata, such as traffic data, time-stamped location data, and identification data; it does not require the retention of the content. The Court notes that such data provides detailed knowledge of a person’s whereabouts and part of their relational network, thus enabling very precise insights in a person’s private life. The Court concludes that such retention interferes with the fundamental rights to privacy and data protection, as formulated in the Charter of Fundamental Rights of the European Union (CFREU):

Article 7 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8 Protection of personal data

Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.

Notably, the Court considers that not being informed of such interferences will generate a feeling of being constantly surveilled. The fundamental rights of privacy and data protection, however, are not absolute in the sense of having unlimited application. Often, these rights will have to compete with other fundamental rights (for instance, freedom of expression), or with legitimate private and public interests. This requires a delicate and well-argued balancing act, as it results in the limitation of a fundamental right. Art. 52 of the CFREU stipulates the scope of lawful limitations:

Article 52 Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Court finds that the interference does not adversely affect the essence of the rights, because they do not concern the content. It also finds that in itself, retention to make metadata available for law enforcement is an objective of general interest. However, the Court considers the measures as enacted in the Data Retention Directive to be disproportional, i.e. appropriate, but not sufficiently circumscribed to ensure that the interference is actually limited to what is strictly necessary: the scope of the retention measures is undifferentiated, there are no limitations or exceptions; no objective criteria have been stipulated or required to prevent data from being used for anything but the most serious offences; the retention period does not differentiate between categories of data; and, finally, the Court observes that storage outside the EU is not prohibited (which reminds us that this Judgment was decided in the aftermath of the Snowden revelations).

The final verdict of the CJEU declared the Data Retention Directive invalid, due to a violation of arts. 7 and 8 of the CFREU. This had sweeping consequences, because it

meant that the national laws of the MSs of the EU that were based on the Directive might therefore be unlawful, if they shared the shortcomings of the Directive.

Both examples show the complexity of legal issues, the prominent role of legislation as well as courts, and the crucial importance of interpretation and contestation. They also show the performative nature of legal norms as they attribute legal effect and potentially transform the world we share.

2.1.2.2 Effective and practical individual rights

The concept of **rights** is an essentially contested concept, as are most of the terms that ground the generative nature of societal intercourse. Some folk may use the term in a loose way, geared more to moral claims (I have a right to hack into your system if you don't keep it properly secured) than to the performative language of legal rights.

A legal right is a very special 'thing', providing a legal subject with specified powers to act or not to act in relation to others, or the liberty to ensure that others will refrain from interfering with the object of their right. Though we may intuitively think we know what rights are, attempts to define or analyse them usually end up in complicated framings that create more problems than they solve. One such attempt is **Hohfeld's typology**, which dissects the language of rights, claiming that 'things' like property rights are in point of fact bundles of claims, liberties, powers and immunities:

1. One can have a **claim right** against another person that they act in a specific way, which correlates with that other person's **duty** to act that way (I sell you a book against a specified price and have a claim right to you paying the price; you have a duty to transfer the property of the book to me).
2. One can have a **privilege** (liberty) against another person that you have the freedom to act in a specified way, which correlates with that other person having **no claim** that one does not act that way (if I own a book I am free to dispose of it and no other person can claim that I cannot throw it away).
3. One can have **power** (authority, competence) over another person to act in a specified way, which correlates with that other person having **a liability** to act as specified (if I am an employer I can require my employees to perform specified tasks that are part of the job; they are liable to carry out those tasks).
4. One can have an **immunity** against another person with regard to specified actions, which correlates with that other person **not having the authority** to disallow such actions (if I am an employee I have an immunity against my employer requiring me

to engage in improper or unlawful behavior; the employer lacks the authority to make me do this).

The owner of a house has a claim right against the person who rents the house, a liberty against anybody trespassing, authority over the broker who is engaged to sell the house and an immunity against a neighbour asking that they grow a specific type of tree in their garden.

All this is very interesting, though I am not sure the scheme solves the problems we face in real life. For instance, what if the neighbour claims that the trees you grow take away all the light in their kitchen? Do you have an immunity against their right that you cut the trees, or would invoking such immunity qualify as 'abuse of right'? Also, many authors detected inconsistencies, resulting in a lot of discussion in Hohfeldian terms that often have another meaning in law. For instance, in tort law the term liability refers to the fact that a tortfeasor is legally responsible for the damage caused, resulting in a duty to pay damages. In Hohfeld's framework the term has another meaning, as it correlates with a competence rather than with a claim right. We shall therefore not use Hohfeld's terminology in this work, other than to create awareness that rights and obligations have different meanings, depending on what legal effect the law stipulates for them.

What Hohfeld nevertheless demonstrates can be summarised as:

1. rights always play out in **relationships between legal subjects**, they are based on:

- a **claim right** of a legal subject against one or more legal subjects (such as a property right, or the right to performance of a contract, the right to have one's privacy respected by the government), or
- a **competence** of a legal subject with regard to one or more legal subjects (such as the competence of the owner of a good to dispose of one's property as one wishes, the competence of the legislature to enact legislation);

1. these rights **necessarily correspond with:**

- a **duty** for another legal subject to act in a specified way in relation to the rightholder, or
- the **lack of a right** for another legal subject in relation to the rightholder.

Perhaps more importantly, Hohfeld pays little attention to:

- the difference between, on the one hand, rights that can be invoked **against all**, such as a property right, (also called rights *erga omnes*, *ad rem*, or **absolute rights**), and, on the other hand, rights that can only be invoked **against specified others**, such as one's contracting party (also called *ad personam*, or **relative rights**), (see section 3.1.1);
- the difference between, on the one hand, a right that one or more others **act** in a specified way, such as the right to be paid compensation, and, on the other hand, a right that others **refrain from interfering** with a specified legal object (one's property or one's fundamental right); the latter right is often called a liberty or a liberty right;
- the difference, on the one hand, between rights of **private parties** (natural persons or legal persons) **based on private law**, and, on the other hand, the competences of **public authorities** to enact rules that everyone should follow, to adjudicate and to decide requests **based on public law** (legislature, courts, public administration, police, regulations).

It is crucial to take note of the fact that individual rights that can be enforced against others are a **recent invention** (attributed to Hugo Grotius in the 16th century), not a natural attribute of either human beings or human society. For such legal rights to be 'practical and effective' a system of institutions must be developed and sustained that ensures that such rights are upheld against the law of the jungle and against the survival of the fittest. To safeguard rights against arbitrary power we need rules, and to protect rules against arbitrary power we need a **rule of law** instead of a **rule by (means of) law**.

Competences are legal powers that enable a legal subject to lawfully act in a way that **impacts the legal status of others**.⁴ For instance, the owner of a good has the legal power to transfer the property; a legislature has the competence to enact binding legislation; a court has the competence to authoritatively decide cases, public administration may have competence to take decisions on building permits, social security grants, and tax applications. **Competences are attributed and limited by law** (whether written or unwritten).

Individual rights thus depend on the institution of the Rule of Law, that is:

- a distribution of public competences by way of a constitutional system of checks and balances, and
- practical and effective fundamental rights whose enforcement is disentangled from arbitrary decision-making by the government.

This will be further discussed in section 2.2 and throughout this book, notably when analysing the case law of the highest European courts.

2.1.3 Legal reasoning

If we understand law in terms of legal conditions and legal effect, the prominence of interpretation and argumentation becomes clear. This is connected with the possibility of contestation and the need for justification.

Legal reasoning is not a matter of method, but one of justification. It is not merely about heuristics but about legitimisation. One could say that ‘solving’ a legal problem is first of all a matter of heuristics, of figuring out potential solutions. This will entail establishing the relevant facts (Peter hit Paula, who died), identifying applicable legal norms (e.g. the criminal offence of negligent death, manslaughter or murder), interpreting the facts in light of the norms (what if Paula is a cow, are the facts still relevant?) and interpreting the norms in light of the facts (what if Paula is a dangerous criminal who was on the verge of killing Peter?). After establishing and interpreting the facts in light of the norms and vice versa, a conclusion will present itself – based on the fact that if specific legal conditions apply, a specific legal effect will be attributed. Alternative solutions will also present themselves, as both the facts and the norms may be interpreted differently and the relevance or completeness of the facts as well as the identification of the applicable norm may be up for debate. Sometimes, different norms with contradictory consequences are applicable, requiring a higher-level decision on the priority of one over the other.

A crucial point, however, is whether a solution can be justified based on law. This is one of the pivotal functions of the law: to reign in arbitrary decisions based on prejudice or on the whimsical preferences of individual judges. The need to justify a decision constrains the ‘solution space’. Justification thus affects the heuristics; it will generate self-censure as the judge knows she will have to justify her decision in legal terms. This justification can be portrayed as a syllogism:

Major: If a then b (legal norm)

Minor: a is the case (facts)

Conclusion: b (legal effect)

This scheme raises a number of questions that are best framed in terms of legal conditions and legal effect. As to the applicable legal conditions, the first question is which legal norm is relevant and how it relates to other relevant legal norms. Should the public prosecutor stick to murder or bank on manslaughter? To answer that question, the norms must be analysed in terms of the conditions they contain, e.g. death of the victim, causation by an act or omission of the defendant, intent, and potential justification or excuse. The next question is whether these conditions are fulfilled, which requires an investigation of the facts, for instance asking which actions have been identified, which are missing, and which are relevant for the case at hand. These facts are historical events that must be reconstructed based on evidence such as witnesses, documents, forensic materials and reporting, including inferences based on the available evidence, context and common sense. The law of criminal procedure has strict requirements for what counts as lawful evidence (e.g. the police need a warrant for invasive investigation measures), and for the level of certainty that counts as proof that the offence has indeed taken place as charged. This means that the second step (the minor) entails interpreting the facts in light of the relevant norm, while interpreting the relevant norm in terms of the facts. This is a delicate operation that must be undertaken with great acuity, making sure that judgment is suspended until proof can be established beyond reasonable doubt. Note that we are dealing with an example of criminal law, whereas the law of evidence and the burden of proof may differ in private law and administrative law. After deciding that the legal conditions apply, their legal effect must be established, which will be the final step in the 'solution' of a case. This will again demand interpretation. Criminal offences are usually formulated in terms of a maximum punishment. This means that a court must weigh the seriousness of the offense and the culpability of the offender, taking into account numerous circumstances, before imposing a sanction. The fundamental legal principles of equality, fairness and proportionality will require that similar circumstances will result in similar punishment, so the court will have to develop and sustain a policy to avoid arbitrary sentencing. This entails that the choice of punishment must be motivated.

A legal decision by a court and its anticipation by lawyers and citizens thus requires a legal reasoning that explains and justifies the decision as lawful. This involves both more and less than logic, as the ambiguity of human language is part of the protection that law offers. Application of legal conditions and legal effect is not a mechanistic affair. That is why legal reasoning is a matter of argumentation rather than logic, built on experience, expertise and a salient acuity as to the many layers of interpretation

that constitute legal judgment. Once judgment is given, legal effect is operational, based on the performative nature of legal decisions: if the accused is acquitted, she can legally ward off any punitive measures; if she is convicted, she can be imprisoned or fined accordingly.

The study of law is the study of legal conditions and legal effect. This entails an in-depth understanding of the sources of law and the arguments and argumentation available for the justification of legal decision-making. In a sense, the study of law is about anticipating what a court will decide if confronted with the case at hand. As Oliver Wendell Holmes wrote: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’. What matters, however, is not merely the decision itself, but the legal reasoning that justifies it, as in the end the justification (what lawyers call the *ratio decidendi*) determines how a particular judgment will shape future case law.

2.2 What is law in a constitutional democracy?

Law is closely related to politics (who decides the law?) and to morality (what content should prevail?). In many ways, law, morality and politics are mutually constitutive. When I say, ‘in many ways’ I do not mean ‘in any way’. In a viable constitutional democracy, they cannot be related in an arbitrary fashion.

First, to some extent, law shapes the playing field for politics by the institution of legislative, administrative and adjudicative powers that are both enabled and constrained by such institutions. This refers to one of the core functions of the law: the simultaneity of its instrumental and protective nature. Law allows legal subjects, including the state, to act in law and to generate legal effect, but always conditioned by limitations that ensure e.g. legal certainty, proportionality and transparency. Legal norms provide competences in a way that also protects interests, rights and freedoms considered worthy of protection. Note that these interests, rights and freedoms may be private interests, but their protection is often deemed a public good. Privacy, for instance, may be a private interest of an individual person, but it is also an important public good as it aims to sustain and protect the individual autonomy on which a vigilant democracy depends.

Second, to some extent, law creates the level playing field that enables individuals, companies and government agencies to act ethically. The point of law is not to impose a specific morality on its constituency, but to provide the preconditions for developing an ethical stance and acting upon it. If companies are aware that data protection law prohibits cookie walls that force users to consent to privacy policies they would otherwise not consent to, they can develop other types of business models – knowing their competitors are forced to do the same.

Third, law in a constitutional democracy constrains and enables both politics and morality in very specific ways. Democracy is not the dictatorship of the majority but a system of checks and balances that requires a ruling majority to take into account that democracy implies that minorities can become majorities. This means that a ruling majority should not act in ways that pre-empts minorities from becoming a majority. This goes back to what legal philosopher Ronald Dworkin considers the core of both democracy and the Rule of Law: governments should treat their citizens as worthy of equal respect and concern. This grounds both the idea of one person one vote (representational democracy), and the imperative for majorities to respect individuals that are part of a minority (individual human rights).

2.2.1 Law, morality and politics, and the nature of legal rules

One of the most famous legal philosophers of the 20th century was Herbert Hart. In his seminal *The concept of law*, he explained the meaning of law in terms of three questions, aiming to set law apart from morality and politics.

The first question asks how law relates to and differs from orders backed by threats. His answer regarding the relations is that modern positive law (1) has teeth, (2) assumes state authority, and, (3) depends on sovereignty but also constitutes it. His answer regarding the difference is that under the Rule of Law (1) legal norms apply to those who enact them (this distinguishes law from discipline or administration and Rule of Law from a dictatorship), (2) legal norms that confer legal powers to adjudicate or to legislate or to contract are not orders backed by threats (this relates to the difference between primary and secondary rules, to which I will return later), (3) not all legal norms come into existence as explicit prescription (unwritten law, such as legal principles and customary law are not imposed by a legislature but are confirmed

by either the legislature or the courts), and, (4) sovereignty is not an apt description of law, even though law constitutes and limits it.

The second question is how legal obligation differs from and relates to moral obligation. His answer regarding the differences is that modern law (1) has teeth, whereas moral obligation is a matter of individual commitment, and, (2) integrates primary rules with secondary rules that determine the validity of primary rules. His answer regarding the relationship between legal and moral obligation is that law is not merely a matter of being forced (e.g. the gunman situation). Having an obligation (in law as in morality) implies (1) the existence of a standard, (2) its application to a particular person, which, (3) may be against the interest of the person having the obligation.

The third question that Hart asks to clarify the nature of law inquires into the nature of legal rules. What are rules and to what extent is law an affair of rules? Hart explains, first, that legal rules are rules in the sense of obligations, not rules in the sense of regularities. The mere fact that most people violate a traffic rule does not stop it from being a legal rule. Second, he notes that rules are observed from an internal point of view, they assume a sense of obligation. Even when one violates a legal rule, one supposedly remains committed to the obligation to comply. In a sense this is the core difference between law and force: the possibility to disobey the law is constitutive of the law; validity does not depend on brute force in itself. This raises the question of what determines the validity of legal rules. Hart's brilliant answer was that this is decided by law itself, in a highly distinct way. Legal rules, he proposes, come in two types: primary and secondary rules. Primary rules are regulative rules, they 'regulate' our interactions by imposing a prescription or a prohibition (e.g. 'you shall not kill'). Secondary rules are constitutive rules that determine the validity of primary rules and the legal effect of violation. Secondary rules confer powers, e.g. 'parliament decides on criminalisation', 'if you kill you will be punished with ...', 'to be legally married the marriage must be inscribed in the civil registry'. Hart argues that the difference between primary and secondary legal rules is typical for modern positive law, as it allows a court to determine the validity and thus the applicability of legal norms without resorting to either regularity or brute force. This highlights the systemic and architectural nature of positive law, which consists of a complex, coherent system of primary rules that clarify what is expected, supported by secondary rules that allow one to test whether a primary rule is indeed valid.

2.2.2 Legal Certainty, Justice, Instrumentality

We end with the concept of law that was introduced in the beginning of this chapter, based on the work of Radbruch. The reason for selecting Radbruch is that he pins down three goals that law must serve, without ignoring the fact that in concrete cases these goals are often incompatible. He withstands the temptation to reduce two of these goals to sub-goals of one and thus to resolve the tension between them. Instead, he highlights the importance of nurturing this tension, sustaining it and thus challenging lawyers to continuously reinvent the right balance or trade-off, without thereby discarding either any one of the three goals as being overruled. This accords with a difference of opinion between Dworkin and Hart about the nature of law.

Whereas Hart initially claimed that modern law can be characterized as a system of legal rules, which are either applicable or not, Dworkin argued that the decision as to which legal rule applies and how it must be interpreted in concrete cases involves an important role for legal principles. Other than rules, Dworkin said, principles do not follow the binary applicability of rules. Principles have a certain weight, depending on what is at stake in the case at hand. In the case of competing rules, either one will 'win'. In the case of competing principles, both can be relevant and both can inform the decision (notably the decision as to which rule is valid), though their impact on the decision may vary. For Radbruch, who served as Minister of Justice in the Weimar Republic in the '30s of the last century, the tension between justice, legal certainty and instrumentality in law was not mere intellectual nit-picking. The rise of Nazism and the role of law as an instrument of genocide challenged the balance between law's fundamental goals. Before elaborating on that, I will first clarify how the goals of the law can be understood.

Legal certainty refers to the need to provide a foreseeable response to one's actions, in order to create societal trust. For Radbruch, this refers to law's positivity, to the fact that law is 'posited' by a legislator (and by the courts that decide its correct interpretation). The legal power to 'posit' the law is based on what Hart termed a set of secondary rules that determine the validity of legal norms. Though Radbruch was not a positivist in the sense that he only cared about the formal validity of legal norms, he attached particular importance to the positivity of law and the legal certainty it provides. He explains that precisely because we may not agree about what moral duties we have, law provides a measure of certainty about the legal rights we have and the legal obligations we should comply with. Legal certainty is also connected with the notion of equality before the law; it is the opposite of arbitrary, discriminatory or

explicitly unjust exercise of state authority. The goal of legal certainty does not necessarily overrule the other two goals, if so, it would collapse into a positivism that separates law entirely from both morality and politics – thus turning it into an unresponsive and mechanical form of administration.

Justice refers to treating equal cases equally, and unequal cases unequally to the extent of their inequality. This is directly connected with legal certainty as this should enable people to plan ahead, capable of anticipating how their actions will be read by the law and responded to by the government. That also goes for how the government responds to actions by others that concern us (criminal offences, breach of contract, invasion of privacy by a private company). But, as Dworkin argued, justice is more than mere consistency; it is rather about the integrity of the totality of legal rules, principles and policies, ensuring that each decision is taken in accordance with the implied philosophy that grounds the law. Justice as fairness concerns two types of equality: distributive and proportional. Distributive justice means that everyone should be treated in the same way, to the extent that similar conditions apply. Proportional justice means that punishment should be proportional to the seriousness of the crime and compensation proportional to the damage suffered. The goal of justice does not necessarily overrule the goals of legal certainty and instrumentality. If so, law would collapse into morality.

Instrumentality refers to the fact that law is an instrument to achieve a variety of goals that are in part external to its own functioning. These goals play out at the level of politics (legislation), where law is a policy instrument and at the level of individual legal subjects (including companies) who will use the law to strategically further and protect their own interests (private law) and their rights and freedoms (private law, criminal law, and legal remedies afforded in administrative law). Since the rise of independent courts in 16th-18th century Europe, law and politics have struck a historic bargain: law does not interfere in politics (where goals are to be determined by democratic legislation), while politics remains under the Rule of Law. This means that though law is instrumental to achieve the goals that a democratic legislature determines, it has its own values and goals that will constrain the ‘solution space’ of political goal setting. The goal of instrumentality does not necessarily mean that law’s expediency will overrule justice and legal certainty. If so, law *of* law would collapse into arbitrary rule *by* law.

When the second World War ended, Radbruch wrote a brief text to explain how his antinomian goals relate to Nazi rule. The title of his text was: *5 minutes of legal*

philosophy. He targets some of the maxims that were typical for the way that law was instrumentalised by Nazi Germany. First, the maxim of ‘an order is an order’ and ‘a law is a law’. He frames this as the equation of law with power. Second, the maxim of ‘law is what benefits the people’ and ‘whatever state authorities deem to be of benefit to the people is law’. This results in framing the private benefit of those in power as public benefit. Instead of these populist maxims, he presents ‘law as the will to justice’ and ‘equality before the law’. He reiterates that law is determined by the antinomial goals of instrumentality, justice and legal certainty, and adds that laws that do not even aim for justice do not merely forsake their validity within the system, but must be denied their legal character. This demonstrates the priority of fundamental principles of law that preclude mistaking brute force or arbitrary rule *by* law for the rule *of* law.

We can sum up this chapter by stating that in a constitutional democracy, legal rules that confer powers simultaneously restrict them; they provide functionality *in a way that* provides protection, thus serving the double instrumentality of the law as a tool of both government and protection.

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Footnotes

1. 10-1259 US v Jones (01/23/2012). [↵](#)
2. Subsequent case law: *Riley v. California*, June 25, 2014, No. 13-132, 573 U.S., holding: 'The police generally may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested'. See <http://www.scotusblog.com/case-files/cases/riley-v-california/>. *Carpenter v. United States*, June 22, 2018, No. 16-402, 585 U.S, holding: 'The government's acquisition of Timothy Carpenter's cell-site records from his wireless carriers was a Fourth Amendment search; the government did not obtain a warrant supported by probable cause before acquiring those records'. See <http://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/>. [↵](#)
3. CJEU, 8 April 2014, C-293/12 and C-594/12 (*Digital Rights Ireland*). [↵](#)
4. In the US and the UK lawyers will speak of legal powers, in continental Europe they speak of legal competences. [↵](#)