Opposable reasons

Solving Conflicts of Fundamental Rights and Norms

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Per a la Raquel

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Ubi societas, ibi ius

Cicero

ABSTRACT

This dissertation argues that the deadlock that constitutional courts find themselves in when justifying decisions on cases that involve conflicting constitutional norms can be best resolved by appealing to a particular type of reasons, namely opposable reasons. These opposable reasons form the basis for building a minimal account of law that can meaningfully claim a universal reach while being fully compatible with libertarian or anarchist ideals. This dissertation explores in depth concepts such as KANT's *obligationes non colliduntur* principle, RAZ's second-order reasons, RAWL's reflective equilibrium, and SCANLON's reasons for action so as to make the case in favour of opposable reasons.

RESUM

Aquesta tesi argumenta que l'atzucac que afronten els tribunals constitucionals a l'hora de justificar decisions sobre casos que impliquen normes constitucionals en conflicte es pot resoldre apel·lant a un tipus particular de raons: a saber, raons oposables. Aquestes raons oposables constitueixen la base per construir un concepció mínima del dret que pot atribuir-se justificadament un abast universal, alhora que és del tot compatible amb els ideals llibertaris i anarquistes. Amb l'objectiu de defensar les raons oposables, aquesta tesi analitza en profunditat conceptes com el principi *obligationes non colliduntur* de KANT, les raons de segon ordre de RAZ, l'equilibri reflexiu de RAWLS i les raons per a l'acció de SCANLON.

1 PRESENTATION

My goal in this dissertation is to offer an alternative account to solve conflicts in cases of constitutional norms. I will argue that certain reasons have a social grip. I call these opposable reasons. Knowing the social grip that such reasons have on us, we can address them to others and expect the opposable reason's social grip to work effectively on them as well.

In exchanging reasons with one another to decide what to do or to justify our actions before others, the opinion and views of third parties matter, and they matter a lot. Indeed, the findings of social psychology in the 60's and 70's on the importance of the opinions and views of others in our own beliefs and behaviour will offer strong evidence in favour of the existence of opposable reasons.

In fact, I will show that recent research in neuroscience has confirmed social psychology findings and, what is more, it will show that the social force of what others might think about a given situation – and this obviously involves beliefs about reasons for action – is so great that there is no need to explicitly expose or mention what others would think.

In consequence, opposable reasons do not need to explicitly state the assumption upon which they work, that is, that others think reasons for action to be such and such. The social grip of opposable reasons will thus be understood in terms of PAUL GRICE's conversational implicatures.

Opposable reasons will allow us to explain why judges deciding on conflicting constitutional cases are justified in expecting the ruling to be justified *erga omnes*, that is, justified before any other member of society, even if some may not share the underlying moral or political principles involved in the reasoning for the ruling.

Crucially for legal philosophy, opposable reasons have broader consequences. They will not only allow us to offer an alternative account for solving cases of conflicting constitutional norms but they will allow us to give an alternative account of law that truly aims at universality.

In order to establish the case in favour of opposable reasons, I propose the following path:

In section 2, I will give three typical examples of cases of conflicting constitutional norms. In such cases the conflict cannot be solved by either of the following principles:

lex posterior derogat legi priori; Lex superior derogat legi inferiori; or Lex specialis derogat legi generali.

There are different accounts that aim to solve cases of conflicting constitutional norms: judicial discretion, particularism (legal realism), interpretivism, proportionalism and specificiationism. I will briefly explore how each of them attempts to solve the problem and why they fail.

In section 3, I will note that all these accounts see legal norms as the core concept of law. Ethics and practical philosophy though have shifted from norms to reasons for action. Following this trend, I suggest tackling our problem with the concept of reasons for action at the centre of legal reasoning instead of norms.

In section 4, I will present SCANLON's *reasons fundamentalism*, which is a normative view that defends that (i) reasons for action is a fundamental concept that cannot be explained or reduced to natural facts or sociological facts and (ii) all other normative concepts are derivable from reasons for action.

I will briefly expose SCALON's quadruple R(q, x, c, a): the fact that *q* is a reason for person *x* to carry out action *a* in circumstances *c*. Being a reason here means simply a fact or state of affairs that favours or promotes an action. Therefore, SCANLON's quadruple represents a *pro tanto* reason. SCANLON's quadruple will allow me to use first-order logic to analyse the structure of reasons. I will use first-order logic rather intensively in this dissertation. This will give us precision and new insights, especially when discussing RAZ's second-order reasons in section 7.

In section 5, I will make use of first-order logic and SCANLON's quadruple to give a definition of *pro tanto* obligations, much in the same spirit as ROSS's *prima facie* duties. However, ROSS considered the concept of obligation as primitive or fundamental. ROSS's assumption is shared by the vast majority of works on deontic logic, where obligation is an intuitive and undefined concept. I believe the definition of obligation in terms of reasons for action to be an original idea and a confirmation of the interesting results obtained from the assumption that normative concepts are derivable from SCANLON's quadruple R(q, x, c, a).

In section 6, the observation that reasons do override other reasons and the concept of reasons for action will allow me to give a definition of sufficient reasons, conclusive reasons and actual (*toti-resultant*) obligations. Here I will also devote an entire subsection

to discuss the *obligationes non colliduntur* principle, that is, that obligations cannot conflict. This principle was famously defended by KANT in his *Metaphysics of morals* and it is also a theorem of standard deontic logic. However, this principle seems to be in contradiction with our concept of obligation. I will conclude that the *obligationes non colliduntur* principle should be limited to actual (*toti-resultant*) obligations.

In section 7, I will defend that second-order reasons for action are needed to account for certain cases of practical reasoning. Following RAZ, I will argue that first-order reasons for action and the overriding relationship are not enough to account for certain crucial cases of practical reasoning.

However, my analysis of second-order reasons will differ critically from RAZ's. He defends that second-order reasons are reasons for action to act (or refrain from acting) for a reason. I will reject this view after a careful and detailed analysis of RAZ's examples in his *Practical reason and norms*. I will conclude that second-order reasons are epistemic reasons to accept, withhold or reject the belief that certain reasons for action hold.

I will show that whenever a second-order reason is present in practical reasoning, the final set of reasons to be considered on the balance of reasons is affected: A reason to accept the belief that certain reason for action holds will be called a second-order inclusionary reason because it includes a new reason to take into consideration.

In contrast, a reason to withhold or reject the belief that a certain reason for action holds will be called an exclusionary reason because it excludes a reason from the consideration. Since second-order reasons are reasons to believe (accept, withhold or reject) that certain reasons for action hold, first-order logic will be extended by the epistemic operator B in our analysis. I will exploit my notion of second-order reasons as epistemic reasons to analyse the concept of negative rights and the concept of legal power. Such concepts will be used later in section 11 in our analysis of the cases of constitutional ruling.

In section 8, I will introduce some concepts that help to accurately describe practical reasoning: underminers, enablers, reversers and excuses. These concepts, the overriding relationship and second-order reasons will allow me to present in section 9 an account for reflective equilibrium as an algorithm of reasons for action. This algorithm will be used in section 11 in our analysis of the cases of constitutional ruling.

In section 10, I will introduce the key concept of opposable reasons. I will argue that, when we exchange reasons with one another to decide what to do or justify our actions

before others, what others might believe is crucial. More precisely, our beliefs about what our opponent might believe about what third parties would consider valid reasons for action exercise a social grip on us and, if we are right about our opponent's belief, our reasons for action claim will also have a social grip on our opponent.

The social grip that accompanies certain reasons for action is what allows us to efficiently oppose them before our opponent because we know that the social grip would have an effect on our opponent's beliefs and subsequent behaviour, even if our opponent does not accept the underlying reasons for action.

That is why opposable reasons are so important in the social fabric of exchanges of reasons in deciding what to do. Opposable reasons do not require that our opponent changes her mind through our exchange of reasons. Our opponent is free to stick to her initial set of reasons for action. However, when confronted with an opposable reason, even if she does not share the underlying reason for action, the social grip of the opposable reason will have an impact on her behaviour and therefore on what is finally acted upon.

As mentioned above, the existence of opposable reasons is explained by the findings of social psychology in the 1960s and 1970s on the importance of the opinions and views of others in our own beliefs and behaviour. Recent research in neuroscience has confirmed this and, what is more, it shows that the social force of what others might think about a given situation – and this obviously involves beliefs about reasons for action – is so great that there is no need to explicitly expose or mention what others might think.

In consequence, opposable reasons do not need to explicitly state the assumption upon which they work, that is, that others think reasons for action to be such and such. Therefore, the social grip of opposable reasons should be understood in terms of PAUL GRICE's conversational implicatures.

Finally, in section 11, I will use the concept of second-order reasons to give an alternative account for solving conflicts of cases of constitutional norms. The main drawback in all current accounts is that they are unable to explain why the justification of such rulings aims at being an *erga omnes* justification. In others words, judges of constitutional courts do not just want to have their rulings justified, but that the justification given by them should be seen by everybody else as an acceptable justification, even if they do not agree on the moral and political principles sustaining the ruling.

I will show that opposable reasons allow constitutional court judges to have an *erga omnes* justification of their rulings in cases of conflicting constitutional norms. The social grip that opposable reasons have on others forces them to accept the ruling as being socially justified, even if they do not share the moral and political principles sustaining the ruling. Why? Because if judges have used a felicitous opposable reason, we are certainly free not to share the underlying reason for action, but, and this is the point, we cannot deny that it is an opposable reason and thus the social grip forces us to accept the social force of the ruling's justification. In consequence, opposable reasons are the key concept that allows us to offer an alternative account for solving cases of constitutional conflicting norms.

As determined above, opposable reasons can do much more than that. Opposable reasons are the key concept for a minimal account of law. Legal philosophy has been parochial. It assumed that elements such as the legislator, organs of adjudication and legal norms are at the centre of what needs to be considered as Law. However, it has been established by the work of anthropologists during the 20th century questions the assumptions of legal philosophy.

The outcome is that most anthropologists, in analysing what I believe to be truly legal experiences in societies other than the Western legal tradition, decided to abandon the concept of law and reframe their analysis in terms of order and dispute, leaving to legal philosophers whether what they analyse is law or not. Legal philosophers won the term "law" from anthropologists, but in doing so, they have been condemned to possessing a parochial concept of law.

Opposable reasons offers an account of law that entitles us to say that what anthropologists reported from other societies' experience of order and dispute is truly law. Each society has obviously its own set of opposable reasons. However, opposable reasons must exist in all societies. They are a natural consequence of social rational beings exchanging reasons. Some reasons to believe that an opposable reason holds are publicly available. Legal reasons are precisely those opposable reasons whose reasons to believe in them are publicly available. Of course, what counts as publicly available changes from society to society and through time within a society, which in turn, explains why what counts as law is different in different places and times.

If publicly available reasons to believe that an opposable reason holds is a successful universal definition of law, then a new field of research unfolds and will force us to reconsider the relationship between law and political authority, law and coercion, law and the state, law and morality, etc. This, in turn, will force us to reconsider the relationship between the state and the citizen. These notions, while primarily political, are partly determined by law. However, I will leave such fascinating topics for further research.

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2 CONFLICTS OF CONSTITUTIONAL NORMS

2.1 THE PROBLEM

How does a constitutional court justify a decision in cases in which two constitutional norms conflict?

Let us consider the three following Spanish Constitutional Court adjudications involving conflicts of norms. In judgment 133/2010[1], the petitioners alleged that their fundamental right to decide whether their children may receive teaching in their own home instead of attending school was breached. On the other hand, school attendance at the age corresponding to the petitioners' children was compulsory pursuant to article 9 of Organic Law 10/2002, dated December 23rd, 2002, on Quality of Education (hereinafter, "**Quality of Education Law**")[2], in force at the time. The conflict between the parents' right to decide whether their children should receive teaching in their own home and the fact that attending at school is mandatory is quite obvious.

In judgment 154/2002[3], the case presented before the Court was as follows: a child died because of the lack of the only appropriate medical treatment (a blood transfusion). His parents initially opposed the medical treatment on the basis of a religious belief (Jehovah's Witnesses consider that blood transfusion is prohibited by commandment of God). Doctors requested and obtained judicial authorization to undertake the blood transfusion without the parents' consent. However, when the doctors tried to perform the blood transfusion, the child opposed it so violently that the doctors considered it too dangerous to perform the blood transfusion in such circumstances. The doctors asked the parents to convince their child to accept the blood transfusion. The parents refused to try to persuade their child to go against their child's religious beliefs and tried to find alternative medical treatment. Such treatment was not available and, unfortunately, the child finally died. The parents were found guilty of negligent manslaughter by a criminal court pursuant to articles 11 and 138 of the Spanish Criminal Code[4] due to the omission

1 Judicial decision 133/2010, 2nd December 2010 (BOE Wednesday 5th January 2011)
2 Organic Law 10/2002, 23rd December 2002 (BOE-A-2002-25037 – permanent link: https://www.boe.es/eli/es/lo/2002/12/23/10)
3 Judicial decision 154/2002, 18th July 2002 (BOE Wednesady 7th August 2002).
4 Organic Law 10/1995, 23rd November, (BOE-A-1995-25444 Permalink: https://www.boe.es/eli/es/lo/1995/11/23/10/con)

of the conduct required by the legal obligation that parents have as regards the health and life of their child. The parents appealed before the Constitutional Court, requesting legal protection of their constitutional right. They alleged that their fundamental right to religious freedom[5] as well as the child's very same right was breached pursuant to article 16.1 of the Spanish Constitution. It is obvious that the legal duty as parents to facilitate the blood transfusion (the only appropriate medical treatment) and the religious prohibition of blood transfusion is a normative conflict.

In judgment 50/2010[6], a journalist appealed before the Constitutional Court for legal protection of his Constitutional rights. He alleged that the rights of freedom of expression and information were breached pursuant to article 20.1.a) of the Spanish Constitution. The facts of the case were as follows: the journalist said during a radio broadcast that Antonio Herrero was involved in the attempted *coup d'état* in Spain in 1981. Antonio Herrero's heirs sued the journalist and the radio station on the grounds that what was said was an infringement of the right to honour as provided in article 18.1 of the Spanish Constitution. The court of first instance decided that what was said was an infringement of art. 18.1 of the Spanish Constitution and awarded Antonio Herrero's heirs compensation for moral damages. The court of appeal and cassation confirmed the decision by the court of first instance: the right to honour was breached. In this case, the conflict between the rights of freedom of expression and information (in common law this is widely referred to as freedom of speech[7]) on the one hand, and the right to honour (in common law this is normally included within the scope of the the right to protect one's good name) on the other hand, seems obvious. In contrast with prior judicial verdicts, the Spanish Constitutional Court decided that there was no infringement of the right to honour provided in article 18.1 of the Spanish Constitution.

Conflicts of norms are a problem that is solved by the means of the following legal rules:

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5 For an analysis of the right to religious freedom in international law: SCOLNICOV's *The right to religious freedom in International Law* (Scolnicov 2010). For an analysis of the right of religious freedom under Spanish law: ENDEMAÑO AROSTEGUI's *La libertad religiosa y la neutralidad religiosa del Estado en el ordenamiento jurídico español* (Endemaño Aróstegui José María 2020).

6 Judicial decision 50/2010, de 4th October (BOE 29th October 2010).

7 For a study on comparative law on freedom of speech: BARENDT's *Freedom of speech* (Barendt 2010). For a jurisprudential analysis of the right of freedom of expression and information under article 20.1 of the Spanish Constitution: AGUILAR CALAHORRO's *El derecho fundamental a la comunicación 40 años después de su constitucionalización : expresión, televisión e internet* (Aguilar Calahorro 2017).

i *Lex posterior derogat legi priori*: this principle establishes that whenever two norms conflict the last norm abrogates the first norm, which is no longer valid;

ii *Lex superior derogat legi inferiori*: this principle establishes that whenever two norms conflict, the norm which is in a higher position in the normative hierarchy of the legal system prevails over the norm which is in a lower position; and

iii *Lex specialis derogat legi generali*: this principle establishes that whenever two norms conflict, the norm regulating a specific subject matter (*lex specialis*) overrides the norm whose regulation is more general.

In the three judgments I considered above, both norms in conflict are valid (the first principle fails to solve the conflict), none is in a higher position in the legal system (the second principle fails) and none regulates a more specific matter (the third principle also fails), for each norm is a constitutional norm or a norm grounded on a constitutional norm. In spite of the conflict, the Constitutional Court must decide and, as a matter of fact, it does. How does the Constitutional Court (or any court) rationally justify a decision in cases in which two norms conflict but the *lex posterior*, *lex superior* and *lex specialis* principles fail to solve the normative conflict?[8] (Hereinafter the "**Question**").

We will see that the decisions of the Spanish Constitutional Court in the judgments considered above somehow reproduce the different theoretical approaches that I will discuss below.

As regards the Question, there are two first possible theoretical moves:

i to deny that justification is possible: courts cannot justify any decision in cases in which two norms conflict but the *lex posterior*, *lex superior* and *lex specialis* principles fail to solve the normative conflict. According to this view, in these cases there is no solution because the law as it is offers no solution. The law has simply run out. Since courts cannot justify their decisions in these cases, but they have to decide them, courts have discretion. This view, labelled *judicial discretion*, was adopted by HART.

8 This is actually how ROBERT ALEXY presents the problem of conflicting constitutional rights and norms (Alexy 2002).

ii to affirm that justification is possible: courts can justify any decision in cases in which two norms conflict but the *lex posterior*, *lex superior* and *lex specialis* principles fail to solve the normative conflict.

Nevertheless, the theories that defend that this justification is possible differ dramatically. I offer the following classification with the only purpose in mind of giving some preliminary conceptual clarity. Each of the strengths and weaknesses of each theory will be evaluated separately.

We can distinguish between generalist and *particularist* theories. Generalist theories state that to justify a decision we must appeal to the norms applicable to the case. In contrast, the *particularist* theories make these two claims: (i) norms do not help since we can always imagine counterexamples and (ii) the reasons in favour or against a decision are always context sensitive. In this sense, the *particularist* may give the following answer to the Question: the court must identify the particular reasons of the case and then justify the decision accordingly. The leading philosopher of particularism is JONATHAN DANCY.

Generalist theories, in their turn, differ in important ways as regards the Question. I distinguish the three following approaches:

i *interpretivism*: this states that there are two kind of norms: rules and principles[9]. Rules are norms that operate in a kind of "all or nothing" way. If a rule is applicable to the case, it fully determines the legal outcome. Contrary to this, principles do not determine the legal outcome, since they only provide a reason to decide the case one way or the other. They thus operate in a kind of "more or less" way depending on the case and the circumstances. Interpretation consists of the moral and political evaluative reasoning essential to determine the content of

9 To be fair, the distinction between rules and principles is just the original way *interpretivism* was presented by DWORKIN, first in *The Model of Rules* (Dworkin 2018 (1967)) and afterwards in *Taking Rights Seriously* (Dworkin 1977). However, DWORKIN's *interpretivism* has evolved substantially since the initial distinction between rules and principles to explain the necessary connexion between morals and law. DWORKIN later introduced concepts such as legal practises and institutions which, according to him, play a crucial role in understanding the nature of law and its necessary connexion with moral and political values: see *Law's Empire* (Dworkin 1986), *Justice in Robes* (Dworkin 2006) and *Justice for Hedgehogs* (Dworkin 2011). This section will be focused on the first presentation of *interpretivism*, that it, the one based on the distinction between rules and principles. I will offer a general attack to *interpretivism* in section 12 of this dissertation based on the idea that legal anthropology offers a wide range of legal-like human interactions that are not institutionalized. This attack will not only affect *interpretivism* but virtually to all accounts of law given from philosophy of law.

principles. According to this view, the Question arises because two principles are in conflict. To solve the normative conflict, the court must interpret, that is, it must assess the moral and political reasoning to determine the content of the conflicting principles that harmonizes them. The leading philosopher of *interpretivism* is DWORKIN[10].

ii *proportionalism*: this accepts the distinction between rules and principles as well as the explanation of why the Question occurs (namely because two principles conflict) given by *interpretivism* but it does not accept its solution. *Proportionalist* theories defend that the court must apply the principle of proportionality to decide which of the conflicting principles is applicable to the case. The principle of proportionality has three steps: (i) suitability: the decision affecting the overridden principle must be adequate/suitable to promote/optimize/defend the prevailing principle; (ii) the decision affecting the overridden principle must be necessary to promote/optimize/defend the prevailing principle (that is, alternative scenarios not affecting the overridden principle must not be available); and (iii) apply the principle of proportionality in the narrow sense, which consists in balancing or weighing the two conflicting principles to see which one prevails. The leading legal scholar of *proportionalism* is ROBERT ALEXY[11].

iii specificacionism[12]: a *specificationist* states that, in order to justify a decision, courts must identify the norm applicable to the case. In this view, cases are to be subsumed under the norm previously identified. The *specificationist* is well aware of the argument pointed out by particularism: given a norm, there are always counterexamples. The *specificationist* strategy reduces the scope of the norm but

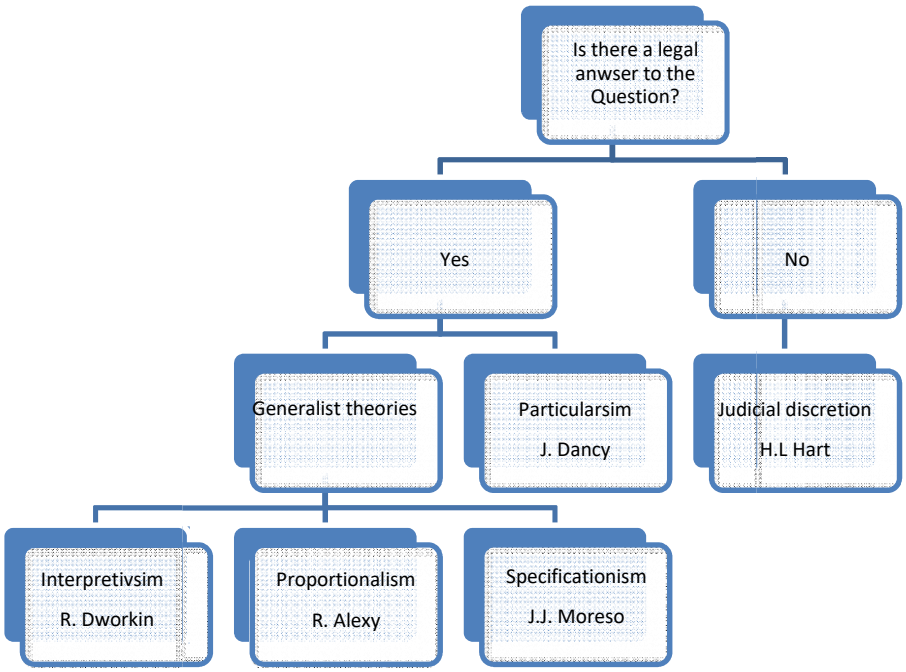
10 Other legal philosophers attached to *interpretivism* are GREENBERG (Greenberg 2004) and STAVROPOULOS (Stavropoulos 2016).

11 ROBERT ALEXY's main work were *proportionalism* is defended is *Theorie Der Grundrechte* -in English published as *A Theory of Constituional Rights* (Alexy 2002). ROBERT ALEXY's *proportionalism* is not always followed by legal philosophers but it must be admitted that it is a very popular view to deal with constitutional conflicts of norms among legal scholars. The reasons for this is that the terms in which ROBERT ALEXY's *proporitionalism* is presented are familiar for legal scholars and legal practitioners. For an overview of ROBERT ALEXY's proportionalism in Spanish see CARLOS PULIDO (Bernal Pulido and Cascajo Castro 2007).

12 Among others, examples of specificationist accounts are MCKEEVER AND RIGDE (McKeever and Ridge 2006), SHAFER-LANDAU (Shafer-Landau 1997) and RICHARDSON (Richardson 1990)

preserves its stringency. A *specificationist* account tailored to the Question has been given, among others, by MORESO[13].

The classification of the theoretical moves as regards the Question is then as follows:



2.2 JUDICIAL DISCRETION

Hart defends that law is constituted by social rules, which are actual patterns of conduct, beliefs and attitudes[14]. He distinguishes two kinds of rules: (i) primary rules, which prescribe certain modes of conduct (e.g. "Do this" "Do not do that") and (ii) secondary rules, which regulate how rules can be created, modified, abolished or interpreted.

Among secondary rules, there is a special kind: the rules of recognition, which identify certain types of conducts, beliefs and attitudes on how a human community creates law in that community. In modern legal systems the gathering of certain people (members of the parliament) in a certain place (the parliament), speaking (deliberation) and raising hands (voting) are patterns of conduct that are good candidates to play the role of the rules of recognition.

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13 MORESO has defended specificationism in several articles (José Juan Moreso 2012; 2018).
14 HART major legal philosophy work is The Concept of Law (Hart 2012). In this work, HART defends discretionalism. According to ANDREI MARMOR Hart's discretionalism is a necessary consequence of his legal positivism (Marmor 2011). I will follow MARMOR's presentation of HART's legal positivism and discretionalism in this section.

In consequence, we are able to identify what the law is in a certain community by identifying the rules of recognition and all the other rules created according to those.

HART defended that the only way to justify legal decisions is to subsume the case under the applicable legal norms. Nevertheless, he was well aware that sometimes cases to which there is no applicable norm are brought before courts. In many jurisdictions courts must decide even if there is no applicable law. Spain is an example. HART said that in these kinds of situations the court has discretion to decide. That is why this position is known as *judicial discretion*.

The reasoning in the paragraph above can be applied to cases in which two norms conflict but there is no rule to solve the conflict (such as *lex posterior*, *lex superior* or *lex specialis*). The idea is that, since there is no legal norm that solves the conflict, courts have discretion.

In my opinion, the claims that lead HART to adopt j*udicial discretion* are:

Claim 1: s*ome social rules depend on other social rules that depend ultimately on the rule of recognition.*

This attempts to capture the fact that there are certain specific social rules that allow us to identify what the law is. Which? Those that are ultimately grounded on the rule of recognition. The rest of the social rules that are not ultimately grounded on the rule of recognition are moral norms, rules of etiquette, social conventions, rules of games, etc.

Claim 2: *we fully identify the content of legal norms on the basis of social rules that are ultimately grounded on the rule of recognition.*

This claim attempts to capture the idea that we only need to relate legal norms to the social rules that, according to Claim 1, determine what the law is. It is worth noting that identifying the social norms that determine the content of legal norms is a matter of description. According to HART's view there are no evaluative, normative or moral considerations involved. I believe Claims 1 and 2 to be the core of HART's *legal positivism*. Why? Because *legal positivism* states that the content of law (what the law is) is not grounded on moral norms[15]. Since rules of recognition are nothing but actual

[15]15Legal positivism can be specified as follows. Let's consider the following proposition "a rule prescribing that p is a legal rule because it exists a moral norm that prescribes that p". Let's call this proposition q. (i) Exclusive legal positivism believes that q is always false. It is a descriptive claim.

patterns of conduct, beliefs and attitudes, the content of law is identified without the need to appeal to moral norms.

Claim 3: *a legal decision is justified if and only if the case to be decided is subsumed under a legal norm.*

This claim attempts to capture the idea that legal decisions are made on the basis of legal norms applicable to the case and that doing so is precisely what justifies legal decisions.

Claim 4: *unsettled cases have no norm to be subsumed under.*

This claim attempts to capture the legal fact that there are situations that are not regulated by law. From Claims 3 and 4 (*modus tollens*), we obtain Claim 5:

Claim 5: *unsettled cases cannot be justified*

The reason why Claim 5 follows from Claims 3 and 4 is easy to see. Claim 3 defines the justification of legal decisions in terms of cases being subsumed under legal norms. Since an unsettled case has no legal norm under which it is subsumed, then, by definition of what a justified legal decision is, unsettled cases cannot be justified.

Claim 6: *Whenever a legal decision is not justified by subsuming the case to a legal norm because there is no such legal norm, courts make the decision at their sole discretion (judicial discretion).*

The argument is as follows:

i Let us define a discretionary legal decision: a legal decision is discretionary if and only if the decision is not justified.

Exclusive positivism does not deny that sometimes legal rules and moral rules are coextensive, that is, that there are legal rules that prescribe that *p* and also moral rules that prescribe that *p*. It denies that a rule prescribing that *p* may obtain its legal pedigree precisely because there is a moral rule prescribing that *p* (or moral principle, the jargon does not matter here). (ii) **Inclusive *legal positivism*** believes that *q* is sometimes true. It is a descriptive claim. And finally, (iii) **normative *legal positivism*** makes a normative claim: regardless whether *q* is true or false, we must not justify that a rule prescribing that *p* is a legal rule on the ground that there is a moral rule prescribing that *p*. For a defense of exlusive legal positivism see RAZ's *The Authority of Law: Essays on Law and Morality* (Raz 1979a) , SHAPIRO's *Law, Morality, and the Guidance of Conduct* (Shapiro 2000) and MARMOR's *Exclusive Legal Positivism* (Marmor 2004). For a defense of inclusive positivism see HART's postscript of *The Concept of Law* (Hart 2012), COLEMAN's *Incorporationism, Conventionality and the Practical Difference* (Coleman 1998) , and WALUCHOW's *Inclusive Legal Positivism* (Waluchow 1994). For a defense of normative legal positivism see CAMPBELL's *Prescriptive Legal Positivism* (Campbell 2004) .

ii Let us suppose that *a* is a legal decision such that there is no legal norm under which the case related to *a* is subsumed but a is justified on other grounds (moral reasoning, for instance).

iii Since there is no legal norm under which the case related to decision *a* is subsumed (by assumption (ii)), then decision *a* is not justified (*modus tollens* Claim 3);

iv Decision *a* is both justified (by assumption (ii)) and not justified (by premise (iii));

v There is no legal decision *a* such that there is no legal norm under which the case related to *a* is subsumed but *a* is justified on other grounds (by *reductio ad absurdum* (ii) and (iv));

vi There are no legal decisions such that there is no legal norm under which the case related to them, but these decisions are justified (by universalizing (v), since decision *a* was an arbitrary decision);

vii For every legal decision, either there is a legal norm under which the case related to the decision is subsumed, or the decision is not justified (De Morgan (vi));

viii Let us suppose that there is a legal decision *a* related to a case that is not subsumed under any norm;

ix legal decision *a* is not justified (by eliminating the dilemma (vii));

x decision *a* is a discretionary decision (by definition (i) and premise ix);

xi Whenever there is a legal decision *a* related to a case that is not subsumed under any norm, then the legal decision *a* is a discretionary decision (by introducing the conditional (viii) and (x)).

Conclusion: whenever a legal decision relates to a case that is not subsumed under any norm, then this legal decision is a discretionary decision (by universalizing (xi), since the decision was an arbitrary decision). To say this is to defend *judicial discretion*.

DWORKIN distinguishes between strong discretion and weak discretion. MARISA IGLESIAS in her *Facing judicial discretion : legal knowledge and right answers revisited* exposes very clearly DWORKIN's view on this topic. Strong discretion is defined as "*the judicial duty to make a justified choice among different admissible courses of action when*

there is no right legal answer"[16]. Weak discretion is defined "*as the need for reasonableness and good judgment in identifying the course of action prescribed by the law when there exists a right legal answer*"[17]. According to MARISA IGLESIAS, DWORKIN attributes strong discretion to HART:

> *"The distinguishing feature of Hartian positivisim is that hard cases are characterised by an absence of right answer. They thus involve strong discretion, for the judge is expected to make a choice between open alternatives. In this context, discretionary activity is regulated by standards such as admissibility and reasonableness. These standards legally guide and control the judges' role as interstitial legislators and not as agents applying the law" [18].*

Since *strong judicial discretion* is a logical consequence of Claims 3 and 4, one of these claims must be abandoned[19]. Let us see which of the Claims is abandoned by each of the following theoretical approaches.

I believe *strong judicial discretion* to be wrong. As regards unsettled cases and conflicts of norms that cannot be solved by *lex posterior*, *lex superior* or *lex specialis* principles, courts make a considerable effort to justify them.

In the legal practice, courts do not decide at their sole discretion. They argue for their decisions in all cases including unsettled cases and cases of conflicting constitutional norms. Thus, *strong judicial discretion* must be abandoned. I will later discuss *weak judicial discretion* together with *interprevitism*.

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[16]See MARISA IGLESIAS's *Facing judicial discretion : legal knowledge and right answers revisited* (Iglesias Vila 2001, p.37)

[17] See MARISA IGLESIAS's *Facing judicial discretion : legal knowledge and right answers revisited* (Iglesias Vila 2001, p.77)

18See MARISA IGLESIAS's *Facing judicial discretion : legal knowledge and right answers revisited* (Iglesias Vila 2001, 76)

19 Indeed, DWORKIN assumed that HART's positivism implies *strong discretionalism*. Since *strong discretionalism* is untenable, DWORKIN famously rejected Hart's positivism and its rule-based model(Dworkin 2018). However, it must be said that the attribution of *strong discretionalism* to HART has been questioned (Shiner 2011). The often most cited work on HART-DWORKIN's controversy is SHAPIRO's *The "Hart-Dworkin" debate: A short guide for the perplexed"*(Shapiro 2007).

2.3 PARTICULARISM

Particularism opposes *generalism*. This view has been attributed to ARISTOTLE[20] in his *Nicomachean Ethics*[21]. The contemporary fathers of particularism as a meta-ethical position are JONATHAN DANCY[22] and DAVID MCNAUGHTON[23].

The *generalist* claims that a moral belief *that p* is justified if and only if there is a moral principle that applies to *p*. The *particularist* attacks this view in many different ways:

i Metaphysical challenge: moral principles are doubtful entities. The generalist has the burden of proof and must give an account of what moral principles are.

ii Epistemological challenge: if moral principles exist, how can we identify them? Again, the generalist has the burden of proof and must give an account of how moral principles are identified.

iii Rationality does not work with principles. Let us consider this third attack in some detail because it is the core of the *particularist* view.

Particularism[24] believes, as *generalism* does, in moral reasons so that our moral beliefs can be justified. Particularism is not a form of scepticism. The thing is that the *particularist* differs on the picture of how reasons in general (not only moral reasons) actually work: reasons are context sensitive. What in one context can be a reason to believe that *p*, in another different context can be precisely a reason to believe that *not p*. To illustrate this, imagine that you are in the countryside. It is a wonderful day and the sun is shining brightly. You see a red flower. That is a reason to believe *that the flower is red*. Now imagine that you are in a discotheque and you are told that there is a special light effect that turns blue objects into red and red objects into blue. You see a red flower.

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20 Though it is common in *particularist* literature to quote ARISTOTLE as a forerunner of particularism, however, this view has been challenged, see IRWIN'S *Ethics as an Inexact Science : Aristotle's Ambitions for Moral Theory* (Irwin 2000).

21 Aristotle, *NE* 1165a35 (Aristotle 1934).

22 JOHNATHAN DANCY has defended moral particularism in several works during the last four decades (Dancy 1993; 1983; 2004b; 2018)

23 See MCNAUGHTON's Unprincipled ethics (McNaughton and J.Piers 2000).

24 For an overview of moral particularism see *Moral Particularism* (Hooker and Little 2000). In this collective work, a selection of leading philosophers defend particularism – JONATHAN DANCY, BAKHURST, D., JAY GARFIELD and LAWRENCE BLUM - while others critize it - BRAD HOOKER, ROGER CRISP, JOSEPH RAZ, FRANK JACKSON, PHILIP PETTIT and MICHAEL SMITH. A third group of philosophers, often seen as sympathetic to particularism, presents a moderate view of particularism - MARTHA NUSSBAUM, PIERS RAWLING and MARGARET LITTLE.

In this context, that is precisely a reason to believe *that the flower is not red*. In sum, reasons are context sensitive.

Though particularism was originally conceived within the meta-ethics debate, it has been introduced in philosophy of law. Why? If particularism is not a claim of how moral reasons work but how reasons work in general (moral reasons being no exception) the same applies to legal reasons. If legal reasons are context sensitive then Claim 3 must be abandoned.

I would like to point out that, despite *particularism* having recently entered the debate in philosophy of law, it is a view that has a protracted history within legal thought: casuistry. Indeed, one can say that particularism is the philosophical justification of casuistry[25].

As a matter of fact, one could even defend the idea that *particularism* was the approach Roman legal scholars held. Both 'schools' of legal though in the Roman Empire– *proculean* and *savinian* – were very reluctant to see law as a matter of a system of general rules [26]. Case sensitivity for them was an essential aspect of legal reasoning.

Nowadays, legal scholars are taught Roman law as a legal system. This way of presenting Roman law has deep roots in the history of Western law[27]. It is a long process starting with the systematic study of Justinian's *Corpus iuris civilis* by the Glossators at Bologna University in the 11th century and concluded by the German Pandecticts, who finally presented Roman law as a rational legal system[28]. It is good to remember that legal

25For an overview of casuistry (Jonsen and Toulmin 1988).
26 For the case-oriented approach to Law of the two Roman legal schools see PETER STEIN's *Regulae Iuris : From Juristic Rules to Legal Maxims* (Stein, Peter 1966).
27 For how legal scholars in Western legal tradition started to consider Law as a system of rules see PETER STEIN's *Roman Law in European History* (Stein, Peter 1999).
28 The father of the pandect-science is VON SAVIGNY (Savigny 1981). It is worth mentioning that, in contrast with VON SAVIGNY, the two most prominent pandectists of the second half of the 19th century, WINDSHEID (Windscheid 1879) and JHERING (Rudolf von Jhering 1865), did not consider the roman legal system as a system of posited moral norms but a as a rational product of economic interactions, much in the same spirit of the economic analysis of law of POSNER (Posner 2007) or more recently KORNAHUSER (Kornhauser 2002).

scholars have not always assumed that the law is a rational system of legal norms. This way of *seeing* the law is the product of a complex historical evolution[29].

Besides the Roman legal scholars, American legal realists can be counted among those who hold a *particularist* account of law. Justice Holmes, father of *American legal realism*[30], defended that *"[g]eneral propositions do not decide concrete cases."*[31]

The way particularism answers the Question is easy to see. When a case is brought before a court and there is a conflict of norms, the court must look for the reasons to decide one way or the other in the context in which the case is brought.

I think *particularism* is wrong. The main reasons against it are:

i Moral principles are used constantly and play an important role in the way we justify our morals beliefs and decisions and in moral education;

ii Not having a right and complete metaphysical account of what moral principles are is not a reason to reject them since not having a right and complete account of what "meanings" are does not allow us to say that words do not have meanings;

iii If one accepts *particularism*, it is difficult to give an account of moral consistency, that is, an account of why we should be consistent with past moral decisions. The thing is that, if all that matters is the case at hand, why should we care about other cases (which includes the past ones)? This seems quite contrary to what we intuitively do when we reason morally;

iv Since any epistemological project concerning moral reasoning requires epistemological principles, *particularism* implies that any epistemological project is flawed. *Particularism* argues that (1) we do not need principles *because* (2) reasons are always context sensitive, that is, reasons are always reasons for person *s* to believe *p* in the particular circumstances *c*. I think that one can accept that reasons are always context sensitive and defend that we do need principles. Why?

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29 However, we should not be tempted to jump to the idea that its historicity means that it is not the right way to see the Law. The theory of relativity is the product of a long history in the science of physics but we consider it to be true.

30 American legal realism is a view of the law which considers that law is essentially what judges decide. American legal realism was motivated on methodological grounds: what judges actually do is something empirically verifiable. This contrast with positivism and natural law which both see the law as a system of norms. For an overview on American legal realism, see ZAREMBY's *Legal Realism and American Law* (Justin Zaremby 2014).

31 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

A moral reason *p* explains why I am morally right or wrong in the context *c* the same way that seeing that *p* explains why I know that *p* (in this respect, I fully share the *particularist view*) whereas epistemic principles show how we become justified in believing *that p is right or wrong* or *that p is actually the case* respectively (principles are instructions that tell us how we are to use reasons so that we can justify our beliefs). Contrary to the *particularistic* account, I believe that we do need principles precisely *because* reasons are context sensitive. In consequence, one can both maintain that reasons are context sensitive and that Claim 3 is true.

Notwithstanding these criticisms of *particularism*[32], it must be acknowledged that sometimes the Spanish Constitutional Court does, as a matter of fact, reason giving a sort of *particularistic* justification. For instance, in sentence 50/2010, the protection requested by the petitioners was granted due to the infringement of the fundamental right to freedom of religion (article 16.1 of the Spanish Constitution). The Constitutional Court argued that we must take into account the specific actions performed by the parents. The reasons it gave to support its decision are particular or specific in nature:

> *"From the stated considerations it may be concluded that the requirement on the parents for dissuasive action or permissive action towards the transfusion is, in fact, an action which negatively affects the very core or centre of their religious convictions. And it may also be concluded that, in addition, their coherence with such convictions was not an obstacle for them to place the minor at the effective disposal so that guardianship could be performed by the public authorities for his safeguard, guardianship which they did not any time oppose."*

Let us now consider the generalist accounts.

2.4 INTERPRETIVISM

DWORKIN famously criticized HART's *judicial discretion*. There are two *interpretivist* strategies to criticize HART's *judicial discretion*: one that is dependent on the distinction between principles and rules and one that focuses on the role of interpretation in legal

32 For an overview of the arguments against particularism here presented see NORRIS LANCE's Challengin Moral Particularism (Lance, Potrč, and Strahovnik 2008).

reasoning. Both strategies, as I will show, question the truth of Claim 2, that is, one of the core claims of *legal positivism*.

Let us consider the first strategy. The move consists in abandoning Claim 4, that is, to reject that unsettled cases have no norm to be subsumed under. Rules and principles behave in different ways. Rules work in an "all or nothing" fashion. Rules are not complied more or less: either they are complied with or they are not. This implies that if a case is brought before a court and the case can be subsumed under a rule, either the rule has been complied with or it has not been complied with. As a consequence, rules fully determine a legal outcome. In contrast, principles only provide reasons in favour of deciding a case one way or the other but not reasons to decide *simpliciter*[33]. The reasons provided by principles may weigh more or less under the relevant circumstances, depending on various considerations. Principles, though sometimes enacted and thus belonging to positive law, are deduced by reasoning. How? When an unsettled case is brought before a court, the court looks at the legal history of the posited law in the relevant legal area (statues, regulations and precedents) and tries to identify what the best moral principles are that would solve the case. This reasoning is always possible. That is why, according to this view, the law never runs out.

In consequence, it is false to say that unsettled cases have no norm to be subsumed under because it is always possible to identify a principle. To say that is to reject Claim 4. Besides, since principles are at least partly identified by moral principles, Claim 2 must also be abandoned.

It is easy to see how the distinction between principles and rules answers the Question. Conflicts of norms in constitutional cases are all conflicting principles. Given the fact that they do not work in an "all or nothing fashion", we can always determine their content

33 There is a debate over the basis of the distinction between rules and principles. I have exposed the distinction as DWORKIN presented it in *The Model of Rules* (Dworkin 2018). SHAUER, in spite of accepting principles, argues that DWORKIN wrongly conflates weight and specificity (Shauer Frederick 1997). In fact, norms including vague terms such as 'cruel' can behave like rules (all-or-nothing fashion) and very specific norms can behave like DWORKIN's principles. RAZ grounds the rules and principle distinction differently (Raz 1972, p.838): '*rules prescribe relatively specific acts; principles prescribe highly unspecific actions*'. In contrast, ROBERT GOODIN in *Political Theory and Public Policy* questions the distinction between rules and principles altogether (Robert Goodin 1982): they are simply the limits of a continuum. Following this continuum hypothesis, JOHN BRAITHWAITE conceives rules and norms as both being prescriptions: rules being simply more specific and principles more unspecific (Braithwaite 2002).

through moral reasoning so that they harmonize. According to this view, conflicts of principles are only apparent.

Despite the initial appeal of the distinction between rules and principles, some philosophers have doubted that this distinction is a categorical distinction since virtually all legal norms may have exceptions (including those typically identified by the defenders of the distinction as rules). Just to have a glimpse of how rules are defeasible, observe "public policy" exception in article 1.255 Spanish Civil Code:

> *"The contracting parties may establish any covenants, clauses and conditions deemed appropriate, provided that they are not contrary to the laws, to morals or to public policy"*

That is why some philosophers defend that legal norms are, as per ROSS[34], *prima face* duties, and thus the categorical distinction between rules and principles collapses. This criticism is not fatal to *interpretivism*, because it does not depend necessarily on the distinction between rules and principles. This leads us to consider the second *interpretivist* strategy.

This second strategy points out that norms are not simply out there to be applied by the court. Legal texts (statutes, regulations, contracts, etc.) need to be interpreted. Interpretation is a complex activity that necessarily involves evaluative, normative or moral reasoning. In consequence, it is not true that the content of legal norms is fully determined by the description of the actual patterns of conduct (that is, by describing social rules). Claim 2 must thus be abandoned.

How this strategy answers the Question is similar to the first strategy. Conflicting constitutional norms can be solved by interpretation so that the content of the norms invoked is no longer contradictory.

In judgment 133/2010, the Spanish Constitutional Court decided to deny that the right to education was violated. It offered two kinds of arguments. The first seems to fit the *interpretivist* account quite well:

> *"Once we have drawn up the constitutional contours of the complaint, we can now advance that the appeal for protection must be rejected on two grounds. Firstly, because the invoked*

34 See ROSS's The right and the Good (Ross 2002).

> *option —which gives parents the right to choose an education outside the system of compulsory school attendance for their children, on grounds of a pedagogical nature— is not included, even prima facie, in any of the constitutional rights referred to in the lawsuit and recognized in Article 27 SC"*

According to the quote, the Spanish Constitutional Court clearly denies that the right to choose an education outside the system of compulsory school attendance is included in the scope of the right to choose one's own children education. Why? Here is the reason: the content of the right to choose one's own children education duly interpreted:

> *"Parents' freedom of education in this context is therefore circumscribed to the power to teach their children without prejudice to the fulfillment of the duty to attend school on the one hand, and the power to create a teaching centre whose educational project, without prejudice to the unavoidable compliance with the provisions contained in Sections 2, 4, 5 and 8 of Article 27 of the Spanish Constitution, better meets their pedagogical or other preferences."*

The problem of interpretivism is that it is unable to offer a solution when even a precise interpretation of the rights does not solve the normative conflict as in the cases of judgments like 154/2002 and 50/2010.

2.5 PROPORTIONALISM

In judgment 133/2010, the Spanish Constitutional Court gives a second argument to dismiss the parents' petition:

> *"[…]compulsory school attendance does not generate a disproportionate restriction on the fundamental right invoked, as this standard of judicial review has been constructed in our case-law"*

This line of reasoning is what constitutes the intuitive appeal of *proportionalism*, which is the view held by ROBERT ALEXY[35]. *Proportionalists* accept the distinction between

35 ROBERT ALEXY's main work were proportionalism is defended is Theorie Der Grundrechte -. in English published as A Theory of Constituional Rights (Alexy 2002) -. ROBERT ALEXY's proportionalism is not always followed by legal philosophers but it must be admitted that it is a very popular view to deal with constitutional conflicts of norms among legal scholars. The reasons for this is that the terms in which ROBERT ALEXY's proporitionalism is presented are familiar for legal scholars and legal practitioners. For an overiview of ROBERT ALEXY's proportionalism in Spanish see CARLOS PULIDO's El principio de proporcionalidad y los derechos fundamentales : el principio de

rules and principles (and thus reject Claim 4) but do not accept the answer to the Question given by *Interpretivism*. According to this view, problems arising from conflicting constitutional principles cannot be solved by interpretation so that the content of constitutional principles can be fully harmonized. Conflicts between principles are real, not apparent.

The way *Proportionalism* answers the Question is by balancing or weighing the conflicting principles. How? They appeal to a principle whose function is to perform this balancing or weighing: the *principle of proportionality*.

The *principle of proportionality* is constituted by three sub-principles:

1 The principle of suitability: this principle expresses the idea that the decision that applies one constitutional principle instead of the other constitutional principle must be suitable to contribute to/favour/promote/defend/guarantee/etc. the winning principle.

   This principle does not indicate by itself which principle we are to favour. It works as a requirement. If the decision does not suit the winning principle, the decision must not be made, because it does not comply with the principle of suitability.

2 The principle of necessity: this principle expresses the idea that the decision that applies one constitutional principle instead of the other constitutional principle is necessary to contribute to/favour/promote/defend/guarantee/etc. the winning principle.

   In consequence, if there is an alternative decision that equally contributes to/favours/promotes/defends/guarantees/etc. the winning principle but that is less harmful as regards the losing principle, the decision must not be made because it does not comply with the principle of necessity. Similarly to the former principle, the principle of necessity does not tell us by itself which principle we are to favour. It works as a requirement.

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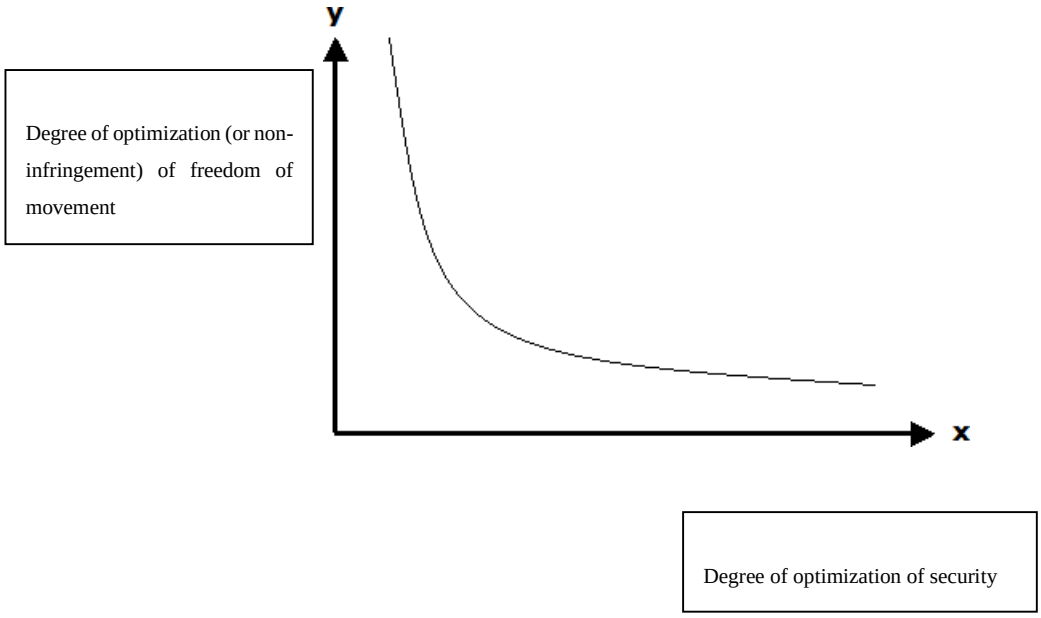
proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador (Bernal Pulido and Cascajo Castro 2007).

3 The principle of proportionality in the narrow sense: this principle allows us to decide which of the conflicting principles to apply. Since this principle is the core of *proportionalism*, I set forth its content in some detail in what follows.

Proportionalism sees constitutional principles as "*optimization requirements*". This means that what principles require or prescribe can be satisfied to varying degrees. To illustrate this, consider the constitutional right to freely move about within the national territory (article 19 of the Spanish Constitution) or the right to security (article 17 of Spanish Constitution): freedom of movement within the national territory may be more or less allowed (in certain zones it is totally free, in others you need to comply with certain requirements, for instance, in airports or military zones) so accordingly a measure may affect this right more or less. The same applies to the right to security. A measure may affect it more or less. In consequence the goal that measures should seek as regards constitutional principles is to optimize them.

When two constitutional principles conflict, the increase in the optimization of one principle implies the decrease in the other. As a consequence, we can use a mathematical tool that is common usage in microeconomics: indifference curves.



Horizontal axis (x) represents the degree of optimization of security and vertical axis (y) the degree of optimization of freedom of movement. The indifference curve thus represents the fact that as we near (x) a decrease in freedom of movement must be

compensated by a greater increase in national security and, vice versa, as we near (y) a decrease in national security must be compensated by a greater increase in freedom of movement. ROBERT ALEXY said:

> *"The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.*[36]*"*

ROBERT ALEXY calls this idea the Law of Balancing. It is easy to understand intuitively if one thinks of the choice we often face between time and money as individuals: to earn money I need to work. The more hours I work, the more I earn. Inversely, if I want free time, the more free time I get, the less I work, and thus the less I earn. Well, if my bank account shows 0 euros and I have plenty of time, I will probably be ready to exchange time for money selling my time cheap, so to speak. Now, the thing is that since the more I exchange time for money, the less free time I will have, and I will then be less ready to exchange it at the same rate I started with. I will ask for more money per hour. The time unit will be more and more expensive. Inversely, if I have a lot of money (imagine that I am a general manager of a big company) but no free time at all, I will be ready to buy free time by relinquishing part of my salary. First I will be ready to relinquish large quantities of money, but once I have a certain amount of free time my desire to buy free time reduces considerably. I will not be ready to relinquish my money so easily.

The Law of Balancing can be broken down into three stages:

1 to determine the degree of non-satisfaction of, or detriment to, one principle (let it be Pi);

2 to determine the degree of satisfaction of the other principle (let it be Pj); and

3 to determine whether the importance of satisfying Pj justifies the non satisfaction of, or detriment to, Pi.

R. Alexy argues that we can assess how intensively a measure or decision (let it be M) affects or impacts on Pi (he says "interferes"). For instance, if we are required to show our identity card to travel by plane in Spain, we are entitled to say that this is a rather minor impact on the right to freedom of movement, whereas if we are required to show

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36 See ALEXY's *Constitutional Rights, Balancing, and Rationality* (Alexy 2003, 136).

that we have 100.000 euros in our bank account, we could say that this would be quite a major impact. Accordingly to ROBERT ALEXY, this allows us to make the following assessments: a measure M is a minor/moderate or serious interference to Pi.

Accordingly, we are also allowed to assess whether measure M satisfies (optimizes) Pi in minor, moderate or major way.

Let l, m and s be minor, moderate and serious respectively.

Let IPi C be "the degree of interference of Pi in context C is".

Let SPj C be "the degree of satisfaction of Pj in context C is".

Accordingly, SPj C: m means "the degree of satisfaction of Pj in context C is moderate"

Given a conflict of principles we have 9 possible outcomes of the Law of Balancing:

Pi wins	**Pj wins**	**Stalemate**
IPi C: s / SPj C: l	IPi C: l / SPj C: s	IPi C: s / SPj C: s
IPi C: s / SPj C: m	IPi C: m / SPj C: s	IPi C: m / SPj C: m
IPi C: m / SPj C: l	IPi C: l / SPj C: m	IPi C: s / SPj C: s

To simplify the use of the Law of Balancing, ROBERT ALEXY suggests the weight formula. This formula is purportedly constructed so that we obtain the same 9 outcomes that we obtain by applying the Law of Balancing (those in the table above).

The weight formula is constructed in the following way:

1 Number 1 is given to minor interference or satisfaction.

2 Number 2 is given to moderate interference or satisfaction.

3 Number 4 is given to serious interference or satisfaction.

4 WPi,j C stands for "*the weight of Pi in relation to Pj under circumstances C*" and, once the weight formula is applied, WPi,j C gets a number.

5 If WPi,j C is more than 1, then Pi wins (the outcomes of the first column of the table).

6 If WPi,j C is less than 1, then Pj wins (the outcomes of the second column of the table).

7 If WPi,j C equals 1, then Pi and Pj draw (the outcomes of the third column of the table).

The weight formula is:

WPi, j C = IPi C/ SPj C

Let us consider the following example. Imagine that the government introduces the following policy: Spanish citizens are forced to stay at home in a context of a very contagious but not severe flu. Spanish government justifies this policy on the grounds of public health. This measure would be a serious interference of freedom of movement and a minor contribution to public health. The degree of interference of freedom of movement under these circumstances is serious, then IPi C = 4. The degree of satisfaction of public health is a minor one, then SPj C=1.

If we apply the weight formula we obtain:

WPi, j C = 4/1 = 4

In the case considered, the weight of Pi in relation to Pj under circumstances C has value 4. Since 4 > 1, freedom of movements prevails.

It is important to bear in mind that the weight formula is heuristic in nature. It does not aim at making any substantive claim. Its function is merely to summarize the Law of Balancing. In this respect, ROBERT ALEXY explicitly warns us:

> *"[…] This would be the case if intensities of interference, degrees of importance, and abstract weights were really such that they could be represented on scales with an infinite number of classes. Such a representation would not simply be an idealized model, but the reproduction of an actually existing structure. But there is little in favor of such structure really existing. It is as true as here as it is generally in practical matters that as Aristotle pointed out "we must… not look for precision in all things alike, but in each class of things such precision as accords with the subject-matter". Constitutional rights are not a subject-matter which is so finely distinguished that is excludes structural that is, real balancing stalemates to such an extent as to make them practically insignificant. But that means that a discretion in balancing, as*

> *a structural discretion enjoyed by the legislature and the judiciary, really does exists"*[37].

In the previous quotation, in spite of the weight formula, ROBERT ALEXY rejects the possibility of a mathematical calculus of conflicts of norms. But he does not only do that. He accepts judicial discretion as a necessary consequence of his theory: stalemate cases cannot be solved by balancing or weighing. In such cases, courts have discretion.

My first criticism of *proportionalism* is precisely that it does not solve the problem: it entails that in certain cases (the stalemate cases) there is no possible justification.

My second criticism is that it depends on the controversial distinction between norms and principles. Besides, the conception of principles as optimization requirements is problematic, for what does "to optimize education (article 27 of the Spanish Constitution)" actually mean, for example? Does it mean giving schools more funds? Does it mean more power to teachers? Does it mean giving more teaching options to parents? The thing is that it is far from clear what "optimizing" constitutional rights really means.

Optimization is a mathematical concept. We first need to remember what a mathematical function is: a function correlates a set of inputs to a set of outputs so that each input is related to exactly one output. Optimization is to identify the best outputs of a given function with regard to the criteria established. If principles are optimization requirements it is hard to see what the functions, whose best results the principles must identify, are. Identifying the criteria is as difficult as picking up the alleged functions.

The suspicion that the whole idea is flawed is given by ROBERT ALEXY's warning as regards mathematics: optimization is a mathematical concept.

The third criticism is that p*roportionalism* is defended as a principled manner to answer the Question but (i) accepts *judicial discretion* as regards stalemate cases and (ii) it is a form of a *disguised* particularism. The reason I believe that *proportionalism* is nothing but a form of particularism is that interferences or satisfactions are always concrete and context dependent. Note the way the three steps of proportionality in the narrow sense are actually conceived by *proportionalism* despite the talk of principles:

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[37] See ROBERT ALEXY's A Theory of Constitutional Rights (Alexy 2002).

1 to determine the degree of non-satisfaction of one Pi *in context C*;

2 to determine the degree of satisfaction of Pj *in context C*; and

3 to determine whether the importance of satisfying Pj justifies the non-satisfaction of, or detriment to, Pi *in context C*.

In this respect, we can reproduce here the criticism of *particularism.*

2.6 SPECIFICATIONISM

The *specificationist* strategy to answer the Question consists in reducing the scope of the norm while preserving its stringency. I will consider here MORESO's *specificationist* account[38]. He proposes answering the Question in five steps.

1 To determine the universe of discourse (the set of relevant human actions). That makes the case of conflict of norms we are to decide upon manageable. For instance, as regards a conflict involving the right to freedom of expression and information and the right to honour, the universe of discourse would be all human actions of information in the mass media affecting concrete persons;

2 To determine the conflicting principles;

3 To take into account paradigmatic cases. That allows us to test admissible reconstructions of the conflicting norms, which must be consistent with the way paradigmatic cases are solved;

4 To determine the relevant properties of the case;

5 To determine the rules that univocally solve all the cases of the universe of discourse. These rules avoid the conflicting norm situation, which consists in having at least one case of the universe of discourse which is solved by two principles, because these rules are constructed so that every case of the universe of discourse is related to only one principle.

MORESO nominally keeps the distinction between principles and rules to elaborate his proposal. Nevertheless, *specificationism* does not require the distinction between principles and rules. All that is needed by the *specificationist* is the concept of norms as

38 See MORESO's *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism* (Moreso 2012).

prima facie duties. In this way it avoids (1) one of the particularist objections to generalism: norms have exceptions; and (2) becomes immune to theoretical attacks on the distinction between norms and principles.

A *particularist* may be willingly to point out here that new cases may show that there are exceptions to the exceptions so that the model becomes more and more complex and thus unpractical, leading to pure casuistry in spite of the talk of principles. As regards this criticism by the *particularist*, first of all, it is odd to hear the *particularist* accusing *specificationism* of leading to casuistry, for the *particularist* has nothing else to offer. However, the criticism shows that something is missing in the *specificationist* account. What?

In my opinion, in order to respond to this criticism we need an epistemological account of steps 3, 4 and 5. This project may be seen as an attempt to answer the following questions:

- How do we justify our use of the paradigmatic cases to test norms?
- How do we justify our picking the relevant properties of the case?
- How do justify the new norms that univocally solve all the cases of the universe of discourse?

I think that MORESO's *specificationist* account is right but incomplete. It is right because (1) it explains very well the effort that courts make to justify their decisions in cases of conflicting norms in which *lex posterior*, *lex superior* and *lex specialis* principles fail to solve the conflict. As a matter of fact, courts often look for criteria (norms) that work as exceptions and take into account paradigmatic cases. (2) It is not subject to the criticisms I mentioned as regards *judicial discretion, particularism, interpretivism* and *proportionalism*.

For example, in judgment 50/2010, The Spanish Constitutional Court decided that the right to honour was not infringed. It reasoned that whenever freedom of expression and right to honour conflict, the following rules apply:

- if the facts reported have general or public interest;
- if the information given is reliable (though not necessarily true) and obtained by diligent journalist standards; and

- if the wording used is not insulting (though the ideas expressed may offend).
- then freedom of expression supersedes right to honour.

However, *specificationism* is incomplete because it lacks an epistemological account of steps 3, 4 and 5.

Whereas MORESO's *specificationist account* rejects *judicial discretion*, it does not explicitly reject any of HART's claims. Nevertheless, since *judicial discretion* is a logical consequence of those claims, it must necessarily reject one of them. One may wonder which claim is to be abandoned.

I think that the right *specificationist* move is to elaborate an epistemological account of steps 3, 4 and 5, to reformulate HART's Claim 3 so that we can keep Claims 1 and 2. (i.e. so that we can keep exclusive legal positivism).

The hypothesis is that the epistemological principles governing steps 3, 4 and 5 of MORESO's *specificationism* are grounded on practical reasons structure. This entails that to justify a legal decision we do not simply subsume the case to the relevant norm (this is one concession to *interpretivism* and *particularsim).* This suggests the idea that the structure of practical reason is much complex than *subsuming* the case to the relevant norm.

Legal philosophers aligned with *specificationism* have been recognising that the way a principle is specified is not as simple as a bare subsumption[39].

I will show in the next chapters that when unveiling the structure of practical reason, it is convenient to shift from norms to reasons for action as the central element. Principles or norms will be regarded as generalized reasons for action. Subsumption will be regarded as the final step of a complex process. I will present this complex process as a process consisting of different steps in *algorithmic-like* fashion following what MORESO sketched [40].

39 A good example of this SEAN MCKEEVER and MICHAEL RIDGE's *Principled Ethics* where both philosophers present generalism as able to respond to the attacks from *particularism* (McKeever and Ridge 2006). Another example is PEKKA VÄYRYNEN's *A theory of hedged moral principles* (Väyrynen 2009).
40 See MORESO'S *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism* (Moreso 2012).

3 FROM NORMS TO REASONS

All the accounts studied in the last section share one common element: norms are the bricks and mortar of a judicial decision concerning a clash of fundamental rights. Indeed, all these accounts assumed that norms are the basic elements of law. This view has a long pedigree in Ethics. It can be traced back at least to Aquinas:

> *"[…] a **law is imposed** on **others by way of a rule** and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to law, it must be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force. Thus from the four preceding articles, the definition of law may be gathered; and **it is nothing else than an ordinance of reason** for the common good, made by him who has care of the community, and promulgated."*[41].

Since legal reasoning is considered a form of practical reasoning—and I must say rightly so, law as essentially norm-based is a common assumption:

> *"Most of us, if asked to define law, would probably do so in terms of rules: for instance, we understand criminal law, forbidding certain activities, as a set of rules defining the types of behaviour which, if indulged in, result in some form of official 'retaliation' through police intervention, the courts, and some form of criminal sanction such as imprisonment, or a fine. Criminal law and the notion of legal sanctions will be examined in a later chapter. For the moment, the fundamental notion for us is that of a 'rule'."*[42]

All views of the clash of fundamental rights discussed in the previous section share this view on practical reasoning. They simply differ in the way norms are considered. They differ on the ontology of norms.

In *judicial discretion*, norms are constructed as rules while *interpretivism* makes the distinction between rules and principles. In *proportionalism*, a value is assigned to norms so we can weigh them. Finally, in *specificationism* norms are considered in their logical

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[41] See AQUINAS's Summa Theologica (Aquinas 2012, [QQ 90-108])
[42] See PHIL HARRIS's Introduction to Law (Harris 2006)

structure, so we can talk about properties such as their scope or their stringency. It is thus undeniable that all the accounts discussed in the last chapter take norms as the bricks and mortar of legal reasoning. However, none of the accounts is free from important objections.

I have insisted on the idea that legal philosophers assumed norms to be the fundamental concept from which any theoretical account is to be given. However, my real suspicion is that the notion of a legal system is what actually plays the role of the fundamental concept in the twentieth century legal philosophy. Both KELSEN and HART, the two major figures of legal positivism in the twentieth century, defended the idea that a norm is a legal norm if it belongs to a legal system. In consequence, if legal norms are defined by this belonging to a legal system, it seems that the notion of a legal system is even more fundamental.

KELSEN assumes that legal systems do exist and, from that, he further elaborates that the only way we can make sense of the existence of legal systems is by assuming the existence of the fundamental norm[43]. A legal system is thus a set of norms such that all norms belonging to it are linked to the fundamental norm[44]. That is the reason why KELSEN, in Kantian fashion, said that his theory of law is pure[45]: there is nothing but law contained in it. KELSEN thus gave an account freed from any other normative domains, especially from morality. KELSEN's account is thus necessarily positivist.

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43 KELSEN's interpreters rightly point out that this argument is of Kantian transcendental flavour, see BERGER's Kelsen's Transcendental Argument - A Response to Stanley Paulson (Berger 2017). A transcendental arguments in KANT's jargon is a conclusion reached from the analysis of the representation of something, See SALVI TURRÓ's 'Sentido y Límites de La Filosofía Transcendental En El Proyecto Kantiano' (Turró 2019). In other words, what is required to have a representation of a certain thing. In KELSEN's case, the key question revolves on what is required to have the concept of a legal system. KELSEN's answer is: the fundamental norm. Representations are taken as a fact: we have them. We have perceptions of things and we have concepts about things. Perceptions and concepts are representations in KANT's jargon. Transcendental arguments are aimed to show what is required to have a representation and since, it is beyond any doubt that we actually have the representations we have, we must therefore accept conclusions arising from transcendental arguments. KELSEN's trascental argument have been largely critized by legal philosophers, see STANLEY L. PAULSON's On the Puzzle Surrounding Hans Kelsen's Basic Norm (Paulson 2000).

44 This is the presentation defended in KELSENS's *Reine Rechtlehre* (Kelsen 2018).

45 Note on Critique of pure reason (Kant 1998a) : 'pure' in KANT's jargon means that nothing other than reason is taken into account (that is no sense data, sensibilia, etc). KANT famously concludes that when we reason theoretically, if reason is pure, that is, it does not contain any element from the senses, we end up with paradoxes and generating bad metaphysics. KANT concludes that we cannot trust the result from theoretical reason when reason works alone (pure) without the aid of the senses. In contrast to theoretical reason, KANT concludes that in practical reasoning, when practical reason is mixed with other elements (passions, motives, personal goals, subjective considerations, etc.), practical reason yields invalid results. In practical reason, reason must be pure to reach valid results.

HART does not share KELSEN's Kantian assumption. Certainly, for HART as for KELSEN legal systems do exist. However, to make sense of them HART does not consider that we need to assume a fundamental norm as a kind of a logical requirement to account for the existence of legal systems. HART believes that legal systems arise from social practices and, in contrast with Kelsen, not only as a matter of logical requirement[46].

The key player for HART is the norm of recognition. According to Hart, this norm is itself a social practice that decides when any other norm belongs to the legal system. The parallelism between KELSEN's basic norm and HART's norm of recognition is blatant. Both define a legal system as a set of norms such that all norms are linked to a special norm: for KELSEN, the basic norm (BN), which arises as a logical requirement, and for HART, the rule of recognition (RR), which is itself no more than a social practice.

Formally, a legal system is thus any set of norms S so that all norms *n* in S are related to BN or RR. An important part of KELSEN's theoretical account was to flesh out the relationship between norms *n* of S and BN. In contrast, one important missing part in HART's theoretical account is that he said very little about the relationship between norms *n* of S and RR. HART's commentators even struggle with the very concept of RR. Due to the lack of theoretical elaboration for the relationship between the norms in a system and RR in HART's *The concept of law*, Hart's interpreters are not even sure whether RR is a legal norm or not.

In spite of the differences between HART and KELSEN's accounts, they do share the fundamental structure: norm *n* is a legal norm if $n \in S \wedge S \; is \; a \; legal \; system.$ As I warned earlier, legal systems are key concepts and not legal norms. KELSEN and HART set forth the theoretical framework within which the vast majority of legal philosophers still work.

I think that the very concept of legal system is flawed as a descriptive concept. However I really consider the concept of a legal system an important one to describe western legal tradition. Legal practitioners seem to assume their existence. This assumption has an impact on the expectations of legal practitioners about what is and what is not the Law

46 HART defends social practices as what grounds law in The Concept of Law (Hart 2012). The importance of social practices in HART's work is self-evident, but for a detailed discussion of the grounding role of social rules in HART's concept of law see STEPHEN PERRY's Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View (Perry 2006).

and its content. Therefore, these expectations arising out of the assumption that legal systems exist partly guide and explain legal practices among practitioners in western legal traditions (common law and civil law).

However, I object to the idea that legal systems *are* actually something *besides* these practices and, in consequence, I object to the idea that legal systems are these sets of norms linked by either a fundamental norm or a norm of recognition. I also reject the idea that if a society has law there must be a legal system. To make it clear, the notion of a legal system as a practice may be useful to understand western law but not law as a universal phenomena that regulates order and dispute within a society.

In assessing particular cases, legal practitioners do not consider the legal system as a whole. Rather, they pre-select a set of legal norms according to the nature of the case from their own professional experience and from what practitioners have taken into account in the past with similar cases. In assessing a case, the notion of a legal system plays no role at all. Even in private international law cases, legal practitioners do not consider the legal system as whole either, but rather work with the concept of jurisdiction where norms are only a few. Legal practitioners can pre-select a set of jurisdiction norms according to the nature of the case from their own professional experience and from what practitioners have taken into account in the past with similar cases.

The very notion of a legal system has been a result of a long history[47]. Legal thinkers in Rome rejected the idea of a legal system[48]. For them, law is too case-sensitive to have a system. Paradoxically, the concept of a legal system stems from the very ones who rejected it: the Romans. Roman law started to be systematically studied by Medieval Bologna *Commentators.* Their main source was Justinian's *Corpus Iuris Civilis*, a 6th century legal work, which was the endpoint of a legal tradition of more than one thousand years. Roman law evolved no further. It was final. And its final product was not approached by *Commentators* to solve practical problems as the *jurisconsult*s did[49]but studied as the best legal system human reason could produce, and thus studied and analysed systematically. The systematic study of Roman law ends in the XIX century with VON SAVINGNY's German pandect science, which sees law as a rational system.

47 See PETER STEIN's Roman Law in European History (Stein, Peter 1999).
48 See PETER STEIN's Regulae Iuris : From Juristic Rules to Legal Maxims (Stein, Peter 1966).
49 See PETER STEIN's *Regulae Iuris : From Juristic Rules to Legal Maxims* (Stein, Peter 1966).

The idea of law as a rational system was boosted by XVIII Enlightenment. The outcome of legal thinking and political philosophy of the liberal state is the Napoleonic code, which was mimicked by a large number of countries during the XIX and XX centuries[50] and its success explains why civil law tradition is one of the largest legal traditions today.

The idea of law as a legal system also has another source whose origin is again the Romans. In Roman times, *civil law* was only for Roman citizens. When one party was foreign the Romans developed what is called *ius honorarium* which is the origin of *ius gentium*. Romans considered *civil law* as part of their political identity, their most precious tradition and thus something that should not be shared with others. In contrast, *ius gentium* was seen as a product of human reason only[51]. Middle Age philosophers received from Church Fathers and roman legal tradition the idea of law based on natural reason only. The best expression of natural law tradition in the Middle Ages is *the treatise on law* in AQUINA's *Summa Theological*. Scholastic natural law tradition was secularized by early natural law philosophers such as PUFFENDOR, GROTIUS and SUAREZ[52]. Famously, this tradition is defended today among legal philosophers by JOHN FINNIS[53].

This view of law, that is, the law as a product of human reason, was integrated into the philosophy of the construction of the liberal state during the XVII, XVIII and XIX

50 See KONRAD ZWEIGERT and HEIN KÖTZ's *Introduction to Comparative Law* (Zweigert, Kötz, and Weir 1998).
51 Of course, we are not romans and thus we see *ius Gentium* as just another product of *roman tradition.*
52 See KNUD HAAKONSEN Grotius, Pufendord and Modern Natural Law (Haakonsen 1999).
53 See JOHN FINNIS's Natural Law and Natural Rights (Finnis 1980).

centuries by philosophers such as HOBBES[54], ROUSSEAU[55], LOCKE[56], KANT[57], HEGEL[58], FICHTE[59] and MILL[60] just to mention some of the leading names.

The philosophy of the liberal state had a major impact on how law was produced: the code. That law as a rational system was put into practice with the very idea of the code. It is worth remembering that NAPOLEON's troops spread the ideals of the French revolution through the whole Europe. All of NAPOLEON's soldiers had a bayonet and a copy of the Napoleonic code[61]. Once the idea of code is established among legal practitioners, they naturally start to think of law as system of rules, and of course as a system that is *sustained* by political authority[62]. The idea of law as a system is thus reinforced by the liberal political tradition. When AUSTIN struggles to distinguish law from morals in his *The Province of Jurisprudence Determined* (Austin 1995) and thus started legal positivism, he simply assumed that law must be understood as a system of norms.

In consequence, law as rational system of norms is a view of law that has not always been shared by legal practitioners – Roman legal scholars for instance – and the idea of law as a system is the outcome of protracted history. As any historical product, it is only natural to ask whether it is necessarily so, or just one among many possible ways, that is, whether the existence of law in a sociey requires a system of norms, or having a system is just a

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[54] HOBBES's Leviathan (Hobbes, Thomas 1968) is seen as one of the sources of political liberalism, see JAUME's Hobbes and the Philosophical Sources of Liberalism (Jaume 2007).
[55] ROUSSEAU's *Social Contract* (Rousseau 2018) is both a challenge for classic liberalism (Jonathan 2005) and a contribution to the construction of the liberal state (Jennings 2016).
[56] LOCKE is seen as a founding father of political liberalism (Stanton 2018). The main work of LOCKE where liberalism is defended is his *Two treatises of government* (Locke 1988).
[57] KANT's ideas defending the liberal state are mainly laid down in his *Doctrine of Right*, the first part of his *Metaphysis of Morals* (Kant 2017). For an overview of the impact of KANT's ideas on current political liberalism see FLIKSCHUH's *Kant and Modern Political Philosophy* (Flikschuh 2000).
[58] For a recent discussion of HEGEL's political ideas and liberalism see SIEPS's *Hegel's Liberal, Social, and 'Ethical' State* (Siep 2017).
59 See GABRIEL GOTTLIEB's Fichte's Foundations of Natural Right (Gottlieb 2016). For a work that connects Fichte's ideas with the construction of the liberal estate see SALVI TURRO's Fichte : De La Consciència a l'absolut (Turró 2011).
60 MILL's *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations*(Mill 1986)offer a clear example of his defense of political liberalism.
61 See STEIN's Roman Law in European History (Stein, Peter 1999). It must be said that in contrast with Justinian's Corpus iuris civilis, whose work was performed by Tribonian and his legal team, NAPOLEON actually took a fundamental part in the creation of the code that bears his name (see ZWEIGERT and KÖTZ's Introduction to comparative law (Zweigert, Kötz, and Weir 1998, p.85).
62 The most radical move was made by KELSEN in equating law and the state, see KELSEN's s General Theory of Law and State (Kelsen 2017).

particular way among others of instantiating the idea of law, an idea that is of much more universal scope than the idea of a legal system.

Since what I have said about legal systems may be controversial and would certainly deserve a much longer and fine-grained discussion than the reasons I have given above, I shall for the purpose of the argument of this dissertation, stick to the fact that legal norms have been considered as the fundamental concept. That should be a fairly equable statement for legal philosophers. My proposal is to shift from norms to reasons as the fundamental concept.

In recent years, the meta-ethical debate in philosophy has been shifting from norms to reasons as the works of SCANLON[63], PARKIT[64] and DANCY[65] show. Legal philosophers have been introducing the term reason or legal reasons in the debate for some time[66]. We can trace this back at least to RAZ's work in the 1970s[67]. However, in spite of the introduction of reasons for action into the legal debate, the truth is that the major players still seem to assume norms as the fundamental bricks and mortar of legal reasoning.

In the next chapter I will present SCANLON's *reasons fundamentalism* which places the concept of reasons for action as the fundamental concept for understanding practical normativity. Since legal reasoning is a normative domain, one line of research worth undertaking is to explain legal concepts and legal reasoning though the more basic concept of reasons for action. That is what I will be doing in the next sections.

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63 See SCANLON's Being Realistic about Reasons(Scanlon 2014).
64 See PARFIT's On What Matters(Parfit 2011).
65 See DANCY's Moral Reasons (Dancy 1993).
66 Good examples of an intensive use of reasons for action in legal philosphy are: CELANO's Dialettica della giustificazione pratica : saggio sulla legge di hume (Celano 1994), CRISTINA REDONDO's Reasons for action and the law (Redondo 1999) MORESO, NAVARRO and REDONDO's Legal Gaps and Conclusive Reasons (Moreso, Navarro, and Redondo 2008), CARLOS BAYÓN's La normatividad del derecho: deber jurídicos y razones para la acción (Bayón Mohino 1991), PEZENIK's On law and reason (Peczenik 2009) and more recently ENOCH's Reason-giving and the law (Enoch 2011).
67 See RAZ's Practical Reason and Norms (Raz 1999).

4 SCANLON'S REASONS FOR ACTION

In this section, I will present SCANLON's *reasons fundamentalism* as defended in his *Being realistic about reasons*[68]. It is an account on normative discourse in general and not only on moral reasoning. Since law is a normative domain, it is obvious that a philosopher of law can exploit SCANLON's ideas to better understand law's normativity, which is the major conundrum for philosophers of law.

Of course, SCANLON is far from being alone in giving an account for normative discourse. It is the core part of what nowadays we call meta-ethics[69]. For this reason, I will start this section with a brief taxonomy of the positions in meta-ethics. Then I will move to present SCANLON's *reasons fundamentalism* and how well it answers the typical meta-ethical questions about normative statements. Offering arguments for and against *reasons fundamentalism* and their alternatives is out of the scope of this dissertation.

I simply justify the discussion of SCANLON's ideas here because (i) the concept of reasons for action he presents is in itself a very powerful tool for analysing normative issues, as I will show in the subsequent sections of this dissertation and (ii) reasons fundamentalism seems to offer a good start to think of normativity (in our case, law's normativity) with minimal metaphysics, and no reductionist programme either.

4.1 NORMATIVE STATEMENTS

In the 20th century, philosophers argued about the nature of normative statements.[70] In doing so, a lively, rich and still on-going academic field of research was born: meta-ethics.

As regards moral statements, philosophers working on meta-ethics typically ask the following questions:

- Are moral statements *truth-apt* or are they expressions of feelings of approval or disapproval?

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68 See (Scanlon 2014).

69For an overview of the different philosophical positions in metaethics see ALEXANDER MILLER's Contemporary Metaethics: an Introduction (Alexnader 2013).

70 Philosophers working on metaethics acknowledge that the first piece of metaethics in philosophy can be traced back to Plato's Euthyphro when Socrates asks Euthyphro *"Is that which is holy loved by the gods because it is holy, or is it holy because it is loved by the gods or is it pious because it is loved by the gods?"* (Plato 1914, p.35).

- What do moral terms refer to? Moral properties?
- If moral terms refer to moral properties, what are moral properties ('good', 'right', 'fair', etc.)? How do these properties relate to natural properties ('red', 'round', 'hard', etc.)?
- If moral statements are truth-apt, how is it possible that moral beliefs have practical significance?

Realists defend that moral terms refer to moral properties. Among realists, they differ on whether these moral properties are ultimately reducible to natural properties[71] or if they are non-natural properties[72], that is, properties whose nature is completely different from natural properties.

Cognitivists defend that (i) moral statements are *truth-apt* and (ii) when we make a moral statement we are expressing a belief, that is, if I say 'killing innocent people is wrong' I am expressing my belief that killing innocent people is wrong. Among realists, they differ on the possibility of true statements. Error theorists defend that all normative statements are false[73] while the rest of cognitivists accept that there are many moral claims that are actually true.

Non-cognitivists defend that, on close examination, normative statements are not truth-apt and that normative statements do not express beliefs but rather feelings of approval or disapproval[74].

It is important to note that nowadays there are philosophers currently developing their views defending these positions. In consequence, as regards normative statements, all positions seem to be philosophically available for the legal philosopher.

As I see it, if the initial *data* we have is the normative discourse, that is, how we actually argue and discuss moral issues, to evaluate the aforementioned accounts on normativity we should at least be asking:

- Does it accurately describe moral discourse?
- Does it have controversial metaphysical implications?

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71 FRANK JACKSON defends that moral properties are reducible to natural properties (Jackson 1998).
72 G.E MOORE's *principia ethica* is a paradigmatic example of non-natural realism of moral properties(Moore 1982).
73 MACKIE famously defended that all our moral judgements are wrong J. L. (Mackie 1977).
74 See ROOJEN's *Moral Cognitivism vs. Non-Cognitivism* (van Roojen 2018).

- Does it accurately describe the way we come to know substantive moral claims?
- Does it accurately describe how we seem to respond (to be motivated) to moral claims?

Realists and cognitivists do not have any trouble with the fact that moral reasoning seems to accept conceptual implications from one moral concept to another or to make inferences from moral claims to moral claims through logical schemes[75]or Aristotelian *topoi*. For realists and cognitivists this is no surprise since they already accept the truth-aptness of moral statements.

However, realists and cognitivists seem to struggle with the metaphysical implications of the truth-aptness of moral claims. If moral claims are truth-apt, then the moral terms contained in them must have truth-makers, that is, something that makes those statements true. If so, what is it that makes moral statements true? The fact that something instantiates the moral property referred by the moral terms? If so, what are moral properties? Realists and cognitivists[76] must thus offer an answer for such questions. If moral properties are not natural properties, how can we know them?

Non-cognitivists seem to fare well as regards the metaphysical implications. Since normative statements are ultimately expressions of feelings of approval or disapproval, there are no metaphysical worries here. *Feelings* are psychological entities that we have knowledge of: our own. These accounts easily explain why normative statements have practical significance since, in contrast with belief, *feelings* (desires, wishes, etc.) have an impact on what we finally decide to do (they *move us* to action, so to speak).

However, non-cognitivists must explain how the use of logic and conceptual entailment is possible if normative statements are not expressions of beliefs but of feelings of some sort.

I have just given an excessively brief taxonomy of the accounts currently available in meta-ethics. It is far beyond the scope of this dissertation to discuss these accounts in detail. I have presented them so that the discussion on reasons for action is better

75 I am using the term 'logic schemes' here as DOUGLAS WALTON's argumentation schemes (Walton 1996).
76 MACKIE's cognitivist position, error theory, solves the metaphysical worries for cognitivists from the start: he asserts that all moral claims are false because there is no such thing as moral properties (Mackie 1977).

understood. Reasons for action were introduced into the debate precisely to better understand the normative discourse.

Recently, SCANLON gave an account for the normative discourse called *reasons fundamentalism*. This position has three assumptions:

- Normative statements involve, ultimately, reasons of some sort
- Reasons cannot be reduced to non-normative statements, typically, to statements about natural facts or sociological facts.
- Reasons are the fundamental bricks and mortar of normative discourse: any other normative concept can be ultimately explained in terms of reasons.

In *Being realistic about reasons*, SCANLON starts by saying that "*the idea that there are truths about reasons for action is strongly supported by common sense*"[77]. In support of this initial claim, he offers some examples:

> *"(1) For a person in control of a fast moving automobile, the fact that the car will injure and perhaps kill a pedestrian if the wheel is not turned is a reason to turn the wheel.*
> *(2) The fact that a person's child has died is a reason for that person to feel sad.*
> *(3) The fact that it would be enjoyable to listen to some very engaging music, moving one's body gently in time with it, is a reason to do this, or to continue doing it."*[78]

According to the examples in the quotation, it is undeniable that we, as human beings, are able to make true statements[79] about the reasons persons have in favour (or against) of doing something. In spite of this initial truism, pressing questions and puzzles arise: what are reasons (the ontological or metaphysical problem)? Why do reasons have a grip on us (the practical significance problem)? How do we come to know them (the epistemological problem)?

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[77] See (Scanlon 2014, P.2)
[78] See (Scanlon 2014, p.2)
79 As discussed above, non-cognitivists deny that there are normative statements that are truth-apt, however they cannot deny that we make such statements. This is SCANLON's starting point.

There are different philosophical accounts for *reasons for action* that address these questions: (i) expressivism[80] (ii) desire theories, (iii) theories based on the idea of rationality, and (iv) *reasons fundamentalism*. Obviously, all these accounts for reasons for action assume one of the meta-ethical positions mentioned above.

Expressivist[81] positions state that normative claims[82] must be understood as expressing a negative or positive attitude towards something. According to expressivism, since normative claims do not describe anything but only express an attitude of the speaker[83], normative claims do no not have truth values. In this way, the expressivist avoids any metaphysical discussion on moral properties and values from the start. Besides, since moral claims express attitudes of the speaker, expressivim also seems to avoid the problem of motivation (or practical significance) of normative judgements.

Desire theories[84] equates reasons with certain desires. Desires are some undeniable psychological fact that we have epistemic access to (namely, our own desires). They also motivate us to act. In consequence, it does seem that *desire theories* have an initial appeal in answering the ontological or metaphysical problem, the practical significance problem and the epistemological problem.

Theories based on an account of rationality [85] identify reasons with what rationality requires us to do. These theories seem to explain well why reasons have a grip on us (after all, reasons are what rationality requires us to do) and offer an explanation for how we come to know the reasons we have (the ones meeting the rationality requirement) and seem to be able to handle the ontological question (reasons are simply the requirements of rationality).

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80 Following SCANLON, I am using the label *expressivism* in a general manner to cover what is normally labeled as non-moral cognitivism (Scanlon 2014, p.53).
81 Expressivism about reasons for action is thus a non-cognitivists position as stated earlier.
82 From HARE's prespectivism (Hare 1964) to GIBBARD'normativity (Gibbard 2002).
83 With the exception of GIBBARD who defends a minimal concept of truth within *expressivism* (Gibbard 2002).
84 Desire theories about reasons for action are thus a non-cognitivist position. For an example of a good desire theory: MARK SCHROEDER's *Slaves of Passions* (Schroeder 2007).
85 Theories based on an account of rationality are cognitivist positions since they accept that there are true normative statements (those required by practical reason) but they are anti-realist (they deny realism) since moral properties do not correspond to anything besides the fact that practical reason requires doing (or refrain from doing) a certain action. Most theories based on an account of rationality are *contractualist* in nature (e.g. Korsgaard and Onora O'Neill in *The Sources of Normativity* (Korsgaard 1996), RAWLS's *A Theory of Justice* (Rawls 1971) and SCANLON's *What We Owe to Each Other* (Scanlon 1998)).

SCANLON offers some objections to all these accounts of reasons for action. However, I will leave the discussion of these criticisms out of this dissertation.

SCANLON defends a position known as *reasons fundamentalism* which states that (i) normative statements are ultimately statements about what reasons do people have and (ii) that normative statements cannot be reduced to non-normative statements, that is, normative statements cannot be reduced to statements about facts about physical or psychological or sociological reality.

As regards, *reasons fundamentalism* some pressing questions naturally arise: if normative statements cannot be reduced to non-normative facts, what kind of reality *reasons* in normative statements refer to (ontological problem)? It thus seems that *reasons fundamentalism* forces us to accept the existence of odd properties beyond the properties of physical and psychological entities. If reasons are not ultimately reducible to facts about the physical and psychological entities, what are they (ontological problem), how do we know them (epistemological problem)? And finally, how can mere judgements (beliefs) about reasons affect my will (practical problem)?

After having exposed SCANLON's reasons fundamentalism, I will show how this position handles the ontological problem, the epistemological problem and the practical significance problem very well. SCANLON's reasons fundamentalism therefore offers an account for normativity that a philosopher of law can profit from.

4.2 THE STRUCTURE OF REASONS FOR ACTION

SCANLON defines *reason* as "*the relation of simply counting in favour of some action or attitude"*[86] and right after he states that "*whether a certain fact is a reason, and what it is a reason for, depends on an agent's circumstances*"[87]. To illustrate this, he gives the example of a sharp knife. The fact the knife is sharp is a reason for me not to press my finger against it. However, in different circumstances the fact that the knife is sharp is a reason for me to keep the knife in the picnic basket so that I can cut cheese with ease later

[86] See (Scanlon 2014, p.30)
[87] See (Scanlon 2014, p.30)

on[88]. The point here is that a fact is a reason for somebody to do something *under certain circumstances.*

According to SCANLON, the example given "*suggests that 'is a reason for' is a four-place relation, R(p, x, c, a), holding between a fact p, an agent x, a set of conditions c, and an action or attitude a.*"[89]

SCANLON warns us that these elements of the R(p, x, c, a) quadruple are often interrelated. According to SCANLON: "*the possibility of such interrelations between p, x, c, and a is not a problem for the account I am offering, but rather a complexity that it allows for*"[90].

I think that one essential aspect of normative discussions is to flesh out these interdependencies. This suggests that there is room for a general theoretical account of these interdependencies. This research cannot be pursued here. In this dissertation whenever I find some of these interdependencies, I will offer an analysis especially suited for the particular case. A more general account is out of the scope of this dissertation.

4.2.1 FACT AND ACTION

The fact that p in quadruple R(p, x, c, a) is a fact that we are able to identify through proposition *p*. That is the reason why *p* in R(p, x, c, a) is a constant. That *p* is a fact in quadruple R(p, x, c, a) accounts for the factive character of reasons, that is, the fact that *p* in quadruple R(p, x, c, a) cannot be a reason for anything *unless p is the case*. However, the normative content of R(p, x, c, a) does not depend on whether *p* is the case or not.

It is important to note that the term 'reason' may denote two different (though closely related) things:

i The *fact* (or normative fact) *that p* that is a reason for someone to do (or refrain from doing) a certain action *a* in circumstances *c*. In other words, the term reason can be used to denote *p* in quadruple R(p, x, c, a). In this sense, reasons are factive. However, it is clear that the normative relevance of *p* is not

88 I can even complement SCANLON's example here with a situation of DANCY's flavour: in some other circumstances, the fact that the knife is sharp is a reason for me *to press my finger against* it so that I can cut out some dangerous insect eggs I found in my finger flesh after my last journey in the jungle.
89 See (Scanlon 2014, p.31)
90 See (Scanlon 2014, p.32)

delivered by *p* itself but by the fact that *p* is a member of the quadruple R(p, x, c, a).

ii The quadruple R(p, x, c, a), that is, to denote the relation of *being a reason* that holds among the fact that *p*, agent x, action *a* and circumstances *c*. In this sense, reasons are not factive because as SCANLON says "*the essentially normative content of a statement that R(p, x, c, a) is independent of whether p holds*."[91].

True propositions expressed by quadruples R(p, x, c, a) are normative facts since R(p, x, c, a) states that it is the case that the fact that *p* is a reason for person *x* in circumstances *c* to do action *a*. In consequence, R(p, x, c, a), being a normative fact, can be placed in position number one of a new normative statement. This is much simpler that it sounds. Imagine that you have to prepare a meeting for tomorrow morning. Some friends invite you to go out: the fact that you are obligated to prepare the meeting is a reason for you to politely refuse the invitation in such circumstances. Note that in this case, the fact that *p* is itself a normative statement. In the next chapter, we will see different instances of nested reasons for action.

As regards actions, It should be noted that *a* in R(p, x, c, a) is a type and not a token. That is, *a* in R(p, x, c, a) is always a kind of action promoted or favoured by the fact that *p*.

4.2.2 AGENT: REASONS RELATIVITY

In contrast, agent *x* in the quadruple R(p, x, c, a) is a variable. Why? According to SCANLON if the fact that *p* is a reason for person *x* in circumstances *c* to do a, then any other person in such circumstances also have reason *p* to do *a*.

> *"Also, it is an implication of my view that something is a reason for an agent only if it is also a reason for any other agent in similar circumstances"*[92]

Therefore, the right way to express SCANLON's position here would be ∀xR(p, x, c, a). However, I will not follow SCANLON here because reasons can be essentially tied to a particular person. For example, a judicial dispute is constituted by the controversy and the parties. Imagine now that a court makes a decision ruling against the defendant. That

[91] See (Scanlon 2014, p.36)
[92] See (Scanlon 2014, p.32)

means *that* the ruling would be a reason for *that defendant* to do (or refrain from doing) action *a* imposed by the ruling of the court. The fact that the court decided against the defendant is *p* in R(p, d, c, a). The defendant, let us say *d*, would be the agent *d* in R(p, d, c, a), where *d* is a constant and not a variable. The defendant here is not universalizable for ∀xR(p, x, c, a) would be false for all x≠d. One may be tempted to say that *d* is actually universalizable since any person to whom the court would have ruled against would be in the position of defendant *d*. That is true, but unfortunately it does not justify going from R(p, d, c, a) to ∀xR(p, x, c, a). The argument only showed the fact that p, that is, the fact that the court decided against the defendant is itself a normative statement justified by another more general normative statement that says that judicial decisions are reasons for action. The same applies to the parties in a contract. Contractual rights and obligations set forth in a contract are reasons for action for the *actual* parties of the contract.

Therefore, contrary to SCANLON, I reject that ∀xR(p, x, c, a). In a sense, I am defending a relativistic view of the quadruple R(p, x, c, a): what reasons a person has in given circumstances may be linked to the *particular agent* and not be applicable to all other agents. SCANLON may reply that the agent *d* in R(p, d, c, a) may be subjunctivized away and put the *relevant personal elements* (such as the fact of being the losing party in a judicial proceeding) into circumstances *c*.

This move is logically admissible. However, transforming R(p, d, c, a) into R(p, x, c', a) thanks to adjusting circumstances *c* to circumstances c' does not allow going from R(p, d, c, a) to ∀xR(p, x, c, a). Besides, R(p, d, c, a) is as legitimate a reason as R(p, x, c', a) and it is not clear in which sense these two reasons are logically or conceptually equivalent although R(p, x, c', a) is obtained from R(p, d, c, a).

Finally, and beyond the arguments given in the last paragraphs to reject ∀xR(p, x, c, a), it is simply convenient to express the agent in the court ruling and contractual cases as a constant rather than search for subjunctivized versions.

The relativistic view put forth in the last paragraph does not imply that we are not able to make true statements about normative reasons. On the contrary, if R(p, x, c, a) holds, that is, if *p* is actually a reason for agent *x* to do *a* in circumstances *c* then any person should be able to reach, through sound normative reasoning, that R(p, x, c, a) holds. However, note that person making this statement is not necessarily agent x in R(p, x, c, a). It could

by anyone reflecting on the reasons for action under circumstances *c* to give advice to agent *x* who happens to be under such circumstances.

4.2.3 CIRCUMSTANCES: PARTICULARISM VS GENERALISM

Circumstances *c* is a crucial part of the quadruple R(p, x, c, a). Most of the time normative reasons revolve about determining the conditions required by circumstances *c* so that R(p, x, c, a) actually holds. It is also important to note that circumstances *c* are often presented in pure factual terms but sometimes normative terms are also involved.

As regards quantification over circumstances *c*, should we interpret *c* as a parameter or should we interpret *c* as a variable? This is one way to identify the dispute between particularists, such as DANCY, and a generalist such as SCANLON.

Particularists would interpret *c* in R(p, x, c, a) as a parameter and a generalist as a variable. Particularists question (i) both the idea of absolute principles and (ii) contributory principles.

Absolute principles can be built in terms of the quadruple R(p, x, c, a) as follows: let us suppose that R(p, x, c, a) is not only a contributory reason but a conclusive reason[93]. Let us convene that CR*(p, x, c, a)* stands for the fact that *p* is a conclusive reason for *x* to do action of type *a* in circumstances *c*.

For now, it suffices to appeal to this intuitive notion of conclusive reasons. We are able to define absolute principles as follows: for all circumstances c and all agents x, the fact that *p* is a conclusive reason to do *a*. In formal notation:

$$\forall xcCR(p, x, a, c)$$

There is no single principle that meets this requirement, that is, there is no single principle that applies to all circumstances all the time. The generalist must improve this first raw definition of absolute principles in terms of the quadruple R(p, x, c, a).

The generalist does not mean to say that a principle should apply to all circumstances but only to circumstances such and such. The generalist needs to specify *some set of circumstances* satisfying some conditions. The generalist can formally express these conditions through a predicate C. Therefore, an absolute principle would be defined as

93 In section 5 a definition for conclusive reasons is given

follows: for all circumstances c such as C and all agents x, the fact that *p* is a conclusive reason to do a. In formal notation:

$$\forall xcCR(p, x, a, Cc)$$

Though initially this definition of absolute principles is much more acceptable since the absolute principle does not apply to all circumstances all the time but only to those circumstances that meet condition C, the particularist easily challenges this definition of absolute principles constructing cases where conditions C are allegedly met but adding some other condition, let us say Q, so that the fact that *p* is not a reason to do *a* any longer, or even *p*, turns into a reason not do *a*.

$$\neg\forall xcCR(p, x, a, Cc\wedge Qc)$$

$$\forall xcCR(p, x, \neg a, Cc\wedge Qc)$$

That is the reason why the vast majority of generalists do not defend the existence of absolute principles but contributory principles instead.

Since SCANLON defines the notion of *being a reason* as contributory, contributory or *pro tanto* reasons are simply expressed by the quadruple R(p, x, c, a). Therefore, we can define contributory principles as follows: for all circumstances c and all agents x, the fact that *p* is a reason to do a. In formal notation:

$$\forall xcR(p, x, a, c)$$

To this definition of contributory principles, a particularist may oppose that we can easily find examples of alleged principles where the fact that *p* is a reason for doing *a* in some circumstances, while being a reason not do *a* in others.

The generalist may try to adopt the earlier strategy: the generalist does not mean to say that a contributory principle should apply to all circumstances but only to circumstances such and such. The generalist needs to specify *some set of circumstances* satisfying some conditions. The generalist can formally express these conditions through a predicate C. In formal notation:

$$\forall xcR(p, x, a, Cc)$$

I will revisit the importance of circumstances *c* in R(p, x, c, a) along this dissertation on several occasions.[94]

4.3 NORMATIVE QUIESTIM

As discussed above, if normative statements are truth-apt, then it seems that some pressing questions arise:

- Metaphysical question: what are normative properties and how are they related to natural properties?
- Epistemological question: how do we have knowledge of normative truths? Perception allows us to have knowledge of physical objects, what kind of epistemic access do we have for normative truths?
- Practical significance: how do *mere* beliefs that a reason for action holds have an impact on people's will?

SCANLON points to the example of how we think of mathematical objects. Truth statements about mathematical objects do not require us to have metaphysical entities such as numbers added to natural entities like mountains, rivers, animals, etc. Mathematical objects are defined and acceptable *within* a particular domain: mathematics. The same with the normative domain.

SCANLON rejects the *conceptual/intuition* dilemma as regards mathematical thinking. All that mathematicians are able to say about sets so that a theory of sets is constructed cannot be explained through simple conceptual derivation from the concept of a set. For instance, the pairing axiom that says that if A and B are sets, then there is a set C whose members are just A and B, is not a conceptual truth which may be obtained directly from the concept of a set. However, the pairing axiom is unproblematically accepted by mathematicians working on sets.

The example of the pairing axiom shows that in order to establish mathematical truths, conceptual derivation is not enough. Intuition then? Though intuitionism is still popular among mathematicians, mathematical intuition as some sort of special skill that allows

[94] MORESO defends that SCANLON's quadruple admits a generalist reading. His strategy is to observe that circumstances c in R(p, x, a, c) include the evaluative context which is constituted by the relevant properties in such context (Moreso 2016, p.14). I will follow MORESO's approach in section 9 of this dissertation.

maintaining contact with mathematical objects is highly controversial. It seems that as regards the axiom of pairing, it is simply *the way we think* about sets that makes that axiom acceptable.

Further thinking on sets allowed mathematicians to abandon the Naïve Theory of Sets which stated that for any property P there is a set formed by all those elements instantiating property P. Let us consider the property of being a set which is not a member of itself: what about the set M that contains all sets that are not members of themselves? Does M contain M or not? If M does not contain M, then M does not contain all the sets that are not members of themselves, contrary to the given definition. If M does contain M, then M contains a member that *does* contain itself, also, contrary to the given definition. Either way, we reach a contradiction. Thus the paradox[95]. Set theorists then moved to a different way of considering sets, instead of considering them as extensions of properties, they consider them as collections. Instead of the Naïve Theory of Sets, they adopted the Iterative Conception which provides an intuitive basis for the current standard set theory (Zermelo-Frankel)[96].

The set theory example here shows that mathematical objects and mathematical truths make sense within a domain. It does not make sense to ask whether numbers or sets exist in general outside the mathematical domain.

Mathematical domain is determined by some initial truths (that may be reviewed in the light of further thinking as in the case of Naïve Set Theory) of how we think of certain objects. From these initial truths, other truths or questions arise by appropriately thinking on them. From this reflective process, new objects or new axioms may be introduced and thus our mathematical knowledge is expanded and increased. Old axioms may be revisited and old objects reshaped. SCANLON parallels this process of reasoning to RAWL's reflective equilibrium. No metaphysical entities are required nor some special epistemic faculty, just thinking and reasoning on them.

SCANLON argues that a similar case can be argued for reasons for action as a domain. Reasons make sense within the normative domain about reasons. However, it does not

95 This paradox is known as Russell's Paradox (Irvine and Deutsch 2020).
96 For a detailed historical development of set theory: FERREIRÓS's Labyrinth of Thought: A History of Set Theory and Its Role in Modern Mathematics (Ferreirós 2007)

make sense to ask what the ontological status of reasons is in general outside the normative domain.

Reasons for action relate a fact, a person and a course of action. No weird metaphysical entities are required. The relational property 'being a father' is a relational property understood in naturalistic terms: it instantiates a relationship between two persons where one, the child, is the offspring of the other, the father, that is, 'being a father' is a relation that can be fully described in terms of biological laws[97].

In contrast, 'being a reason' is a relation that has no counterpart in the natural world, it does not refer to anything in the natural world. The relational property 'being a reason' or much better 'q is a reason for x to do a in circumstances c' has no reality outside the normative domain.

Reasons as properties are objects of the normative domain in the same way as sets are objects of the mathematical domain. No natural counterpart of these objects is required. No extra metaphysics is needed. Each domain determines its own acceptable range of objects and thus its own ontological list. No special epistemic abilities are required: just thinking properly.

Reasons for action, like sets, start by some initial acceptable notion for reason and some initial acceptable truths. On reflecting on them we gain new insights of what counts as a reason or, as I will show in the next chapter, new insights of how reasons are related and structured.

For instance, a reason can be an underminer of another reason. I will also argue that epistemic reasons can be related to reasons for action in a very peculiar way: an epistemic reason to accept, withhold or reject some reasons for action in our deciding process. To establish these assertions, only the quadruple R(q, x, c, a) will be required. No metaphysics is involved. No weird epistemology.

97 I am limited here to the biological meaning of 'being a father' and I leave aside the much more difficult concept 'being a father' in cultural terms.

5 DEONTIC CONCEPTS

5.1 THE CONCEPT OF OBLIGATION

ROSS[98] considered the concept of duty (obligation) undefinable[99]. Most deontic logic works treat the concept of duty or obligated as an undefined term too[100]. Reasons fundamentalism defends that the notion of reason is the fundamental concept of normative discourse and thus any other normative concept should be derivable from it. Here I will try to define the concept of obligation in terms of reasons for action.

First of all, I should insist that what rationality requires a person to do in given circumstances should not be conflated with obligations. Obligations are sometimes decisive or conclusive reasons but not always, as ROSS insisted with his *prima facie duties*[101]. If this is so, what kind of reasons are obligations?

Let me have an initial attempt at a definition: person s is obligated to do *a* in circumstances *c if* person *s* has a reason to do *a* and this very reason is also a reason not to do anything else instead.

Note that I have said "*has a reason*" without identifying which reason the person actually has. That is why I will be using a variable *x* to refer to the reason. This is no accident, the analysis of this important aspect of obligations will be tackled later on.

Put formally:

$$O(a, s, c) \rightarrow \exists x(R(x, s, c, a) \wedge \forall y R((x, s, c, \neg y) \wedge y \neq a))$$

If the inverse conditional is also true, we would have an extensional definition for obligations *build up just with the concept of reasons for action* as bricks and mortar. Let us consider whether this conditional holds:

$$\exists x(R(x, s, c, a) \wedge \forall y R((x, s, c, \neg y) \wedge y \neq a)) \rightarrow O(a, s, c)$$

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[98] See ROSS's The Right and the Good (Ross 2002)

99 CHISHOLM in his The Ethics of Requirement (Chisholm 1964) tries to define the concept of duty or obligation in terms of the more general notion of a state of affairs requiring another. The problem of Chisholm's proposal is that if the notion of requirement is understood within ethics, it simply equates ROSS' prima facie duties in the The Right and the Good (David Ross) and if, on the contrary, the notion of requirement is understood ontologically as Chisholm intends, then there are prima facie duties that we should not allow.

100 See NAVARRO and RODRIGUEZ's *Deontic Logic and Legal Systems* (Navarro and Rodriguez 2014).

101 David Ross.

If there is a reason for person *s* to do *a* in circumstances *c* and this reason also constitutes a reason not to do anything else, this reason to do *a* also restricts the scope of options available to person *s* to just one action: namely, action *a*. It seems that we can say that person *s* would be obligated to do *a* in circumstances *c*. In consequence, it seems that the inverse conditional also holds.

Therefore, the bi-conditional holds as well: person *s* is obligated to do *a* in circumstances c if and only if person *s* has a reason to do *a* and this very reason is also a reason not to do anything else instead.

Put formally:

$$O(a, s, c) \leftrightarrow \exists x(R(x, s, c, a) \wedge \forall y R((x, s, c, \neg y) \wedge y \neq a))$$

This bi-conditional looks like a promising start for constructing the concept of obligation from the more basic concept of reasons for action. Let us thus give this first definition.

Def1 Obligatory action:

Person *s* is obligated to do *a* in circumstances *c*	if and only if there is a reason *x* for person *s* to do *a* in circumstances *c* and x is also a reason for *s* not to do anything else in circumstances *c*.

This definition of obligation has certain very interesting features. One relevant aspect is its relative opacity[102]. That we know that *a* is an obligation for person *s* only allows us to infer from the definition that there is *some* reason *x* to do *a* in circumstances *c* and that this reason *x* is also a reason not do anything else instead in circumstances *c*.

However, the definition *does not allow us to infer which reason is referred by variable x*. This opacity seems to match our intuitions. Imagine two persons discussing. Person s_1 says to person s_2 '*you are obligated to do a*'. If person s_2 does not agree, one way to challenge person s_1 statement would be '*why am I supposed to be obliged to do a*' meaning what is the reason for this obligation[103], that is, person s_2 is asking what the reason *x* is in the following statement:

$$O(a, s, c) \text{ iff } \exists x(R(x, s, c, a) \wedge \forall y R((x, s, c, \neg y) \wedge y \neq a))$$

102 Legal obligations are better understood if we acknowledge the opacity of obligations in general.
103 I will discuss KANT's grounds for obligations in chapter 5.

Since obligations are defined in terms of reasons and reasons sometimes override other reasons, we can easily define when an obligation overrides another obligation.

O(a, s, c) > O(a, b, c) precisely when:

a is an obligation:

$$O(a, s, c) \text{ iff } \exists x(R(x, s, c, a) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq a))$$

b is an obligation:

$$O(b, s, c) \text{ iff } \exists x(R(x, s, c, b) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq a))$$

The reason *q* in favour of *a* overrides reason *p* in favour of *b*:

$$R(q, s, c, a) > R(p, s, c, a)$$

However, there is a flaw in the overriding account of obligations just given. Reason *q* and reason *p* above could meet the formal requirements set forth above but fail to be a case of conflicting reasons.

Imagine that this afternoon you have to take your child to the hospital. Imagine that you promised to one beloved friend that you would see her before she leaves the country. Now suppose that your friend's flight is this evening, so this afternoon is the last chance to see her. This seems a classic case of conflicting obligations: your obligation to take your child to the hospital and your obligation to keep your promise to see your friend before she leaves.

In this case, your obligation to take your child to the hospital overrides your promise. However, it is no genuine case of conflicting obligations, since you can offer your friend to see her at the hospital cafeteria. If your friend goes to the hospital, you can still comply with your two obligations. Would we still say that one obligation overrides the other?

I think that the right answer is to say partly yes and partly no. If it is impossible to comply with both of them, we would say that taking your child to the hospital clearly overrides the promise to see the friend in most circumstances.

However, it seems incorrect to say that taking your child to the hospital clearly overrides the promise to see the friend when two actions are both compatible. Therefore, in order to apply the overriding relationship to two reasons and see which one prevails, the two actions need to be incompatible in circumstances *c*. This finding forces us to revisit the Def1 of obligatory actions given earlier.

Let us recall the definition given:

O(a, s, c) iff $\exists x(R(x, s, c, a) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq a))$

Let us focus on the second part of the definition: $\forall yR(x, s, c, \neg y)$. This part of the definition of obligatory actions says that the reason to carry out the obligatory action is also a reason not to do anything else. This 'not to do anything else' does not capture well either conflicting obligations or compatible obligations. Let me show you why:

If *a* is an obligatory action and *b* is an obligatory action, then:

1.- $\exists x(R(x, s, c, a) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq a))$

2.- $\exists x(R(x, s, c, b) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq b))$

3.- $R(q, s, c, a) \wedge \forall yR((q, s, c, \neg y) \wedge y \neq a)$	substitution instance x=*q* to premise 1.
4.- $R(q, s, c, a) \wedge R(q, s, c, \neg m) \wedge m \neq a$	substitution instance y = m to premise 3.
5.- $R(q, s, c, \neg m) \wedge m \neq a$	Elimination $\wedge$ to premise 4
6- $\forall x(R(q, s, c, \neg x) \wedge x \neq a)$	$\forall$ to premise 5.
9.- $R(q, s, c, \neg b) \wedge b \neq a$	Elimination of $\forall$
10.- $\exists x(x, s, c, \neg b)$	Introduction of $\exists$ to 9.

10.- [again pattern with $\exists x(R(x, s, c, b) \wedge \forall yR((x, s, c, \neg y) \wedge y \neq b))$ to get $\exists x(x, s, c, \neg a)$]

We have shown that for any two obligations, one is a reason not to comply with the other. In other words, all obligations in circumstances *c* will be incompatible. This result is obviously unacceptable. In most circumstances, there are several obligations to be fulfilled at the same time that are fortunately fully compatible.

In consequence, Def1 Obligation must be revisited. We need the Def1 Obligation to take into account when two obligations are actually compatible.

Besides, even in the case that two obligations are compatible – such as in the case of the conflict between taking the child to the hospital versus keeping my promise to see the friend – they would still conflict in the sense shown, that is, not all instances of doing one action are compatible with the other, just some.

Let us review Def1.Obligation[104] and make the necessary changes accordingly:

We replace $\forall yR((x, s, c, \neg y) \wedge y \neq a)$ by $\forall yR((x, s, c, \neg y) \wedge y \rightarrow \neg a)$ so the new definition for obligation is as follows:

Def2. Obligation:

Person *s* is obligated to do *a* in circumstances *c*	if there exists a reason *q* for person s to do *a* in circumstances *c* and reason *q* is a reason not to do anything incompatible with action *a*.

Formally:

$$O(a, s, c) \text{ iff } \exists x(R(x, s, c, a) \wedge \forall yR((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg a)))$$

In the old definition, an obligation was an action *a* such as there is a reason *q* for person *s* to do *a* in circumstances *c* so that *q* is also a reason for person *s not to carry out any action different from a*. We have seen that this definition does not capture well either conflicting obligations or compatible obligations. In the new definition, we do not require that *q* is also a reason not to do something else, but a reason not to do any incompatible course of action.

5.2 OTHER DEONTIC CONCEPTS

Assuming I have been successful in defining the notion of obligation in the more fundamental concept of reasons for action, it is worth a try to define other deontic concepts as well. However, the task to sketch a deontic logic that suits the normative concepts defined in terms of reasons for action is well beyond the scope of this dissertation. This should be seen only as a tentative work. This tentative work however is justified by the nature of our inquiry : in cases of a clash of constitutional norms, obligations as well as rights are involved. In consequence, it is worth developing, even tentatively, other important deontic notions from the concept of reason for action. I will leave the concept of right for section 7 below because in order to define it I need to explain the concept of second-order reasons first.

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104 However, it is worth noting that though Def1 of obligation does not work for *prima facie* duties, it actually works in case the obligation is a conclusive reason (a toti-resultant obligation).

5.2.1 PROHIBITION

In standard deontic logic, prohibition is defined in terms of obligation as follows:

$$IMp \leftrightarrow OB{\sim}p$$

This means that *p* is prohibited if and only if there is an obligation to do ¬p. In terms of reason for action: an action *a* is forbidden if and only if O(¬a, s, c), which, in turn, can be defined fully in terms of reasons for action:

$$O(\neg a, s, c) \leftrightarrow \exists x(R(x, s, c, \neg a) \wedge \forall yR((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg\neg a)))$$

In consequence, an action *a* is forbidden if there is a reason x to refrain from doing *a* and this reason x is also a reason not to undertake any course of action leading to *a*.

5.2.2 PERMISSION

In standard deontic logic permission is defined in terms of obligation as follows:

$$PEp \leftrightarrow {\sim}OB{\sim}p$$

That means that an action *a* is permitted if and only if action *a* is not prohibited. As shown, that an action is prohibited is defined in terms of an obligation not to do a certain action. In consequence, action *a* is permitted if and only if there is no obligation not to do *a*. In our notation, action *a* is permitted if and only if ¬O(¬a, s, c):

$$\neg O(\neg a, s, c) \leftrightarrow \neg\exists x(R(x, s, c, \neg a) \wedge \forall yR((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg\neg a)))$$

This means that an action *a* is permitted if and only if there is no reason for person x not do *a* and this reason x is no reason not to undertake alternative courses of action incompatible with not doing *a*.

That permission is defined in terms of absence of reasons explains the behaviour of what is called *weak permission*[105] among deontic logicians. However, *weak permissions* do not fully grasp the role that permissions have in legal reasoning. For new human activities, legal practitioners are at pains to set forth clearly for their clients what is legally alright or not, that is, what would be legally permitted or not. Even if there is no prohibition set forth in the statutes, that is, even if ¬O(¬a, s, c), there are aspects such as the impact of the activity on third parties or the impact on public goods that, with reason, worry their

105 For an analysis of permission in deontic logic see ALCHOURRÓN and BULYGIN's Permission and permissive norms (Alchourrón and Bulygin 1984) and KAZIMIERZ OPAŁEK and JAN WOLEŃSKI's Normative Systems, Permission and Deontic Logic (Opałek and WOLEŃSKI 1991).

lawyers, who are afraid that, if the dispute ends up in court, the final ruling may consider that the activity was prohibited by the law after all. These lawyers are not happy with having a *weak permission*, they prefer a statute regulating the new activity so that *strong permissions* exist, that is, reasons that, within a certain scope, make the action permitted immune from all other reasons against doing it. However, I leave the analysis of strong permission in terms of reasons for action out of this dissertation[106].

5.2.3 OMISSIONS

In standard deontic logic omissible acts are defined in terms of obligation as follows:

$$OMp \leftrightarrow \sim OBp$$

This means that an action *a* is said to be omissible if and only if there is no obligation to do *a*. In our notation, an action *a* is omissible if and only if ¬O(a, s, c):

$$\neg O(a, s, c) \leftrightarrow \neg\, \exists x(R(x, s, c, a) \wedge \forall y R((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg a)))$$

In consequence, an action *a* is omissible if there is no reason x such that it is a reason to do *a* and a reason not to take any course of action incompatible with carrying out *a*.

[106] My guess is that strong permissions can be defined in terms of second-order reasons as defended in section 7.4.4

6 CONFLICTING REASONS

6.1 WEIGHING VS OVERRIDING

In practical philosophy, there are two general strategies to solve conflicting reasons. The first strategy is to defend that reasons have weight and thus we can weigh them and determine which of the conflicting reasons is weightier. The second strategy is to defend that reasons override other reasons and, accordingly, in conflicting reasons the overriding reason prevails over the overridden one[107].

The first strategy, let us call it the *weighing account*, is followed by *utilitarianism* and *consequentialism* in Ethics and by some authors in artificial intelligence as a model for agency[108]. In the legal debate, ROBERT ALEXY' *proportionalism* defended this view as we have already seen in section 2. Surely, this account has some initial intuitive support thanks to the analogy of the balance of weights. In spite of this (apparent) initial support, the weighing account has very implausible assumptions as we have already discussed in section 2.

Most philosophers regard weighing accounts with contempt[109]. They observe that in some cases it is beyond any doubt that reasons override other reasons. From the elaboration of the overriding relationship, these philosophers try to explain the conflict of reasons situation. Let us call this view, the overriding account.

From the philosophical literature, it seems that the overriding accounts are more prominent. However, let us note that in the artificial intelligence literature one can find recently strong defences for the weighing accounts. In mathematical models used in governmental or big corporations' decisions, instances of the weighing account models are, as a matter of fact, used all the time[110]. In spite of where the sympathies of most philosophers are aligned, we must face it: there is still no final verdict here.

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107 These two strategies parallel two kind of mathematical models: the optimization model and the rule-based model, see (Page E.Scott 2018).
108 For a defense of a weighing account in consequencialist terms for an artificial intelligence project see POLLOCK's Practical Reasoning in Oscar (Pollock 1995).
109 For a philosopher overtly defending the weighing account see POLLOCK's Thinking about Acting (Pollock 2006).
110 See (Page E.Scott 2018)

However, in what follows I will adopt the overriding account for one reason: reasons transparency, which in law matters. If one opts for the weighing account, once we assign a number to norms (a weighing value), there is not much room for discussion. Why we get the numbers we get seems completely out of our reach, epistemologically opaque I would say.

In sharp contrast, in the overriding account, we are able to give further reasons for our verdict. For instance, imagine a situation where, after careful consideration, you conclude that a person's privacy should override the journalist's interest in pursuing the scoop in circumstances *c*. If someone asked you why, you can simply say: the person affected is only a child. This further reason introduced 'it is only a child' seems to justify why one reason overrides the other. As I said before, transparency and justification seem to favour the overriding account.

Since transparency and justification are important properties for judicial decisions, it seems that a philosopher of law is justified in provisionally assuming the overriding account over ROBERT ALEXY's *proportionalism* until the philosophical investigation sheds further light on this topic. In spite of the lack of final verdict, I too (provisionally) choose the overriding account.

6.2 OVERRIDING, SUFFICIENT AND CONCLUSIVE REASONS

Reasons interact. A reason may override another reason. Since I like movies and I am in the mood to see one right now, I have a reason to go to the cinema this afternoon. However, I have a very important exam tomorrow morning. I have a reason to stay at home and study. The fact that I have an exam tomorrow clearly overrides (prevails over) my mood for the movies.

Sometimes, when contrasting two reasons that require incompatible actions, one simply knows without further complication which reason is overriding and which reason is overridden. Nevertheless, sometimes some reflection is necessary. In the case just considered, it was crystal clear.

Let us complicate the choice a bit: imagine now that the exam is not so important and that in some weeks we have a second chance to pass the exam. Now imagine that the person you are in love with will go to the cinema this afternoon. Now, the choice is not so clear. When faced with this kind of choices, we consider the merits of doing one thing or the

other. It basically consists in identifying as many reasons as we can to support the decision. For instance, reasons to stay at home and study: (i) even if I fail tomorrow, I will have invaluable experience for the second exam; (ii) if I pass the exam tomorrow, I will not need to pass the exam in some weeks and I will be entitled to choose subjects for the next semester without academic restrictions. Reasons to go to the cinema: (i) I am in the mood to go to the cinema and (ii) a chance to meet the person I like and therefore increase my options to be loved back. If I am a teenager, I would probably go for the cinema option. In contrast, if I am a Masters Degree student, I would probably stay home and study. Reasons may matter differently for different people (or even the same person but at different times). A realistic account for reasons for action must accommodate these facts.

Two reasons q and p conflict when q is a reason for person s to do action a in circumstances c and reason p is a reason for person s to take a course of action incompatible with action a in circumstances c. In a more formal fashion:

Def. reasons p, q conflict if $R(q, s, a, c) \wedge R(p, s, a, c) \wedge (a \rightarrow \neg b) \wedge (b \longrightarrow \neg a)$

First, we must observe that some conflicting reasons that meet our formal definition have absolutely no interest. For example, eating and drinking at the same time are two incompatible actions. This kind of uninteresting conflict is naturally solved: doing one after the other[111]. From now on though, the analysis will be static (i.e. disregarding time) to keep things as simple as possible.

Our definition of conflicting reasons also seems to work correctly for cases involving different persons as well. Instead of just person s, we will have person s_1 and person s_2 where person s_1 has reason q to do a in circumstances c and person s_2 has reason p to do b in circumstances c where s1 doing a and s2 doing b are incompatible[112].

$$R(q, x, a, c) \wedge R(p, y, a, c) \wedge (a \rightarrow \neg b) \wedge (b \longrightarrow \neg a)$$

111 Unfortunately, there is no room in this dissertation to include one aspect that seems crucial to understanding how obligations interact: time. I will pursue time-logic and deontic-logic in future investigations.

112 To be more precise: the *a-ing* of s1 is logically inconsistent with b-ing of s2 or any consequence of b-ing of s2 in circumstances c. By the same token, the b-ing of s2 is logically inconsistent with a-ing of s1 or any consequence of a-ing of s1 in circumstances c. Accordingly, the incompatibility requirement of reasons would be more precisely grasped using triples where (a, s, c) means a-ing done by s in circumstances c. However, to keep the explanation as simple as possible we will leave this technical complexity aside.

When two reasons conflict, one reason may override the other. I say 'may' because even if two reasons conflict, sometimes neither overrides the other. For instance, preferences. I may want a cola but also a bagel but I do not have pocket money for both. Of course, at the exact same time I cannot get both. One may be tempted to say that since I am more thirsty than hungry, my wish for cola overrides my wanting the bagel and I should buy the cola accordingly. This picture is wrong. From a normative point of view, it is irrelevant what I finally do here. I should be free to do either, even if I want the cola more.

From a normative point of view, even if two reasons conflict in the sense discussed above, they are both sufficient reasons to carry out action *a* (or ¬a). In sum, I am justified in doing either of them[113].

If I am right about the last observation, it seems that the default mode of reasons is to be contributory for the justification of action, what the literature calls *pro tanto* reasons. However, sometimes reasons do not simply contribute to justify a course of action but seem to decide what to do, that is, they seem to decide the course of action to take. In the literature these reasons are sometimes called conclusive reasons or decisive reasons.

A sufficient reason *q* is a reason for a person *s* to do *a* in circumstances *c* such as there is no other reason *p* to take an alternative course of action in circumstances *c* that overrides *q*. Put formally:

SR(q, s, c, a) iff □□xR(x, s, c, □a)>R(q, s, c, a)

To deny that SR(q, s, c, a) means that there is a reason x to do something incompatible with *a* that overrides reason *q*. Put formally:

Not SR(q, s, c, a) iff □xR(x, s, □a)>R(q, s, c, a)

Now, observe that a sufficient reason may not determine the outcome, since it may not be decisive for the final course of action to take. Why? A sufficient reason *q* to do *a* is logically compatible with the existence of another sufficient reason *p* to take a course of action incompatible with *a*. However, sufficient reasons can be said to be final in a sense: in a discussion with other people, sufficient reasons fully justify our actions.

113 See DANCY's Enticing Reasons (Dancy 2004a). SCANLON also defends the enticing character of reasons in Being realistic about reasons (Scanlon 2014, p.106).

A conclusive reason *q* to do *a* in circumstances *c* is a reason such as (i) *q* is a sufficient reason and (ii) there is no other sufficient reason *p* to take a course of action incompatible with *a*. In this sense, person *s* is required[114] by reason to do *a*, since any other reason to take an alternative course of action is overridden by some reason (not necessarily *q*).

CR(q, s c, a) iff SR(q, s, c, a) $\wedge\neg\exists$xSR(x, s, c, $\neg$a)

To deny that CR(q, s c, a) it is sufficient to show that either SR(q, s, c, a) or $\neg\exists$xSR(x, s, c, $\neg$a) are false.

However, even if person s is required by reason in this sense, we may still be reluctant to say that person s is under an obligation to do *a* and we certainly do not want to conflate conclusive reasons with obligations.

People sometimes fail to follow what reason requires, but they are in no breach of an obligation. I think that a right account of practical reason must acknowledge this fact without difficulty. In sum, obligations are not to be conflated with decisive or conclusive reasons for action.

6.3 OBLIGATIONES NON COLLIDUNTUR

KANT famously said in the introduction to *Metaphysics of morals* s that "*a collision of duties and obligations is entirely inconceivable*"[115]. KANT is not alone in defending such a principle, many other philosophers and logicians advocate it. It is even an axiom in standard deontic logic[116], where the *obligationes non colliduntur* principle is expressed as follows:

OB$\boldsymbol{p}\rightarrow$ ~OB~$\boldsymbol{p}$

This tells us that *p* is obligatory provided that $\neg$p is not obligatory. The problem of the *obligationes non colliduntur* formulation in standard deontic logic can be expressed with Sartre's Dilemma[117]:

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114 However, rationally required is not synonymous with obligated to do something. That a reason is a conclusive or decisive reason does not convert this reason into an obligation. The inverse also applies: that we are obligated to do something does not convert the obligation into a conclusive reason.

115 See KANT's Metaphysics of morals (Kant 2017)

116 See (McNamara 2019) .

117 This dilemma is presented by LEMMON (Lemmon 1962). This dilemma is named SARTRE's dilemma because SARTRE offered an example where a student of his must decide whether to stay with her mother or join the French *resistance* against the Nazis. SARTRE's intention with this example was to show

a It is obligatory that I now meet Jones (say, as promised to Jones, my friend).

b It is obligatory that I now do not meet Jones (say, as promised to Smith, another friend).

These two propositions are equably represented in deontic logic as:

i OBj

ii OB¬j

Since OBp → ~OB~p is an axiom, it is easy to derive a contradiction and get~OB~j and ~OBj, which contradict the initial assumptions (i) and (ii). However, even if it is impossible to comply with both (a) and (b), the set of sentences {a, b} does not seem logically inconsistent.

In spite of the criticisms made of the *obligations non colliduntur* principle, it seems intuitively that some version of this principle must be right: practical reason cannot require us to take incompatible courses of action. We thus need to accommodate *two things*: (i) that practical reason cannot require us to take incompatible courses of action and (ii) allow (a) and (b) not to be logically contradictory.

KANT defends in his *Metaphysics of Morals*[118] that (i) genuine obligations cannot possibly conflict and that (ii) genuine moral norms (*perfect duties* in Kant's jargon) are exceptionless norms. However, the truth is that KANT himself was well aware of the challenge presented by conflict of obligations:

> *"A* conflict of duties *(*collisio officiorum s. obligationum*) would be a relation between them in which one of them would cancel the other (wholly or in part). – But since duty and obligation are concepts that express the objective practical* necessity *of certain actions and two rules opposed to each other cannot be necessary at the same time, if it is a duty to act in accordance with one rule, to act in accordance with the opposite rule is not a duty but even contrary to duty; so a* collision of duties *and obligations is inconceivable*

the inability of general moral standards such as Christian ethics of Kantian ethics to help us in deciding such cases. SARTRE concludes that in such situation we are left alone to decide for ourselves, which explains our despair and abandonment (Sartre, Jean-Paul 1970). Obviously, in deontic logic SARTRE's dilemma is only to show that it is easy to obtain deontic contradictions from consistent sets of propositions, all the *existentialist* dimension of despair and abandonment is left out of the analysis. For moral conflicts and ethical consistency, see WILLIAMS's *Ethical consistency* (Williams 1965) .

118 See JENS TIMMERMANN 's *Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory* (Timmermann 2013).

> *(*obligationes non colliduntur*). However, a subject may have, in a rule he prescribes to himself, two* grounds *of obligation (*rationes obligandi*), one or the other of which is not sufficient to put him under obligation (*rationes obligandi non obligantes*), so that one of them is not a duty. – When two such grounds conflict with each other, practical philosophy says, not that the stronger obligation takes precedence (*fortior obligatio vincit*), but that the stronger* ground of obligation *prevails (*fortior obligandi ratio vincit*)"*[119]

In what follows, I will try to give a formal account of the Kantian *obligationes non colliduntur* principle and his account for the seemingly conflicting obligations cases[120]. Why? The idea is to parallel the Kantian account for conflicting obligations to our own account given in terms of reasons for action to better understand what a conflict of reasons actually is.

Besides, KANT's ethics is often read as a strong form of *generalism*. This discussion will help us to understand generalism, its initial theoretical force, its flaws, some unacceptable version of it with the aim to construct a much more fine grained version of generalism that I will later use for the clash of constitutional rights.

From the citation above, it can be equably concluded that KANT believes that (i) obligations as such do not and cannot conflict and that (ii) what is normally presented as conflicting obligations is actually a conflict between two 'grounds of obligations'. In order to make sense of the difference between (i) and (ii), we need to give a formal account of the Kantian key concepts appearing in the aforementioned quotation: obligation ('*Verbindlichkeit*') and duty ('*Pflicht')*.

KANT defines obligation ("*Verbindlichkeit*") as "*the necessity of a free action under a categorical imperative of reason*"[121] and duty ("*Pflicht*") as the "*action to* which someone *is bound. It is therefore the matter of obligation, and there can be one and the same duty (as to the action) although we can be bound to it in different ways*."[122].

From that, we can infer that KANT reserves the word duty for the action (what is to be done, the action itself) and the word obligation for "*the necessity of a free action*", that

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[119] See KANT's Metaphyics of morals (Kant 1996 [6:225])

120 A similar approach, though not in terms of reasons for action, to mine about Kant's obligations non colliduntur is JENS TIMMERMANN's Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory (Timmermann 2013).

[121] See KANT's *Metaphysics of morals* (Kant 2017, [6:223]).

[122] See KANT'S *Metaphyscis of morals* (Kant 2017, [6:223]).

is, for the binding character of an action. What gives an action its binding character? In Kantian moral reasoning, the binding character is given by the fact that the action is required by a Categorical Imperative.

Therefore, in order to understand the Kantian concept of obligation, we need to comprehend what a Categorical Imperative is and how it confers an action its binding character. For this purpose, I will follow KORSGAARD's interpretation of the Categorical Imperative[123] test and the readings of ONORA O'NEIL[124] for the Kantian passage containing the *obligationes non colliduntur* principle.

Given the Kantian definition of duty ('*Pflicht*') and obligation ('Verbindlichkeit') we can translate them into our jargon as follows: an action *a* is a duty (i.e. an obligatory action) if and only if for a person *s* in circumstances *c* action *a* is required by a Categorical Imperative.

Though it is true that KANT does not explicitly mention circumstances *c* in the quotation of the *obligationes non colliduntur* principle, it is a truism that any action must be done in certain circumstances. KANT himself was aware of this, according to what VILIGANTIUS[125] reported from KANT's lectures on ethics: "*[moral laws] must be meticulously observed*" but "*they cannot, after all, have regard to every little circumstance, and the latter may yield exceptions, which do not always find their exact resolution in the laws*"[126].

Even so, some of KANT's interpreters would still probably oppose the idea of including circumstances *c* in the definition of obligatory action since it would invite an illegitimate *particularist* reading of KANT that would be obviously wrong. I will come to this important topic later. For argument's sake, let us keep circumstances *c* in the definition since it allows us to easily compare the formal account of KANT with SCANLON's quadruple R(p, x, c, a).

In consequence, duty (*Pflicht*) in Kantian terminology can be formally defined as an action *a* appearing in the triplet O(a, s, c), whose meaning is 'an action *a* seen by person

123 See KORSGAARD's Kant's formula of universal law (Korsgaard 1985).
124 See ONORA O'NEILL's *From Principles to Practice* (O'Neill 2018).
125 VIGILANTIUS was a KANT's student whose notes from 1793-1794 course are used by KANT's scholars to interpret KANT's *Metaphysicis of morals* (Lara and Oliver 2015).
126 See (Vigilantius 1997 V27:574). In VIGILANTIUS's notes we also find: "*moral laws are only […] generales, never universales, they are therfore […] a rule not a law*" (Vigilantius 1997 V27:541).

s as obligatory in circumstances *c'*. The O in the triplet O(a, s, c) can be seen as the formalization of the term obligation ('*Verbindlichkeit'*) in Kant's terminology, that is, it can be the formalization of the binding character of an action. Now, an action *a* is obligatory (i.e. an action is a duty) precisely when it is required by a Categorical Imperative.

In formal form:

O(a, s, c) ↔ *a* is required by a Categorical Imperative

What does it mean that an action is obligatory when required by a Categorical Imperative? What does required by a Categorical Imperative mean? Famously, KANT gave four different versions of the Categorical Imperative[127]. In what follows, I will focus on the Universal Law Formula version of the Categorical Imperative:

> *"act only in accordance with that maxim through which you can at the same time will that it become a universal law"* [128]

KANT warns us that "*the categorical imperative, which as such only affirms what obligation is*"[129] Therefore, KANT refuses *ex radice* the idea that the Categorial Imperative can provide us with substantial moral claims. The Categorial Imperative is not an algorithm to produce substantive valid ethical claims but a test of whether an action is morally obligatory or not. Indeed, most of Kant's interpreters read the Categorial Imperative as a test[130].

When reading the Universal Law Formula of the Categorical Imperative, most of KANT's interpreters consider that the "*can at the same time will*" phrase in the Universal Law Formula of the Categorical Imperative is asking for a consistency test or, in other words, a test for avoiding contradictions.

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127 See KANT's *Groundwork of the Metaphysics of morals* (Kant 1998 [4:422]). KANT famously gave four presentations for the Categorical imperative: (1) **The Formula of the Law of Nature or Universal Law Formula**: "*act as if the maxim of your action were to become by your will a universal law of nature*."[4:422] (2) **The Formula of the End Itself**: " *So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.* " [4:429] (3) **The Formula of Autonomy**: "*act only so that the will could regard itself as at the same time giving universal law through its maxims* " [4:434] and (4) **The Formula of the Kingdom of Ends**: "act as if he were by his maxims at all times a lawgiving member of the universal kingdom of ends. " [4:438]

128 See KANT's *Groundwork of the Metaphysic of Morals* (Kant 1998b, 4:421).

129 See KANT's *Metaphyscis of morals* (Kant 2017, [6:226]).

130 See KORSGAARD *Kant's formula of universal law* (Korsgaard 1985).

What kind of contradiction are we looking for? KANT's interpreters have not reached a consensus here[131]. Three kinds of contradiction have been identified by scholars of KANT's work: logical, teleological and practical. A logical contradiction would mean that if the maxim was universalized, the resulting law would be inconceivable. A teleological contradiction means that either your maxim contradicts some natural purpose or your maxim cannot be a teleological law. A practical contradiction means that if your maxim were universalized then your action would not result in the intended purpose.

KORSGAARD acknowledges that there is textual basis to defend any of them. However, KORSGAARD advocates the practical contradiction interpretation based on philosophical arguments.

I will follow KORSGAARD's interpretation of the Categorial Imperative test. To understand the Universal Law Formula we need to determine "*what you can will without contradiction*"[132] with a universal law.

What kind of will? Since persons seem to be wanting many things and sometimes persons do even want an incompatible state of affairs, what does 'will without contradiction' mean in Kantian terms? Certainly, it cannot mean my wishes, desires, personal taste, etc. Why not? The will in KANT's philosophy equals to practical reason. Therefore, this 'will' appearing in the Universal Law Formula is not (and cannot be) a matter of your desires, wishes or your personal taste: practical reason demands that everyone reaches the same conclusions on matters of duty.

KORSGAARD's account for this "*what you can will without contradiction*"[133]is a practical contradiction test where the person *s* envisaging doing action *a* with purpose *p* in mind must imagine what would happen *if the maxim adopted* by person *s* to justify action *a were the standard way* of doing things (i.e what everyone would normally do) to achieve purpose *p*. If action *a* fails to achieve purpose *p* in case maxim *m* is adopted, then maxim *m* and action *a* constitute a practical contradiction. Put in KORSGAARD's own words, the practical contradiction test:

131 See KORSGAARD Kant's formula of universal law (Korsgaard 1985).
132 See KORSGAARD Kant's formula of universal law (Korsgaard 1985, p.1).
133 See KORSGAARD Kant's formula of universal law (Korsgaard 1985, p.1).

> *"[…] is carried out by imagining, in effect, that the action you propose to perform in order to carry out your purpose is the standard procedure for carrying out that purpose. What the test shows to be forbidden are just those actions whose efficacy in achieving their purposes depends upon their being exceptional. If the action no longer works as a way of achieving the purpose in question when it is universalized, then it is an action of this kind."*[134]

From this, we conclude that action *a* intending to attain purpose *p* and maxim *m* constitute a practical contradiction and thus do not pass the Categorical Imperative test precisely when, if *m* is adopted as the standard procedure, action *a ceases to be a way to achieve purpose p*.

In consequence, Categorical Imperative *is a test of the maxim* adopted by the person intending to do a certain action. We thus need a definition of maxim to go further with our formal account.

Fortunately, KANT gives us a definition of maxim: "*A rule that the agent himself makes his principle on subjective grounds is called his maxim*; *hence different agents can have very different maxims with regard to the same law*"[135]. Maxims are therefore just rules that persons adopt to attain certain purposes, but not only: maxims are also those rules that a person adopts as a 'principle for himself'.

Just before giving the definition of maxim, KANT says that a practical law is the principle that makes a certain action a duty. To have the whole context:

> *"A principle that makes certain actions duties is a practical law. A rule that the agent himself makes his principle on subjective grounds is called his* maxim; *hence different agents can have very different maxims with regard to the same law "*[136]

KANT's interpreters often read the difference between maxim and principle as follows: a maxim is a rule *as viewed and considered by a particular person in certain circumstances and with a purpose in mind* when intending an action for which the maxim is the justification. Maxims are thus subject dependent.

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134 See KORSGAARD Kant's formula of universal law (Korsgaard 1985, p.20)
[135]See KANT's Metaphysics of morals (Kant 2017, [6:225])
[136] KANT's Metaphysics of morals (Kant 2017, [6:225])

Following the Universal Law Formula in KORSGAARD's interpretation, a maxim consists in a rule *r* that a person *s* has (adopted), which is presented to person *s* in a certain way and adopted by s for a certain purpose. Rule *r* is the normative content of the maxim, that is, 'do this' or 'do that'. However, when considered by a person, rules need to be necessarily presented in a certain way to this person in the given circumstances (there are always different ways to express the same rule).

Besides, maxims are purpose driven as well. Why? Note that maxim consists in a rule *r* adopted by a person *s* to justify a certain action *a* intending *to achieve a purpose p* in circumstances *c*.

In order to formalize the structure of maxims, we can make use of a quintuple where a maxim M is represented by M(*r*, *s*, a, *p*, *c*) where *r* stands for the rule as such, *s* for the person who adopted rule *r*, *a* for the action persons *s* aims to justify by *r*, *p* for the purpose intended by s in doing *a*, and *c* for the circumstances.

Now that we have reached a formal account for Kantian maxims, how can we proceed for Kantian principles? Let us recall KANT's definition of practical law: "*the principle which makes a certain action a duty is a practical law* ". From this definition, we can at least draw the following conclusions: some principles make actions a duty, that is, some principles make actions obligatory.

Since we know that an action *a* is obligatory precisely when it is required by the Categorical Imperative, principles and the Categorical Imperative are strongly related. How? Now that we have a formal account of maxims, let us give a formal account for the Categorical Imperative as KORSGAARD's practical consistency test. This will allow us to identify what role Kantian principles play.

Let us formalize a/the practical consistency test in the following steps:

1.- M(*r*, *s*, a, *p*, *c*) — we start with a **maxim M** represented by the quintuple M(s, m, a, c), where *r* stands for the rule as such, *s* for the person who adopted rule *r*, *a* for the action person *s* aims to justify by *r*, *p* for the purpose intended by s in doing *a*, and *c* for the circumstances.

2.- ∀xyM(r, x, a, p, y)	**universalization**[137] of maxim M. Any person x would justify action *a* in any circumstances y appealing to maxim *m* to attain purpose *p*.
3.- If ∀xyM(r, x, a, p, y)→¬(a→p)	**practical consistency test** after universalization. If action *a* ceases to be a way to attain purpose *p* - expressed by . ¬(a→p) - when M is universalized, then rule *r* is not practically consistent and thus should not be adopted as a principle. On the contrary, if M is practically consistent, rule *r* should be adopted as a principle and makes action *a* obligatory when *r's* content is 'do *a*' or forbidden if *r*'s content is 'do not do *a*'.

If our formal account is right, that if, if it captures the Categorical Imperative well enough as a practical consistency test, then there are two points worth mentioning here. I will start by the easiest one: note that, in considering whether we perform action *a* or not, if maxim M adopted to justify action *a* does not pass the test, it does not mean that *a* should not be done.

The fact that maxim M does not pass the test does not affect action *a*. There may be another Maxim that justifies action *a*. Besides, an action *a* is forbidden (i.e. obligatory not to do) when a maxim, let us say F, does pass the test and its rule *r* is 'do not do actions of type *a*'. In conclusion, though we use the Categorical Imperative to decide whether *a* is mandatory or not, the Categorical Imperative is a test on maxims, not on actions.

The second issue I wish to mention is a very important one. Note how the universalization test is given in step 2: we go from M(*r*, *s*, a, *p*, *c*) to ∀xyM(r, x, a, p, y) through replacing constants *s* and *c* by variables *x* and *y*. This means that the particular person *s* in the universalized version is now any person *x* and circumstance *c* is any circumstance *y*. The meaning thus conveyed is that rule *r* in maxim M is valid for all persons in all circumstances. I must say that although this approach serves us to gain some understanding of how the different elements involved are related (rules, person, actions and purposes), understanding universalization in this way – from M(*r*, *s*, a, *p*, *c*) to

137 I will later show that this way of universalizing is wrong.

$\forall$xyM(r, x, a, p, y) – would have a very unpleasant result: no actions would be obligatory. Why? Because, as *particularists* warn us, it seems that there are no candidates of universal exceptionless rules as required by this kind of universalization. *Particularists* insist in that there is no single rule that is valid for all persons in all circumstances. Accordingly, Universalization in step 2 above should be reviewed.

KANT has been considered to have defended the view that moral obligations have their source in universal exceptionless moral norms (or in KANT's jargon practical laws). I think that this view of KANT is deeply wrong. I will come back later to this very important topic once we finish the formal account of the *obligations non colliduntur* principle.

Thanks to the Kantian definition of maxim and the Categorical Imperative test of the Universal Law Formula, I am in a position to give the following definition of the Kantian obligations:

$$O(s, a, c) \leftrightarrow (\exists xM(x, s, a, p\ c) \wedge \neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a)))$$

Let me explain this formula bit by bit:

O(s, a, c) is a triple that stands for action *a* being obligatory for person *s* in circumstances *c*. I am using constants *a, s,* and c instead of variables. This choice is not trivial at all, but the reasons for this will be discussed later when discussing the role of circumstances in KANT's obligations.

$\exists$xM(x, s, a, p c) means that there is a maxim M consisting in a rule *x* adopted by person *s* that is the reason for doing action *a* with purpose *p* in circumstances c.

$\neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a))$ attempts to capture the Categorical Imperative. Note that $\forall$yzM(x, y, a, p, z) is just the universalization of maxim M(x, s, a, p c). The consequent $\neg(p \rightarrow a)$ tries to capture the practical consistency test. If maxim M is universalized and, as a consequence, action *a* is not a way to achieve *p*, then maxim M is practically inconsistent, i.e. failed the test of the Categorical Imperative. In order to secure that maxim M is consistent (that is, it is not inconsistent), we must negate the whole conditional $\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a)$.

In consequence $O(s, a, c) \leftrightarrow (\exists xM(x, s, a, p\ c) \wedge \neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a)))$ means that action *a* is obligatory for person *s* in circumstances *c* if and only if there is a maxim M consisting in a rule *x* adopted for person *s* to justify action *a* intending purpose *p* in

circumstances *c* and maxim M *is not,* such that action *a* ceases to be a way to attain purpose *p* if maxim M were adopted by anyone in any circumstances. I know, a long sentence, but I must defend myself by saying that it really conveys a lot of information and tries to do it in well-defined and specific terms.

Now that we have reached a formal account of the Kantian notion of obligatory action, let us go back to our initial problem: the *obligationes non colliduntur* principle.

> *"**A COLLISION OF DUTIES OR OBLIGATIONS** (collisio officiorum s. obligationum) would be the result of such a relation between them that the one would annul the other, in whole or in part. Duty and Obligation, however, are conceptions which express the objective practical Necessity of certain actions, and two opposite Rules cannot be objective and necessary at the same time; for if it is a Duty to act according to one of them, it is not only no Duty to act according to an opposite Rule, but to do so would even be contrary to Duty. Hence a **Collision of Duties and Obligations is entirely inconceivable** (obligationes non colliduntur). There may, **however**, be two grounds of obligation (rationes obligandi), connected with an individual under a Rule prescribed for himself, and yet neither the one nor the other may be sufficient to constitute an actual Obligation (rationes obligandi non obligantes); and in that case the one of them is not a Duty. **If two such grounds of Obligation are actually in collision** with each other, **Practical Philosophy does not say that the stronger Obligation is to keep** the upper hand (fortior obligatio vincit), **but that the stronger ground of Obligation is to maintain its place** (fortior obligandi ratio vincit)."*[138]

According to KANT, it is inconceivable for there to be two obligations or duties (in our jargon two obligatory actions) so that one '*one would annul the other, in whole or in part*'. What does this mean? We can interpret the phrase '*one would annul the other, in whole or in part*' in different ways.

I will do my best to interpret '*one would annul the other, in whole or in part*' which suggests looking for a kind of contradiction between obligations. One way to interpret the kind of contradiction KANT is refering to in this quotation is as follows: given two obligations $O_1(s, a, c)$ and $O_2(s, \neg a, c)$, it is clear that person *s* cannot possibly comply with both, since if person *s* does *a* she complies with $O_1(s, a, c)$ but fails to comply with

[138] See KANT's *Metaphysics of morals* (Kant 2017, [6:225])

$O_2(s, \neg a, c)$. Conversely, if person *s* does not do action *a* then she complies with $O_2(s, \neg a, c)$ but fails to comply with $O_1(s, a, c)$. Thus, person s cannot comply with both. Now, KANT seems to argue that, since obligations are required by practical reason, that is, since obligatory actions are required by a Categorical Imperative, they are required *necessarily* of person *s*. However, we have seen that person *s* cannot comply with both. In consequence, at least one is not necessarily required by practical reason. By (Kantian) definition, at least one is no obligation at all. Therefore obligations cannot collide by definition. This could be formally expressed as follows:

1. $O_1(s, a, c) \wedge O_2(s, \neg a, c)$ assumption
2. $O_1(s, a, c)$ E∧
3. $O_2(s, \neg a, c)$ E∧
4. $\neg O(s, \neg a, c)$ By principle **OB***p*→ ~**OB**~*p* in Standard Deontic Logic, which says that *p is obligatory only if its negation is not.* It seems that KANT is appealing to this principle when saying "*Duty and Obligation, however, are conceptions which express the objective practical Necessity of certain actions, and two opposite Rules cannot be objective and necessary at the same time;* ***for if it is a Duty to act according to one of them, it is not only no Duty to act according to an opposite Rule****, but to do so would even be contrary to Duty*"[139].
5. $\neg(O_1(s, a, c) \wedge O_2(s, \neg a, c))$ contradiction 3,4

As regards the fact that obligations annul each other '*in whole or in part'* in KANT's quotation, this suggests the idea of a mereology of actions where a part of action *a* would be incompatible with the whole action *b* or a part of action *b*. In order to formalize this, actions can be represented by sets A and B instead of constants. Two actions A and B will be incompatible if there is one element of set A that is, at least, contradictory with one element of set B. Action A and action B are thus contradictory actions if and only if $\exists x \wedge \exists y \; sucha \; that \; x \in A \wedge y \in B \wedge \neg(x \cap y)$. However, I leave aside the complexities of a mereology of actions in what follows.

In KANT's argument, there is one undeniable truth: given two obligations $O_1(s, a, c)$ and $O_2(s, \neg a, c)$ person s cannot comply with both of them. The rest of the argument depends on deontic logic principles that are controversial[140]. However, for the sake of

[139] See KANT's *Metaphysics of morals* (Kant 2017)
140 See (Lemmon 1962).

understanding KANT's own account of the *obligationes non colliduntur* principle, we would accept by now that $\neg (O_1(s, a, c) \wedge O_2(s, \neg A, c))$. I will come to this important topic later on.

KANT acknowledges that, in spite of *obligationes non colliduntur* principle, ***something is in conflict*** in many cases:

> *"There may, **however**, be two grounds of obligation (rationes obligandi), connected with an individual under a Rule prescribed for himself, and yet neither the one nor the other may be sufficient to constitute an actual Obligation (rationes obligandi non obligantes); and in that case the one of them is not a Duty. **If two such grounds of Obligation are actually in collision** with each other, **Practical Philosophy does not say that the stronger Obligation is to keep** the upper hand (fortior obligatio vincit), **but that the stronger ground of Obligation is to maintain its place** (fortior obligandi ratio vincit)."*[141]

What is in conflict here? KANT says that '**grounds of obligation'** are in conflict[142]. What are they? Unfortunately, grounds of obligation are not defined by KANT himself in contrast with the other Kantian concepts and notions discussed here. In order to understand what '**grounds of obligation'** are, we first need to understand the role of Kantian principles. To do that, I will start from the definition of Kantian obligation set forth above:

$$O(s, a, c) \leftrightarrow (\exists xM(x, s, a, p\ c) \wedge \neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a)))$$

KANT explicitly says that a practical law consists in a principle that makes a certain action an obligatory action (a duty) and, accordingly, maxims and principles are strongly related. Why? Because an action *a* is obligatory for a person *s* in circumstances *s* precisely when a maxim M passes the Categorical Imperative test, that is, a maxim M renders action a obligatory if $\neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a))$. If principles can make an action obligatory, then *principles* must be something *in here*: $\neg(\forall yzM(x, y, a, p, z) \rightarrow \neg(p \rightarrow a))$.

But what? Let us take a closer look at what a maxim M is made up of. We have a rule *r* that person *s* adopts and that justifies action *a* with purpose *p* in circumstances *c*. KANT

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[141] See See KANT's *Metaphysics of morals* (Kant 2017, [6:225]).

142 The expressions 'grounds of obligation' in Kant's original German is 'Gründe der Verbindlichkeit'. The translation of 'Gründe' can also be translated into English as 'reasons' or 'principles'. It helps to further specify what KANT actually meant by noticing that he treats 'grounds of obligation' explicitly equivalent to '*rationes obligandi*'.

opposes the '*the subjective principles of volition*' necessarily contained in maxims to the '*the objective principle*':

> *"A maxim is the subjective principle of volition; the objective principle (i.e., that which would also serve subjectively as the practical principle for all rational beings if reason had complete control over the faculty of desire) is the practical law"*[143]

For KANT, a practical law is nothing but a principle that makes an action obligatory. This means that we can build the notion of a practical law from the notion of maxim after having passed the Categorical Imperative test. In other words, an objective principle or practical law is what is left of a maxim after having passed the test of practical consistency. To any maxim passing the test, there is one corresponding objective principle or practical law.

Following this line of reasoning, from maxim M(*r, s, a, p, z)* we obtain ∀xyM(*r, x,* a, *, p, y*) which means that maxim M consists in rule *r* adopted by any person *s* to justify action *a* with purpose *p* in any circumstances. I will later argue that it does not really make any sense to interpret the universalization of maxims in this way, but for the sake of argument, let me go on. What would be the corresponding practical law (i.e. the corresponding principle) to maxim M once universalized?

Purpose *p* in ∀xyM(*r, x,* a, *, p, y*) plays no role in the maxim's corresponding principle, that is, our personal inclinations, our 'subjective grounds' for volition do not (and indeed must not) play any role in a practical law. So, let us drop it. Now we would have ∀xyM(*r, x,* a, *y*), which cannot be interpreted as a maxim cause it lacks *p*, that is it lacks the '*subjective principle of volition*'. Since it is not a maxim, it can be accepted as a first attempt for a formal definition of a practical law. To denote this we can replace M by P so that we obtain ∀xyP(*r, x,* a, *y*).

Now that we have reached a formal account for both maxims and practical law (i.e. objective principles), and knowing that maxims are 'subjective principles of volition' and practical laws are 'objective principles', whatever 'grounds of obligations' are, they must

[143] See KANT's *Groundwork of the metaphysics of morals* (Kant 1998 [4:402]).

be found somewhere in definitions of both maxims and principles. Let us identify what we are looking for:

- Maxim M is the quintuple M(*r*, *s*, a, *p*, c)
- Practical law is the quadruple ∀xyP(*r*, *x*, a, *y*)

Now we can see that **rule *r* is the only candidate actually available for '*grounds of obligation*'**. Moreover, since ∀xyP(*r*, *x*, a, *y*) is obtained from M(*r*, *s*, a, *p*, c) passing practical consistency test after universalization, this means that the following definition holds:

$$O(s, a, c) \leftrightarrow \forall xyP(r, x, a, y)$$

Now, let us go back to the *obligations non colliduntur* principle for which we already have given a formal account:

For any x and y, $\neg (O_x(s, a, c) \wedge O_y(s, \neg A, c))$.

Now, since $O_x(s, a, c)$ and $O_y(s, \neg A, c)$ are assumed *ex hypothesis* as obligations, each one has its corresponding practical law:

$$O_x(s, a, c) \leftrightarrow \forall xyP(r, x, a, y)$$

$$O_x(s, a, c) \leftrightarrow \forall xyP(r, x, \neg a, y)$$

According to KANT, when we are facing a case where it seems that two obligations conflict, in reality the conflict is between the rules *r* of the corresponding practical laws.

However, it does not make much sense that rules do actually conflict when considered in abstraction of the person, the action intended and the circumstances. KANT himself gives us a clue when he says that '*there may, **however**, be two grounds of obligation (rationes obligandi), **connected with an individual under a Rule** prescribed for himself, and yet neither the one nor the other may be sufficient to constitute an actual obligation*"[144].

From this quotation, we must infer that we cannot simply equate 'grounds of obligations' to the rule *r* in the corresponding practical law ∀xyP(*r*, *x*, a, *y*) since the term rule appears in the quotation and it is not intended to be understood as a definition for 'grounds of obligation'.

[144] See See KANT's *Metaphysics of morals* (Kant 2017, [6:225]).

Fortunately, the quotation offers a very interesting new piece of information: since two grounds of obligation are '*connected with an individual under a Rule prescribed for himself',* grounds of obligation are thus what justifies person *s* to adopt rule *r*, which in turn, justifies doing *a.* However, according to KANT's quotation, no two grounds of obligation may '*constitute an actual obligation*', which means that grounds of obligation are evaluated under certain circumstances *c.* In others words, without circumstances c, we are not in a position to know what our actual obligations are.

This is precisely O'NEIL's reading of the *obligations non collidutur* quotation[145]. In consequence, we can thus give a formal account for grounds of obligation as the quadruple G(*r, s, a, c*) where G is defined as the relationship holding among *r*, *s*, *a* and *c* so that *r* is the rule adopted by person *s* to perform action *a* under circumstances *c.*

How is a conflict of rules or 'grounds of principles' solved? KANT says that 'the stronger ground of obligation is to maintain its place (*fortior obligandi ratio vincit*). In our jargon, G(r_1, x, a, c) overrides G(r_2, x, a, c), which is exactly the solution for conflicting reasons in chapter 6.2 of this dissertation.

That should not be a surprise. The structure of G(r, s, a, c) allows us to say that G is just a subset of reasons R(q, d, c, a) where *q* is always a rule adopted by person s. If grounds are just a subset of reasons, the overriding relationship applies.

If Kantian grounds for obligation are thus a subset of reasons, which by default are *pro tanto* reasons, I think that we are obliged to revisit the reading of KANT that defends moral principles as exceptionless rules. First of all, Kantian principles or practical laws cannot be conflated with rules. I read Kantian principles as being what is left from a maxim, let us say M(r, s, a, p, c), once this maxim has passed the practical consistency test. In the practical consistency test, the purpose is removed from the maxim M.

So from M(r, s, a, p, c) we get $\forall xyP(r, x, a, y)$ where x is any person and y is any circumstance by the practical consistency test. Now is time to consider $\forall xyP(r, x, a, y)$ in detail. At a first glance it seems that one natural reading would be that principles or practical laws require exceptionless rules. After all, rule *r* constitutes part of the principle and the rule seems to apply for all persons in all circumstances.

[145]See O'NEILL's *From Principles to Practice* (O'Neill 2018).

I think that this is a bad reading which leaves poor room for grounds of obligation G(r, s, a, c). Why? First of all, if this simple minded reading would be correct, we would be attributing a very counterintuitive view to a great philosopher. The adoption of this reading would be a complete failure of the hermeneutical principle of charity. However, there is another reason to reject the exceptioless rule reading for Kantian principles: principles and grounds wouldn't be discernible since they would share same logical structure:

$\forall xyP(r, x, a, y)$ has exactly the same strutuce as $\forall xyG(r, x, a, y)$. The only difference would be the letters P and G. How can we make a substantive difference about G and P? We could try to start building different wordings for how (r, x, a, y) are related under G quadruple and how they are related under P quadruple. However, this strategy seems futile. My suspicion is how the *universalization* process in the practical consistency test (our preferred version of the Categorical Imperative) is actually understood.

If the process is read as going from the maxim M(r, s, a, p, c) to the principle $\forall xyP(r, x, a, y)$, then the most natural reading for Kantian principles or practical law would be exceptioless rules. Under this reading, their being exceptionless is evidence of their validity as moral principles.

However, in KORSGAARD reading, the practical consistency test does not aim to get exceptionless rules from Maxim M(r, s, a, p, c). The practical consistency test only states that the Maxim expresses a valid moral reason, i.e, it has a corresponding valid moral principle or practical law. ***The practical consistency test does not allow us to say that this principle is a decisive reason for all circumstances***. The practical consistency test is a test for the moral validity of a principle or practical law, that is, it is a test to determine whether a maxim expresses a moral reason.

If so, a maxim M(r, s, a, p, c) will always be valid as a moral reason, that is, any rational being should necessarily accept *r* as the first placeholder of R(r, s, c, a). It is in this sense that moral reasons are necessary: if M(r, s, a, p, c) passed the practical consistency test, then for any rational being, it is necessarily the case that R(r, s, c, a).

The fact that a rational being must necessary acknowledge moral reasons when presented to her is what constitutes, under this reading of KANT, the objectivity of morality. KANT reserves the term principles or practical law to express this *necessary and objective*

presentation of what is left from a maxim M(r, s, a, p, c) after the practical consistency test.

Given this reading of KANT's idea of obligation, then $\forall xyP(r,x,a,y)$ is not a good formalization of what is left from a maxim M(r, s, a, p, c) after the practical consistency test. I do think that the best formalization is the simplest:

P(r, a).

That is *do actions of type a* or *do not do actions of type a*. Moral principles are very simple, as they should be according to Kantian ethics. Moral reasons do not need to be simple.

If our reading on KANT's principles is sounded and correctly captured by P(r, a), then the difference between principles and grounds of obligation is very easy to establish: principles determine whether a maxim M(r, s, a, p, c) express a valid moral reason. In contrast, *grounds for obligation* G(r, s, a, c) are the moral reasons considered in connection with a particular person under particular circumstances. The moral principle P(r, a) is always valid by definition. Given a situation, if P(r, a) is relevant, then person *s* necessarily needs to consider R(r, s, c, a) as a reason.

This does not mean that person *s* is required by practical reason to do *a*. That is, following KANT, it does not mean that R(r, s, c, a) constitutes an actual obligation. It will constitute an actual obligation if and only if R(r, s, c, a) is a conclusive or decisive reason.

If CR(r, s, c, a) then, by definition, reason *r* to do *a* in circumstances *c* is a reason such as (i) *r* is a sufficient reason and (ii) there is no other sufficient reason *p* to do a course of action incompatible with *a*. First, if R(r, s, c, a) is a moral conclusive reason then SR(r, s, c, a), that is, there is no other reason *p* such as R(p, s, c, a) > R(r, s, c, a). Second, there is no other reason *p* such as SR(p, s, c, ¬a). From this it is very easy to see that there is no other conclusive reason such as R(r, s, c, ¬a).

1.- CR(r, s, c, a)↔ $\neg\exists xSR(p,s,c,\neg a)$ by definition of conclusive reason

2.- CR(r, s, c, a) by 1, ∧ elimination.

3- $\neg\exists xR(x,s,c,\neg a) > R(r,s,c,a)$ by 1, ∧ elimination.

4.- $\neg\exists xSR(p,s,c,\neg a)$ by 1, ∧ elimination.

5.- CR(r, s, c, ¬a) by assumption

6.- SR(r, s, c, ¬a) by 5 and definition of conclusive reason

7.- ¬ CR(r, s, c, ¬a) by 2 and contradiction 4,6

This argument shows that if actual moral obligations do only arise out of conclusive reasons, then *obligationes non collidutur principle* would true by the definition of conclusive reasons.

In conclusion, KANT's moral generalism allows for moral conflicts through grounds of obligation. I have argued that Kantian ground of obligation can be read as reasons for action. In particular ground of obligation are reasons for action such as *p* in quadruple R(p, x, c, a) is a rule. This means that we have all the machinery of reasons for action at our disposal in the framework of KANT's moral generalism. I also concluded that the principle *obligationes non collidutur* is true by definition for those obligations that constitute conclusive reasons, that is, *obligationes non collidutur* principle applies to actual (or toti-resultant) obligations. It is true that KANT does not have the concept of *prima face duties* or *pro tanto* obligations. But, under our reading of KANT here, this is just a terminological debate.

7 RAZ'S SECOND-ORDER REASONS AND EXCLUSIONARY REASONS

In this section, I will defend that RAZ's second-order reasons and exclusionary reasons famously defended by him in his *Practical reason and norms* are best understood as epistemic reasons to withhold, reject or accept that certain reasons for action hold.

In section 7.1, I will defend that RAZ's model of reasons for action is essentially SCANLON's quadruple R(p, x, c, a). This will allow us to use the quadruple R(p, x, c, a) and first-order logic to analyse RAZ's second-order reasons and exclusionary reasons structure. Inasmuch as second-order reasons involve beliefs, first-order logic will be extended with the epistemic operator B for the analysis of second-order reasons.

In section 7.2, I will defend that deciding on the balance of reasons consists in our ability to know whether a reason overrides another reason or not, that is, deciding on the balance of reasons consists in applying the overriding operator to the reasons we have in particular circumstances to know which reason is the conclusive reason (or sufficient reasons) in the given circumstances.

Like many other philosophers, RAZ considers our capacity to decide on the balance of reasons as a fundamental principle of practical reason. However, RAZ famously defended that there are cases where the conflict of reasons does not seem to be solved solely on the balance of reasons.

In chapter 7.3 I will show, following RAZ, that 'on the balance of reasons' principle, called principle P1, is not enough. RAZ gives three examples where 'on the balance of reasons' principle seems to fail: (i) being unable to decide on the merits of an investment due to mental exhaustion; (ii) the promise to take into account exclusively your child's educational needs when deciding whether to send her or not to state school and (iii) the orders given to a soldier by a superior in rank.

RAZ argues that in these three cases we have reason to act in a certain way and at the same time we also have reason to exclude some reasons from our practical reasoning. This reason to exclude certain reasons is not based on the merits of the case: the decision not to invest due to mental exhaustion has nothing to do with the merits of the investment. In the case of the merits of keeping the promise, the promise made has nothing to do with

the merits of sending the child to the state school or not[146]. Finally, the order given to the soldier to do as commanded has nothing to do with the merits of the action ordered. RAZ famously said that examples (i) to (iii) are second-order reasons for action and, in particular, exclusionary reasons, reasons not to act for certain reasons.

In section 7.4.1, I will analyse RAZ's case for second-order reasons for action and exclusionary reasons. I will conclude that RAZ is right in believing that 'deciding on the balance of reasons' is sometimes not enough to solve the case, that is, principle P1 is sometimes not enough.

In some cases, a new practical principle, called principle P2, is needed. This principle says that whenever there is a conflict between a second-order reason and a reason for action, second-order reason must always prevail.

However, I will show, against RAZ, that second-order reasons and exclusionary reasons are not reasons for action. In my view, second-order reasons are best understood in terms of epistemic reasons to withhold, reject or accept that certain reasons for action hold.

In chapter 7.4.2, I will first analyse Ann's hampered judgement example. This example will serve us to see the structure of legitimate cases of second-order reasons: *p* is an exclusionary reason if and only if the fact that *p* is a reason for a person x to withhold or reject that certain beliefs on reasons for action actually hold. More generally, *p* is a second-order reason if and only if the fact that *p* is a reason for a person x to accept, reject or withhold that certain beliefs on reasons for action actually hold.

I will also show that, contrary to RAZ, Colin's promise example and Jeremy's commanding officer order example are not legitimate cases of exclusionary reasons. The explanation for this is that principle P2 fails and principle P1 seems to be able to solve these cases. This is in sharp contrast with Ann's hampered judgment example. RAZ tries to save Colin's promise example and Jeremy's commanding officer order example as legitimate cases of exclusionary reasons with the notion of scope. However, I will show that this strategy does not work either.

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146 For instance, family economic resources should be a reason to include in our practical reasoning to decide whether or not to send the child to the state school. However, this reason is excluded. Note that it is not excluded on the grounds of the merits of sending the child to the state school or not. The exclusion is justified as the outcome of keeping a promise.

The *apparent* exclusionary effect of Colin's promise example and Jeremy's commanding officer order example is explained by the fact that orders and promises are sources of obligations. Obligations, as defined by me in chapter 5, have an intrinsic *exclusionary effect* since an obligation is not only a reason to do as obligated but also a reason not to undertake any course of action incompatible with what is obligated. However, the *exclusionary effect* of obligations has nothing to do with the exclusionary effect of second-order reasons, which is epistemic in nature.

In section 7.3, from the prior analysis of the examples, I will show the general structure of second-order reasons as epistemic reasons to withhold, reject or accept that certain reasons for action hold.

Finally, in section 7.4, I will be able to give a tentative definition of rights in terms of second-order reasons to accept that certain reasons for action hold. This line of enquiry should not come as a surprise since reasons fundamentalism adopted in section 4 assumes that all normative concepts are derivable from the fundamental concept of reasons for action.

7.1 RAZ'S REASONS FOR ACTION AS SCANLON'S QUADRUPLE

I will show in this section that RAZ's concept of *reasons for action* in his *Practical reason and Norms* is equivalent to SCANLON's quadruple R(q, x, c, a) discussed earlier in section 4[147].

RAZ starts by analysing sentences where '*is a reason*' appears. He identifies the following types of sentences on reasons:

> *"'___is a reason for__' (for example, 'the devaluation is a reason for imposing exchange controls')*
> *'There is a reason for – '('there is a reason for punishing him')*
> *'x has a reason for – ' ('John has a reason for refusing the job')*
> *'x believes that – is a reason for postponing the trip'. (John believes that the approaching election is a reason for the President to go on a tour abroad'.)*

[147] A similar formulation of reasons for action as presented in *Practical reason and Norms* can also be found in RAZ's *Legal Reasons, Sources and Gaps* (Raz 1979b) and *The authority of law* (Raz 1979a, p.17)

'x's reason for ω-ing is –' (His reason for staying late in the office is the enormous amount of work which accumulated during his absence).[148]"

In first sentence, the reason is "*the devaluation*", which from the point of view of English grammar is a noun. A noun that refers to a *factual situation*: the fact that the national currency has lost value as regards other country's currencies.

In the second sentence, '*there is a reason*' seems to refer to a wrong action done by someone. That somebody has done something *is a fact*.

In the third example, as stated, it is not explicit nor clear what it refers to. Nevertheless, in such situations, we may naturally ask: what is the reason for refusing the job? The answer would be something like 'the reason for refusing the job is *that p'* and *p should be a fact*.

Finally, the most natural way to fill the place holder left by RAZ in the fourth and fifth sentences are correspondingly, 'x believes that *p'* and 'x's reason for ω-ing is *p*' where the best candidate for *p are facts*.

RAZ notes that '*we usually think of reasons for action as being reasons for a person to perform an action when certain conditions obtain'*[149]. RAZ realizes that sentences about reasons *relate a fact to a person*, that is, *a fact is a reason for* somebody to do (or refrain from doing) something. The relational character of reasons, as stated, is obvious.

Therefore, '*is a reason*' is not a monadic predicate but a relational predicate. From this observation, RAZ concludes that *reasons are relations between facts and persons*.

The sentences above all have the same logical structure "*the fact that p is a reason for x to do φ*"[150]. Sentences that have such a logical "*the fact that p is a reason for x to do φ*" structure are called '*R-sentences*' by RAZ[151].

148 See RAZ's Practical reason and norms (Raz 1999, p.16)
149 See RAZ's Practical reason and norms (Raz 1999, p.19)
150 See RAZ's RAZ's Practical reason and norms (Raz 1999, p.20)
151 See RAZ's RAZ's Practical reason and norms (Raz 1999, p.20)

RAZ then offers '*R(φ), p, x*'[152] as a symbolic notation for analysing R-sentences where the operator R(φ) stands for "a reason for φ-ing", where φ is an action, *p* is a fact and *x* is the person for whom the fact *that p* is a reason.

One can easily see that RAZ's notation for sentences about reasons for action is a triplet R(p, x, φ) where *p* is a fact, x is a person and φ is an action. It is obvious that if circumstances *c* are taken into consideration, what is obtained is precisely SCANLON's quadruple R(p, x, c, a).

Since sentences about reasons are always evaluated in a given context, adding circumstances *c* to RAZ's triple R(p, x, φ) does not affect RAZ's core concept of '*being a reason'*. This means that I am entitled to present RAZ's ideas using SCANLON's quadruple R(*p, x, c, a*).

This move is convenient because it allows us to better compare ideas and insights already discussed earlier in this dissertation and we make it explicit that reasons are always evaluated in certain circumstances.

From now on, whenever RAZ uses the 'R(φ), p, x' notation, I will replace it by R(p, x, c, a), which is the notation used in this dissertation.

7.2 REASONING ON THE BALANCE OF REASONS

As we have already seen in section 6, reasons override other reasons. When deciding what to do, it seems that after having taken into account all that is relevant in the given circumstances and having identified all the reasons we have in the aforementioned circumstances, we must be able to identify either one conclusive reason for action or two or more sufficient reasons for action with the application of the overriding operator.

RAZ tries to capture this kind of practical reasoning with the following principle:

> *"P1 it is always the case that one ought, all things considered, to do whatever one ought to do on the balance of reasons"*[153].

[152] See RAZ's Practical reason and norms (Raz 1999, p.20)
[153] See RAZ's Practical reason and norms (Raz 1999, p.36)

This principle P1 has two notions that need to be clarified: "*all things considered*" and "*on the balance of reasons*". In what follows I will show that principle P1 basically consists in (i) identifying the reasons one has in certain circumstances and (ii) applying the overriding operator to them.

In practical philosophy, "*all things considered*"[154] is a phrase that is often used in the context of *pro tanto reasons* or *prima facie reasons*. Famously, ROSS made the distinction between *prima facie* duties and *actual duties* (also named *toti-resultant* obligations):

> *"I suggest 'prima facie duty' or 'conditional duty' as a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g. the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant. Whether an act is a duty proper or actual duty depends on all the morally significant kinds it is an instance of."*[155]

ROSS was interested in the context of analysing duties or obligations. However, the distinction has a broader application. In the literature, philosophers apply the distinction to reasons in general – not only to duties or obligations – so that there is a difference between *pro tanto reasons* (*prima facie* reasons) and *conclusive reasons*.

Pro tanto reasons are those reasons that we have to weigh, to balance, or in other words, to consider in a given situation. Weighing for authors like ROSS[156], RAZ[157], SCANLON[158], CHISHOLM[159] and NOZICK[160] means to apply the overriding relationship to those reasons.

In fact, RAZ's reference of the overriding relationship is CHISHOLM's[161]. The reason that overrides all others is the conclusive reason for action in such circumstances. Sometimes, the result of the process is not a conclusive reason but two or more sufficient

154 See RUTH CHANG's *All Things Considered*(Chang 2004).
155 See W. D. ROSS's The Right and the Good (Ross 2002, p.19).
156 See W. D. ROSS (Ross 2002).
157 See RAZ (Raz 1999).
158 See SCANLON (Scanlon 2014; 1998).
159 See CHISHOLM (Chisholm 1964).
160 See NOZICK(Nozick Robert 1968).
161 See See RAZ's Practical reason and norms (Raz 1999, p.202).

reasons: reasons that are not overridden but do not override all others. This has already been discussed in section 6.

BROAD expresses this process as follows:

> *"We might compare the claims which arise from various right-tending and wrong-tending characteristics to forces of various magnitudes and directions acting on a body at the same time. And we might compare what I will call the resultantly right course of action to the course which a body would pursue under the joint action of such forces. Looking at the situation from the point of view of the agent, we can say that each right-tending and wrong-tending characteristic imposes on him a component obligation of a certain degree of urgency; and that his resultant obligation is to make the best compromise that he can between his various component obligations."*[162]

From deontic logic literature, a similar approach is found:

> *"Naturally, we must also consider the problem how to adequately formalize in Deontic Logic the remaining notion of oughtness, what Ross calls 'duty proper' and Broad 'resultant obligation', as well as its logical relationship to that of prima facie oughtness. In what follows we shall also, like Searle (1978), speak of that remaining notion as oughtness 'all things considered'; this terminology is justified by its explicitly emphasizing the 'toti-resultant' character of that notion"*[163]

In conclusion, 'all things considered' is nothing but identifying the conclusive reasons or sufficient reasons one has in a given situation.

RAZ himself explicitly explains how he uses the term 'ought all things considered':

> *"I am using 'ought all things considered' to indicate what ought to be done on the basis of all the reasons for action which are relevant to the question, and not only on the basis of the reasons the agent in fact considered or could have considered."*[164]

What about reasoning 'on the balance of reasons'? When discussing precisely RAZ's concept of reasons for action, STEPHEN R. PERRY says:

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162 See C. D. BROAD's *Some of the Main Problems of Ethics* (Broad 1946).
163 See Lennart Åqvist's *Prima Facie Oughtness vs. Oughtness All Things Considered in Deontic Logic: A Chisholmian Approach*' (Åqvist 1997, p.89-96).
164 See RAZ's *Practical Reason and Norms* (Raz 1999, p.36)

> *"The objective balance of reasons consists of all practical inferences and weighing processes that would be carried out by an agent who, when deciding what ought to be done in a particular situation, possessed true information about all relevant facts and who in addition reasoned validly at every stage of his or her practical deliberations."*[165]

From this quotation, we are entitled to conclude that acting on the '*balance of reasons*' simply means the argumentative process of weighing reasons, that is, to apply the overriding operator to the *pro tanto* reasons in a given situation to reach either a conclusive reason or two or more sufficient reasons.

Therefore, '*all things considered*' and '*balance of reasons*' seem to be referring to the same process. The phrase 'all things considered' underlines the previous process of identifying the *pro tanto* reasons and the relevant normative elements of the circumstances, and the '*balance of reasons*' seems to be referring to the actual weighing, that is, the process of applying the overriding operator.

Since principle P1 requires "*all things considered, to do whatever one ought to do on the balance of reasons*" of us, the practical principle P1 requires that a person acts on the conclusive reason resulting from the overriding relationship of reasons, after having considered the situation carefully and with the relevant information about the relevant facts.

7.3 THE OVERRIDING OPERATOR IS NOT ENOUGH

RAZ gives us three different examples where principle P1 seems to be wrong or seems not to be properly capturing the practical reasoning involved: (a) a person, Ann, who must make a decision on an investment but, being mentally exhausted[166], is not able to make a judgement on the merits of the investment; (b) a man, Colin, who promised his wife that, in deciding whether or not to send his child to a state school, he will only take into account his son's educational needs and disregard all other reasons; and (c) a soldier, Jeremy, who has been ordered to unlawfully appropriate a van from a civilian[167].

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165 See PERRY's '*The works of Joseph Raz: second-order reasons, uncertainty and legal theory*.' (Perry 1989, p.922).
166 See RAZ's Practical reason and norms (Raz 1999, p.37).
167 See RAZ's Practical reason and norms (Raz 1999, p.38).

In example (a), we have, on the one hand, all the reasons to make the decision based on the merits of the investment, such as the fact that the investment yields a good return, it is a low-risk investment, the market sector of this investment is well-regulated, etc. and on the other hand we have a reason to disregard all the reasons on the merits of the investment, namely, the inability to assess the merits of the investment due to mental exhaustion. It does seem to be *a reason about reasons* where Principle P1 seems not to be enough to explain the practical reasoning involved in this example.

In example (b), given the content of Colin's promise made (to *disregard* all other reasons and take into consideration only the educational needs of his son), the promise made is a *reason about reasons*, since the promise (which is obviously a reason) precludes taking into account certain reasons: those unrelated to the educational needs of his son. Principle P1 seems not to be enough.

In example (c), a soldier, Jeremy, has been ordered by his superior to appropriate and use a van belonging to a civilian. Taking a property away from a civilian is morally wrong[168]. Another soldier points out to the soldier who has been ordered that the action required is morally wrong. The soldier ordered responds that he is well aware of that but the fact that the required action is morally wrong is beside the point because *following orders* requires that one does not decide or act on the merits of an action but solely on the fact that one has been ordered to perform (or refrain from performing) a certain action. In this sense, the order to do something by a superior, is a *reason about reasons*, since the very fact of the order seems to preclude the soldier from taking into account all other reasons on the merits of the action. Principle P1 seems not to be enough.

7.4 SECOND-ORDER REASONS AND EXCLUSIONARY REASONS

7.4.1 RAZ'S PRESENTATION OF SECOND-ORDER REASONS

In order to explain what is going on in these examples and why P1 does not seem to apply to them, RAZ famously introduced the idea of exclusionary reasons:

168 Probably unlawful in many jurisdictions, but in order to avoid extra complications, let's focus only on the moral dimension of the action *taking away a property of a third person*.

> *"A secondary reason is any reason to act for a reason or to refrain from acting for a reason. An exclusionary reason is a second-order reason to refrain from acting for a reason"*[169] .

RAZ thus defines second-order reasons as "*any reason to act for a reason or to refrain from acting for a reason*". Second-order reasons presented in this way are reasons for action, since they are a reason *to act* (or refrain from acting) for a reason.

If the analysis that I present in this section is correct, second-order reasons are not reasons for action at all but epistemic reasons[170]. But before jumping to that, let us stay with how RAZ describes practical reasoning when exclusionary reasons are involved[171]:

> *"If p is a reason for x to φ and q is an exclusionary reason for him not to act on p then p and q are not strictly conflicting reasons. q is not a reason not to φ -ing. It is a reason not φ -ing for that reason. The conflict between p and q is a conflict between a first-order reason and second order exclusionary reason. Such conflicts are resolved no by strength of the competing reasons but by a general principle of practical reasoning which determines that exclusionary reasons always prevail, when in conflict with first-order reasons."*[172]

According to RAZ, when exclusionary reasons are involved, the person making the decision *does not ground her decision* for acting one way or the other "*by strength of the competing reasons*". First-order reasons and exclusionary reasons "*are not strictly conflicting reasons"*. Why? Because an exclusionary reason "*is not [only]*[173] *a reason not to ϕ-ing*" but "[also][174] *a reason not ϕ-ing for that reason*".

An exclusionary reason precludes some reasons for action to be taken into account for the final decision. Thus, when first-order reasons conflict with exclusionary reasons,

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169 See RAZ's Practical reason and norms (Raz 1999, p.39).
170 CARLOS NINO also defended that second-order reasons are epistemic reasons (Nino 1985).
171 Oddly enough RAZ introduces exclusionary reasons as a special case of second-order reasons, that is, reasons for refraining from acting for a reason, but he gives no example of a second-order reason that is not exclusionary, that is, he never gives an example of a reason to act for a reason. I will later offer an example of a second-order reason that is not an exclusionary reason: the favourable opinion of an expert.
172 See RAZ's Practical reason and norms (Raz 1999, p.40).
173 The 'only' is mine but in doing so I am trying to convey RAZ's ideas, not defending mine. My own ideas on this will appear later on. As probably noticed from what has been said so far, I will defend that second-order reasons are not reasons for action but epistemic reasons. If I am right, this would have a major impact on RAZ's interpretation of legal norms as exclusionary reasons. However, I will not pursue this very interesting enquiry. The idea of defending that second-order reasons are epistemic reasons here is to prepare the concepts we need to understand opposable reasons in section 10.
174 The 'also' is mine but in doing so I am trying to convey RAZ's ideas, not defending mine.

exclusionary reasons always prevail. For RAZ, this is simply a principle of practical reason:

> *'[…] Such conflicts are resolved not by the strength of competing reasons but by a general principle of practical reasoning which determines that exclusionary reasons always prevail.'*[175]

RAZ calls this principle P2:

> *"P2. One ought not to act on the balance of reasons if the reasons tipping the balance are excluded by an undefeated exclusionary reason."*[176]

However, 'prevail', as long as it conveys some notion of strength, is not a fortunate expression because first-order reasons for action and exclusionary reasons are not decided "*by strength of the competing reasons*"[177]. Exclusionary reasons prevail not because of their strength but because, as exclusionary reasons, their role in practical reasoning is to exclude some set of reasons for action to be taken into account in the final reasoning.

So, whenever a first-order reason for action is confronted with an exclusionary reason, the exclusionary reasons prevails even if judging on the merits of the action, the first-order reason seems to be the winning case.

Before analysing second-order reasons logical structure in the next section, there is an ambiguity in RAZ's *Practical reason and norms* that is worth noting: he sometimes uses the term reason to designate '*the fact that p',* whereas in other contexts it is clear that he is designating the relationship between the fact and the person, that is, he is designating the quadruple R(q, x, c, a) as a whole.

If we assume SCANLON's framework, as I am doing in this dissertation, it is clear that whenever we designate *'the fact that p'* as a reason, it is simply a linguistic shortcut. Facts *per se*, on their own, are not reasons. Facts are only reasons when considered in an R-sentence or, following SCANLON, facts are only reasons when considered in the quadruple R(q, x, c, a). So, from now on, whenever I say that the fact *that p* is a reason, I am simply assuming that R(p, x, c, a) holds.

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175 See RAZ's Practical reason and norms (Raz 1999, p.40).
176 See RAZ's Practical reason and norms (Raz 1999, p.40).
177 See RAZ's Practical reason and norms (Raz 1999, p.40).

7.4.2 EXCLUSIONARY REASONS LOGICAL STRUCTURE

7.4.2.1 *ANALYSIS OF THE INVESTMENT EXAMPLE*

Let us start by Ann's investment case of example (a). Ann is presented with an investment proposal by a friend of hers. The deadline to accept the proposal is the very same evening. The investment seems to be a good opportunity, but to decide on its merits, careful reading of the documents of the investment is needed. The documentation is complex. Here is the thing: Ann is mentally exhausted, unable to judge on the merits of the investment. She cannot make a decision. Her friend says that not making a decision in this case is the same as rejecting the investment opportunity. She says that she is not deciding on the merits of the investment but that her mental exhaustion is a "*reason not to act on the merits of the case*"[178] .

RAZ's analysis of this example is accurate except for one reason: Ann's hampered judgment *is not a reason not to act*, in other words, it is not a reason for action but an epistemic reason. Before I reach this conclusion, let us examine the logical structure of the example.

The circumstances of the investment proposal allows Ann to determine the universe of discourse where all the relevant facts to think on the merits of the case are present. We can express this through a function.

Let us say function U = Rel(x) is a function such that the argument x is the given circumstances and its output is the universe of discourse for the given circumstances, which is a set U of the relevant facts to think on the merits of the case.

Let:

c = the given circumstances to Ann's situation

p = the investment offers a good return

q = the investment is low risk

r = the investment is complex

t = too mentally exhausted to read the documentation carefully

a =to invest

[178] See RAZ's Practical reason and norms (Raz 1999, p.37).

Rel(c) = U={p,q, r, t}

Since the ability to rightly identify the facts and properties relevant to think on the merits of the case in the given circumstances depends significantly on the person's moral discernment, which in its turn, depends on the person's expertise in handling the given circumstances, intellectual capacity, moral sensitivity, and so on, Rel(x) function can be expressed as a two variable function U = Rel(x, y) where x is a variable standing for any circumstances and y is a variable standing for any person:

Rel(c, Ann) = U={p,q, r, t}

From the universe of discourse U={p,q, r, t}, Ann is able to determine what reasons she has. Again, we can express this with a function so that, given a universe of discourse, Ann is able to identify the reasons she has. Let us say S = Rso(X) is the function such that for any set X that is a universe of discourse, its output is a set of reasons S:

S = { R(p, Ann, *c*, *a*), R(q Ann, *c*, *a*), R(r, Ann, *c*, ¬a), R(t, Ann, *c*, ¬a)[179]}

If all reasons in S were first-order reasons[180], all we should do now is apply principle P1, that is, all we need to do is to pair all reasons and apply the overriding operator '>' to all of the pairs.

The overriding operator '>' is nothing but a function. We can express this function as follows: let us call z = OV(x,y) with two-variables x and y such that x is a reason and y is a reason where action required by x and action required by y are incompatible. The output of the function is the wining reason or a draw situation when no reason overrides the other[181], that is, the conclusive reason, or two or more sufficient reasons:

Ov(x,y) = x if x overrides y or y if y overrides x or x=y, if no reason overrides the other.

It is customary to express the overriding function with the operator '>'. I will follow this convention from now on.

I will not pair all of the reasons in S above. I will simply assume, for argument's sake, that the outcome of the pairing is:

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179 RAZ certainly assumes that R(s, Ann, c, □a) is a reason for action. However, I will later show that the hampered judgment is not a reason for action here and, in consequence, it does not imply R(s, Ann, c, □a).
180 I will leave the defeaters complexity for sections 8 and 9.
181 I think that the overriding operator should not be applied to enticing reasons, even if they are conflicting reasons. However, I will leave this complexity out of the analysis.

R(p, Ann, c, a) > any other reason in S.

However, RAZ rightly points out that in contrast with all other reasons in set S, my hampered judgment *t* in R(*t*, Ann, c, ¬a) cannot be paired with the other reasons to apply the overriding operator.

RAZ seems to confirm this:

> *"if p is a reason for x to ϕ and q is an exclusionary reason for him not to act on p then p and q are not strictly conflicting reasons"*[182]

R(t, Ann, c, ¬a) and the rest of reasons "*are not strictly conflicting reasons*". To put it crudely: saying 'my hampered judgment on the investment overrides the fact that the investment offers a good return' sounds odd and unnatural. My hampered judgment on the investment does not seem to override any reason on the merits of the investment. What is the relationship between these two reasons? If P1 (the overriding operator) does not apply, how is Ann supposed to decide according to reason in this case?

RAZ's proposal is to apply principle P2: '*P2. One ought not to act on the balance of reasons if the reasons tipping the balance are excluded by an undefeated exclusionary reason.*'[183]. The exclusionary reason over the first-order reason can be described as excluding reasons for action from the set S of the reasons to decide. In sum, if the reasons are excluded, I cannot use them to justifiably reach my conclusion.

If this is so, Ann's argument seems to be that her hampered judgment is a reason to withhold any belief that a certain reason for investing (or not investing) on the merits of the investment actually holds.

Let the quadruple W(q, x, p, c) stand for the fact that *q* is a reason for person x to withhold the belief that *p* holds in circumstances *c*. Accordingly, W(s, Ann, p, c) means that the hampered judgement is a reason for Ann to withhold any belief that *p* in circumstances c.

We already know that the reasons for action that Ann has is determined by set S:

S = { R(p, Ann, *c*, *a*), R(q Ann, *c*, *a*), R(r, Ann, *c*, ¬a), R(t, Ann, *c*, ¬a)[184]}

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[182] See RAZ's Practical reason and norms (Raz 1999, p.40).
[183] See RAZ's Practical reason and norms (Raz 1999, p.40).
184 RAZ certainly assumes that R(s, Ann, c, □a) is a reason for action. However, I will later show that the hampered judgment is not a reason for action here and, in consequence, it does not imply R(s, Ann, c, □a).

Since *p* in W(q, x, p, c) can be replaced by any reason α on the merits in S, the following W statements hold:

W(s, Ann, R(p, Ann, c, a), c)

W(s, Ann, R(q Ann, c, a), c)

W(s, Ann, R(r, Ann, c, □a), c)

However, none of these presentations are actually correct because *p* in the statements above is a normative fact of the form R(q, x, a, c) and not a belief of Ann. A more correct presentation thus needs the epistemic B operator. Let the duple B(x, p) stand for person x who has the belief that *p* holds. Accordingly, the right presentation for the statements above is:

W(s, Ann, B(Ann, R(p, Ann, c, a)) , c)

W(s, Ann, B(Ann, R(q Ann, c, a), c)

W(s, Ann, B(Ann, R(r, Ann, c, □a), c)

More generally, for any reason for action α on the merits of the investment:

W(s, Ann, B(Ann, α), c)

Accordingly, if she has a reason to withhold any belief that certain reason on the merits of the investment actually holds, she has no belief left that there is a reason to invest on the merits. The effect of W(s, Ann, B(Ann, α), c) is that all reasons for action on the merits of the investment are removed from the set S of reasons. To simplify notation in what follows:

W(s, Ann, B(Ann, α) , c)≡ β

The exclusionary effect of β can be expressed through a function. Let S above be denoted by S_1. Let be Ex(β, S_1) a function such that, given an exclusionary reason *β* and a set S_1 of reasons for action as arguments, the function returns a new set of reasons S_2 where the reasons affected by the exclusionary reason are removed:

Ex(β, S_1) = S_1 - {reasons affected by β} = S_2

Note that Ex(β, S_1) function has a certain scope[185], since the operator will not affect all reasons for action but only those that meet the criteria. For instance, the scope of the hampered judgment as an exclusionary reason is all the reasons on the merits of the investment.

Since for every exclusionary reason, there is particular a range of reasons excluded, this can be also express through a function. Let be Scp(β) a function such that, given an exclusionary reason β, it returns a set of reasons S_c of the reasons affected by β:

$Scp(\beta) = S_c$ = {reasons affected by B(α) exclusion}

With this notion of scope, we can improve the exclusionary function Ex(β, S_1) given above. Why? Ex(β, S_1) needs the scope of the exclusionary function as an argument:

$Ex(\beta, S_1) = S_1$ - {x is a reason on the merits of the investment} = S_2

Therefore, the right way to describe the behaviour of the exclusionary function is with a three argument function Ex(β, S_1, S_c) such that given an exclusionary reason β, a set of reasons for action S_1 and another set of reasons for action S_c, the function returns a new set of reasons S_2 where the reasons of S_c in S_1 are removed:

$Ex(\beta, S_1, S_c) = S_1 - S_c = S_2$

To see how the scope of an exclusionary reason actually matters, let us consider the following variation in Ann's example. Now, imagine that Ann's broker calls her to say that the investment proposed by her friend is an opportunity. The fact that the broker says to Ann that the investment is good is itself a reason for Ann to accept (instead of withdrawing) the belief that the fact that the investment is good is a reason to invest.

Is the broker's advice affected by the hampered judgment' scope? Clearly not. If we take β to be the hampered judgment as an exclusionary reason, β affects *only her judgment on the merits of the investment.*

$Scp(\beta) = S_c$ = {x is a reason on the merits of the investment}

The broker's advice is not a member of S_c because it is not a reason on the merits of the investment. The broker's judgment on the investment will not change the facts about the investment. The broker may be wrong in this particular case and the investment may

185 I will later argue that this notion of scope does not help RAZ in defending that Colin's promise example and Jeremy's order example are exclusionary reasons. I will argue that they are not.

actually be bad. Why? It could easily be that the broker missed some relevant factor (experts do fail from time to time in their judgments). In fact, if Ann takes the broker's advice as a reason in her reasoning she is not reasoning on the merits of the investment but relying on somebody else's reasoning on the merits of the case.

Interestingly, we find ourselves before a new second-order reason, since the broker's favourable opinion is an epistemic reason for her to believe that the investment is actually good and thus a reason to invest. Let us formalize the broker's advice:

Let q, p, a, c be

q = the fact that the broker said that the investment is good

p = the fact that the investment is good

a = the action of investing

c = the circumstances

In contrast with the hampered judgement, the broker's advice is a reason to accept the belief that there is a reason for Ann to invest in such circumstances. Let the quadruple A(q, x, B(x, p), c) be the fact that *q* is a reason for person x to accept the belief that *p* holds in circumstances c, where *p* is a reason for action. To simplify notation:

$$A(q, x, B(x, p), c) \equiv \gamma$$

In this case, the best way to understand γ behaviour is including a new reason for action in the set S of reasons for action. The scope of γ is determined as follows:

$$Scp(\gamma) = S_c = \{ R(p, Ann, c, a)\}$$

Let In(γ, S, S_c) be a function such that given a second-order (inclusionary) reason γ, an initial set of reasons S and a scope of reasons to be included S_c as arguments, its output is a new set S_f that results from all the members of S plus all the members of S_c. Put formally:

$$In(\gamma, S, S_c) = S \cup S_c = S_f$$

In the case of γ we are discussing:

$$In(\gamma, S, S_c) = S_f = \varnothing \cup S_c = S_c = \{ R(p, Ann, c, a)\}$$

It seems that the fact that Ann is exhausted and not able to reason on the merits of the investment does not override her capacity to rightly judge that somebody else knows whether the investment is good "all things considered". Put formally:

$\neg(\beta>\gamma)$[186]

In the last sentence, we simply assumed that the overriding operator can be applied to β and γ, which are second-order reasons. Earlier we found that we cannot apply the overriding operator between a first-order reason for action and a second-order reason. However, a second-order reason can override another second-order reason. RAZ is of the same opinion here:

> *"Conflicts between second-order reasons. Only one type of such conflicts will be mentioned here. These involve conflicts between a reason to act for a certain reason and an exclusionary reason to refrain from action for it."*[187]

As regards β and γ, neither of them overrides the other. This has a very interesting result: due to β, all the reasons based on the merits from Ann's judgment are removed from the set S of reason to finally decide the case. However, due to γ, which is an inclusionary reason not overridden by β, a reason – which is initially removed by β – is reincorporated into S by the inclusionary reason γ[188].

One may be tempted to say that since the only reason available is R(p, Ann, c, a), Ann must invest. However, it is clear that Ann has no obligation (but simply a possibility for action) to invest. She is entitled to say that after all 'she does not want to assume any risk'.

One may think that this should be included in the universe of discourse from the beginning. I do not think so. Practical reasoning is a process through which we discover wishes, desires, fears and new beliefs and considerations[189]. I think it is only fair that, once one reaches a conclusion such as S_f = { R(p, Ann, c, a)}, since R(p, Ann, c, a) is not

186 The same for B(□):□(B(□)>B(□)

187 See RAZ's Practical reason and norms (Raz 1999, p.47).

188 This shows that whenever there are overridden inclusionary reasons and exclusionary reasons, the order of how the reasons are included or excluded actually matters. This is an interesting complexity that I will leave out of this dissertation for future investigation.

189 Those who think that Ann's fears, desires, and wishes should be included at the beginning of the Universe of discourse due to the 'all things considered clause' certainly have a point. My reply is that the best way to understand 'all things considered' then is that the person has all the relevant reasons because the process has been iterated until no further reasons appear in the last step as I will explain later in section 9.

an obligation, Ann can discover in this very last step that she does not really want to assume any risk[190]. If this is so, this fact will constitute a new reason so that:

Let *r* be the proposition 'Ann does not want to assume any financial risk' then R(r, Ann, c, ¬a) where *r* is a reason for Ann not to invest in circumstances *c)*. The fact that S_f = { R(p, Ann, c, a) } is not an actual (or toti-resultant) obligation is revealed by the fact that the following sentence may be true:

R(r, Ann, c, ¬a) > R(p, Ann, c, a)

In conclusion, Ann's hampered judgment is not a reason for action. It is a reason to withhold any belief on the reasons for action on the merits of the investment. The withholding has an exclusionary effect on certain reasons for action: they are removed from the final set of reasons to make the decision. In consequence, Ann's hampered judgment is an epistemic reason in two different senses: (i) the grounds for withholding the belief are epistemic in nature and (ii) the effect of the withholding is on beliefs that certain reasons for action hold.

RAZ seems to be aware that Ann's hampered judgment can be interpreted as an epistemic reason and not a reason for action:

> *"Alternatively, some may claim that incapacity is a reason for not acting on one's judgement (because it is likely to go wrong). It is not a reason for not action on valid reasons. It is obvious that the fact that one's judgement may be wrong is in such circumstances the ground for the reason. But it is also true that the reason is a reason for mistrusting one's judgement rather than for not action on certain reasons?"*[191]

However, RAZ wrongly insists that Ann's hampered judgment is a reason for action and, in particular, a reason for not acting on certain reasons because the practical relevance for Ann's hampered judgment as a pure epistemic reason is the same as a reason for action not to act on certain reasons:

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190 RAZ precludes this under his definition of 'all things considered'. One problem of considering 'all things considered' at the beginning of the practical reasoning process is that the nature of practical reasoning as a process is lost. One point I will insist in section 9 is that practical reasoning seems to be a process that is iterated – and through which reasons are discovered – until an equilibrium is reached. I rather suggest understanding 'all things considered' as the demand that the process should be iterated until the equilibrium is reached, and thus guarantee that all reasons are considered (at least given the cognitive limitations of the agents).

191 See RAZ's Practical reason and norms (Raz 1999, p.48).

> *"[..]One cannot act for a reason unless one believes in its validity. The practical relevance of a reason not to act for the reason that p is, therefore, the same as the practical relevance of a reason not to act for p if one believes that p is a valid reason. In an obvious sense, the latter is a reason not to act on one's beliefs. But in this sense, every second order reason is also a reason to act on or to refrain from action on one's beliefs in reasons.[…]"*[192]

RAZ defends that exclusionary reason W(s, Ann, B(Ann, α) , c) is also a reason not to invest, that is, R(s, Ann, c, ¬a). If so, the following conditional must hold:

$$W(s, Ann, B(Ann, \forall xR(x, Ann, c, a)) , c) \rightarrow R(s, Ann, c, \neg a).$$

RAZ's argument for defending such a conditional is that the practical relevance of this conditional is the same as:

$$W((s, Ann, B(Ann, \alpha(a)) , c) \rightarrow S_f=\varnothing) \rightarrow \neg\exists xR(x, Ann, c, a).$$

However, R(s, Ann, c, ¬a) and ¬∃xR(x, Ann, c, a) are not logically equivalent.

$$\neg(R(s, Ann, c, \neg a) \leftrightarrow \neg\exists xR(x, Ann, c, a))$$

RAZ does not need logical equivalence. He only needs the same practical relevance, which *seems* to be the case:

$$R(s, Ann, c, \neg a) \rightarrow \neg a$$

$$\neg\exists xR(x, Ann, c, a) \rightarrow \neg a$$

It is true that when W(s, Ann, B(Ann, ∀R(x, Ann, c, a)) is the only exclusionary reason present, both conditionals seem to be practically equivalent, that is, both lead Ann not to invest.

However, these conditionals describe a very different situation when other second-order reasons come into play. For instance, consider again the case where Ann is too exhausted to carefully consider the documentation but she receives the call from her broker saying that the investment is good.

If the conditional W(s, Ann, B(Ann, ∀xR(x, Ann, c, a)), c)→R(s, Ann, c, ¬a) is true, the final set of reasons S_f when the two second-order reasons are present – Ann's hampered judgement and the broker's advice – should be:

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[192] See RAZ's Practical reason and norms (Raz 1999, p.48).

S_f={R(s, Ann, c, ¬a), R(p, Ann, a, c)}

However, when the two second-order reasons present – Ann's hampered judgement and the broker's advice – the final set of reasons S_f is actually:

S_f= { R(p, Ann, c, a)}

If the above conditional was true, the resulting S_f should include R(s, Ann, c, ¬a) and it does not. This shows that W(s, Ann, B(Ann, ∀xR(x, Ann, c, a)) , c)→R(s, Ann, c, ¬a) conditional is false, that is, RAZ's assumption that the practical relevance of Ann's hampered judgment seen as an epistemic claim is the same as a reason not to act is wrong.

However, some may be reluctant to accept the analysis offered here of exclusionary reasons in pure epistemic terms. Ann can certainly go through the documents of the investment, not to make a decision (she has already decided not to invest on the basis of the exclusionary reason) but out of curiosity[193]. In consequence, she must necessarily form some sort of belief about the reasons for the investment. For this reason, it seems that the sentence W(s, Ann, B(Ann, α) , c) would not capture Ann's exclusionary reason well, since she is able to form a belief on the reasons to invest after all.

Is it is true that in that scenario, Ann is entertaining some beliefs about the reasons on the merits of the investment. However, she has no reasons to accept that the reasons on the merits actually hold. In epistemology, belief is a general concept: to merely consider or entertain that *p* is a belief. However, the epistemic commitment of the person who merely considers something is not the same as the commitment needed to accept something to be true.When faced with a proposition, a person may (i) accept the proposition to be true; (ii) disbelieve the proposition, that is, accept that the proposition is false (ii) or withhold the proposition (that the person does not accept nor disbelieves the proposition)[194].

I am treating the B operator here not as *mere belief* but as accepting the belief to be true. Accordingly, formula W(t, Ann, B(Ann, α) , c) actually captures Ann's investment case cause s is a reason to withhold the belief that reason for action α holds.

However, one may object that, in spite of Ann's exhaustion, it may be the case that Ann actually accepts (not merely entertains) that the reasons on the merits actually hold. If that

193 RAZ offers this argument in page 48 of *Practical reason and norms* (Raz 1999, p.48).
194 See CHISHOLM's (Chisholm 1976, p.177) .

scenario is possible, W(t, Ann, B(Ann, α) , c) would not be a right description of the hampered judgment as exclusionary reason.

However, it still makes sense for Ann to say that she will not decide because she is not able to judge on the balance of the reasons. Therefore, what Ann is saying is that she is unable to make judgements for the form:

For any reasons for action α and β on the merits of the investment, W(t, Ann, B(Ann, α>β),c).

In the case of Ann's hampered judgment, we have seen two ways to understand the logical structure of exclusionary reasons:

1 W(t, Ann, B(Ann, α) , c) which means the fact that *t* ***is a reason*** for Ann ***to withhold the belief that any reason for action*** *α on the merits* ***holds*** *in circumstances c*.

2 W(t, Ann, B(Ann, α>β), c) which means that, for any reasons for action *α* and *β* on the merits of action, the fact that *t* is **reason** for Ann **to withhold the belief that α overrides β in circumstances c.**

In conclusion, the right way to describe the role of the *hampered judgment* in Ann's arguing process *is* ***as an epistemic reason to withhold*** either (i) the belief that certain reason for action hold or (ii) the believe that, for any reasons for action α and β, α>β.

RAZ wrongly concludes that Ann then has a reason not to invest. RAZ is assuming that:

$\neg\exists x(x, Ann, invest, c) \rightarrow \exists x(x, Ann, \neg(invest), c)$

This first-order logic sentence is false. Ann needs something more than ¬∃x (x, Ann, invest, c) in order to conclude that ∃x (x, Ann, ¬(invest), c). In consequence, contrary to RAZ's analysis, the hampered judgment is not the reason for not investing but actually the lack of reasons in favour of the investment available in S to her after the exclusionary reason – the hampered judgment – removed them from the set S of reasons.

If my account of Ann's example is right, then R(s, Ann, c, ¬a) is not the right presentation of the hampered judgment as an exclusionary reason, contrary to RAZ's view. The right presentation is W(t, Ann, B(Ann, α) , c) or W(t, Ann, B(Ann, α>β), c).

The hampered judgment is not a reason for action but just an epistemic reason to withhold certain beliefs about reasons for action. Ann decided not to invest because, once she

applies principle P2, that is, once she applies the exclusionary reason W(t, Ann, B(Ann, α) , c), the set S_f of reasons for action on the merits equals the empty set. So she decides not to invest because $\neg\exists$x(x, Ann, invest, c), that is, because *she has no reason* to do it and not because $\exists$x(x, Ann, $\neg$(invest), c), that is, *not because she has a reason not to do it*.

7.4.2.2 ***ANALYSIS OF THE PROMISE EXAMPLE***

Colin and his wife have to decide whether or not to send their child to a state school. Colin has promised his wife that, in making the decision, he will only take into account his child's educational interests. Sending her to a state school would allow Colin to resign his job to have time to write a book. Private school, being costly, does not allow Colin to resign his job. However, to keep his promise, he must discard precisely this kind of considerations in making the decision.

In the last section, I defended that Ann's hampered judgment is an epistemic reason in two different senses: (i) the grounds for withholding the belief are epistemic in nature and (ii) the effect of the withholding is on beliefs that certain reasons for action hold.

There is an important difference between Ann's example and Colin's case. In Ann's example the hampered judgement was a fact that *itself* constitutes an epistemic reason to withhold certain beliefs on reasons for action.

However, the promise that Colin makes his wife, to exclude unrelated reasons to their child's educational interests, is not justified *on epistemic grounds*. Colin's promise is thus not an epistemic reason in the first sense, in the sense of epistemic grounding.

Despite not being on epistemic grounds, promises – as Colin's example shows – can also be reasons to exclude certain beliefs on reasons for action from our final reasoning. It is true that it does sound unnatural to say that Colin's promise is a reason for him to *withhold* his beliefs that certain reasons for action hold. Therefore, it does not seem that 'withholding' is the term we are looking for here.

Colin's promise *is a reason for us not to make any use of our beliefs that certain reasons for action hold*. The practical effect is exactly the same as withholding such beliefs. For those who believe that epistemology is a normative endeavour, this should not be a

surprise: as rational agents, we have certain control over which beliefs we accept as true[195]. In this respect, RODERICK CHISHOLM:

> *"I assume that every person is subject to a certain purely intellectual requirement – that of trying his best to bring about that, for every proposition h that he considers, he accepts h if and only if h is true. We could say that this is the person's duty or responsibility qua intellectual being[..] '*[196]

Normative epistemology and its corresponding epistemic principles make sense only under the assumption that we human beings are, at least partly, responsible for the beliefs we accept to be true, which obviously also includes our beliefs in reasons for action. In this dissertation I simply assume that this stance on epistemology is right.

Since we have certain control over which beliefs we accept or not[197], we have room to make decisions on them. Epistemology is concerned with justifying the decisions about which beliefs to accept (or to reject or withhold) on epistemic grounds. However, in making such decisions, other factors can be relevant. RODERICK CHISHOLM resumes the last quotation as follows:

> *"[…]But as a requirement, it is only a prima facie duty, it may be, and usually is, overridden by other, non-intellectual requirements and it may be fulfilled more or less adequately"*[198].

The fact that epistemology is normative in nature and that we human beings have a certain degree of control over which beliefs we finally accept, explains why Colin's promise, while not a reason justified on epistemic grounds, is a reason with epistemic

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[195]I must admit that *doxastic voluntarism*, that is, that we have control at will over our beliefs, is a controversial issue. WILLIAMS offered an argument aimed to show that *doxastic voluntarism* is impossible (Williams 1973). Since then, this has been an open discussion among epistemologists. For a defense of *doxastic voluntarism* see (Ginet 2001; Montmarquet 1986). For a criticism of *doxastic voluntarism* see (Curley 1975; Scott-Kakures 1994; Scott-Kakures 2000). In what follows, I will assume that some form of deontological conception of epistemic justification is true. For a defense of a deontological conception of epistemic justification see (Alston 1988).

196 See RODERICK CHISHOLM's *Person and Object* (Chisholm 1976, p.176).

197 DESCARTES in his *Discourse de la Méthode* and his *Metaphysiscal Meditation*s (Descartes 2011) makes good use of this freedom to set forth the epistemic standard that unravels all modern philosophy: person x must treat p as false unless p is apodictically certain. Obviously, this is a very demanding epistemic standard that contemporary epistemologists reject. HUSSERL famously in his *Ideas* (Husserl and Schuhmann 1991) invited us to suspend our beliefs about the natural world, to be left solely with our own intentional acts, the domain of phenomenology. The standards that different sciences establish to accept a belief is also a manifestation of this freedom. Given this freedom, it is no wonder that promises can actually affect which beliefs we finally accept for a certain purpose.

[198] See RODERICK CHISHOLM's *Person and Object* (Chisholm 1976, p.176)

consequences: it affects what we will do with certain beliefs. I will keep the W operator used in Ann's example for last section, because although Colin's promise is not a reason to withhold certain beliefs, it is certainly a reason not to use certain beliefs, whose effect on the set S of the final reasons for action to make the decision is the same.

Colin starts by identifying the reasons for action he has in circumstances c through the relevance function Rel(x,y):

Rel(c, Colin) = U={p,q, r, t}

Where:

p = the best school in the neighbourhood is a private school

q = the private school is expensive

r = sending the child to the state school would allow Colin to resign his job and write a book

t = Colin promised his wife not to consider reasons other than their child's educational needs

a = send the child to private school.

From the universe of discourse U={p,q, r, t}, Colin is able to determine what reasons he has through the Rso(X) function, which is the function whose input is a set X that is a universe of discourse, and its output is a set of reasons S.

Rso(U) =S = { R(p, Colin, *c*, *a*), R(q, Colin, *c*, ¬*a*), R(r, Colin, *c*, ¬a)}

Colin also knows that *t* is a reason not to make use of reasons R(q, Colin, *c*, ¬*a*) and R(r, Colin, *c*, ¬a) because they are unrelated to his child's educational needs. We can express this with the W operator:

W(t, Colin, B(Colin, R(q, Colin, *c*, ¬*a*)) c)

W(t, Colin, B(Colin, R(r, Colin, *c*, ¬a)) c)

More generally, for any reason for action α such that α is unrelated to Colin's child educational needs:

W(t, Colin, B(Colin, α) c).

The exclusionary effect can be captured through the exclusionary function Ex(x, y, z):

Let W(t, Colin, B(Colin, α) c) be β.

Let S_1 be S = { R(p, Colin, *c*, *a*), R(q, Colin, *c*, ¬*a*), R(r, Colin, *c*, ¬a)}

Let Sc be = { R(q, Colin, *c*, ¬*a*), R(r, Colin, *c*, ¬a)}

$Ex(\beta, S_1, S_c) = S_1 - S_c = S_2 = \{R(p, Colin, c, a)\}$

After applying the exclusionary function Colin is thus left with:

$S_2 = \{R(p, Colin, c, a)\}$

Colin thus has a conclusive reason to send his child to the private school.

If Colin's promise was an exclusionary reason on epistemic grounds, that would be all. However, we noted at the beginning of the analysis that Colin's promise was not on epistemic grounds. A promise is a reason for action. In this case, the action to perform is a control over Colin's beliefs on certain reasons for action. We already know that reasons for action can be overridden by other reasons for action. In our case, if *q* instead of 'the private is school is expensive' stood for 'the private school is unaffordable for the family', R(q, Colin, *c*, ¬*a*) would override Colin's promise made to his wife.

According to RAZ, principle P2 states that a second-order reason *always* prevails over a first-order reason for action. However, Colin's promise is presented as a second-order exclusionary reason but is clearly overridden by the fact that Colin's family cannot afford to pay the tuition at the private school, which is a first-order reason for action. This means that RAZ's principle P2 fails here. Does that mean that Colin's promise is not an exclusionary reason?

RAZ argues that principle P2 always applies to exclusionary reasons *within their scope*.

> *"[…] it should be remembered that exclusionary reasons may vary in scope; they may exclude all or only some of the reasons which apply to certain practical problems. There may, for example, be some scope-affecting considerations to the effect that thought Colin's promise apparently purports to exclude all the reasons not affecting his son's interests it does not in fact validly exclude consideration of justice to other people. […]"*[199].

Unfortunately, RAZ never fleshes out how the scope of exclusionary reasons should be understood. As regards the scope of exclusionary reasons, we are on our own. In Colin's promise, the scope can be interpreted in two different ways. However, I will show that both ways collapse in the application of principle P1. In consequence, RAZ's strategy defending that principle P2 applies within the exclusionary reason scope fails.

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[199] See RAZ's Practical reason and norms (Raz 1999, p.40).

The first interpretation for the scope of Colin's promise as an exclusionary reason is simply the set of reasons for action affected by it S_c. In our analysis above:

Sc = { R(q, Colin, *c*, ¬*a*), R(r, Colin, *c*, ¬a)}

However, we know that the fact that the private is school is unaffordable overrides the promise made:

R(q, Colin, *c*, ¬*a*)>R(t, Colin, c, b)

In consequence, *this notion of scope does not warrant that principle P2 always applies within the scope*.

The second interpretation for the scope of Colin's promise as an exclusionary reason is saying that principle P2 applies whenever the promise is not overridden. However, this strategy seems simply to beg the question. We know that the promise is overridden or not, precisely by the application of principle P1. If so, one may wonder if principle P2 is of any use at all here.

RAZ's might reply that for those cases where the promise is not overridden and to which principle P2 applies, it makes a difference in our practical reasoning. This means that we should get different conclusive reasons (or sufficient reasons) when we simply apply principle P1 than when applying principle P2.

However, this is not the case. To see why not, first we start by the intuition that the promise made is overridden by the fact that private school is unaffordable. However, R(q, Colin, c, ¬a) and R(t, Colin, c, b) are not conflicting reasons as defined in section 6.2. We thus need to readjust our notion of conflicting reasons to honour our intuition that:

R(q, Colin, *c*, ¬*a*)>R(t, Colin, c, b)

In section 6.2, I defined that two reasons *q* and *p* conflict when *q* is a reason for person s to do action *a* in circumstances *c* and reason *p* is a reason for person *s* to take a course of action incompatible with action *a* in circumstances *c*. In more formal fashion:

Def. reasons p, q conflict iff $R(q,s,a,c) \wedge R(p,s,a,c) \wedge (a \rightarrow \neg b) \wedge (b \longrightarrow \neg a)$

R(t, Colin, c, b) and R(q, Colin, *c*, ¬*a*) do not seem to conflict that way since we cannot say that:

$$(a \rightarrow \neg b) \wedge (b \longrightarrow \neg a)$$

Why not? Because *b* does not imply ¬a but something very different: that R(q, Colin, *c*, ¬*a*)$\notin S_f$. However, let us remember what happens if *b* is performed:

$Ex(\beta, S_1, S_c) = S_1 - S_c = S_2 = \{R(p, Colin, c, a)\}$

If *b* is performed, CR(p, Colin, *c*, *a*) is Colin's conclusive reason for action in circumstances *c*, that is, the fact that the private school is the best in the neighbourhood is a conclusive reason for Colin to send his child to the private school.

Now, CR(p, Colin, *c*, *a*) and R(q, Colin, *c*, ¬*a*) are conflicting reasons as defined in section 6. Therefore, if *b* is performed, then the conclusive reason to send Colin's child to the private school is in conflict with not sending her for economic reasons, that is, it is in conflict with R(p, Colin, *c*, *a*).

In consequence, though not as defined in section 6, R(t, Colin, c, b) and R(q, Colin, *c*, ¬*a*) are conflicting reasons because doing *b* entails CR(p, Colin, *c*, *a*) which is a conflicting reason for R(q, Colin, *c*, ¬*a*). With this new idea of conflicting reasons, it does seem that the overriding operator applies naturally:

R(q, Colin, *c*, ¬*a*)> R(t, Colin, c, b)

Now, we are in a position to show why RAZ is wrong in defending that for those cases where the promise is not overridden, the application of principle P2 makes a difference, that is, we are in a position to show that we do not actually get different conclusive reasons (or sufficient reasons) when we simply apply principle P1 than those we get when we apply principle P2.

For those cases where Colin's promise is not overridden (now assume that *q* stands for 'the private school is more expensive than the state school' instead of 'the private school is unaffordable'):

S = { R(p, Colin, *c*, *a*), R(q, Colin, *c*, ¬*a*), R(r, Colin, *c*, ¬a), R(t, Colin, c, b)}

We pair the conflicting reasons with the overriding operator:

R(t, Colin, c, b)> R(q, Colin, *c*, ¬*a*)

R(t, Colin, c, b)> R(r, Colin, *c*, ¬a)

From the pairing process, the conclusive reason is R(p, Colin, *c*, *a*). In consequence, the application of principle P1 yields the same result as we got earlier through the

exclusionary function by principle P2. RAZ's assumption that principle P2 makes a difference when the promise not overridden is thus wrong.

RAZ defends Colin's promise as an exclusionary reason because (i) principle P2 applies within the scope, (ii) it is not a reason on the merits and (iii) it can be described as performing an exclusionary function on reasons for action.

As regards (i), I have just argued that the notion of exclusionary reasons scope fails. Understood as the set of reasons S_c affected by the exclusionary reason fails because the scope does not warrant that principle P2 will always apply. Understanding the scope as those cases where the exclusionary reason is undefeated (not overridden) fails because principle P2 yields exactly the same conclusions as simply applying principle P1. Principle P2. Contrary to RAZ's prediction, principle P2 makes no difference when it should.

As regards (ii), RAZ seems to assume that 'on the balance of reasons' and 'on the merits' are equivalent or at least coextensive, that is, to decide on the merits of a case covers exactly the same situations as to decide on the balance of reasons. This assumption is simply false. As we have discussed in section 7.2, to decide on the balance of reasons is to decide on the conclusive reason (or sufficient reasons) left after the overriding operator is applied.

It is simply very easy to find examples of reasons that are not on the merits of the case but to which the overriding operator applies. Promises are an example. I may promise that I will go with you to watch a football match even if I hate soccer. I have plenty of reasons not to go: I do not like football to begin with. However, I will go because I promised you that I would. The promise has nothing to do with the merits of watching a football match. The promise is not on the merits. However, the overriding operator applies and, as a consequence, a reason to take into account when deciding on the balance of reasons.

Maybe we should distinguish (i) the merits of the case and (ii) the merits of the action favoured (or disfavoured) by a particular reason. It is true that Colin's promise has nothing to do with the merits of sending his child to the state or private school, that is, it has nothing to do with action *a*.

However, when deciding what to do, we rarely consider just one action. We normally consider a set of possible (often interrelated) actions. Colin promised that he will only consider his child's educational needs. That is certainly an action to perform. An action

to perform on Colin's beliefs on reasons for action, true. But this fact – being an action on our beliefs – does not make the action less of an action. As Colin's example shows, *actions* promoted or disfavoured by the reasons for action we have *are interrelated*. All those actions seem to be part of the merits of the case. In consequence, under the distinction between the merits of the case and the merits of the action, 'on the merits of the case' simply equates with 'on the balance of reasons'. Under this distinction however, against RAZ's opinion, Colin's promise and Ann's hampered judgement are reasons on the merits of the case.

To be fair, RAZ does not seem to be aware of this difference. When RAZ says that Colin's promise is not on the merits, he seems to refer that it is not on the merits of the action (i.e. sending or not sending his child to a public school). However, RAZ is wrong to conclude, from the fact that a reason is not on the merits of an action, that the reason is a second-order reason, that is, a reason for which principle P1 is not enough.

Finally as regards (iii), it must be said that Colin's promise can be described by the exclusionary function, provided that the promise is not overridden. However, the exclusionary function is not needed since we get the same conclusive reasons (or sufficient reasons) simply by the application of principle P1. The exclusionary function is thus not needed. Principle P1 is enough. However, it must be said that the exclusionary function is a legitimate way to present the interaction of reasons whenever the promise is not overridden.

At this point, if we compare Ann's hampered judgment case and Colin's promise case, one may wonder whether Colin's promise is a legitimate case of exclusionary reason.

In both cases, it makes sense to describe them in terms of the exclusionary function. However, Ann's hampered judgement is a reason that (i) is grounded on epistemic reasons and (ii) the overriding operator between the exclusionary reason and reasons for action cannot possibly be applied and therefore, besides principle P1, principle P2 and the exclusionary function are needed to describe practical reasoning in Ann's hampered judgement example.

In contrast, Colin's promise is a reason that (i) it is not grounded on epistemic reasons and (ii) the overriding operator between the exclusionary reason and reason for action can be applied, and therefore principle P1 is enough.

In conclusion, although we could simply denote by 'exclusionary reasons' all those reasons that can be described in terms of the exclusionary function, we would uncover the difference in nature between cases such as Ann's hampered judgment and Colin's promise.

I suggest reserving the term 'exclusionary reasons' for those reasons to withhold our beliefs on certain reasons for action on truly epistemic grounds. Accordingly, I suggest reserving the term 'second-order reasons' for those reasons to accept, withhold or reject our beliefs on certain reasons for action on epistemic grounds. So defined, Ann's hampered judgement is a legitimate case of an exclusionary reason, but Colin's promise is not.

7.4.2.3 *ANALYSIS OF THE ORDER EXAMPLE*

I will show that Jeremy's order in example (c) is neither a legitimate case of an exclusionary reason nor of a second-order reason. I will show that the logical structure of second-order reasons and exclusionary reasons that suited Ann's investment example (a) well, does not apply to this example either. The main reason for this failure is that an order is a reason for action and not an epistemic reason.

Let c, p, q be:

c = Jeremy's circumstances

p = Jeremy's commanding officer ordered Jeremy to appropriate the van

q = the appropriation of a vehicle from a civilian is wrong

a = appropriate the van

Jeremy is able to determine the universe of discourse through the function Rel(x, Jeremy):

$Rel(c, Jeremy) = U = \{p, q\}$

Jeremy is then able to determine the set of reason for action through the Rso(X) function:

$Rso(U) = S = \{R(p, Jeremy, a, c\}, R(q, Jeremy, c, \neg a)\}$

RAZ assumes that R(p, Jeremy, c, a} is an exclusionary reason on the grounds that:

- R(p, Jeremy, c, a} is not on the merits of the action, that is, the order does not make the action more or less worthy. In this respect, we already know from our analysis on Colin's promise example earlier that not being on the merits of the action does not exclude the application of principle P1, that is, it does not exclude

being a reason to be taken into account on the balance of reasons (or, as discussed above, on the merits of the case).

- R(p, Jeremy, c, a} has an exclusionary effect, that is, Jeremy seems to be justified in disregarding the reasons on the merits he has - such as R(q, Jeremy, c, ¬a} – based on the order given. In RAZ's terms, Jeremy has a reason to refrain from acting for a reason. However, I will show that R(p, Jeremy, c, a,} is neither an exclusionary reason nor a second-order reason, but a first-order reason for action. I will show that the apparent exclusionary effect of R(p, Jeremy, c, a} is due to the "*exclusionary*" effect that all obligations have, which is very different in nature than the exclusionary effect of second-order reasons such as Ann's hampered judgement in example (a).

RAZ defends that the order is a reason for Jeremy to reject all beliefs on reasons for action grounded on the merits of the action. This parallels Ann's hampered judgement as a reason to withhold any belief on reasons for action on the merits of the action. Here the epistemic attitude required is not one of withholding, but of rejection. The structure seems to be the same. However, I will show that it is not.

Let α be any reason for action incompatible with the action of taking the van. Let RJ(p, Jeremy, B(Jeremy, α) c) stand for Jeremy's commanding officer's order being a reason for Jeremy to reject the belief that α in circumstances *c*.

The fact that R(p, Jeremy, c, a} is not only a first-order reason for action but an *alleged* exclusionary reason that can be expressed as follows:

$$R(p, Jeremy, c, a\} \rightarrow RJ(p, Jeremy, B(Jeremy, \alpha) c)$$

Let the whole RJ(p, Jeremy, B(Jeremy, α) c) be simply β to simplify notation in what follows.

The exclusionary effect of β can be expressed though the function $Ex(\beta, S_1, S_c)$, where given an exclusionary reason β and a set S_1 of reasons for action as arguments, the function returns a new set of reasons S_2 where the reasons affected by the exclusionary reason are removed:

$$Ex(\beta, S_1, S_c) = S_1 - \{\text{reasons affected by } \beta\} = S_2$$

In order to apply the exclusionary function $Ex(\beta, S, S_c)$, we first need to find S_c, that is, the scope of the exclusionary reason β. We can do this by applying the scope function:

$Scp(\beta) = S_c$ ={x is a reason on the merits of taking (or not taking the van)}

Now, we can apply the exclusionary function $Ex(\beta, S, S_c)$ to determine the final set of reasons S_f:

$Ex(\beta, S, S_c) = S - S_c = S_f$ = { R(p, Jeremy, c, a}

We can see that R(q, Jeremy, c, ¬a) is a not member of the final set of reasons S_f because R(q, Jeremy, c, ¬a) is a member of set S_c of the scope of β, that is, R(q, Jeremy, c,) is under the scope S_c of the reasons affected by the exclusionary reason β.

In consequence, the final set of reasons for action S_f available to Jeremy is:

S_f = { R(p, Jeremy, c, a)}

According to RAZ, this explains why Jeremy is justified in complying with the order even if "on the merits" of the action Jeremy would have probably done differently, since taking the van from a civilian is wrong.

However, as with Colin's promise example, it is easy to find reasons for action that actually overrides an order given by a commanding officer. In other words, it is easy to find examples where principle P2 fails and where principle P1 is enough. For instance, imagine that Jeremy's commanding officer ordered Jeremy to shoot at a market full of innocent civilians instead of taking the van.

Let c, p, q be:

c = Jeremy's circumstances ∪ {the market is full of innocent civilians}

p = Jeremy's commanding officer ordered Jeremy to shoot at the market

q = killing innocent civilians is wrong

a = shoot at the market

Jeremy is able to determine the universe of discourse through the function Rel(x, Jeremy):

Rel(c, Jeremy) = U = {p, q}

Jeremy is then able to determine the set through the Rso(X) function:

Rso(U) = S = {R(p, Jeremy, c, a,}, R(q, Jeremy, c, ¬a)}

In this case, that killing innocent people is wrong clearly overrides the order given to Jeremy:

R(q, Jeremy, c, ¬a)>R(p, Jeremy, c, a)}

RAZ is aware of this problem:

> *"the order is a reason for doing what you were ordered regardless of the balance of reasons. He admits that if he were ordered to commit an atrocity he should refuse"*[200]

His solution, as in Colin's promise[201], is the notion of scope. However, as observed in Colin's promise example, RAZ never fleshes out how the scope of exclusionary reasons should be understood. There are two possible candidates for the notion of scope that RAZ is aiming at. As noted earlier, both notions finally collapse.

The first interpretation for the scope of Jeremy's order as exclusionary reason is simply the set of reasons for action affected by the exclusionary reason S_c. In our analysis above:

S_c ={x is a reason on the merits of shooting at the market}

However, we know that the fact that killing innocent people is wrong overrides complying with the order:

R(q, Jeremy, c, ¬a)>R(p, Jeremy, c, a}

In consequence, the scope understood as S_c does not warrant that principle P2 always applies within the scope.

The second interpretation for the scope of Jeremy's order as exclusionary reason is saying that principle P2 applies *whenever the order is not overridden*. However, this strategy seems simply to beg the question. Principle P2 was introduced because principle P1 was unable to deal with the case. However, we know that the order is overridden or not *precisely by the application of principle P1*. It does seem that principle P2 collapses into principle P1 as in Colin's promise example.

The only strategy available to keep principle P2 *whenever the order is not overridden* is that it makes a difference in the outcome of practical reasoning, that is, applying principle P2 *whenever the order is not overridden* must lead to different conclusive reasons (or sufficient reasons) than if only principle P1 is applied.

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[200] See RAZ's Practical reason and norms (Raz 1999, p.38).

201 To be fair with RAZ's own words, RAZ discusses this problem in Jeremy's order case and not in Colin's promise. The fact that the problem is common to both cases is part of our argument in this dissertation to show that Colin's promise and Jeremy's order, in contrast with Ann's hampered judgement, are not legitimate cases of exclusionary reasons, contrary to what RAZ believes.

However, this strategy fails in the case of Jeremy's order in the same manner it failed in Colin's promise example. Applying principle P2 yields the same results as applying only principle P1. Principle P2 thus makes no difference in the Jeremy's order example. It is thus expendable in contrast with Ann's hampered judgement case.

For those cases where Jeremy's order – R(p, Jeremy, c, a} – is not overridden:

S = {R(p, Jeremy, c, a}, R(q, Jeremy, c, ¬a)}

We pair the conflicting reasons by the overriding operator:

R(p, Jeremy, c, a}> R(q, Jeremy, c, ¬a)

For the case where the order is not overridden, it seems to be intuitively correct to say that, given the circumstances, complying with the order is more important than complying with the moral principle that the unlawful appropriation of a vehicle is wrong. Therefore, contrary to RAZ, it simply makes sense to state that 'on the balance of reasons':

R(p, Jeremy, c, a)>R(q, Jeremy, c, ¬a)

From the pairing process, the conclusive reason is R(p, Jeremy, c, a}. In consequence, the application of principle P1 yields the same result as through the exclusionary function by principle P2 we got earlier. RAZ's assumption that principle P2 makes a difference here when the order is not overridden is false.

The possibility of simply applying principle P1, that is, the overriding operator in Jeremy's order as well as Colin's promise is in sharp contrast with Ann's hampered judgement, where it seems completely unnatural to say that, given the circumstances, my incapacity to think clearly is more important (or prevails or overrides) than the fact that the investment is good.

As a matter of fact, the exclusionary reason *the hampered judgment* cannot even be stated in the form of the quadruple R(p, x, c, a) of reasons for action. Why? Because it is not a reason for action but an epistemic reason.

Therefore, it does not make sense in formal terms to say that α being an exclusionary reason, such as the hampered judgment, and β a reason for action such that:

$\alpha > \beta$ or $\beta > \alpha$

In conclusion, our intuitions seem to indicate that orders are reasons for which the application of the overriding operator when in conflict with other reasons for action seem

completely natural. Therefore, orders are not exclusionary reasons. If so, what about the excluding effect that RAZ saw in orders?

An order creates an obligation. The fact that Jeremy's commanding officer orders him to take the van creates an obligation. This is so because orders are *speech acts* and, as such, orders do not only convey the meaning of what is said, but require the addressee to perform an action. Orders are actions that, given the right conditions[202], are able to create obligations[203].

In example (c), an obligation on Jeremy to appropriate the van is created. As explained in section 5, obligations are reason for action that have a particular structure. They are not only reasons for doing what one is obligated to, but *also* a reason to refrain from doing anything that leads to the breach of the obligation. The very structure of obligations is what explains the seemingly "*exclusionary*" effect RAZ saw in the order of example (b). In sharp contrast, the exclusionary effect of the hampered judgment is epistemic in nature and it has nothing to do with the presence of an obligation.

7.4.3 SECOND-ORDER REASONS AS EPISTEMIC REASONS

Our analysis of RAZ's examples of exclusionary reasons revealed that exclusionary (or inclusionary reasons) are epistemic reasons (*i.e.* reasons to believe something) that *affect* our beliefs in the reasons for action we have.

RAZ tries to convince us that examples (a), (b) and (c) share the same structure:

- The three examples can be rephrased as reported speech examples: (i) Ann *judges that* she is not able to reason on the merits of the investment due to mental exhaustion in example (a); (ii) Jeremy's commanding officer *orders* Jeremy *to* appropriate the van in example (b); and (iii) the husband *promises* his wife *that* he will exclude all reasons that are not related to their child's educational needs in deciding on their child's education.

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202 It is beyond the scope of this dissertation to describe how some speech acts are able to create obligations. For further reference on this issue see REINACH's *The A Priori Foundations of Civil Law* (Reinach 1934) and SEARLE's *Speech Acts : An Essay in the Philosophy of Language* (Searle 1992) [reference].

203 See Adolf, 1883-1918? Reinach, *Los Fundamentos Apriorísticos Del Derecho Civil / Adolfo Reinach* (Barcelona : Libreria Bosch, 1934).

- The three examples are reasons that are not on the merits of the action.
- The three examples have an exclusionary effect on other reasons.

However, the analysis of the logical structure of the three examples revealed that:

- In spite of the reported speech structure, their logical structure is different. Ann's hampered judgement is a reason to withhold/accept/reject any belief on certain reasons on epistemic grounds, while Colin's promise and Jeremy's are reasons for action. While in Ann's hampered judgment principle, P1 cannot apply and principle P2 is needed in Colin's promise and Jeremy's order principle, P1 is all that is needed.
- The fact of not being a reason on the merits of the action does not preclude the possibility of that reason to be taken into account on the balance of reasons, that is, reasons not on the merits of the action are reasons to which the overriding operator is applied. Such is the case of Colin's promise and Jeremy's order.
- The exclusionary effect in the 3 examples is different. In Ann's hampered judgement the exclusionary effect is due to the exclusionary function over our own beliefs that certain reasons for action hold on epistemic grounds. In Colin's promise example, the exclusionary effect is due to the fact that what is promised is an action over Colin's own beliefs to exclude some of them *in complying with the promise* (i.e. complying with an obligation), that is, it has nothing to do with epistemic justification or grounds. In Jeremy's order, the exclusionary effect is explained by the fact that an order is an obligation[204] and obligations are reasons that have an "exclusionary" effect since they are also reasons not to do any action incompatible with what is obligated. However, this exclusionary effect has nothing to do with the exclusionary function of Ann's hampered judgment.

Their structure of second-order reasons can be represented by the quadruple W/A/RJ[205](q, x, B(x, α) c) where *q* is a fact (or normative fact) that is a reason to withhold, in circumstances c, the belief that α holds and where α is a reason for action of the form R(q, x, c, a).

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204 This obviously also applies to Colin's promise example. However, Colin's example has a further specific element – leaving aside the obligational element – which is that what is promised (and thus obligated) is an action over our own beliefs.
205 W for withholding a belief, A for accepting a belief and RJ for rejecting a belief.

Exclusionary reasons are reasons to withhold or reject the belief that α holds. Ann's hampered judgement is an example of withholding.

Inclusionary reasons are reasons to accept the belief that α holds. Ann's broker's advice is an example of inclusionary reason.

In the case of second-order reasons, principle P2 always applies because second-order reasons can only be challenged by other second-order reasons. That is, epistemic reasons can only be challenged by epistemic reasons. Epistemic reasons always 'prevail' over reasons for action within their scope[206].

Second-order reasons are neither on the merits of the action nor on the balance of reasons for action. The reason why is that reasons of the appropriate type can only be balanced one with the other. As suggested above, epistemic reasons cannot be balanced with reasons for action. However, contrary to what RAZ seemed to assume in the examples discussed, reasons for action that are not 'on the merits of the action' are frequently 'on the balance of reasons'[207], that is, the overriding operator naturally applies to them[208].

What distinguishes a second-order reason from a first-order reason for action[209] is not the fact of being on the merits of the action or not, but the fact that one is a reason for action and the other an epistemic reason of the form above. It is in virtue of its epistemic nature that the exclusionary effect must be properly understood.

I believe that I have argued in favour of the thesis that all legitimated cases of second-order reasons (exclusionary or inclusionary) are epistemic reasons to withhold, reject or accept the belief that certain reasons for action hold. However, in this dissertation, only a more humble statement is needed: that *some* second-order reasons (exclusionary or inclusionary) are epistemic reasons.

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[206] On closer examination, second-orders reasons and reasons for action do not actually conflict. 'Prevail' here shall mean that second-order reasons are applied before the reasons for action are taken into consideration on the balance of reasons.

207 Remember our discussion above about the distinction between 'on the merits of the action' and 'on the merits of the case'. If the distinction is made, 'on the merits of the case' can be equated to 'on the balance of reasons', which is no more (but no less) than solving the case by the overriding operator, that is, by applying principle P1.

208 This is actually the case of orders and promises as discussed above.

[209] Ore ven better: reasons for action *simpliciter* since, contrary to RAZ, there are not second or higher order reasons for action.

7.4.4 RIGHTS AND POWERS AS SECOND-ORDER REASONS

In chapter 4, I assumed *reasons fundamentalism,* which defends that all normative notions can be derived from the fundamental notion of reasons for action. In this section, I will try to give a tentative definition of rights in terms of second-order reasons and reasons for action. In order to accomplish this, concepts defined in previous chapters will be used: reason for action in chapter 4, obligation in chapter 5, sufficient reason in chapter 6 and second-order reasons (exclusionary and inclusionary) in chapter 7.

Legal scholars offer different classification of rights:

- Right in Rem and Right in Persona
- Personal and Proprietary Right
- Positive and Negative Rights
- Principal and Accessory rights
- Perfect and Imperfect Rights
- Right in Re-propria and Right in Re-aliena
- Vested and Contingent Right
- Corporeal and Incorporeal Right
- Primary and Sanctioning Right
- Public and Private Rights

This list (or similar lists), developed by legal scholars, is not aimed at theoretically classifying rights in a philosophical manner. This taxonomy is at the service of legal practitioners. That is why it is not exhaustive nor mutually exclusive. It does not pretend to be a sort of initial ontology of rights. However, it is a starting point for the legal philosopher who tries to understand the nature and structure of rights. In what follows, I will just try to give a tentative definition of negative rights in terms of reasons for action.

In this chapter I will limit myself to the analysis of negative rights, since I will need this concept in section 11 when analysing the conflict between the negative right that parents have to home-school their children and the power of the administration to obligate parents to send their children to educational centres. A complete analysis of all the rights listed above and other Hohfeldian legal positions are left out of this dissertation for future research.

An example of negative right is found in Article 19 of the Spanish constitution:

"Spaniards have the right to choose their place of residence freely, and to move about freely within the national territory"

I have the legal right to move freely from one place to another within the national territory of Spain. This means that, if I wish to go anywhere in Spain, I have a *prima facie* reason to believe that no one has sufficient reason to prevent me from doing this.

I may have a more pressing reason not to go, let us say, to Madrid: to stay in Barcelona at the hospital with my ill mother. However, if I decided to do the wrong thing, that is, not to stay with my mother and go to Madrid to visit the city, my sister could certainly point out that I am acting wrongly, but *she* – nor anyone else – would not have *sufficient* reason to prevent me from going.

The fact that my decision is wrong and that my mother needs me is certainly a reason for my sister to prevent me from going. However, the fact that she believes that I have the legal right to go anyway is a reason for her that overrides the other reasons she has to prevent me from going to Madrid.

From the right holder's perspective, a right is a *prima facie* reason to believe that others do not have sufficient reasons to prevent us from doing what is granted by the right. From the perspective of all others, if they acknowledge the existence of the right, they will conclude that, in spite of all the reasons they may have to prevent (hamper or hinder) the right-holder from doing what the right-holder is granted by the right, none of these reasons overrides their obligation not to prevent (or hamper) the right-holder's right.

From the right holder's perspective: *p* is a right for person x to do *a* in circumstances c if and only if person x has a *prima facie* reason to accept that no one has sufficient reason to prevent person x from doing *a*. Put formally:

$$A(p, x, B((x, \forall ym \neg \exists z\ SR(z, y, c, m), c) \wedge m \rightarrow \neg a))$$

Since sufficient reason is defined in terms of reasons for action in chapter 6.2: *p* is a right for person x to do *a* in circumstances c if and only if person *x* has a *prima facie* reason to believe that, for any person *y*, there is no reason *t* for person *y* to prevent person *x* from doing *a* that overrides any other reason *z* for person *x* to do *a*.

$$A(p, x, \neg \exists tB(\forall yzm\ (R(t, y, c, m) > R(z, y, c, \neg m)) \wedge m \rightarrow \neg a))$$

From the perspective of all others, *the right p that person x has* to do a in circumstances c *is a reason for any other person y to believe that she has an obligation* not to prevent person x from doing *a* in circumstances *c*. Put formally:

$$\forall yzA(p, y, B(y, \exists O(y, \neg z)),c)\wedge z\rightarrow\neg a))$$

Since obligation is defined in terms of reasons for action in chapter 5.1, the complete definition of negative rights in pure terms of reasons for action and second-order reasons is: *the right p that person x has* to do *a* in circumstances c *is a prima facie reason for any other person y to believe* that she has (i) *a reason not to prevent* person x to do a in circumstance c and (ii) *a reason not to do anything that leads a from not happening*. Put formally:

$$\forall yzA(p, y, B(y, \exists x(R(x, s, c, \neg z)\wedge\forall yR((x, s, c, \neg y)\wedge(y\wedge c\rightarrow z)),c)\wedge z\rightarrow\neg a)$$

Rights in terms of reasons for action defined this way are second-order reasons to accept (believe) that certain reasons for action hold. Why are rights *prima facie* reasons to believe? Fundamental rights are not absolute, as legal scholars studying constitutional law remind us. In particular, they conflict with other fundamental rights or with constitutional norms of the same legal hierarchical level as discussed in section 2.

In the case of the right to move freely within the Spanish territory, privacy of others or other's private property is a limit to my actual capacity to freely choose my location. I cannot freely enter somebody else's house nor enter the premises of a factory without permission. These are just two instances of cases where my right to freely choose my location is overridden. That is the reason why rights are only a *prima facie* reason to believe that others do not have sufficient reason to prevent me from doing what the right grants.

Since rights are second-order reasons, when they conflict, it is a case of conflict between second-order reasons. Second-order reasons cannot be overridden by a reason for action. However, they can be, and often are overridden by another second-order reason. I do not have the right to freely enter somebody else house because my right to move freely under article 19 of the Spanish Constitution is overridden by the other's right to privacy.

Negative rights thus defined are second-order reasons to *prima facie* believe that certain reasons for action hold. Obligations and rights are different in their nature and structure.

Rights are second-order reasons and thus epistemic in nature. Obligations are reasons for action. This may seem surprising, but it should not be[210].

That a person x considers that *p* is an obligation does not involve other people's beliefs. The beneficiary of an obligation can be – and often is – another person. However, what this other person thinks or believes about *p* is not needed for *p* to be considered as an obligation for person x.

In sharp contrast, rights involve the beliefs of others on reasons for action. *From the perspective of the right holder*, having the right that *p* to do *a* means that I have a *prima facie* reason *to believe that others do not have sufficient reason* to prevent me from doing *a*. *From the perspective of others*, their acknowledgment that person x has the right that *p* to do *a* means that they accept that they have an obligation not to prevent person x from doing *p*, that is, *they accept (believe) that certain reasons for action hold*.

Let us now consider the concept of having the power to do something. Imagine that a friend of yours has conferred you with the power to sell her house. In terms of reasons for action, this means from the perspective of the person that has the power to sell the house, that the power is a reason for the power-holder to believe that she has sufficient reason to sell the house. Put formally:

$$A(p, s, \exists xSR(x, s, c, a), c)$$

From any other person *y*, the fact that person *s* has the power *p* to do *a* means that any person *y* has a reason to believe that person s has sufficient reason to do *a*. Put formally:

$$\forall yA(p, y, \exists xSR(x, s, c, a), c)$$

My point here is that an analysis of rights and powers as second-order reasons looks promising and offers a different line of investigation beyond the theories of choice and theories of interest[211]. It also looks promising to revisit the Hohfeldian analysis of legal positions as the analysis of legal power above shows. I leave the definition of other kinds

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210 Does this mean the axiom of correlation between rights and obligations does not hold? If the axiom of correlation means that obligations and rights are two ways of defining the same thing, the axiom of correlation does not hold if rights are understood as second-order reasons. However, from the perspective of anyone acknowledging that person x has the right that *p* to do *a*, this person believes she has an obligation not to prevent person x from doing *a*. There is thus a conceptual connexion between negative rights understood as second-order reasons and obligations understood as reasons for action.

211 For an overview of the discussion between theories of choice and theories of interest: KRAMER SIMMONDS, AND STEINER's A Debate over Rights (Kramer, Simmonds, and Steiner 1998).

of rights in terms of second-order reasons and how they relate to one another and how they relate to Hohfeldian analysis out of this dissertation for future inquiry.

8 UNDERMINERS, REVERSERS, EXCUSES AND OVERRIDERS

So far, I have shown that reasons for action, when conflicting, are related by the overriding relationship (one reason overrides the other or neither of them overrides the other) and that epistemic reasons include or exclude reasons for action in our decision process on what to do. However, reasons are related in others ways that actually matter in our decision process.

Let us consider the following example: Sarah promises Tom she will paint his house. The fact that Sarah promised Tom she would paint Tom's house is a reason for Sarah to paint Tom's house.

Let

q = Sarah promised Sarah to paint his house

s = Sarah

a = to paint Tom's house

c = the given circumstances.

Assume that, at a certain time, R(q, s, c, a) holds. Now imagine that later on, Tom tells Sarah that she does not need to keep her promise because he has found another painter.

p = Tom told Sarah that she does not need to keep her promise because another painter

s = Sarah

a = not painting

c = the given circumstances

It seems that R(p, s, c, ¬a) holds. Since R(q, s, c, a) and R(p, s, c, ¬a) are conflicting reasons for action, it seems that all we need to do is to apply the overriding operator:

R(p, s, c, ¬a)> R(q, s, c, a)

However, it is unnatural to say that the fact that Tom released Sarah from the promise *overrides* Sarah's promise. There are two reasons that explain this weirdness: (i) the overriding relationship does not apply here and (ii) R(p, s, c, ¬a) is not an accurate description for the role of the fact that *p.*

As regards (i), it does not seem that R(p, s, c, ¬a) and R(q, s, c, a) are two reasons related by the overriding operator. It is actually much more natural to say that, in this case, the fact that Tom released Sarah from the promise *cancels* Sarah's promise and, accordingly,

the fact that she promised Tom she would paint his house is not a reason any more. In consequence, the following conditional would seem to capture the relationship between these two reasons better:

$R(p, s, c, \neg a) \rightarrow \neg R(q, s, c, a)$

However, even this conditional does not seem to capture the relationship between the fact that p and R(q, s, c, a). Why? For the reason advanced in (ii) above. R(p, s, c, ¬a) is not a good description of the role that *p* plays here. In effect, the fact that Tom released Sarah from her promise is not a reason for Sara not to paint Tom's house, but a fact that makes that R(q, s, c, a) does not hold any more. In the relationship between the fact that *p* and R(q, s, c, a), the timeline is crucial. In the quadruple R(q, s, c, a), time is supposed to be simply included in circumstances *c*. However, to capture the cancellation effect that *p* has on R(q, s, c, a), time must be explicit.

$R(q, s, c, a\ t_1) \wedge (p,t_2) \rightarrow \neg R(q, s, c, a, t_2)$

Now, note that the fact that *p* is not a reason for action any more, but simply a fact. However, from Sarah's point of view, the fact that *p* at t_2 is a reason to believe that ¬R(q, s, c, a, t_2). In order for Sara to believe that ¬R(q, s, c, a, t_2), on the one hand, she needs to believe that R(q, s, c, a, t_1) and, on the other hand, she also needs to believe that (p,t_2).

In a sense, R(q, s, c, a, t_1) is an ambiguous presentation. It can mean two different things: (i) the third point of view where we mean that R(q, s, c, a, t_1), even if Sarah does not believe that R(q, s, c, a, t_1), or (ii) the fact that *q* is a reason *s* takes for granted that *s* believes that R(q, s, c, a, t_1).

In what follows, I will use expressions such as R(q, s, c, a) or, if time is made explicit, R(q, s, c, a, t_1), for the third person point of view meaning. To make the actual beliefs involved explicit, I will use the belief operator already seen in section 7.

B(s, c, p) means *s* believes that *p* in circumstances *c*. If we want to make the reasons for such belief explicit, we can use sentences of the form B(q, s, c, p), meaning *q* is reason for *s* to believe that *p* in circumstances *c*.

We can express that Sara believes that ¬R(q, s, c, a, t_2) as B(s, ¬R(q, s, c, a, t_2), c). In order for Sarah to hold rationally the belief that ¬R(q, s, c, a, t_2), she also needs to believe that R(q, s, c, a, t_1) and that (p,t_2). To list the beliefs involved:

$B(s, \neg R(q, s, c, a, t_2), c)$

$B(s, R(q, s, c, a, t_1), c)$

$B((p,t_2))$

As a matter of fact, she comes to believe that $\neg R(q, s, c, a, t_2)$ in spite of $B(s, R(q, s, c, a, t_1), c)$ precisely because $B(p,t_2)$. In other words, (p,t_2) is a reason for Sarah to believe that $\neg R(q, s, c, a, t_2)$, that is, the fact that Tom released Sarah from her promise is a reason for Sara to believe that the promise made is not a reason for painting Tom's house any more.

The fact that *p* here can be seen as second-order reason so that the negation operator is applied to R(q, s, c, a) to obtain $\neg$ R(q, s, c, a), which actually accounts for the cancellation effect that the fact that *p* has on R(q, s, c, a).

Now imagine that instead of telling Sarah that she does not have to keep her promise any more, Tom had asked Sarah not to paint his house. This does not only have a cancellation effect, but has a reversal effect that is: it cancels the promise made and constitutes a reason for action not to paint Tom's house. A reversal is therefore a second-order reason with a cancelling effect and a reason for action to act in the opposite way as regards the initial reason for action.

Now imagine that Sarah broke her leg after having promised to paint Tom's house. The fact that Sarah's leg is broken has as a consequence: she is unable to paint.

Let p be

p = Sarah's broke her leg

$p \rightarrow \neg a$

The fact that p is the case and that $p \rightarrow \neg a$ is a reason for Sarah to believe that she has no obligation to perform what she promised. She still has a reason to paint Tom's house: her promise. However, she is under no obligation to do as promised. She is released from the obligatory effect of her promise. However, her promise has not been cancelled. It is still a reason for action for her. Imagine that she recovers from her injury very quickly: the promise would still be binding in contrast to the cancellation of effect of the last example.

In consequence, the fact that *p* in this case is a reason to believe that the obligation created by the promise is temporarily not binding. The promise made is a reason for Sarah to paint Tom's house and also a reason for her not to engage in alternatives courses of action incompatible with the action of painting Tom's house.

$O(q, Sara, a) \equiv R(q, Sara, c, a)$ and $\forall x R((q, Sara, c, \neg x) \wedge (x \rightarrow \neg a))$

The broken leg affects only this second part of the promise:

$\forall xR((q, Sara, c, \neg x)\wedge(x\rightarrow\neg a))$

She has a reason to stay at the hospital (her broken leg), which is a course of action incompatible with painting Tom's house. It seems that the following conditional applies:

$p\rightarrow\neg\ \forall xR((q, Sara, c, \neg x)\wedge(x\rightarrow\neg a))$

While *p* is true, she has no reason not to engage in alternative courses of action incompatible with painting Tom's house. That is, the obligationary effect of the obligation created by the promise is undermined while *p* is true. The fact that the underminer only affects $\forall xR(q, s, c, \neg(x\rightarrow\neg a))$ of the obligation can easily be seen by the fact that the promise is still a reason for action for Sarah to paint Tom's house, though not obligatory while *p* is true. In other words, the fact that *p* is not a reason to deny that R(q, Sara, c, a) holds.

In general, excuses thus undermine $\forall xR(q, s, c, \neg(x\rightarrow\neg a))$ part of an obligation. In our example, Sarah's broken leg justifies some alternative courses of action in spite of the obligation created by the promise. In other words, the fact that Sarah has a broken leg is a reason for her to believe that the promise made is not a reason to undertake any course of action incompatible with do as promised any more.

In terms of belief statements:

$B(R(q, s, c, a) \wedge \neg\forall xR(q, s, c, x\rightarrow\neg a))$

$B(p)$

$B(p, s, \neg\forall xR(q, s, \neg(x\rightarrow\neg a), c))$

The effect of $B(p, s, \neg\forall xR(q, s, c, \neg(x\rightarrow\neg a)))$ therefore is to change the truth value of the obligational part of the promise. The difference with underminers as defined above is that the first changes the truth value of the whole reason so that the initial reason ceases to be reason at all.

When underminers are applied to reasons that constitute obligations, these reasons are *cancelled*: reasons cancelled do not have any practical effect at all, we are completely freed from the obligation. In contrast, excuses only apply to reasons that constitute obligations and only change the truth value of the obligational part of the reason.

Underminers, reversals, excuses and overriders are all *called* defeaters because they prevent a reason from being a conclusive reason. The introduction of these in terms in philosophy is rather recent. However, it must be admitted that legal practitioners have always known of underminers, reversals, excuses and overriders. The list of concepts in this section does not pretend to be exhaustive. Further study of reasons for action may reveal other interesting categories. My aim here is just to show that the analysis of reasons for action is well suited to dealing with some vocabulary of reasons for action recently introduced by *particularism*. However, this vocabulary is not exclusive of particularism nor a reason to adopt it. As as shown by WALTER SINNOTT-ARMSTRONG, generalism can profit from this vocabulary for good[212].

The analysis of concepts such as underminers, reversals, excuses and overriders in terms of reasons for action may be successfully applied to understand legal concepts such as (i) exoneration of criminal responsibility; (ii) cause to nullify a contract; (iii) legal prescription; (iv) caducity; (v) tax exemptions and many, many, others. This analysis is an interesting glimpse for future investigation.

212 For the use of the terms ‘defeater’, ‘underminer’, ‘reversal’, ‘excuse’ and ‘overriders’ see WALTER SINNOTT-ARMSTRONG’s Some varieties of particularism (Sinnott-Armstrong 1999)and MORESO’s Towards a Taxonomy of Normative Defeaters (Moreso 2020) .

9 REFLECTIVE EQUILIBRIUM FOR REASONS FOR ACTION

In chapter 4 I exposed SCANLON's *reasons fundamentalism* which states (i) that normative statements about reasons are irreducible to statements of non-normative facts and (ii) that reasons are the fundamental concept from which all other normative concepts can be derived.

According to SCANLON and RAZ, reasons are simply the normative relation that holds between facts and persons so that a course of action is favoured in certain circumstances. I showed that this can be expressed with the quadruple R(q, x, c, a) meaning *q* is a *pro tanto* reason for person x to do (or refrain from doing) action *a* in circumstances c.

In chapter 5, I proposed a definition of obligations in terms of reasons for action. Obligations are reasons such that the fact that *p* is both (i) a reason for person x to do a certain action and (ii) a reason for person x not to take any course of action incompatible with doing *a*.

I also distinguished *pro tanto* reasons from actual reasons and *pro tanto* obligations from actual obligations. I followed SCANLON and took the fundamental concept of reason as contributory. All reasons are initially *pro tanto* reasons. Some reasons have the structure of obligations. Thus all obligations are initially *pro tanto* reasons to do some type of action *a* and, at the same time, also a reason not to do anything incompatible with doing action *a*.

In chapter 6, I showed that reasons for action can conflict. When reasons for action conflict, the actual conflict is solved by the overriding relationship among reasons. After being part of an actual reasoning, an initially *pro tanto* reason becomes a conclusive reason if this reason overrides any other reason or is not overridden by any other[213]. Reasons are not *per se* conclusive. They are conclusive *within* a practical reasoning process. Conclusive reasons that are obligations are *actual* or toti-resultant obligations.

In chapter 7, I argued for equating the overriding relationship to reasoning *on the balance of reasons*. This allowed us to defend that reasons are intermingled in other ways and

213 I have already shown in section 6.2 that reasons that do not override all others but are not overridden are called *sufficient reasons for action*. They deserve to be called decisive as well for two reasons: (i) they allow us to fully justify doing the action and (ii) they are the final point of a practical reasoning process after the overriding relationship is applied.

therefore reasoning on the balance of reasons is not enough to capture the nature of practical reasoning. I have showed that RAZ's second-order reasons are better understood as epistemic reasons to exclude (or include) some reasons from the final set of reasons to make the decision.

In chapter 8, I also showed that reasons can *challenge* other reasons in different ways. Accordingly, I have analysed underminers, reversers, excuses and overriders. I have shown how in these different ways a reason can challenge another reason and can be interpreted in terms reasons for action. I have shown that underminers are reasons to believe that the original reason for action does not hold any more. In consequence, underminers are second-order reasons that change the truth value of the reason affected by them. I have also shown that *reversers* are both (i) an underminer and (ii) a reason for action in their own right to act in the opposite direction. I have also shown that excuses are best understood as underminers of the *obligational* aspect of reasons that are themselves obligations.

Now, equipped with all these concepts, I will try to propose a decisional algorithm[214] for reasons for action that is aimed at capturing the reflective equilibrium that SCANLON defended and that constitutes the nature of reasoning on normative statements, that is, reasoning about reasons.

In chapter 7, I introduced the Rel(c, s) function which tries to capture our capacity to identify the facts that are relevant from the normative point of view given certain circumstances. Of course, the number of facts correctly identified greatly depends on the person, her practical reasoning expertise, her moral sensitivity even her interests. The Rel(c, s) allows us to identify the set of the initially relevant facts:

$$Rel(c, s) = U = \{q, p, r, t\ldots\}$$

Once the initial set U of relevant facts is obtained (the universe of discourse), we are able to list the reasons for action. In chapter 7, I proposed expressing this through the function Rso(U):

$$Rso(U) = S_1 = \{R(p, x, c, a), R(q, x, c, a), R(r, x, c, \neg a)\ldots\}$$

214 I owe the idea of presenting practical reasoning as an algorithm by steps to MORESO's Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism (Moreso 2012; 2015).

In the light of S_1 we are able to review set U to see if in circumstances *c* (i) there are inclusionary or exclusionary reasons and (ii) if there are *underminers*, *reversers* or *excuses*. This may also force us to include new facts into U that we overlooked the first time so that we obtain U_2 or exclude them. This, in its turn, forces us to apply Rso function again (this time to U_2). This process is iterated until an equilibrium is reached. This results in a new set of reasons for action S_2.

I have already defined that inclusionary reasons are epistemic reasons to believe that there are reasons for action that should be included in the set S of reasons for action in circumstances c. This was expressed through the function $In(\alpha, S_1, Sco)$ where α stands for a reason for action (i.e. a quadruple R(q, x, c, a)), S_1 for the set of reasons affected and S_c for the set of reasons to be included in S_1.

I have also already defined that exclusionary reasons are epistemic reasons to believe that there are reasons in S_1 that should be excluded. This was expressed through the function $Ex(\alpha, S_1, S_c)$ where α stands for a reason for action (i.e. a quadruple R(q, x, c, a)), and S_c for the set of reasons to be excluded from S_1.

I argued that underminers can also be understood as epistemic reasons to believe that a certain reason in S_1 does not hold any more. The effect of underminers as second-order reasons is to change the truth value of some reason in S_1 so that if the fact that *p* is an underminer of R(q, x, c, a) in S_1 then $\neg$R(q, x, c, a) in S_2.

Reversers are to be understood as having two distinct roles: they are underminers as well as reasons for action to do the opposite action in their own right. That is, given R(q, x, c, a) in S_1, if the fact that *p* is an underminer, then $\neg$R(q, x, c, a) in S_2 and R(p, x, c, $\neg$a).

In chapter 5, I defended that obligations are defined in terms of reasons for action: they are (a) reasons to do (or refrain from doing) a certain action *and* (b) at the same time they are reasons not to do anything incompatible with doing the aforementioned action. Excuses are underminers of this second reason (b) that constitutes the *obligational* element.

To sum up, the practical reason algorithm can be seen as the following step by step process:

1.- The universe of discourse is identified through the relevance function Rel(c, s):

$$Rel(c, s) = U_1 = \{q, p, r, t\ldots\}$$

2.- The set of reasons for action S is identified through the Rso(U) function:

$Rso(U_1) = S_1 = \{reasons\ for\ action\}$

3.- Given the reasons for action in S_1 and the relevant facts in U_1, we are able to identify second-order reasons (which includes underminers, reversals and excuses). We apply the exclusionary and inclusionary functions so that the final set of reasons for action S_f is obtained.

4.- We pair all the reasons in S_f and apply the overriding operator > to all the pairs. Thanks to the properties of >, we necessarily obtain a conclusive reason or two or more sufficient reasons for action.

5.- From this process from (1) to (4), we are able to identify if some relevant facts are missing in the set U_1. That is, after having performed (1) to (4), the relevance function is applied again. If new facts should be added to U_1 a new universe of discourse U_2 is thus obtained, which forces us to iterate the process.

$Rel(c, s) = U_2 = \{q, p, r, t, m\ldots\}$

6.- While $U_{n-1} \neq Un$, the process is iterated. When $U_{n-1} = U_n$, the process stops. An equilibrium is finally reached.

Note that this equilibrium depends on some facts that may vary: (i) the circumstances and (ii) the capacity of the persons involved in the reasoning. The fact that the circumstances change forces us to launch the process again. This is simply a consequence of the relevance function Rel(c, s). The fact that diferent persons obtain diferent practical conclusions is also explained by Rel(c, s). The fact that new persons may be involded in the discussion may add new relevant facts to U_n by which U_{n+1} is obtained and, therefore by step 6, we are force to iterate the whole process until a new equilibrium is reached.

Reflective equilibrium as described here is never conclusive. In principle, it can always be revisited. However, this does not mean that the reflective equilibriums reached in the past are not valuable. Reflective equilibriums reached in the past, even if supersede by future ones, allow us to reach conclusive reasons for action (or sufficient reasons for action) and thus decide according to reason.

That reflective equilibrium is an open algorithm allows us to explain past moral mistakes and the improvement of our moral insights due to better reasoning and acquired experiences. It also allow us to explain why intersubjectivity is important: the more the

people involved in a practical discussion the better (better justified and more stable) the reflective equilibrium reached.

What happens when people engaged in practical reasoning do not apply the $Rso(U_i)$ in the same manner and thus they obtain a set of reasons for action S_i that is different? If so, it seems that they cannot proceed with the algorithm together? This happens, that is why I suggest to express also $Rso(U_{i,}\ s)$ with a two variable function where U_i is a universe of discourse and s is a person. $Rso(U_{i,}\ s)$ shows that different sets of reasons are normally reached, that is, persons will argue precisely whether a certain fact in U_i is a reason for action or not. Opposable reasons are the answer to this problem.

10 OPOSABLE REASONS

10.1 NORMATIVIY AND INTERNAL REASONING

KORSGAARD asks herself why reasons have a grip on us. She calls this question the normative question:

> *"[…] when we seek a philosophical foundation of morality we are not looking merely for an explanation of moral practises. We are asking what justifies the claims that morality makes on us. This is what I am calling 'the normative question'."*[215]

SCANLON observes that the normative question, that is, why reasons have a grip on us, is drawn from contexts where reasons are discussed, dialectical situation so to speak:

> *"It is noteworthy, I think, that much of Williams' discussion in "Internal and External Reasons" involves cases in which one person is trying to force some other person to agree that he has a reason to act in a certain way. […] Part of Korsgaard's argument early in The Sources of Normativity assumes a similar dialectical situation. She imagines two people disagreeing about whether something is a reason for a certain action, and she observes that it is mere reiterative stonekicking for one party to say, in the face of the other's denial, "But it just is a reason!" A much more effective response would be to come up with an argument that begins from something that the other party accepts, or cannot deny on pain of irrationality."*[216]

There certainly are reasons that, when arguing one to another, can be used to justify one's decisions or actions or to require others to justify them[217]. When discussing, we *expect these reasons to be acknowledged by others as reasons*. When exchanging reasons, reasons must have a grip on others.

That the grip of reasons is different in a dialectical context than within the first person point of view is strongly suggested by what HARMAN calls a case of "*internal reasoning*"[218]. From this, SCANLON argues:

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215 See KORSGAARD'S *Sources of normativity* (Korsgaard 1996, p.9).
216 See SCANLON's *Being realistic about reasons* (Scanlon 2014, p.13).
217 Typically, moral norms, but norms of etiquette, social conventions, etc. play this role as well.
218 See Gilbert Harman's The Nature of Morality : An Introduction to Ethics (Harman 1977).

> *"In this case, the mere fact that one cannot consistently reject a claim about reasons given that one has some desire, intention, or other attitude does not itself settle the matter. One can always ask oneself why one should have these attitudes—whether they can be justified in the relevant way. From the agent's own point of view his or her own attitudes are largely transparent to the subject matter under consideration."*[219]

In internal reasoning, the grip reasons have collapses into what reason I have. It does not make sense to try to find something 'extra' (another belief) within me that explains the grip. That I consider α as a reason for action already implies that the reason has a grip on me. This seems to be precisely SCANLON's conclusion:

> *"But such claims are not as relevant in internal reasoning as in the external variety, and it is the point of view of internal reasoning that is primary in an investigation of reasons and normativity. From this point of view the question of how reasons "get a grip on one" properly disappears.* ***There is only the question: what reasons do I have****?"*[220]

Reasons fundamentalism defends that normativity is fully explained by what reason for action one has from the internal reasoning point of view. However, it is still true that when we exchange reasons in a dialectical context we expect them to have a grip on others. How can we explain this grip on others within the framework of reasons fundamentalism or, at least, in a compatible manner with it?

By *this grip on others* two very different things can be meant: (i) the first one is a conceptual truth about what is to be a reason and (ii) the second one is social or factual in nature. The idea that I will advocate here is that the grip as a conceptual truth is no grip at all. Accordingly, I will defend that the grip that really does its business is social in nature[221].

SCANLON defends that if *p* is a reason for person x to do a in circumstance c, then, for any other person in similar circumstances, *p* is a reason:

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[219] See SCANLON's *Being realistic about reasons* (Scanlon 2014, p.13).
[220] See SCANLON's *Being realistic about reasons* (T. M. Scanlon 2014, p.14).
221 You may think that the fact that exchanging reasons must have necessarily a social grip is simply a truism which is expressed in many different ways in contemporary philosophy and that pointing this out has not made us advance much further. The crucial philosophical aspects is how this truism is modelled. I will discuss this very important topic later on.

> *"Also, it is an implication of my view that something is a reason for an agent only if it is also a reason for any other agent in similar circumstances"*[222]

Therefore, it seems that SCANLON defends that the following conditional holds:

$R(p, s, c, a) \rightarrow \forall x(Rp, x, c', a)$

Let's start with an example. Imagine that you do not eat meat on the grounds that animal suffering is wrong. If so, then animal suffering is a reason for you not to eat meat. *If you believe that this is a reason for you*, then it follows *necessarily* that *you believe that others should* consider animal suffering *as a reason*, that is, you believe that animal suffering should be a reason for them not to eat meat. We can express this through the B operator and the conditional above.

$B(s, R(p, s, c, a))$

From this belief, person s necessarily believes that $\forall x(Rp, x, c', a)$ since $R(p, s, c, a)$ and $R(p, s, c, a) \rightarrow \forall x(Rp, x, c', a)$ is a conceptual truth about reasons. Therefore, the following conditional holds:

$B(s, R(p, s, c, a)) \rightarrow B(s, \forall x(Rp, x, c', a))$

We can state the grip that reasons have as a conceptual truth as follows:

Grip's Conceptual Truth (hereinafter "**GCT"**) = for *q* to be a reason, if person s believes that *q* is a reason to do *a* (or refraining from doing *a*) in circumstances *c*, then person *s* must believe that any other person *y should* consider *q* as a reason to do *a* (or refraining from doing *a*) in circumstances *c*.

Any person with a little training in anthropology would certainly point out that this cannot be a conceptual truth because it is simply empirically false[223]. Let me develop this argument here. What is considered right or wrong, appropriate or not, advisable or not, mandatory or not, etc. is culturally relative. If *p* is actually a reason for person *s* to do *a*

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[222] See SCANLON's *Being realistic about reasons* (T. M. Scanlon 2014, p.32).
223 For moral relativisim defended from anthropology, the two classics are FRANZ BOAS'S *Anthropology and Modern Life* (Boas 1986) and CLIFFORD GEERTZ's *Local Knowledge: Further Essays In Interpretive Anthropology*.

(or refraining from doing p) in circumstances c or not is, at the end of the day, culturally relative. Universal reasons are a controversial issue as ethical relativists[224] remind us.

The anthropology minded critic goes on and points out that GCT seems to imply that if *p* is a reason for you to do *a* (or refraining from doing *a*) in circumstances *c*, then *p* is a universal reason. Now since GCT leads to a controversial conclusion, it follows that GCT is itself controversial. It is difficult to accept a controversial concept as a conceptual truth.

In spite of the initial appeal of the anthropology relativist, the argument is wrong. Why? Anthropology is an empirical science. As regards the reasons that human beings use to justify their actions or to convince others on what is the course of action to follow, anthropologists should limit to what *reasons they actually use*.

Anthropologists do certainly have a point: it is very unlikely that if I consider that *p* is actually a reason to do *a* (or refraining from doing p) in circumstances c others *would do* the same *universally*. Requiring anyone to believe that if *p* is a reason for her, then *p* is a reason for anybody else seems too demanding a requirement. However, GCT does not make this requirement and, thus, the anthropology-minded criticism is missing the point.

What does GCT require then? The difference is in the words 'would' and 'should'. Let us compare what the anthropology-minded guy believed GCT to claim and what GCT actually claims (the difference in bold):

GCT = for *q* to be a reason, if person s believes that *q* is a reason to do *a* (or refraining from doing *a*) in circumstances *c*, then person *s* must believe that any other person y ***should consider*** *q* as a reason to do *a* (or refraining from doing *a*) in circumstances *c*.

GCTv2 (as seen from the anthropology-minded person= = for *q* to be a reason, if person s believes that *q* is a reason to do *a* (or refraining from doing *a*) in circumstances *c*, then person *s* must believe that any other person y ***would consider*** *q* as a reason to do *a* (or refraining from doing *a*) in circumstances *c*.

GCTv2 is simply false as the anthropology-minded person has shown us already. However, **GCT** is completely unaffected by the anthropology-minded person's argument.

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224 For a defense of moral relativism in moral philosophy see GILBERT HARMAN'S *Moral Relativism Defended* (Harman 2000). For a rejection of moral relativism see HARRY J. GENSLER's *Ethics : A Contemporary Introduction* (Harry 2011) and JUDITH THOMSON in *Moral relativism and Moral Objectivity* in her response to HARMAN's moral relativism (Harman and Judith 1996).

First, note that **GCT** does not require that if I believe that *p* is a reason, I necessarily believe that anybody else would think that *p* is a reason, but that I think that anybody else *should think that p is a reason*. Maybe I am the only person in the world to believe that *p* is a reason and, even if I may be aware that nobody else believes that *p* is a reason, still, if *p* is a reason for me, then, it follows necessarily that I think anybody else *should believe it*.

This link between *my belief* that p is a reason and *my belief* that others should think that p is a reason forms part of what a reason is, that is, it is a conceptual truth. In this sense, reasons necessarily aimed at universality. No relativist argument from anthropology can cast any doubt on this. This is precisely what $B(s, R(p, s, c, a)) \rightarrow B(s, \forall x(Rp, x, c', a))$ conditional tries to capture.

If you still hesitate, consider the same phenomena inversely. Suppose that you think that p is a reason. Afterwards, you come to the conclusion that others do not need to think that p is a reason, you finally decide that p is a reason only for you. Even in this case, you believe that others should think that p is a reason for you. If you do not believe that *they should*, then p is not a reason even for you.

After having discussed why **GCT** cannot be affected by relativistic arguments from anthropology, let us continue to analyse **GCT** as a conceptual grip.

Undeniably, this conceptual truth has a very powerful grip on the person stating reason *p*. It even has its realization in a principle of social psychology called consistency principle.

> *"Psychologists have long understood the power of the consistency principle to direct human action. Prominent theorists such as Leon Festinger, Fritz Hieder, and Theodore Newcomb have viewed the desire for consistency as a central motivator of our behavior. But is this tendency to be consistent really strong enough to compel us to do what we ordinarily would not want to do? There is no question about it. The drive to be (and look) consistent constitutes a highly potent weapon of social influence, often causing us to act in ways that are clearly contrary to our own best interests"*[225]

225 See Robert B. Cialdini's Influence : The Psychology of Persuasion (Cialdini 2007, p.44).

Social psychologists have shown us the power of prior self-commitments and the importance of acquired beliefs in our future behaviour due to the force of the consistency principle. That is why, when we argue, we try to find some leverage on commitments alredy made by our opponents[226], we are trying to exploit the consistency principle.

Since I know that others may be indifferent to animal suffering, I know that they may not consider animal suffering as a reason, even if I believe (indeed, must believe) that they should. Even if I condemn their indifference to animal suffering and I can offer them additional arguments to show them that their indifference is wrong and try to make them change their view on this, as a matter of fact, I know that they do not consider animal suffering as a reason not to eat meat.

Since others may not consider *p* to be a reason even though I believe they should, the conceptual truth **GCT** does not imply any actual grip on others, only on me. This is a very important limitation of the **GCT** since it does not explain the grip that reasons are expected to have on others. The consistency principle is not enough. It only explains the grip that the reason already has on me and the grip that reasons for action that my opponent already believes that actually have a hold. It does not explain the grip that I expect my reason to have on others.

Let us look at the consequence of **GCT** which is "person s must believe that any other person *y should* consider *q* as a reason". The "*should*" contained in it, though apparently directed to a grip on others, is contained in a subjunctive sentence. **GCT** is a statement about the beliefs of person *s*, that is, the person stating the reason. **GCT** has no consequence whatsoever in the actual beliefs of others, let alone what others would or would not do. This is shown in the conditional above since no reference to the beliefs of others is made:

$$B(s, R(p, s, c, a)) \rightarrow B(s, \forall x(Rp, x, c', a))$$

In consequence, **GCT** expresses only a constraint over person *s*' beliefs. This constraint can be read as follows: person s cannot say that *p* is a reason to do *a* (or refraining from

226 I think KORSGAARD's normative question discussed above stems from both (i) reasons in dialectical contexts and (ii) that we human beings are very sensitive to what social psychologists call the consistency principle.

doing *a*) in circumstances *c* and, at the same time, say that others do not need to consider *p* to be a reason to do (or refrain from doing) *a* in circumstances c.

Even if *reasons fundamentalism*, that is, what reasons we have from the internal reasoning point of view is all we need to give an account for normativity, it is not enough to explain the social dimension of reasons.

The grip of reasons points outside the person stating them. Reasons are stated to persuade others, to change others' beliefs and thus others' actions. This pointing beyond one's own beliefs is part of what being a reason is.

They are not confined only to one's own inner self (the ego). In spite of this undeniably social dimension of reasons, **GCT**, though aiming at others' beliefs, cannot actually reach them.

In conclusion, even if **GCT** is a conceptual truth about the nature of reasons, **GCT** cannot be used to justify any grip on others and thus **GCT** cannot explain the grip that reasons are expected to have.

How can this grip be understood? As a psychosocial fact. And what is that? Let us jump to the next chapter to explain it.

10.2 THE GRIP OF REASONS AS A SOCIAL FACT

Let us consider the following argument: nearly everyone who lives in Barcelona thinks that *Sitges* is a beautiful town to visit. Therefore, Sitges must a beautiful town to visit[227].

This is an instance of an argumentation scheme called *Ad Populum* argument, that is, argument from popularity. According to Walton its structure is:

> *"[...] If a large majority (everyone, nearly everyone, etc.) accept A as true, then there exists a (defeasible) presumption in favor of A."*[228]

[227] If you are a tourist visiting Catalonia for the first time, though not a valid argument from the point of view of deductive or inductive logic, this argument is compelling.

228 See DOUGLAS N. WALTON's Argumentation Schemes for Presumptive Reasoning (Walton 1996, p.83).

Ad Populum arguments are considered a kind of fallacy and thus invalid arguments. However, as a presumptive argument, it can be used to rightly shift the burden of proof to the opponent:

> *"However, interpreted as a presumptive kind of argumentation that shifts a burden of proof in a dialogue, like a critical discussion, it can, in some cases be a reasonable argument. It is often conjoined with other argumentation schemes, like argument from position to know, in order to make it more plausible in a given case."*[229]

In argumentation theory, argumentation schemes are not valid or invalid from a logical point of view. They are not a matter of logic, as logic is understood in mathematical logic[230]. Argumentation schemes used in the right situation are persuasive and thus are apt to affect our opponent's beliefs and, therefore, her behaviour:

> *"This way of describing argumentation schemes suggests that they are normatively binding, in the following sense. If the hearer accepts the premises of the speaker's argument, and the argument is an instance of a genuine and appropriate argumentation scheme (for the type of dialogue they are engaged in), then the hearer must or should (in some binding way) accept the conclusion. This does not appear to be "validity" in the same sense in which the word is familiarly used in deductive (or perhaps even inductive) logic. But it does appear to express a normative or broadly logical sense of validity, bindingness, conditional acceptability, or whatever you want to call it."*[231]

Why are *Ad Populum* arguments persuasive and apt to change our opponent's beliefs and therefore her behaviour? The answer, again, is given by social psychology. The need we human beings have to conform:

> *"What others think, feel, and do is vitally important to humans, and we are profoundly influenced by others' reactions"*[232]

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229 See DOUGLAS N. WALTON's Argumentation Schemes for Presumptive Reasoning (Walton 1996, p.83)

230 For a view of logic that differs from mathematical logic and which focuses on the dialectical uses of logic see TOULMIN's The uses of argument(Toulmin 1958).

231See DOUGLAS N. WALTON's Argumentation Schemes for Presumptive Reasoning (Walton 1996, p.10)

232 ELIOT R. SMITH's Social Psychology (Smith 2015, p.310).

As regards what is finally acted upon, what others think about the reasons for action of the case actually matters and matters a lot. The same when two people disagree: what third parties would think of each opponent's position actually matters. Indeed, if two people disagree about *p* being a reason, one strategy consists in backing[233] the reason by appealing to *what others would think of q*. When exchanging reasons this way, person *s* believes not only that person *y should* consider that *q is a reason*[234] but person s believes that any other person – alien to the discussion or controversy – *would* believe that *q* is a reason. This fact, what others alien to the discussion or controversy *would* believe, is what confers opposable reasons a grip on the opponent. This grip is thus social in nature.

However, reasons do not need to be explicitly backed to have a grip on others. Current studies[235] show that changes in behaviour due to social pressure may arise simply from knowing what other people think and believe, there is no need for the opponent to actually hear the justification.

In the beginnings of social psychology in the 60's and 70's, social psychologists gave experimental evidence of how the opinion and views of others influence our own behaviour[236]. Recent neurocientific research has confirmed the findings of social psychologists on conformity and social pressure[237].

From this, we can infer that the grip we expect reasons to have on others is social in nature and can be initially described as follows: person s believes that *q* must have a grip on *y* because even when person *y* believes that *q* is not a reason, person *s* believes that any third party would think *q* to be a reason. To sum up, person s knows the principle of social conformity will work on person y despite its opposition in the discussion to whether *q* as a reason holds or not.

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233 For the concept of backing in theory of argumentation see STEPHEN TOULMIN's The Uses of Argument (Toulmin 1958).
234 I have already shown that this has no grip on person *y*.
235 See LINDSEY C. LEVITAN and BRAD VERHULST's Conformity in Groups: The Effects of Others' Views on Expressed Attitudes and Attitude Change (Levitan and Verhulst 2016).
236 For an overview of the conformity principle in social psychology see ELIOT R. SMITH's Social Psychology (Smith 2015).
237 See EMILY B. FALK, BALDWIN M. WAY, and AGNES J. JASINSKA's *An Imaging Genetics Approach to Understanding Social Influence* (E. B. Falk, Way, and Jasinska 2012), T. J. H. MORGAN AND K. N. LALAND's *The Biological Bases of Conformity*, KEISE IZUMA's *The Neural Basis of Social Influence and Attitude Change* (Izuma 2013), ROBERT SCHNUERCH and HENNING GIBBONS' *A Review of Neurocognitive Mechanisms of Social Conformity* (Schnuerch and Gibbons 2014), CHRISTOPHER N CASCIO, CHRISTIN SCHOLZ, and EMILY B FALK's *Social Influence and the Brain: Persuasion, Susceptibility to Influence and Retransmission* (Cascio, Scholz, and Falk 2015).

In conclusion, the key feature of opposable reasons is the role of third parties' beliefs. Social psychology shows us that opposable reasons do exists: they are a social fact. In the next chapter I will try to give a formal analysis of the structure of opposable reasons.

10.3 OPPOSABLE REASONS DEFINITION

I have just shown, thanks to the findings of social psychology, why the grip of opposable reasons is social in nature and why it is a legitimate move for the addressor to expect that what others think of reason *q* would certainly have leverage over the addressee.

Now the question is: How can we formalize opposable reasons? How can we see their logical structure so that we can take advantage of SCANLON's quadruple R(q, s, t, a) discussed in section 4 of this dissertation?

First, we need to establish certain facts about opposable reasons. It is undeniable that at least two persons are involved: the addressor, the person stating or defending that *q* is a reason and the addressee, the person to whom the reason is stated.

It is also undeniable that opposable reasons must involve the addressor's beliefs. The addressor must believe that (1) *q* is a reason; that (2) any third party would think that *q* is a reason; and that (3) irrespectively of what the addressee thinks of *q*, the addressor believes that the addressee also believes that any third party would think that *q* is a reason.

The addressee's beliefs may also be involved: if (4) the addressee actually believes that any third party would think that *q* is a reason, even if the addressee herself does not believe *q* to be a reason, then the addressee's beliefs are also involved.

In cases where only (1) to (3) are present, we have a *would-be* opposable reason. Why? Because from the addressor's point of view, it makes sense to use *q* as an opposable reason to argue with the addressee. However, if (4) is missing, that is, if the addressee does not believe that any third party would believe that *q* is a reason, then reason *q* does not have the social grip on the addressee and thus opposable reason *q* is unsuccessful as opposable reason.

Let us leave aside those complexities for later (successful vs unsuccessful opposable reasons). I have introduced this discussion here to explain why opposable reasons necessarily involve, *at least*, the addressor's beliefs and, when successful, the addressee's beliefs as well. First-order logic does not deal with the agent's beliefs. To deal with the

agent's beliefs, First-Order logic is extended with the operator B which in B(s, p) stands for person s believes that p.

With these comments in mind, let us call *opposable reasons* those reasons such that the addressor, the person stating them, believes that , any third party would believe that there is such a reason, even if the addressee, the person she is discussing with, refuses to believe that there is such reason. In what follows, I am offering a first definition of opposable reasons. Then, I will consider the advantages and the shortcomings of such a definition. I will then improve the initial definition until I reach an acceptable one.

Now let us try to give a formal first definition of opposable reasons:

Df1 *q* is an **opposable reason** = (i) person *s* addresses reason *q* to person *e*; (ii) person *s* believes that *q* is a reason for all person x to do action *a* (or refrain from doing action *a*) in circumstances *c*; and (iii) person *s* believes that any other person *y* would believe that *q* is a reason for x to do action *a* (or refrain from doing action *a*) in circumstances *c* (iv) even if person *e* thinks that *q* is not a reason for x to do action *a* (or refrain from doing action *a*) in circumstances *c*.

Let us state the following definitions:

R(q, x, c, a) is defined as	quadruple relation for reasons as discussed in section 2 stating that *q* is a reason for person x to do a (or refrain from doing a) in circumstances c.
s is defined as	a constant denoting the person stating the reason
x is defined as	a variable denoting any person for whom *q* is a reason to do *a* in circumstances c.
a is defined as	a constant denoting an action
e is defined as	a constant denoting the person to whom *s* is stating the reason, the addressee
y is defined as	a variable denoting any third party

A is defined as	third-place relation in expressions like A(s, e, R(…))where *s* is the person stating the reason and *e* is the person to whom the reason is stated and R(…) is a reason and thus itself a quadruple.
OP is defined as	a third-place relation in expressions like O(s, e, R(…)) where *s* is the person stating the opposable reason, *e* is the person to whom the reason is stated and R(…) is a reason and thus itself a quadruple. The difference between symbol A and O is that in A, person *s* simply states or addresses a reason to person *e* (this reason can be an opposable reason or not) and in O person s addresses an opposable reason to person *e*.
B	two-place relation in expressions like B(s, *p*) where *s* is the person believing proposition *p*, where *p* is any well-formed formula

Let us try to formalyze a first definition of opposable reasons:

Df1 OP(s, e, ∀x(R(q, x, c, a))) iff

A(s, e, ∀xR(q, x, c, a)) and s≠ e ∧

B(s, ∀xR(q, x, c, a)) ∧

B(s ∀y(y≠s ∧ y≠e ∧ B(y, ∀xR(q, x, c, a)))) ∧

it is possible that B¬(e, ∀xR(q, x, c, a)) ∨ it is possible that y¬B(e, ∀xR(q, x, c, a))

Now that I have given the definition of opposable reasons formally, let us analyse it step by step.

OP(s, e, ∀x(R(q, x, c, a)) means that person *s* (the addressor) addresses to person *e* (the addressee) the opposable reason *q*, which we must remember, since it is a reason, is captured by a quadruple where *q* is a fact or normative fact, x is any person, *a* is an action and *c* the circumstances. In essence, O(s, e∀x(R(q, x, c, a)) is the stipulation that *q* is an opposable reason. Now let us move on to the other part of the bi-conditional.

I start by observing that the definition of opposable reasons is set forth by 4 requirements since there are 4 statements linked by the logical operator ∧.

The first requirement of the definition, A(s, e, ∀xR(q, x, c, a)) and s≠ e, simply states that person s is addressing reason *q* to person *e.* Nothing else. Observe that in this statement there are 3 possible persons involved and necessarily at least two. Why? First, note that s≠ e states that person s (the one stating the reason) and person e (the one to whom the reason is argued) are two different persons. This is a very natural assumption to make, since opposable reasons are used to try to persuade others.

By contrast, x, which is the person who has the reason to do or not to do *a* in circumstances *c*, since it is a variable, may be person s, e or any other about whom person s and person *e* are talking about. In contrast, in a discussion, *s* (the addressor) and *e* (the addressee) are two given persons that do not vary; they are not anyone, they are *this* and *that* person. That is the reason why they are represented by constants *s* and *e* in the definition and not by variables.

It is interesting to note that it really makes sense to have some cases where x is not a variable but a constant. For instance, when two persons are discussing whether the government should do such and such, x would be the government and thus x would not be a variable but a constant. Indeed, in that scenario, we would not represent the government with an x but with a constant, since it is customary in logic to use x as a variable. However, I leave that small complication aside.

The fact that x is a variable and not a constant gives the flexibility needed to the definition, since person *s* and person *e* may be discussing something that *s* should do, something *e* should do, something all person x in circumstances *c* should do or even discussing what a particular other should do, such as in the example of the government previously discussed.

The second requirement, B(s (R∀x(q, x, a, c)), states that person s believes that *q* is a reason for x to do or not to do *a* in circumstances c. That the person stating a reason must believe the reason stated seems initially a natural requirement. Later I will show that, although in most well-behaved discussions and in most uses of opposable reasons, the addressor actually believes *q* to be a reason, that is not always the case.

There are some cases – and I will show that law is one of them – where this requirement should be dropped. In fact, what makes the use of an opposable reason by *s*, when s does not actually believe *q* to be a reason at all, morally blameable, is in most circumstances the fact that person *s* is exploiting the grip of opposable reasons to others while not committed to the grip's reason herself. This is a breach of the reciprocity rule[238], which is at the centre of the fabric of well-behaved social interactions.

As a matter of fact, the most natural explanation of insincerity when exchanging reasons is that one prefers to use the social grip and its capacity to modify the behaviour of others rather than being right about what is being discussed. That was Plato's criticism of the sophists[239].

The insincere use of opposable reasons shows that requirement (ii) is not necessary for opposable reasons to do their job. However, I prefer to keep it because it makes opposable reasons easier to understand, and this requirement is present in most well behaved discussions in which being right about what is being discussed actually matters. When opposable reasons are eventually correctly understood, I will get back to this discussion, especially in the context of law, where this requirement is dropped.

The third requirement is that which tries to capture the grip we expect reasons to have on others. It is thus crucial to carefully consider what statement B(s, ∀y(y≠s and y≠e and B(y, ∀xR(q, x, c, a)) actually says. First, note that this statement is of the form B(s, p), that is, person s believes *that p*. What is believed here by person *s*? That is: What is *p*?

Let us unwrap *p*, which is:

∀y(y≠s and y≠e and B(y, ∀xR(q, x, c, a))

238 For the importance of the reciprocity rule in social interactions from the point of view of social psychology, see ARMIN FALK and URS FISCHBACHER *A Theory of Reciprocity* (A. Falk and Fischbacher 2006). It is also worth mentioning that reciprocity is the key idea of RAWLS's argument in favour of public reason(Rawls 1997).
239 For one well known criticism by Plato of rhetoric and sophists see Plató's Gorgias (Plato 1864).

It says that any other person y believes *something*. The phrase *any other person* is captured by the universal quantifier ∀y and (y≠s and y≠e), which grants that person y is neither s nor e, that is, it grants that y is a third party. That y believes something is captured by the B operator. What follows the B operator is what is believed by person *y*, the proposition, let us say *m*, believed by y. What is believed by person y? What is proposition *m*? Person y believes precisely *that q is a reason for x to do or not to do a in circumstances c*. Now, we see that:

m = R(q, x, c, a)

However, it is very important to notice that the third requirement of the definition does not require that person y actually believes precisely that *q* is a reason for x to do or not to do *a* in circumstances c, that is, requirement (iii) does not require person y to actually believe *m*. Why not?

Note that we have two B operators, one nested into the other. Proposition *m* is embedded in the first operator B inside the brackets, that m is found in B(y, m), and in its turn the duple B(y, m) is part of proposition *p* which is in its turn embedded in the brackets under the scope of the second-order reason operator.

The structure is B(s, ∀yB(y, *m*)) where *m* is the proposition '*q* is a reason for x to do *a* in circumstances *c*'. The whole statement is thus a belief statement. A belief that is held by person *s*. It is a belief about what others, all persons *y*, would believe. Since it is a belief statement, all that this statement requires is that *s* actually believes *p*, that is, that person *s* actually believes that ∀yB(y, *m*).

If all persons *y* actually believe proposition *m* or not is irrelevant for the truth conditions of the whole sentence B(s ∀y(y≠s ∧ y≠e ∧ B(y, ∀xR(q, x, c, a)))). All that matters here is the belief actually held by *s*. That this is so is good news because it would have been very problematic to set forth the truth conditions for the beliefs of all persons *y*. I will come to this issue later.

In other words, B(s, *p*) is true if and only if *s* actually believes that *p*. Therefore, the truth conditions of the B operator are such that it is irrelevant if the proposition *p* is true or false. Since B(y, m) is part of the content of proposition *p*, it is irrelevant whether B(y, m) is true or false. Now, we can clearly see that this third requirement of the definition of opposable reasons only requires *that person s actually believes* that any other person y would believe something.

At this point, one may wonder how a belief of person s, even if it is a belief about what others would believe, can have a grip on person *e* at all. The right and honest answer is: it cannot.

Nevertheless, we can see that, if reason *q* is challenged, person *s* can point precisely to person *e* what others would most likely believe. That is what the third requirement tries to capture. It is clear that the third requirement as stated fails to do so, that is, it fails to properly describe the social grip on person *e*.

However, something of the third requirement must be preserved, since it is clear that the grip I am trying to capture in the definition is essentially linked to what others would think or believe. In consequence, even though the third requirement does not capture the grip yet, we know that we are on the right track.

Thus, the third requirement of the definition needs further refinement. Nevertheless, before I go back to the essential question of capturing the grip of opposable reasons, let us turn to the fourth requirement of the definition.

iv it is possible that B¬(e, R(q, x, c, a)) ∨ it is possible that ¬B(e, R(q, x, c, a))

The fourth requirement simply states that, even if person *e* refuses to consider *q* as a reason, *q* would be an opposable reason anyway, that is, *q* would have a grip on person *e* anyway. How do we formalize this idea? Even in the case person *e* believes that *q* is not a reason[240] or person *e* does not believe that *q* is a reason[241], if conditions (i) to (iii) are met, *q* is an opposable reason. The "it is possible that"[242]tries to capture the "even if" of the definition.

One may wonder if, from a logical point of view, (iv) is a formal requirement at all. The idea is that since the definition works whenever conditions (i) to (iii) are met, what piece of information is added by (iv) in the definition? None. It is true that formally speaking, requirement (iv) is simply logically expendable.

240 Which is expressed by the formula B□(e, R(q, x, a, c))
241 Which is expressed by the formula y□B(e, R(q, x, a, c))
242 In modal logic, the notion of possibility is customary expressed by ◇ operator. However, since I will drop requirement iv as stated in a moment, I avoid the complexity of introducing modal logic here.

However, we need to express the idea somehow, inherent in opposable reasons, that even if person *e* challenges reason *q*, the reason has a grip on person *e* anyway (or person *s* justifiably intends that reason *q* must have a grip on person *e*). This is an essential part of what needs to be explained. The fact that requirement (iv) is logically expendable means that the definition is somehow defective.

Let us first get back to requirement (iii) for improvement. Something of the third requirement must be preserved since it is clear that the grip on person *e* is essentially linked to what others would think. From what we already have, where can we get the grip on person *e*?

Notice that requirement (iii) says that person *s* addresses reason *q* to person *e*. This means that person *e* must form a belief about reason *q*. Here either B(e, R(q, x, c, a)) or y¬B(e, R(q, x, c, a)). If person *e* opposes reason *q* and accordingly manifests to person s that she does not believe *q* to be a reason -that is ¬B(e, R(q, x, c, a)) - *then* person *s* would point out that any other person y would believe that *q* is a reason. Naturally, whenever person s points this out, person e is forced to form a belief about what others would believe about reason q.

What about this new belief? Here we have finally reached the addressee's internal sphere where a grip can reasonably be found. Why? What others think has an enormous impact on our behaviour, as I have already shown in section 10.2 about social psychology. There is the social grip.

As seen earlier however, social psychology findings suggest that the principle of conformity does not even require that person s makes the explicit backing. In case person *e* challenges reason *q*, an intelligent move to keep social pressure on person *e* obviously consists in pointing out that reason *q* is widely accepted. A case of *argumentum ad populum* that, as theorists of argumentation show, can be very effective in terms of persuasion. This persuasion is grounded on the principle of conformity.

In conclusion, we do not need to incorporate the backing of *q* into the structure of opposable reasons. If *q* is truly an opposable reason, there is no need to appeal to an *ad populum* argument. This argument is a last-resort argument for person *s* stating what she believes is a truly opposable reason.

Let us further explore the belief about what others would think of reason *q*. Person s says to person e that *q* is a reason for person x to do (or refrain from doing) a in circumstances

c. In a conversational context where decisions must be made, person s intends reasons to be opposable reasons. This means that, in this kind of conversational context, person *e* knows that the simple fact that person *s* has argued reason *q*, implies that person *s* believes that others would also believe that *q* is a reason, and accordingly, person *e* must form a belief about what others would believe about *q*. In most conversational situations when decisions must be made, reasons argued are by default opposable reasons.

In some other contexts, for instance, when people exchange opinions with the hope of influencing others' views, there may be some grey zones and misunderstandings between person s and person *e* about whether a reason *q* is opposable or not. These misunderstandings are easily overcome: if person *s* intends *q* to be an opposable reason and realizes that person *e* simply argues that she does not think *q* to be a reason, person *s* will make a legitimate conversational move: person *s* would say that any other person *y* would believe that *q* is a reason.

Note that, until person *y* refused to accept *q* as a reason, person *s* would not have felt the need to state what was already being intended: that *q* was not only a reason but also an opposable reason, and therefore that there was a conversational implicature[243]: the statement that any other person *y* would believe *q* to be a reason. In other words, if person *e* thinks that she can end the discussion dead by saying that she simply disagrees on whether *q* is a reason at all, person *s* would not leave the discussion, because person *s* would point out that others believe *q* to be a reason. Now, the dispute has been shifted: it is not about whether *q* is a reason or not. It is whether others would consider *q* to be a reason.

Person *e*, when faced with the statement 'others would believe *q* to be a reason', may believe that (a) this is false, others do not think so, because for example whether *q* is a reason that is known to be a controversial issue or that (b) it is true, others would believe that *q* is a reason. Point (b) can come in milder ways, in qualified ways so to speak. Person

243 PAUL GRICE famously introduced the concept of conversational implicature (Grice 1989). Roughly speaking, a conversational implicature is something that the addressee can deduce from the way or the fact that something is said rather than from what is said. In this sense, that third parties would believe that *q* is a reason can be seen as an implicature by person *e* when person *s* opposes reason *q*. For an overview of the concept of conversational implicature in pragmatics see ATLAS's *Logic, Meaning, and Conversation* (Atlas 2005).

e may not exactly believe that (b) is true, that all others would believe that *q* is a reason, but that (b') is true, i.e. that most others would believe that *q* is a reason or (b'') that any other would most probably believe that *q is* reason, etc.

It would certainly be very interesting to explore the several ways in which (b) can be qualified. Nevertheless, what is important here is that (b) or any qualified version of (b) will determine person *e* behaviour. Person *e* may still believe that *q* is not a reason and that what others believe is wrong. In spite of that, person *e* may even be willing to treat *q* as if it were a reason for her when making a decision, and even in justifying her decisions before others.

With our last findings, let us try to find a refinement for Df1:

Df2 *q* is an **opposable reason** = (i) person *s* addresses reason *q* to person *e*; (ii) person s believes that *q* is a reason for x to do something in certain circumstances *c*; and (iii) person s believes that any other person y would believe that *q* is a reason for x to do something in circumstances c (iv), person s addresses person e that any other person y would believe that *q* is a reason for x to do something in circumstances c and (v) person e believes that any other person would believe that *q* is a reason for x to do something in circumstances c.

Df2 O(s, e, ∀xR(q, x, c, a)) iff

A(s, e, ∀x R(q, x, c, a)) and s≠ e ∧

B(s, ∀x R(q, x, c, a)) ∧

B(s, ∀y(y≠s and y≠e and ∧ B(y, ∀x R(q, x, c, a)))) ∧

A(s, e, ∀y B(y≠s and y≠e and B(y, ∀x R(q, x, c, a)))) ∧

B(e, ∀y B(y≠s and y≠e and B(y, ∀x R(q, x, c, a))))

Requirements (i) to (iii) are the same as for Df1. In contrast, requirements (iv) and (v) have been changed to grasp the social grip.

Requirement (iv) is formed by the triple A(*s, e, p*) where the first two elements are the constants *s* for the addressor and *e* for the addressee. The third element of the triple A(*s, e, p*) is proposition *p* of the form ∀y B(y≠s and y≠e and B(y, ∀xR(q, x, c, a)).

Now, we can easily see that proposition *p*, the third element of the triple A(*s, e*¸ p), equals the third requirement, which it is no other than the belief that any other person would believe that *q* is a reason. In plain words, requirement (iv) states that person *s* addresses

person *e* proposition *p*, that is, person *s* addresses person *e* the belief that any other person would believe that *q* is a reason.

The role of requirement (iv) is to grant that person *e* would actually form a belief about proposition *p*, that is, to grant that person *e* would need to consider if any third party would believe *p* to be a reason or not. We have finally reached *e*'s inner sphere. When A(*s*, *e*, p), person s, the addressor, expects to influence *e*'s behaviour. However, for reason *p* to have a grip on person *e* even if person *e* does not believe *q* to be a reason at all, something else is required. That is the job of the next requirement.

Requirement (v) expresses that person *e*, the addressee, shares with person *s*, the addressor, the belief that any other person would believe that *q* is a reason. That is why, (v) is exactly the same formula as (iii) but now the believer of the proposition is switched, in (iii) the believer was person *s* and in (v) the believer is person *e*.

Why do requirements (iv) and (v) capture the grip on person *e*? As I have already discussed, requirement (iv) grants that person *e* will consider whether a third party will believe *q* to be a reason or not. In contrast with Df1, where we did not reach person *e* inner sphere, thanks to requirement (iv) in Df2, now we do.

Requirement (v) is what grants that reason *q* would certainly have an impact on person *e* and therefore grants the social grip because, even if person e strongly believes that *q* is not a reason, and that all others are wrong, her belief that others would believe *q* to be a reason, and socially interact accordingly, will certainly influence person *e* behaviour.

Finally, we can further improve Df2. Now that requirements (iv) and (v) are understood, we can see that Df2 does not properly grasp the fact that requirement (iv) is responsible for requirement (v).

In other words, we need to capture the fact that person *e* is forced to form a belief about what others would think of reason *q* precisely, even if person *s* does not address person *e* that others would believe *q* to be a reason. I insist, as I said earlier, neuroscientific research findings state that the opinions of others have an impact on us even if they are not explicitly used in a justificatory context.

One way to do this is the following:

Df3 O(s, e, $\forall$xR(q, x, c, a)) iff

i A(s, e, $\forall$x R(q, x, c, a)) and s$\neq$ e $\wedge$

ii B(s, ∀x R(q, x, c, a)) ∧

iii B(s, ∀y(y≠s ∧ y≠e ∧ B(y, ∀x R(q, x, c, a)))) ∧

iv A(s, e, ∀x R(q, x, c, a)) → B(e, ∀y B(y≠s and y≠e and B(y, ∀x R(q, x, c, a))))

In Df3 requirement (iv) in Def2 is dropped since opposable reasons does not need to explicitly express what others would believe. It is a conversational implicature[244]. Now, requirement (iv) tries to capture precisely this conversational implicature. If *q* is truly an opposable reason the conditional in requirement (iv) holds. If so, whenever person *s* addresses reason q to person *e*[245], person e would form the belief that others would believe *q* to be a reason.

In Df3, we have reached what I understand to be an appropriate definition for opposable reasons. We can now take advantage of the formal definition to improve our insight of opposable reasons.

In a sense, requirement (iv) in Df3 is all we need for opposable reasons since with requirement (iv) the social grip of opposable reasons is guaranteed. All other requirements can actually be dropped. As regards requirement (i), the fact that a reason is opposable does not depend on actually being addressed or not, since the addressing part is in the antecedent part of the conditional in requirement (iv). Therefore, requirement (i) can be dropped. As regards requirement (ii), which says that the person that addresses the opposable reason must believe that the reason holds is not actually a requirement at all. In the most frequent situation, where persons are being sincere with the reasons they exchange, requirement (ii) holds. However, it is not needed for the reason to have the social grip on others. As regards requirement (iii), note that it is precisely the consequence of requirement (iv) and thus the information of (iii) is already conveyed by (iv). Therefore requirement (iii) can be dropped. This gives us the advantage: we do not need to refer to

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[244] It can also be seen as STALNAKER's common ground: "What is most distinctive about this propositional attitude is that it is a social or public attitude: one presupposes that φ only if one presupposes that others presuppose it as well" (Stalnaker 2002, p.1).

[245] The presence of the addressee may remind some of DARWALL's second-person reasons (Darwall 2010; 2004; 2006). DARAWLL's second-order reasons assume that the addressor has authority over the addressee to make a claim: '*What makes a reason second-personal is that it is grounded in (de jure) authority relations that an addresser takes to hold between him and his addressee*.[…] *When someone attempts to give another a second-personal reason, she purports to stand in a relevant authority relation to her addressee. I shall say that her address presupposes this authority*' (Darwall 2006, p.3). In contrast, opposable reasons do not presuppose any authority at all. Indeed, my suspicion is that authority should be explained in terms of opposable reasons. However, I will left this topic out of this dissertation.

the actual beliefs of third parties (or even person *e*). All we need is that the conditional of requirement (iv) holds.

Df4 O(s, e, ∀xR(q, x, c, a)) iff

A(s, e, ∀x R(q, x, c, a)) → B(e, ∀y B(y≠s and y≠e and B(y, ∀x R(q, x, c, a))))

Now that we have reached a workable definition for opposable reasons, we clearly see that opposable reasons' social grip depends on the ability that we human beings have to make judgments about what others would consider a reason for action. This aspect deserves more attention since it does not seem reasonable to ask person s that *all others actually believe q to be a reason*.

The opposable reason is felicitous (successful) when person *s* addresses person *e* the belief that others believe *q* to be a reason and person *e* actually forms the belief that others would actually believe *q* to be a reason. This last person *e* belief will certainly have an impact on person *e* behaviour, even if person e does not believe that *q* is a reason for action.

However, opposable reasons is infelicitous if person *s* addresses person *e* the belief that others believe *q* to be a reason and person *e* does not form the belief that others would believe *q* to be a reason.

That opposable reasons are felicitous or infelicitous is part of the success of the definition. Opposable reasons are reasons in a persuasive context. A persuasive act may be successful or not. We can even add more complexity to this idea: we can distinguish different degrees of success: (i) person *e* accepts that others would believe q to be a reason; (ii) person *e* considers probable that others would believe q to be a reason; (iii) person *e* considers possible that others would believe q to be a reason; (iv) person *e* hesitates whether others would believe q to be a reason or (v) person *e* rejects that others would believe q to be a reason. Of course, the different degrees of success imply different behaviours in person e due to the opposable reason. However I leave these complexities for further research.

It is certainly the job of the theory of argumentation in the line of research established by DOUGLAS WALTON[246] and social psychology to explain in which conditions opposable reasons are felicitous and in which conditions they fail, and to which degrees of success. After all, I assumed at the beginning of this section, that the grip we expect reasons to have on others is social in nature.

10.4 JUSTIFIED CLAIMS ABOUT THIRD PARTIES BELIEFS

At this point, some philosophers may be tempted to say that *the expectation* person s has that the reason addressed to person *e* will have a social grip on person *s is never justified*. However, as discussed earlier, theory of argumentation and social psychology seem to offer strong evidence in favour of opposable reasons.

Philosophers may construct sceptical scenarios that are supposed to show that person s is never justified in holding any belief about the beliefs of others. However, here I would lean towards sceptical positions, the same attitude that CHISHOLM adopts for epistemology in general: scepticism is not a reasonable position to hold[247].

It is not reasonable to always mistrust the information that our senses provide us with just because in some situations (for eyesight: illusions, bad weather conditions, changes in light, etc.) our senses fail. In the same way, it is not reasonable to always mistrust our capacity to make judgements about what others would likely believe.

Let us consider what we have achieved so far. We have been able to provide a definition of opposable reasons that explains the grip that a reason *q* has on person e. The key idea here is that person *s* can be justified in believing that others would believe *q* to be a reason. At the same time, person s can expect person e to share this belief because person s has reasons to hold this belief as well.

If necessary, person *s* can make explicit the reasons that back her belief. If reasons are sound, person *e* will certainly need take them into consideration. Even if person *e* thinks that *q* is not a reason, once exposed to the reasons that support person s belief that any third party would believe that *q* is a reason, if the aforementioned reasons are sound, person *e* would believe, at least, that any third party would likely believe that *q* is a reason,

246 See WALTON's *Argumentation Schemes for Presumptive Reasoning* (Walton 1996).
247 See CHISHOLM's Theory of Knowledge (Chisholm 1966).

which would obviously make a difference in her future decisions and behaviour. The social grip will do the job.

11 CONFLICTING CONSTITUTIONAL NORMS AND OPPOSABLE REASONS

Now it is time to tackle the problem I started this dissertation with: the conflict of constitutional norms. In this section, I will exploit the notions developed so far[248] to offer a new account for solving conflicts of constitutional norms. I will defend that the *erga omnes* effect that the justification of the constitutional court's rulings intends to have is best understood in terms opposable reasons.

11.1 OPPOSABLE REASONS IN CONSTITUTIONAL RULINGS JUSTIFICATIONS

In constitutional ruling 133/2010 of the Spanish Constitutional court, the parents alleged the right to home-school their children on the grounds of article 27.1 of the Spanish Constitution, whereas the Spanish administration alleged that there is no such right, since the Spanish legislator has the power to establish a mandatory schooling period in educational centres on the grounds of article 27.4 of the Spanish Constitution.

The Constitutional Court admits that "mandatory schooling period" is compatible with "home-schooling". An administrative control over home-schoolers would suffice to make a "mandatory schooling period" compatible with home-schooling. The administrative control is less restrictive on the parents' liberty to freely choose the kind of education for their children than excluding the home-schooling option as an alternative to educational centres.

However, the Spanish legislator actually opted for a "mandatory schooling period" in "educational centres", and thus opted for excluding the home-schooling option. The Spanish Constitutional Court, though admitting that the Spanish legislator's option is more restrictive than the administrative control over home schoolers, concludes that a "mandatory schooling period" in "educational centres" that excludes the home schooling option is not an unlawful breach of article 27.1 of the Spanish Constitution.

248 Reasons for action in chapter 4, the concept of *pro tanto* and actual (toti-resultant) obligation in chapter 5, conflicting reasons in chapter 6, second-order reasons and exclusionary reasons in chapter 7, enablers and underminers in chapter 8, reflective equilibrium in chapter 9 and opposable reasons in chapter 10.

The question here is: with a less restrictive option for the liberty of parents (which includes home-schooling) extant, how is the current option of mandatory schooling at official educational centres (which excludes home-schooling) justified?

The Spanish Constitutional Court justifies the mandatory schooling period at official educational centres excluding home-schooling as follows:

i Though it is true that both the mandatory education period at official educational centres and home-schooling can achieve the same level of knowledge transmission to children, knowledge transmission is not the unique goal of education.

ii Any education system must grant to all (a) the free development of individual personality within a democratic society and (b) the education of citizens that respect the democratic fundamental principles of human coexistence and fundamental rights and liberties.

iii According to the Spanish Constitutional Court, if home-schooling is allowed, (a) the free development of individual personality within a democratic society and (b) the education of citizens that respect the democratic fundamental principles of human coexistence and fundamental rights and liberties will not be granted to all.

Presented with this argumentation, a *discretionalist* would simply say that the Spanish Constitutional Court has the power to decide and, as regards the law, that is all there is to say. The *proportionalist* would say that the restriction of the parent's liberty consisting in the exclusion of home-schooling is proportionate. The *interpretivist* would probably argue that the exclusion of home-schooling is the best interpretation taking into account all the moral and political principles involved. The specificationist would probably introduce a *proviso* to the parent's liberty in the following terms: the parents can freely determine the education for their children provided that all children are granted (a) the free development of individual personality within a democratic society and (b) the education as citizens that respect the democratic fundamental principles of human coexistence and fundamental rights and liberties. In *specificationst* terms, home-schooling is excluded from the parent's liberty because it does not comply with the aforementioned *proviso*.

Discretionalist, *proportionalists* and *interpretivists*, however, are not able to explain why the constitutional court judges can justifiably expect that others would consider the ruling

as sufficiently justified, even if some may believe the ruling to be wrong. In other words, all these accounts fail to give an explanation of why the constitutional court judges do not only look forward to justify their ruling but to offer a truly erga omnes justification.

The *discretionalist* has nothing to say about the nature of the justification used because no justification is needed: the court simply has the power to do so. In chapter 2, I already argued that this is precisely the problem of *discretionalism* here: it does not respect the importance given by constitutional courts to the justification of the rulings in conflicting cases.

Proportionalism would simply see the argument as part of the *judgement on proportionality*. If this is so, then proportionality judgments are reason-based and therefore the *arithmetic* presentation given by ALEXY does not capture the real nature of *proportionality judgments* and, if a proportionalist insists that the arithmetic presentation is right, it is simply a mystery how the reason used by the Spanish Constitutional Court contributes to the *judgement of proportionality* that leads to the exclusion of home-schooling in this case. Proportionalism therefore seems either a false description or, at best, a mysterious one.

Interpretivism justifies the Constitutional Court decision to accept that the exclusion of home schooling is in accordance with the Spanish Constitution on the grounds that it is the best interpretation of law of in the light of the following two moral and political principles: (a) education must grant to all children the free development of individual personality within a democratic society and (b) it must grant to all children the education of citizens that respect the democratic fundamental principles of human coexistence and fundamental rights and liberties.

The moral and political principles that allow the interpretation of what the law is in a particular case form part of what constitutes the law, these moral and political principles are not something extrinsic or alien to law as an institutional practice. Therefore, the interpretivist's answer to why the Spanish Constitutional Court is justified in using principles (a) and (b) is simply because (a) and (b) form part of the law.

However, how do we know that precisely these principles are part of the law? Consider the following principle: (c) governmental impact on fundamental rights is not allowed whenever a less restrictive measure exists on the grounds that this principle fosters and warrants a pluralistic society, which is the basis for a liberal democracy. It seems to me

that (c) is a legitimate candidate to be part of the law[249]in the same manner (a) and (b) are.

If so, that (a) and (b) are part of the law is not enough to explain the justificatory role we expect constitutional ruling justifications to have. In a sense, *interpretivism* is a *begging the question* strategy: (i) it rejects legal positivism on the grounds that legal positivism is unable to account for constitutional ruling justifications on the grounds that these justifications consists in taking into account moral and political principles but (ii) it explains constitutional ruling justifications precisely in terms of moral and political principles that allow us to identify the law.

The point here is why what the moral and/or political principles that, according to the Constitutional Court, justify the ruling should be a justification for others as well. That is, why should judges be entitled to expect that such a justification should have erga omnes effects?

If moral and political principles were enough, a Catholic judge convinced of the universal truth of Catholicism would use principles from canonical law and moral principles of Catholicism to justify her rulings. However, it does not seem that this strategy fares well. The judge knows that an important part of Spanish society would not consider the arguments laid down as a justification for them. This shows that what the judge considers to be the moral and/or political principles that best interpret the law is not enough to explain the justificatory effect that the constitutional court expects to have on others.

If the Constitutional Court believes that the ruling is justified on moral grounds, in the natural law or interpretivist fashion, then why on earth should what the Constitutional Court believes to be the right outcome of moral reasoning have any justificatory effect towards the rest of us, who may not share the Constitutional Court's moral argumentation in this particular?

Well, one may be tempted to say that it has the power to do so. And it certainly does have the power to decide the case, but do the judges really have the power to impose their moral views on us? Clearly not. The Constitutional Court simply has the power to impose on all others its decision, but not the moral and political grounds that justify the decision.

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249 Indeed, this principle (c) could simply be seen as the manifestation of the necessity requirement of *proportionalism* as seen in section 2.

If it is after all a question of having authority to make the decision, then it seems that we are being sent back to *discretionalism*, which I already rejected.

The fundamental question that all these accounts do not address is: **how the Spanish Constitutional Court can justifiably expect its ruling to be justified before third parties?** That is: why can the Constitutional Court justifiably expect that principles (a) and (b) would be seen by others as a legitimate justification for the exclusion of home schooling?

The answer is that the Constitutional Court does not simply think that (a) and (b) are the moral and political principles that best interpret the law, but it believes that (a) and (b) are opposable reasons. If they are, the Constitutional Court can justifiably expect its ruling to be justified before third parties, even if some will not share its moral and political reading of the law. Opposable reasons thus leave room to the unavoidable disagreement about moral and political principles in justifying legal rulings.

In the Spanish Constitutional decision 154/2002, the conflict is between the exiting obligation of care that parents must provide to their children and the parent's religious freedom. In that case, their child died because no blood transfusion was performed.

The parents opposed the blood transfusion due to their religious beliefs and sought alternative medical treatments. The doctors, knowing that no other medical treatment was available, required a judge to authorize a blood transfusion that the parents refused to authorize.

Once the doctors had the judicial permission, they attempted to perform the blood transfusion, to which the parents did not now oppose. However, the child did oppose so violently that it made it very dangerous to perform the blood transfusion. The doctors asked the parents to convince their child of the need for the blood transfusion. They refused to do so.

The prosecutor charged the parents with manslaughter. The Supreme Court decided against the parents. They appealed before the Constitutional Court. The conflict was whether the parent's obligation of care meant, in the particular circumstances, convincing their child to accept the blood transfusion or if this obligation was an unlawful restriction on the right to freedom of religion.

The constitutional court argues that the parents complied with their obligation of care in (i) taking the child to the hospital; (ii) seeking alternative treatments and (iii) not opposing the blood transfusion authorized by the judge. The constitutional court argues that requiring the parents to convince (or at least try to convince) their child to accept the blood transfusion is a violation of their right to religious freedom, especially taking into account that they allowed doctors and public officials to perform the blood transfusion even if doing so was contrary to their religious beliefs. The parents were thus finally absolved from the charges of manslaughter.

The Constitutional Court is saying that the seemingly *prima facie* obligation to make efforts to convince your child of the need to accept the blood transfusion is overridden by the parent's right to act according to their religious beliefs. However, there is a *proviso here*: the fact that the parents did whatever was in their hands in accordance with their religious beliefs *and that they accepted that doctors authorized by a judge could perform the blood transfusion*. Should the parents have opposed the authorized transfusion, the Constitutional Court would have probably decided differently. The absence of opposition to others to save their child's life was crucial here.

It does seem that the obligation to convince (or to make efforts to convince) one's children to perform an action needed to save one's children's lives is justified by the general obligation of care that parents have towards their children, or put even more crudely, the obligation of parents to do whatever is required to save their children's lives.

However, this obligation is overridden by the parent's right of religious freedom not to act against their most profound convictions *provided that* (i) the parents do whatever is needed within their religious beliefs to save their child's life and (ii) that they do not oppose public officials or persons legally authorized to perform what their beliefs prevented them from doing.

The idea is that if the parents did whatever was needed to save their child's life within their religious beliefs and allow others (public officials or doctors officially empowered) to do *precisely* what their beliefs prevented them from doing, it does not seem that they committed manslaughter, that is, by not performing a certain action: to convince their child to accept the blood transfusion. Since the action is not toti-resultant required because religious freedom prevails, there is no omission.

However, there are two requirements or provisos such that the overriding relationship works in this way: (i) the parents must do whatever is needed within their religious beliefs to save their child's life and (ii) that they must not oppose public officials or persons legally authorized from performing what their beliefs prevented them from doing.

Once the argument is understood, what justifies these *provisos* introduced by the Spanish Constitutional Court? Again, there is the temptation to interpret the aforementioned provisos only as moral reasons. It is obvious that they are moral reasons and therefore it seems that interpretivist and natural lawyers have a point here. However, it does not matter that the constitutional judges think that the two provisos are two valid moral reasons in this case. What constitutional judges think that morality requires is not a justification of their decision because others may disagree on matters of moral and political principles.

The crucial aspect here is that the Constitutional Court expects that citizens would believe that these two provisos allow religious freedom to override their obligation as parents to save their children's lives. That is, the Constitutional Court expects this provisos to be an opposable reason and this is the reason why these provisos appear in the ruling to justify the Constitutional Court final decision.

In ruling 55/2010, a journalist attributed to another journalist a connexion with the failed Spanish *coup d'état* on 23rd of February 1981. The heirs of the journalist accused sued for damages for defamation of the journalist's right to honour. The other journalist alleged that what was said is within the right of freedom of expression.

The Constitutional Court has set forth several criteria to deal with defamation-freedom of speech conflicts. Freedom of speech is assumed to be a very important right in a democratic society. This means that freedom of speech restrictions must be qualified. The Spanish Constitutional Court distinguishes two dimensions of freedom of speech: facts and opinions. The facts attributed to someone do not need to be true but must be trustworthy. As regards opinions and ideas, persons are free to express whatever they wish, provided that the expressions used are not insulting or offensive.

In evaluating trustworthiness of facts and the correction of expressions used in defending opinions and ideas, the Spanish Constitutional Court takes into account whether the information or opinion is of public interest and if the person whose honour is affected is

a public person or not. In this case, the two persons involved were publicly known journalists.

The opinion was given in a sort of public debate. In these circumstances, the Spanish Constitutional Court argued that, even if it is not pleasant to be linked with the *coup d'état*, this opinion was given in a public debate about a known journalist and therefore freedom of speech must prevail. The question here is if the criteria used by Constitutional Court to deal with defamation-freedom of speech conflicts are only moral or political reasons. Again, my point here is that the only way to *explain* the justificatory role of such reasons given in Constitutional Court rulings is in terms of opposable reasons.

Moreover, opposable reasons explain the element of truth in all the accounts discussed in section 2 as well as their drawbacks. As regards discretionalism, it must be noted that the reflective equilibrium presented in section 9 does not grant a unique solution for a given situation. Constitutional court judges may find a socially justified ruling in reflective equilibrium among other possible reflective equilibriums. They simply have the power to decide within socially justified reflective equilibriums. Discretionalism is right in insisting that in constitutional conflicting cases, there is room for constitutional courts to make a justified decision. However, *discretionalism* cannot account for the *erga omnes* effect of such justification.

As regards *interpretivism* and natural law, the reasons given to justify the constitutional ruling are of moral and political nature. It is true that when we consider the reason to exclude home-schooling from the parent's liberty to choose the education system for their children, the reasons that justify the ruling are moral as well as political. However, the justificatory role of the reasons given in the ruling cannot be based on the fact that they are moral or political reasons, since these reasons may not be accepted. The *erga omnes* justificatory role of the reasons given can only be accounted by opposable reasons.

As regards, *proportionalism*, it is true that the principle of suitability and the principle of necessity can be seen as requirements for reasons dealing with constitutional rights. However, the principle of proportionality in the narrow sense should be rejected.

Finally, I regard the reflective equilibrium defended in section 9 as a variant of specificationism. In the next section, I analyse the home-schooling case to show in detail how the reflective equilibrium is applied.

11.2 REFLECTIVE EQUILIBRIUM IN CONSTITUTIONAL RULINGS

Let us reconstruct the Consitutional Court's practical reasoning with the ideas laid down in previous sections. The Constitutional Court must first determine the universe of discourse. We have seen in section 7 that given circumstances *c* we are able to find a set U of relevant facts.

U(c) = {relevant facts and relevant normative facts}

q_1 = article 27.1 of the Spanish Constitution

q_2 = article 9 of Quality of Education Law

q_3 = parents wants to home-school their children

q_4 = article 27.4 of the Spanish Constitution

U(c) = { q_1, q_2, q_3, q_4,}

From the universe of discourse, the Constitutional Court is able to find the available reasons for action thanks to the Rso(U) function given in section 7.4.2:

a = home-schooling

b = force parent's to send their children to educational centres

$Rso(U) = S_1 = \{(R(q2, parents, c, b), \forall yR((q2, parents, c, \neg y) \wedge (y \wedge c \rightarrow \neg b)), R(q_3, parents, c, a)\}$

Since obligations are defined in terms of reasons for action in section 5: it is equivalent to:

$O(b, s, c) \equiv \exists x(R(x, s, c, b) \wedge \forall yR((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg b)))$

This means that parents have a reason x to send their children to educational centres and this reason x is also a reason no to take any action *y* that is incompatible with sending their children to educational centres. What can be the reason that *x* in the sentence above? The only fact that can be the reason that x here is obviously article 9 of the Quality of Education Law. Therefore:

$\exists x(R(x, s, c, b) \wedge \forall yR((x, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg b))) = R(q_2, s, c, b) \wedge \forall yR((q2, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg b))$

Accordingly:

$S_1 = \{R(q_2, s, c, b) \wedge \forall yR((q2, s, c, \neg y) \wedge (y \wedge c \rightarrow \neg b)), R(q_3, parents, c, a)\}$

We know that actions *a* and *b* are incompatible:

$(a \wedge c) \rightarrow \neg b$

$(b \wedge c) \rightarrow \neg a$

From the reasons in S_1 and the fact that actions *b* and *c* are incompatible, we can conclude that R(q2, parents, c, ¬a):

1.- $\forall y((y \wedge c \rightarrow \neg b) \rightarrow R(q2, parents, c, \neg y))$ premise 1

2. $(a \wedge c) \rightarrow \neg b$ premise 2

3.- $(a \wedge c \rightarrow \neg b) \rightarrow R(q2, parents, c, \neg a))$ by ∀(a) to 1.

4.- R(q2, parents, c, ¬a) by modus ponens to 1 and 2.

Therefore:

$S_1 = \{R(q_2, parents, c, b), R(q2, parents, c, \neg a), R(q_3, parents, c, a)\}$

In S_1 we can find the following conflicting reasons as defined in section 6:

$R(q_2, parents, c, \neg a)$ paired to $R(q_3, parents, c, a)$

$R(q_2, parents, c, b)$ paired to $R(q_3, parents, c, a)$

The application of the overriding operator:

$R(q_2, parents, c, \neg a) > R(q_3, parents, c, a)$

$R(q_2, parents, c, b) > (q_3, parents, c, a)$

This means that the sufficient reasons for action in S_1 are:

$SR(q_2, parents, c, b)$

$SR(q_2, parents, c, \neg a)$

This means that the obligation that parents have to send their children to educational centres is a conclusive reason:

$OCR(b, parents\ c) \equiv SR(q_2, parents, c, b) \wedge SR(q_2, parents, c, \neg a)$ by definition of OCR in section 6.2

Therefore, if second-order reasons were not applied, it seems that the constitutional court could simply conclude that the obligations that parents have to send their children to educational centres is a conclusive reason.

However, the parents defend that article 27.1 of the Spanish Constitution is a reason to believe that home-schooling is a negative right.

In section 7.4.4, I defined negative right as a reason for anyone to believe (accept) that no one has a sufficient reason to prevent the right-holder from doing action *a*:

$A(p, x, B((x, \forall y m \exists \neg z\ SR(z, y, c, m), c) \wedge (m \rightarrow \neg a)))$

In the current case:

A((q_1, constitutional court, B((constitutional court, ∀ym¬∃z SR(z, y, c, m),c)∧(m→¬a)))

To simplify notation let us equate:

A((q_1, constitutional court, B((constitutional court, ∀ym¬∃z SR((z, y, c, m),c)∧(m→¬a))))≡ α

Note that α is an inclusionary reason as defined in section 7.4.4. Its scope is determined by the Sco(α) function:

Sco(α)=S_c={∀ym¬∃z SR(((z, y, c, m),c)∧(m→¬a))}

This means that the set of reasons S_1 is affected by the inclusionary function Inc(α, S_1, S_c):

Inc(α, S_1, S_c) = S_1∪S_c=S_2= { R(q_2, parents, c, b), R(q_2, parents, c, ¬a), R(q_3, parents, c, a,, ∀ym¬∃z SR(z, y, c, m),c)∧(m→¬a))}

From the inclusion of ∀ym¬∃z SR(z, y, c, m),c)∧(m→¬a)) in S_2, we can conclude that contrary to what was concluded above before the second order was considered, that it is not true that OCR(b, parents c):

1.- ∀ym¬∃z SR(z, y, c, m)∧(m→¬a)) premise since in S_2

2.- ∀ym z¬ SR((z, y, c, m)∧(m→¬a)) by ¬∃x ≡ ∀x¬A to 1

3.- ¬SR(q2, parents, c, b)∧(b→¬a) by ∀y(parents);∀m(b);∀z(q2) replacement to 2

4.- ∃xR(x, parents, c, ¬b)>R(q2, parents, c, b) by SR definition in section 6.2 to 3

5.- OCR(b, parents c) assumption

6.- SR(q_2, parents, c, b)∧SR(q_2, parents, c, ¬a) by definition of OCR to 5

7.- SR(q_2, parents, c, b) by elimination ∧

8-.- ¬∃xR(x, parents, c, ¬b)>R(q_2, parents, c, b) by SR definition

9.- ∀x¬(R(x, parents, c, ¬b)>R(q_2, parents, c, b)) by ¬∃x ≡ ∀x¬A to 8

10.- ¬OCR(b, parents c) by contradiction 4,9

We are now in a position to show that SR(q_3, parents, a, c):

1.- ∀ym¬∃z SR(z, y, c, m)∧(m→¬a)) premise since in S_2

2.- b→¬a premise

3.- ∀ym z¬ SR((z, y, c, m)∧(m→¬a)) by ¬∃x ≡ ∀x¬A to 1

4.- ¬SR(q_2, parents, c, b)∧(b→¬a) by ∀y(parents);∀m(b);∀z(q2) replacement to 3

5.- $\neg SR(q_2, parents, c, b)$ by elimination of $\wedge$ to 4

6.- $\neg SR(q_2, parents, c, \neg a) \wedge (\neg a \rightarrow \neg a)$ $\forall y(parents); \forall m(\neg a); \forall z(q2)$ replacement to 3

7.- $\neg SR(q_2, parents, c, \neg a)$ by elimination of $\wedge$ to 6

8.- $CR(q_3, parents, c, a)$ by axiom of existence of CR[250] to 5,7

9.- $SR(q_3, parents, c, a)$ by definition of CR to 8

It is true that the constitutional court argues in much simpler terms: if article 27.1 of the Spanish Constitution is a reason to accept that parents have sufficient reason to home-school their children, then $CR(q_3, parents, c, a)$ must be the outcome of practical reasoning, once the second-order reason has been considered, and then OCR(b, parents c) must be rejected.

However, we need still to consider another second-order reason: article 27.4 of the Spanish Constitution is alleged by the administration to justify that the legislator has the power to oblige parents to send their children to educational centres. Therefore article 27.4 of the Spanish Constitution is a reason for everybody (including the constitutional court) to believe that the Spanish legislator has the power to impose an obligation on parents to send their children to educational centres.

Let us remind the formal definition of power to do *a* given in section 7.4.4:

$\forall yA(p, y, \exists xSR(x, s, c, a), c)$

In this case:

A(q_6, constitutional court, $\exists$xSR(x, legislator, c, impose a legal obligation on parents to send children to public centres)).

We can formalize the action of imposing an obligation on others to do action a_1 as an action a_2 such that action a_2 implies that others are obligated to a_2:

$a_1 \rightarrow OCR(a_2, person, c)$

In our case, the action that the legislator has the power to do is imposing an obligation on parents to send their children to educational centres:

$a_1 \rightarrow OCR(b, parents\ c)$

---

250 I have not set forth the axioms for reasons for action as developed in section 4 to 9 in this dissertation. However, I can advance one such axiom: if the universe of discourse is not the empty set, then at least one reason is not overridden. This axiom is granted by the behaviour we expect from the overriding operator.

Since *a* is an already used constant that stands for 'home-schooling', let constant *g* be the action of creating the obligation on parents to send their children to educational centres:

$g \rightarrow OCR(b, parents\ c)$

Accordingly, the second-order reason above should be:

$A(q_4, constitutional\ court, \exists x SR(x, legislator, c, g))$

In the second-order reason above the only candidate in the universe U_1 is q2. Therefore:

$A(q_4, constitutional\ court, SR(q2, legislator, c, g))$

To simplify notation let us equate:

$A(q_4, constitutional\ court, SR(q2, legislator, c, g)) \equiv \beta$

Note that β is an inclusionary reason as defined in section 7.4.4. Its scope is determined by the Sco(β) function:

$Sco(\beta)=S_c=\{ SR(q2, legislator, c, g)\}$

This means that the set of reasons S_2 is affected by the inclusionary function Inc(β, S_2, S_c) ot obtain a new set of reasons S_3:

$S_3=Inc(\beta, S_2, S_c) = S_2 \cup S_c = \{ R(q_2, parents, c, b), R(q2, parents, c, \neg a), R(q3, parents, c, a), \forall ym \neg \exists z SR(z, y, c, m),c) \wedge (m \rightarrow \neg a)), R(q2, legislator, c, g) \wedge (g \rightarrow OCR(b, parents, c))\}$

The problem with S_3 is that, due to the introduction of second-order reasons, it leads to a contradiction. Let us see why.

1.- $\forall ym \neg \exists z\ SR(z, y, c, m) \wedge (m \rightarrow \neg a))$ premise since it is in S_3

2.- SR(q2, legislator, c, g) premise since it is in S_3

3.- $g \rightarrow$ OCR(b, parents, c) premise since it is in S_3

4.- g assumption

5.- OCR(b, parents, c) by modus ponens 3,4

6.- $\exists x(SR(x, parents, c, b) \wedge \forall ySR((x, parents, c, \neg y) \wedge (y \rightarrow \neg b))$ by definition of OCR

7.- $SR(q2, parents, c, b) \wedge \forall ySR((q2, parents, c, y) \wedge (y \rightarrow \neg b)$ since q2 is the only candidate in U_1 that makes SR(q2, parents, c, b) and $\forall ySR((q2, parents, c, y) \wedge (y \rightarrow \neg b)$ true

8.- $\forall ymz \neg SR(z, y, c, m) \wedge (m \rightarrow \neg a))$ by $\neg \exists x \equiv \forall x \neg A$ to 1

9.- $\neg SR(q_2, parents, c, b) \wedge (b \rightarrow \neg a)$ by $\forall z(q_2)$ and $\forall m(b)$ replacement to 8

10.- $\neg$SR(q2, parents, c, b) by elimination of $\wedge$ to 9

11.- SR(q2, parents, c, b) by elimination of $\wedge$ to 7

13.- $\perp$ contradiction 10,11

This contradiction found in First-Order logic terms is a technical expression of the intuitive idea that the right of parents to home-schooling and their obligation to send them to educational centres cannot be both conclusive reasons as requested by the introduction of their corresponding second-order reasons α and β above. What can the constitutional court do to solve this conflict of reasons in a justified manner before third parties? As defended earlier, through opposable reasons.

At this point, the constitutional court has performed steps (1) to (4) of the reflective equilibrium algorithm as defined in section 9. According to step (5) of the reflective equilibrium algorithm, the constitutional court should now look for missing relevant facts in the universe of discourse. In a situation where the overriding operator with the second-order reasons leads to a contradiction, step (5) is necessary: we need to look for initially absent relevant facts that may lead to a different outcome.

The constitutional court may consider the relevance of these two normative facts:

> q_3 = education must grant to all children the free development of individual personality within a democratic society
>
> q_4 = education must grant to all children the formation of citizens that respect the democratic fundamental principles of human coexistence and fundamentals rights and liberties

A new universe of discourse is defined:

> $U_2(c) = \{ q_1, q_2, q_3, q_4, q_5, q_6, \}$

The constitutional court has a *prima facie* reason to believe that any other person y would believe that any education system must comply with the following requirements (a) the free development of individual personality within a democratic society and (b) the education of citizens that respect the democratic fundamental principles of human coexistence and fundamentals rights and liberties.

> Let r1 stand for the free development of individual personality within a democratic society
>
> Let r2 stand for the education of citizens that respect the democratic fundamental principles of human coexistence and fundamentals rights and liberties.

We need to distinguish two kinds of requirements: (a) requirements on reasons for action and (b) requirements on rights. The latter are requirements on second-order reasons and not directly on reasons for action.

Requirements are necessary conditions for something to be the case. For instance, r_1 and r_2 are requirements for the educational system. Put formally:

Let D be the property of being an education system.

$\exists x Dx \rightarrow r_1 \wedge r_2$

If r_1 and r_2 are requirements on reasons for action, then the actions that do not meet the criteria are not reasons for action any more. This can be expressed as follows:

$\exists x(Dx \rightarrow r_1 \wedge r_2 \wedge \forall yzt(R(y, z, c, x))$ in $S_n \rightarrow \neg(r_1 \wedge r_2) \rightarrow \forall yzt \neg R(y, z, c, x)$ in $S_{n+1})$

This is obviously not our case because, if it were, then the fact that the parents want to home-school their children would not be a reason for them to home-school their children any more. This should not be allowed in our case. Even if the legislator has the power to impose the obligation on them to send their children to an educational centre, it still makes perfect sense to say that the fact they wish to home-school their children is, in spite of the legal obligation, a reason for them to home-school their children.

As a matter of fact, requirements r_1 and r_2 are not requirements on any reason for action here, but on the parent's right to home-school their children. Parents do have such a right provided that requirements r_1 and r_2 are met. This means that if requirements r_1 and r_2 are not met one does not have the right, meaning that parents will not have the second reason to believe that no one has a sufficient reason to prevent them from home-schooling their children any more:

1.- $\neg(r_1 \wedge r_2) \rightarrow \neg \exists z A((q_6$, constitucional court, $B(\forall ym \neg \exists z$ SR(z, y, c, m),c)$\wedge(m \rightarrow \neg a)))$ if requirements are not met, parents do not have the right to home-school their children.

2.- $Da \rightarrow \neg(r_1 \wedge r_2)$ premise (home-schooling does not meet the requirements)

3.- Da assumption

4.- $\neg \exists z A((q_6$, constitutional court, $B(\forall ym \neg \exists z$ SR(z, y, c, m),c)$\wedge(m \rightarrow \neg a)))$ parents do not have the right to home-school their children.

It is true that if other relevant facts or normative facts (such as principle (c) mentioned earlier) were considered, the constitutional court would have reached a different reflective equilibrium. The constitutional court must aim to find the best justified and more stable

reflective equilibrium[251]. However this is a means obligation that is imposed on constitutional courts. It cannot be a result obligation since the reflective equilibrium is an open algorithm. What we demand of constitutional courts is not THE solution to the case – this idea is alien to the idea of reflective equilibrium as presented in section 9 – but a socially justified ruling.

[251] MORESO, within the debate of supreme and constitutional courts discussing rulings of other supreme and constitutional courts' jurisdictions, advocates for a dialog between among supreme and constitutional courts of different jurisdictions in terms of reflective equilibrium (Moreso 2018a)

12 LAW AS PUBLICLY KNOWN OPPOSABLE REASONS

12.1 BEGGING THE QUESTION: LAW OR 'PRIMITIVE' FORMS OF SOCIAL INTERACTIONS

Legal philosophers try to give an account of law that aims at universality[252]. RAZ in *Between Authority and Interpretation* says:

> *"I have argued that **while the concept of law is parochial, legal theory is not**. Legal theory can only grow in cultures which have the concept of law. But its conclusions, if valid at all, apply to all legal systems, including those, and there are such, which obtain in societies which do not have the concept of law"*[253]

HART in the concept of law explicitly rejects the possibility of a definition of the concept of law but openly defends the possibility of a universal account of law which explains the difference between law, morality and other types of social phenomena:

> *"For its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena."*[254]

Legal philosophers have been well aware from the very beginning that "*primitive*"[255] law and international law offer multiple cases that do not fit well with certain legal institutions such as legislatures, adjudication bodies or even the very concept of legal norm or rule. In spite of the aim of universality of legal philosophy, HART believes that such cases are not the problem for a philosophical account of law:

> *"**Primitive law and international law are the foremost of such doubtful cases**, and it is notorious that many find that there are reasons, though usually not conclusive ones, for*

252 DWORKIN is an exception. He openly admits that his account of law suits only US law and partly to UK law.

253 See RAZ's Between authority and interpretation : on the theory of law and practical reason (Raz 2009, p.41)

254 HART's The Concept of Law (Hart 2012, p.17).

255 For a criticism of the use of 'primitive law' as a descriptive term see ROBERTS's, Order and Dispute: An Introduction to Legal Anthropology (Roberts 2013).

> *denying the propriety of the now conventional use of the word 'law' in these cases. The existence of these questionable or challengeable cases has indeed given rise to a prolonged and somewhat sterile controversy, but surely they cannot account for the perplexities about the general nature of law expressed by the persistent question 'What is law?'* ***That these cannot be the root of the difficulty seems plain for two reasons****."*[256]

What are these two reasons that allow HART to affirm so confidently that international law and primitive cases are not a problem after all? Let us see the first reason stated by HART himself:

> *"First, it is quite obvious why hesitation is felt in these cases.* ***International law lacks a legislature****, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions. Certain* ***types of primitive law****, including those out of which some contemporary legal systems may have gradually evolved,* ***similarly lack these features****, and it is perfectly clear to everyone* ***that it is their deviation in these respects from the standard case which makes their classification appear questionable****. There is no mystery about this."*[257]

HART thus argues that, as regards the lack of a legislature of international law and some primitive law cases, "it is their deviation in these respects from the standard case which makes their classification appear questionable".

Obviously, by standard here Hart assumes having a legislature. HART thus denies that such cases are central cases of law. This argument is simply a petitio principi: HART is simply begging the question here. Let us turn now to HART's second reason to discard primitive law and international law:

> *"Secondly, it is not a peculiarity of complex terms like 'law' and 'legal system' that we are forced to recognize both clear standard cases and challengeable borderline cases."*[258]

HART argues that the existence of borderline cases is not peculiar to 'law'. HART is right here[259]. However the argument is beside the point because it does not explain why having

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[256] See HART's The Concept of Law (Hart 2012, p.3).
[257] See HART's The Concept of Law (Hart 2012, p.3).
[258] HART's The Concept of Law (Hart 2012, p.4)
259 For the open texture of language see Charles A. Baylis's Friedrich Waismann. Verifiability (Baylis 1947). For a discussion of this topic in Hart's concept of law see Brian Bix's H. L. A. Hart and the "Open Texture" of Language' (Bix 1995).

a legislature is the standard case. Certainly it is in the case of Western law, but besides being *ours*, is there any other element to deem it as central to the nature of law?

It rather seems that to judge something as a standard case of law we need an account from which make such a judgement. If this is so, discarding the so called primitive law phenomena as non-standard cases seems simply begging the question.

ROBERTS points out that HART's account of law is of no use for anthropologists when analysing other societies:

> *"Through the device of these secondary rules Hart appears to dissociate his model from any parochial institutional content and invest it with considerable value for cross-cultural purposes. But the escape is illusory because the three categories of secondary rules imply, and require, the presence of legislative and adjudicatory agencies. Hart recognizes that this requirement may not be met in all societies, as it is 'possible to imagine a society without legislature, courts or officials of any kind', but does not consider that many would in practice be excluded on this account. He states that any community managing with primary rules alone would necessarily be a small one and that 'few societies have existed in which legislative and adjudicative organs and centrally organized sanctions were all entirely lacking'. While there may be some room for argument as to what constitutes legislative and adjudicative organs, or centrally organized sanctions, Hart appears simply wrong upon this last point: many societies have existed without them and it is with how order is secured in such societies that we shall be primarily concerned. Furthermore, it is his insistence upon these features which makes his ideas of so little help to us here."*[260]

[260] See ROBERTS's *Order and Dispute: An Introduction to Legal Anthropology* (Roberts 2013).

As a matter of fact, legislatures, adjudication bodies[261] and even legal norms are concepts that are completely alien to some societies. For instance, Bohannan reports that the Tiv[262] seem to settle disputes not according to rules, which seem not to exist, but according to their cultural understanding of how to settle the case. As regards the lack of legislatures or bodies of adjudication, the Trobriand Island societies famously reported by Malinowsky are just one case of many[263].

From this, ROBERTS concludes that anthropologists should abandon the use of legal terms to analyse other societies and instead shift to a different framework of interpretation: order and dispute. He suggests seeing the particular mechanisms that each society uses to keep order and handle dispute without applying our own legal concepts which are tailored to our own Western legal tradition:

> *"Under these circumstances it becomes necessary to establish a different framework for this study; one that will not come under strain in the face of diverse values and various institutional forms. In choosing to focus on 'order' and 'dispute', two simple assumptions are made. First I take for granted that some degree of regularity must prevail in any social group if it is to survive. That much is implied in the very idea of a society. Secondly, it is assumed that disputes are inevitable"*[264]

In what follows, I will show that opposable reasons can be used to build a minimal account of law that seems to explain in fairly simple terms:

i that there are true propositions of law.

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[261] In contrast, RAZ defends that the presence of adjudication bodies is a necessary feature of all legal systems: "many, if not all, legal philosophers have been agreed that one of the defining features of law is that it is an institutionalized normative system. Two types of institutions were singled out for special attention: norm-applying institutions such as courts, tribunals, the police, etc., and norm-creating institutions such as constitutional assemblies, parliaments, etc. I have argued elsewhere that the existence of normcreating institutions though characteristic of modern legal systems is not a necessary feature of all legal systems, but that the existence of certain types of norm-applying institutions is" (Raz 1979a, p.105). RAZ offers just one argument in favour of the necessary presence of adjudication bodies: "my claim is that our common knowledge of intuitively clear instances of municipal systems confirms that they all contain primary institutions and that such institutions play a crucial role in our understanding of legal systems and their function in society."(Raz 1979a, p.111). I have two criticisms to this argument: (i) the Trobian Islands case reported by MALINOWSKI (Bronislaw 1926) is just one counter-example among many others (Roberts 2013, p.14) and (ii) the argument is based on the central case idea discussed above and that I rejected because it is question-begging.

262 See BOHANNAN Justice and Judgment among the Tiv (Bohannan 1989).

263 See MALINOWSKI'sCrime and Custom in Savage Society (Bronislaw 1926).

[264] See ROBERTS's *Order and Dispute* (Roberts 2013).

ii that the so called “primitive” cases are as standard as Western law cases.

iii that international law is by no means a limiting case of law.

iv that law is a distinctive normative domain different from morals and other normative domains.

I will start by discussing the relationship between opposable reasons and the law. I will show that all legal reasons are publicly known opposable reasons. However, not all opposable reasons are legal reasons. I will then argue that opposable reasons where a minimal requirement of publicity is given constitute legal reasons. Accordingly, proposition of law consists in statements on whether or not certain opposable reasons hold. I will show that in this light: primitive law and Western law are at equal terms. Moreover, international law will not be seen as a limiting case. Finally, opposable reasons will explain why law is a distinctive normative domain from morals or other normative domains.

12.2 LEGAL REASONS AS PUBLICLY KNOWN OPPOSABLE REASONS

In this section I will argue that legal reasons are opposable reasons that meet certain criteria of publicity.

Legal reason $\alpha \equiv$ opposable reason α meeting certain criteria of publicity

In order to establish this identity between legal reasons and opposable reasons that meet certain criteria of publicity, I will first show that if α is a legal reason, then α is an opposable reason, and afterwards I will defend that if α is an opposable reason that meets certain criteria of publicity, then α is a legal reason.

Then I will come back to show that if α is a legal reason, not only α is an opposable reason, but there is always some kind of publicity for the opposable reason to be known. I will then be in a position to defend that the following bi-conditional holds:

Legal reason $\alpha \leftrightarrow$ opposable reason α meeting certain criteria of publicity

Let us tackle the first conditional: to understand this conditional it is necessary to recall the definition of opposable reasons in section 10:

Df4 $O(s, e, \forall x R(q, x, c, a))$ iff

$A(s, e, \forall x\, R(q, x, c, a)) \rightarrow B(e, \forall y\, B(y \neq s \text{ and } y \neq e \text{ and } B(y, \forall x\, R(q, x, c, a))))$

I argued in section 10 that the grip opposable reasons have on others (apart from the person stating the reason) depends on whether, this person *e* would believe that others would believe that R(q, x, c, a) holds, provided that a reason R(q, x, c, a) is addressed to person *e*.

It does seems that if R(q, s, c, a) is a legal reason, then any person s has reason to believe that the addressee (person e) has a reason to believe that any third party would consider that R(q, x, c, a) holds, that is, that a certain reason for action holds. This means that the concept of legal reason implies the concept of opposable reason.

If R(q, s, c, a) is a legal reason then any person x has reason to believe that R(q, s, c, a) is an opposable reason. Which, means that, if R(q, s, c, a) is a legal reason then any person x has reason to believe that, if R(q, s, c, a) is addressed to a person y then this person y would believe that any other person z would believe that R(q, s, c, a) holds.

Put formally:

$$\forall xB(q, x, \forall yA((y, R(q, s, c, a))\rightarrow B(e, \forall y B(y\neq s \text{ and } y\neq e \text{ and } B(y, \forall x R(q, x, c, a))))$$

Let us flesh out this conditional with an actual example.

Let:

q = under Spanish law, it is forbidden to drive faster than 120 km/h on the motorway in Spain.

a= driving faster than 120 km/h on the motorway.

In consequence, *q* is a legal reason for person *s* not to do *a* in circumstances *c*, that is, R(q, s, c, ¬a) holds as a legal reason. True, but not only. R(q, s, c, ¬a) is also an opposable reason. Why? Since *q* is assumed to be a legal reason, it is obvious that person s would have a justified belief that, when addressing R(q, s, c, ¬a) to any other person *e*, person *s* has a reason to believe that person *e* would think that any third party would consider R(q, s, c, ¬a) as a reason for action as well.

$$\forall xB(q, x, \forall yA((y, R(q, s, c, a))\rightarrow B(e, \forall y B(y\neq s \text{ and } y\neq e \text{ and } B(y, \forall x R(q, x, c, a))))$$

Obviously, one may wonder whether *q* is actually the law or not. True. But that would be a different question altogether. Here, we are simply capturing the consequences of assuming that *q* is what the law says. The thing here is that, if R(q, s, c, ¬a) is a legal reason, person *s* has reason *q* to believe that, when addressing (or opposing) legal reason R(q, s, c, ¬a) to any other person *e*, person *e* also has reason *q* to believe that any other third party would accept R(q, s, c, ¬a) as a reason for action.

What is said to be the law here, that is, the fact that *q* is also a reason to believe that R(q, s, c, ¬a), is an opposable reason. Interestingly, person s can make a much stronger claim. Person s, knowing that R(q, s, c, ¬a) is a legal reason, can make the following justified claim: any person x has a justified belief that R(q, s, c, ¬a) is an opposable reason. Why can person s make such a claim?

$$\forall xB(q, x, \forall yA((y, R(q, s, c, a)) \rightarrow B(q, e, \forall y\, B(y \neq s \text{ and } y \neq e \text{ and } B(y, \forall x\, R(q, x, c, a))))$$

The reasons that justify person *s* belief that R(q, s, c, ¬a) is an opposable reason are public, that is, person s knows that *the same reason* she has to believe that R(q, s, c, ¬a) – namely the fact that *q* – is an opposable reason is available to anybody else. In consequence, person s has a reason to believe that any person x will believe that R(q, s, c, ¬a) is an opposable reason.

Therefore if R(q, s, c, ¬a) is a legal reason, then (i) person s has a justified belief that R(q, s, ¬a, c) is an opposable reason and (ii) person s has a justified belief that any other person x also has a justified belief that R(q, s, c, ¬a) is an opposable a reason. This second part (ii) requires that the reason to believe must be available to third parties and not only to person *s*, that is, the reason to believe must be public. Otherwise, requirement (ii) that legal reasons impose on opposable reasons demands publicity of some sort. This means that the initial conditional we started with can be further refined to:

If R(q, s, c, a) is a legal reason → R(q, s, c, a) is an opposable reason and *q* in R(q, s, c, a) is a public available reason to believe that any third party would consider that R(q, s, c, a) to be an opposable reason.

Thanks to this conditional, we can say that if R(q, s, c, a) is a legal reason then R(q, s, c, a) is a publicly known opposable reason. This fact suits all kind of legal reasons well. For instance, the fact that *q* consisting in the existence of a custom to do *a* in circumstances c is reason for person s to believe that R(q, s, c, a) is an opposable reason. The reason for believing that R(q, s, c, a) is an opposable reason is the custom itself, which is available to anyone, that is, it is public.

A judicial decision (or any ruling of any legal body) that requests person *s* do action *a* is also a reason for person *s* to believe that the fact that the judicial decision requires her to do *a* is an opposable reason. The opinions of legal scholars, a rule established in the will

for the heirs, a right or obligation set forth in a contract, etc. are all legitimated cases of legal reasons that can be easily captured by the notion of publicly known opposable reasons.

In other words, if α is a legal reason – whatever its nature: statue, contract, custom, public deed, the decision of the elders of the tribe – then it is a publicly known opposable reason. Its force comes from two very different origins: if person s thinks that α is not only an opposable reason but a reason for action then the normativity of the reason for action obviously determines person s behaviour.

However, as already discussed in section 10, the fact person *s* accepts that α is an opposable reason does not imply that person s accepts that the reason for action in α actually holds. If she does, there are two forces: (i) the normativity from believing R(q, s, c, a) and (ii) the social grip of R(q, s, c, a). If she does not, only the social grip of R(q, s, c, a) acts on the person.

This means that *the power of determining persons' behaviour* of legal reasons does not come from the fact that person s believes that a certain reason for action in α holds but *rather that it comes from the fact that α is an opposable reason*.

We should remember here that opposable reasons are reasons to believe that others would believe that a certain reason for action holds. The power that opposable reasons have to shape our actions is through *our beliefs* that we have *about the reasons for actions that other may have*. Obviously, in the case of legal reasons, the fact that the reasons to believe that certain opposable reasons hold *are public* strengthen the social grip of opposable reasons.

With what I have been saying, the case is made for the conditional that if α is a legal reason, then it is a publicly known opposable reason. If we are now able to show that the inverse conditional actually holds, that is, that if α is a publicly known opposable reasons then α is a legal reason, we will have found a legitimate minimal definition for legal reasons: publicly knowable opposable reasons.

However, it does not initially seem that all publicly knowable opposable reasons are legal reasons. It seems that most basic moral reasons are also candidates for publicly knowable opposable reasons, but we may be reluctant to affirm that moral reasons are legal reasons simply because they are publicly knowable opposable reasons.

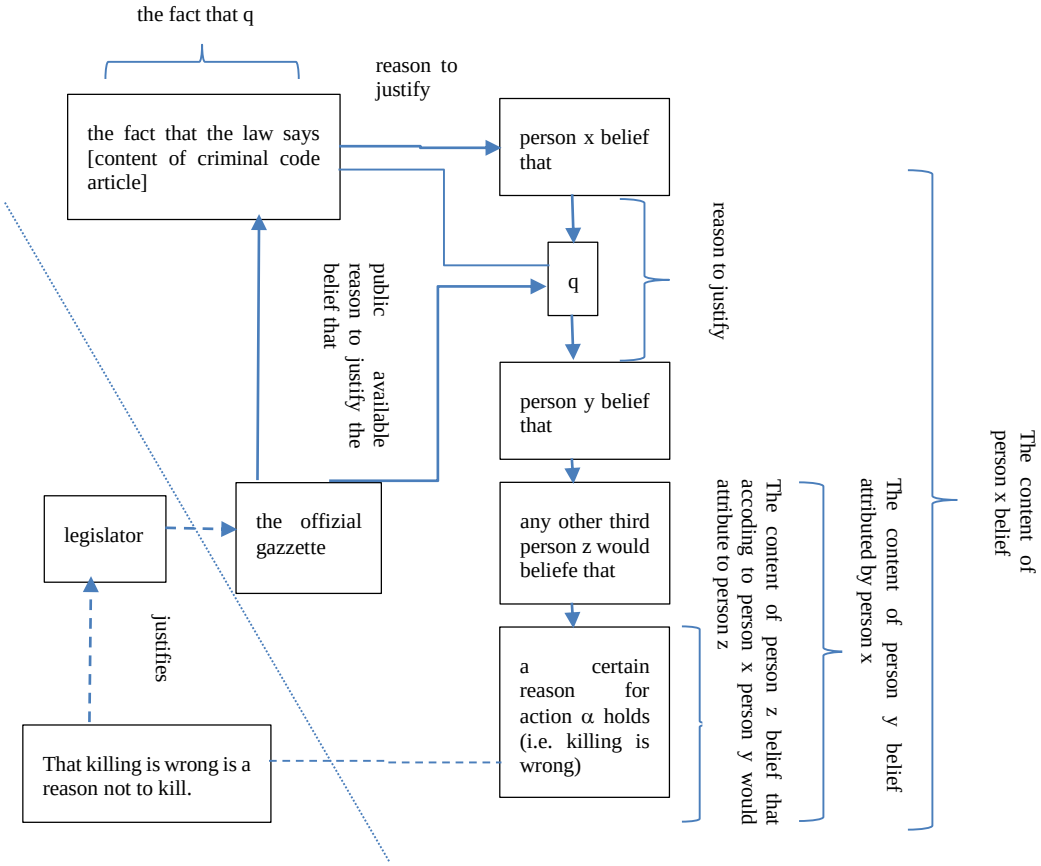
For instance, it is certainly *common knowledge* and thus, *publicly known*, that lying is wrong. We certainly have reason to believe that it is an opposable reason because we have reason to believe that others would believe that, that lying is wrong, is a reason for action. However, many would be reluctant to say that the fact that it is common knowledge that lying is wrong is enough to qualify this moral principle as also being a legal reason. Does this mean that our definition of legal reasons as publicly knowable opposable reasons fails?

Let us consider another example of moral principle: killing people is wrong. We certainly have a publicly known reason to believe that others would think that, killing people lying is wrong, is a reason for action. That is, we have a publicly known opposable reason. This reason is, in Western legal tradition, a legal reason because the law says that killing people is wrong. For instance, in Spain, article 138 of the Spanish Criminal Code says:

> *"Whoever kills another shall be convicted of manslaughter, punishable with a sentence of imprisonment from ten to fifteen years"*

I am well aware that the Spanish Criminal Code does not say that killing people is wrong but rather that the person "*shall convicted of manslaughter*". This suggests that the moral principle is what justifies the fact that the Spanish legislator enacted article 138 of the Spanish Criminal Code. The moral principle and what the law says are two different things. I fully agree with this line of reasoning.

However, the last line of reasoning is fully compatible with the following statement: that the fact that law says *q* is a publicly available reason for a person x to believe that any person has a publicly available reason to believe that others (any person z) would believe that, that killing people is wrong, is a reason for action. The following schema may help to understand the interaction of the different elements involved:



The diagonal dotted line separates what is really an element of the opposable reason and what is simply its causal origin. The fact that killing is wrong is a reason not to kill is probably the moral justification for the decision of the legislator to enact article 138 of the Spanish Criminal Code.

However, this moral justification plays no role in the opposable reason. The crucial fact for an opposable reason is if the following conditional holds: if person x addresses a reason for action α(killing is wrong), then person y would believe that any other person z would believe reason for action α holds.

What constitutes the reason for person x to believe that α is an opposable reason is the fact that *q*, that is what the law says (i.e the content of article 138 of Spanish Criminal Code). However, here we have an extra item that was not present in the case of lying is wrong: the official gazette. That the official gazette contains the fact that *q* is a publicly available reason to believe the fact that *q*.

Since it is publicly available, person x knows that it is also a reason for person y to believe certain things about how others would position themselves as regards the reason for action α. The fact that the reason to believe that α is an opposable reason is publicly available is what distinguishes legal reasons from other opposable reasons.

Note that the lines connecting the legislator's decision and the official gazette are dashed lines. This tries to indicate that it does not really matter if the legislator did not have enough power to pass such an enactment or that the law is unconstitutional or void. Those are very interesting problems within legal reasons. After all, unconstitutional laws are opposable reasons until they are repealed or derogated. The only thing that matters to qualify an opposable reason as a legal reason is if the opposable reason has publicly available reasons to believe that such an opposable reason exists.

In essence, what constitutes a legal reason is (i) the fact of a reason having the social grip required to be an opposable reason as discussed in section 10 and (ii) publicly available reasons to believe that such a reason is an opposable reason.

Discussions about nullity, voidness, not within the powers of the authority, unconstitutionality, etc. are problems among legal reasons. Even validity is a problem among legal reasons. There are valid legal reasons and invalid legal reasons. The concept of validity is itself constructed upon other legal reasons. The only thing that legal reasons require to exist are the points (i) and (ii) above. All other discussions must be regarded as a discussions within the legal normative domain, that is, the normative domain of legal reasons.

In spite of allowing us to distinguish between the lying and killing examples, the latter being a legal reason while the former only a moral reason, our definition of legal reasons fails because it is still too dubious. Not all instances of publicly available opposable reasons count as legal reasons in Western law. Only a subset of public reasons to believe that a reason is an opposable reason are legal reasons. What kind of publicity are we looking for?

The requirements for the kind of publicity that opposable reasons must have to qualify as legal reasons varies from one society to another and through time. In some societies, the fact that some reason for action is commonly known by the relevant human group may be perfectly good enough to qualify as a legal reason. In other societies, much more

stringent requirements are needed for the kind of publicity that makes an opposable reason a legal reason[265].

In Western law, legal norms are reasons to believe that certain opposable reasons hold. However, the kind of publicity required for these opposable reasons to qualify as legal reasons is much more demanding than the simple fact of being publicly available.

After a fairly complex process which involves other legal reasons affecting the behaviour of political representatives, the law enacted is made public through the official gazette. The official gazette is in its turn also affected by many legal reasons that is, by many publicly known opposable reasons that determine how the official gazette is *produced* in order to have legal opposable reasons effects.

In post-industrial societies formed by millions of people and where legal reasons are supposed to effectively deploy their power as opposable reasons for all this big number of people, that is, to deploy their social grip, it is only natural that the reasons to believe that some opposable reasons actually hold should be publicly available in a certain manner.

Publicly available reasons to believe means, in post-industrial societies involving millions of human beings, that these reasons need to be objectified: official gazettes, public documents, public registers, public resolutions, etc. However, it is clear that the publicly available reasons in other kinds of societies, involving much fewer people, need not be objectified in this way.

For instance, the oral decision of the elders in a certain ritual complies perfectly with the kind of publicity needed for this reason to be a publicly known opposable reason and thus, to be a legal reason in such a society. The memory of those present is enough to make the decision publicly available. The fact that the decision is taken within a ritual is of major

265 PIRIE defends that form rather than function is what distinguishes law from other social general norms (Fernanda 2013, p.223). I agree with PIRIE that form – that is the fact that law must have some form or manifestation so that it can be publicly available or publicly knowable – is essential to law: legal reasons are reasons such that there is some *external form or manifestation* (official gazette publications, Public Deed, ritual, etc.) that justifies us to believe that a reason for action holds. However, I disagree with PIRIE's contempt towards function: the function of this external forms or manifestations is precisely to make some opposable reasons publicly knowable.

importance. The ritual is the very reason to believe that the decision will be publicly known, and thus a legal reason.

In other societies, the mere manifestations of the will of the leader is enough for the publicity purposes of opposable reasons. Legal anthropology in fact shows that the ways a reason to believe that a reason is an opposable reason vary a lot. However, if a reason is to be considered legal, this requirement of publicity is needed.

FERNANDA PIRIE defends that there is ethnographical evidence that the evolution of law cross-culturally examined indicates that law tends to adopt some form or another. According to her, law tends to formality. I see FERNADA PIRIE's work as ethnographical evidence that legal reasons are publicly available reasons to believe that certain opposable reasons hold. What is considered as publicly available evidence to believe in the existence of legal reasons varies greatly from society to society, that is, the external formalistic evidence varies, but there must be some publicly known reasons that adopt a certain form.

It is clear now that the simple fact that a moral principle is known to be an opposable reason does not turn this principle into a legal reason in Western societies. In our post-industrial societies, we impose further qualification to the kind of publicity needed for opposable reasons to become legal ones. However, in other societies, this *common* knowledge, is all that is required.

What kind of publicly known opposable reasons count as legal reasons depend on the requirement for publicity that each society or human group imposes? What distinguishes the legal domain for a certain society is not what legal reasons people have but rather what kind of publicity is requested for opposable reasons to hold in a given human group[266].

I also think that the fact that publicity is a requirement for opposable reasons to be legal reasons led FULLER[267] to defend publicity as the formal requirement that distinguishes

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266 Human group should be taken here to be a very minimal concept: no concept of people or nation or tribe is implied. Just a set of human beings for whom certain criteria for the publicity of opposable reasons are shared. If we consider that a nation or country as a set of people that complies with such minimal requirement, it is also clear that many subsets of people in a country or nation count as a human group for the purposes of opposable reasons. In a sense, nations are better defined in terms of certain opposable reasons within a human group than to define opposable reasons (or legal reasons) in terms of the laws of the nation. However, this is a topic that deserves further discussion.

267 See FULLER's The Morality of Law (Fuller 1969).

law from other normative domains. Fuller saw the publicity requirement of legal reasons as a moral requirement. However, I consider that the requirement of publicity is not itself a moral requirement but an epistemic requirement: publicity here helps persons involved in a practical reasoning *to justify to others their beliefs* that certain reasons are opposable reasons.

12.3 THE EXPENDABILITY OF THE ORIGIN OF LEGAL REASONS

There are many different ways by which a reason becomes an opposable reason. Let us consider some of them[268]. I think that social psychology and legal anthropology can help us to further identify ways that allow a reason to become opposable and thus acquire the social grip opposable reasons have. In this sense, I think that a complete taxonomy of the different ways reasons become opposable is a hard theoretical task to be done. Besides, and this adds complexity to this subject, the different ways reasons become opposable are strongly intermingled. In sum, this section is just a glimpse of what it should be.

One simple origin is leadership. Any human group tends to have leading people or leaders. The reasons why leaders arise are different in different times and places because different virtues are demanded by people in different cultures and times[269].

In a small group this is very clear. Contrary to what we initially tend to think, people really tend to believe – often even without the minimal scrutiny – what a leader says and tend to believe that what she does is right and deserves to be imitated[270]. That leadership influences the beliefs and behaviour of persons in a group of people is a very well-known fact by social psychologists. Social psychologists have been studying this phenomena for a long time[271].

Once a group of people have a well-established leader, beliefs and actions of the leader about what is to be done are certainly the origin of some opposable reasons. Let us imagine that the leader starts to clean the front of her house once a week, always on a Saturday. Most members of that group would start to do the same. After a while, most

268 I will not try to be give an exhaustive and complete list.
269 For the influence of leadership see CIALDINI (Cialdini 2007).
270For imitation of leaders in cults see also CIALDINI (Cialdini 2007).
271 See ELLIOT. ARONSON and JOSHUA. ARONSON's The Social Animal (Aronson and Aronson 2012).

members would believe that any other members would believe that the fact that the leader cleans her house every Saturday is a reason to clean one's house every Saturday, and thus, an opposable reason is born.

Even after some time, this opposable reason may be further simplified. Imagine that, because *the fact that the leader cleans her house every Saturday is a reason to clean one's house every Saturday* is an opposable reason, many people would do it. The fact that virtually everyone does it reinforces the social pattern. This may give rise to a convention or tradition. The content of the opposable reason has changed, however, the reason for action has not.

The fact that everybody does so or the fact that it is a tradition is now the reason to believe that cleaning one's house on Saturday is a reason for action. Why? Imagine that the leader who was at the origin of this opposable reason is already dead and thus her direct personal influence cannot be felt by the members of the group any more.

Nevertheless, since the members of the group performed a pattern of behaviour with the initial opposable reason, the opposable reason changed, the personal influence of the leader is not needed any more to sustain the opposable reason, the simple fact that every Saturday virtually everyone has cleaned their houses for years, launched a new thought obviously connected to the initial opposable reason: a person in this group of people would believe that any other member would believe that Saturdays are a reason to clean the house. As I said before, the different ways opposable reasons come to existence are intermingled. In this example, it is leadership and conventions or social patterns.

Collective decisions are also at the origin of some opposable reasons. The fact that we collectively agreed to do something is a reason for me to do it but not only. It is also a reason for me to believe that you would believe that any other person involved in the decision has reason to do it as well. Collective decisions originate opposable reasons within the people making the decision.

Political power is also an origin of some opposable reasons. In complex societies it is the most important source of opposable reasons and what leads legal thinkers to focus almost exclusively on the legal reasons arising from that origin (the sovereign) and what leads most of them to equate law with norms backed by political force. I will distinguish two cases of political power here: (i) political power sustained by the mere monopoly of force and (ii) authoritative (legitimate) authority.

The orders given by those having the monopoly of force are certainly reasons for action. The possibility of being beaten (sometimes to death) is certainly a reason for action. That the gunman asks me to pick up the money and give it to her is a reason for me to do precisely what she orders. If the monopoly of force held by some person or persons is known, the orders given by them are not only a reason for action for those who try to avoid punishment, but constitute true opposable reasons.

This fact leads some political philosophers to reduce all legal normativity (or all social normativity) to this fact. However, even if I acknowledge – contrary to HART – that brute force sometimes gives rise to genuine opposable reasons which, if publicly known, constitute truly legal reasons, I do not consider by any means that one can reduce all forms of creation of legal reasons or opposable reasons to brute force. In fact, as in the case of leadership and social patterns that can intermingle to create long term opposable reasons, the same happens with brute force.

Now imagine a *coup d'etat:* some soldiers take control of the situation. The majority of the citizens thinks that the political power of the *rebels* is illegitimate (more precisely: illegal). Nevertheless, any citizen would think that any other person would believe that *the orders* given by the illegitimate authorities are reasons for action and thus opposable reasons. In time, we have two possible scenarios with two possible outcomes each.

First, after a while, the power loses all support and is unable to maintain the monopoly of force. It is finally replaced by another (whether this new one is legitimate or illegitimate does not affect the argument in what follows). What happens with the *opposable reasons* consisting in, among others[272], the legislation enacted during the brief *putschist* regime? They may cease to exist or they may persist. Some reasons, especially those related to politics (the prison situation of the political prisoners, the privileges in favour of the *putschists*, the limitations on of freedom of speech, etc.) would certainly almost immediately cease to exist and be replaced by new pieces of legislation, decisions, orders, rulings, etc. Nevertheless, most of them, especially those distantly related to politics and power, would probably endure. How is this possible? Social psychology offers sufficient basis to explain opposable reasons persistence after what (even illegitimately) originated them is long gone. People behave taking into account what others would do. Opposable

272 Orders, decisions, actions, rulings…

reasons play a key role in guiding our actions as regards the expected actions or beliefs of others, and thus they are a key piece of the social machinery.

In the case I am now discussing, let us imagine that the illegitimate power orders that the buyer of a house must provide a certification of energetic efficiency of the house (thus certifying that the heating system in the house is efficient and environmentally friendly) to register the acquisition into the property registrar. An opposable reason is born. After the collapse of the regime, it is unlikely that this opposable reason would cease to exist. It would probable endure. Some may now consider the following: the opposable reason introduced by the illegitimate regime has other justifications than the simple fact of having been ordered or enacted. It seems that the content of this order is a right move to improve the quality of our environment and a good thing for the buyer to know. When the illegitimate power collapses, people still have a good reason to stick to the measure. I think that having other good reasons to justify it is part of what explains the situation.

However, having other good reasons that may be used to justify the opposable reason does not explain why it is still an *opposable* reason. People have good reasons for doing many things but this does not turn these reasons into *opposable reasons*. Opposable reasons require that a person believes that *any third person would believe* that *q* is a reason. You may think that you have a good reason to do something but you do not know if others would think alike.

If you think that the reason is actually good, you may expect that others may also think so, but you do not have any other piece of information to make the leap from what you think to what others would think. You have no other justification apart from your thinking 'umm this is a good reason' to believe what others would actually believe. Opposable reasons allow precisely this move. Though the *putschist regime* collapsed, all opposable reasons introduced by them whose *opposability* does not depend on who has the gun persisted as opposable reasons. Why? This is essentially the nature of opposable reasons. Once created, they persist and even find even new reasons to justify their existence.

Now, the second scenario. Imagine that the initially illegitimate regime manages to hold on to power and is able to establish a stable dictatorship. Initially, most people would believe that any third person would believe that an order backed with coercive force is a reason for action. However, in time, the illegitimate regime would not rule solely based on the fact that it holds the monopoly of force. The monopoly of force would certainly

prevent others from taking political power, but this would cease to be crucial for the production of new opposable reasons. When? When people start to think that they have a reason to believe that any third person would believe that orders given by the political authorities are actually reasons for action. Note that the reference to force or coercion has disappeared. This is very important because, at that moment, people would think *q* as an opposable reason even if there is no force or violence expected. Violence and force, as regards opposable reasons, quickly disappear from the equation.

When the political power officials are able to produce opposable reasons without reference to force or violence, they are not a mere political power but they are true authorities. That is what is behind sentences such as "In time, this regime would simply be considered the political authority". There is no logical mystery here: just fairly humanly opposable reasons.

I have thus defined authority as a person whose decisions are able to produce *opposable reasons.* Note that there is *some* self-reference here. Fortunately, this self-reference is easily avoided. Why? Authority is just one source of *legal reasons* and thus just one source of *opposable reasons*. That is why the concept of authority may be expected to be defined by opposable reasons and not the other way around.

I have discussed some origins of opposable reason but I can easily think of others, religious beliefs, for instance. The detailed explanation of all the possible origins of opposable reasons and how they relate to one another is certainly a very interesting line of empirical research that would need the help of several areas of knowledge such social-psychology, anthropology, political science, etc.

In spite of the important aspects revealed by the origin of opposable reasons, the truth is that, once opposable reasons come into existence, their persistence in time does not depend on their origin at all, but in their *being an actual opposable reason*. Indeed, that explains why legal norms created by the Roman Empire persisted as opposable reasons through different powers in Western Europe during centuries long after the Roman Empire collapsed[273]. This also explains why *legal reasons* exist even in times of great political upheaval.

273 Visigoths in Spain would be just such an example. Roman laws applied for Roman citizens under Visigothic rule even though the Roman Empire had collapsed long before.

Indeed, my guess is that equipped with *opposable reasons* we may try to better understand the relationship between morals and law, and politics and law. Obviously, these two questions would deserve further investigation that unfortunately I must for obvious reasons leave out of the present dissertation.

However, let me advance a couple of ideas. Morals consist in certain reasons for action: moral reasons. Law is a normative domain determined by legal reasons. Law does not provide us with reasons for action directly. The business of providing us with reasons for action is done by ethics for moral reasons, politics for political reasons, economy for economic reasons, religion for religious reasons, etc. In contrast, law provides us with reasons to believe that a certain reason is an opposable reason. Obviously, opposable reasons are just reasons to believe what others would consider to be the reasons for action (moral, political, economic, religious, prudential, etc.). In this sense, opposable reasons necessarily point to a reason for action which comes from a domain which is not the legal domain. However, the two domains are neatly distinguishable if we keep the structure of opposable reasons in mind.

It is clear that there is more than one law, since there are several legal normative domains. For instance, in Common law, precedent is a fundamental feature which is absent in Civil law. However, all these legal domains are constituted by legal reasons, that is by publicly known opposable reasons.

Therefore, in spite of the existence of different legal domains, they are all related to the concept of law through publicly available reasons to believe that opposable reasons hold. Moral reasons as reasons for action may be the reasons for action contained in legal reasons. Legal reasons being opposable reasons are second-order reasons: epistemic reasons about the existence of reasons for action. From the point of view of the legal reason, it does not really matter if the reason for action embedded in the legal reason is a moral reason, a prudential reason, a political reason, an economic reason or whatever the nature of the reason may be.

The crucial aspect for a legal reason is the epistemic justification that an opposable reason actually holds. However, legal reasons need a reason for action to be provided for, since they are reasons to believe that opposable reasons exist and opposable reasons are nothing but reasons to believe that other people would accept that a certain reason for action holds.

In a sense, the normative power of legal reasons is two faced: (i) on the one hand, legal reasons rely on the social grip of opposable reasons (ii) but opposable reasons are themselves epistemic reasons to believe that others would accept that certain reasons for action hold. Truly, legal reason do not need the normative force of reasons for action at all to deploy their social effect. The social grip legal reasons have depends, as we have already shown, solely in their being *opposable reasons*.

However, in a sense, legal reasons are normatively derived since opposable reasons are grounded on the existence of reasons for action. Without reasons for action, opposable reasons are senseless. The very concept of opposable reasons as defined in chapter 10 contains the concept of reasons for action.

However, it is very important to note that an opposable reason does not need that the reason for action embedded actually holds in order to be an opposable reason, that is, to have the social grip that it has.

As matter of fact, *racist laws* played the role of opposable reasons for a long time in the USA and South Africa, just to give a couple of well-known examples. However, it is clear that the reasons for action racist laws embedded do not hold. They are utterly false moral claims. And this is what explains why legal reasons can be at odds with moral reasons for action. I said that the normative power of legal reasons seemed to be two faced. However, now it must be crystal clear that what is crucial for legal reasons is to be a truly publicly available reasons to believe that an opposable reason holds. It actually does not matter if the embedded reason for action actually holds or not.

13 CONCLUSION

My goal in this dissertation was to offer an alternative account to solve conflicts of constitutional norms cases. In section 11 this is precisely what is delivered: constitutional conflicts can be solved by opposable reasons in reflective equilibrium.

Opposable reasons explains why judges deciding constitutional conflicting cases are justified in expecting that the ruling is socially justified, that is, justified to any other member of society, even if some may not share the underlying moral or political principles involved in the reasoning for the ruling.

To achieve this, I previously introduced the concept of opposable reasons in section 10. Crucially, it turned out that opposable reasons have much broader consequences for legal philosophy than just an account for solving constitutional conflicts of norm cases. Opposable reasons are a minimal account of law that truly aims at universality.

However, to achieve this a long path has been trodden. Opposable reasons are second-order reasons for action. In consequence, we needed to gain some understanding of more fundamental concepts such as reasons for action, second-order reasons, reflective equilibrium, etc.

Before I summarize how opposable reasons are constructed in this dissertation, it is worth remembering why and where the other accounts for solving constitutional conflicts failed. In section 2, I briefly exposed the current accounts that try to solve such conflicts: judicial discretion, particularism (legal realism), interpretivism, proportionalism and specificationism. I showed that in the actual wording of constitutional rulings there is evidence to support any of these accounts. I also showed what their respective drawbacks are.

Beyond their drawbacks, there is one problem all these accounts share: none of them explains a crucial aspect of the justification of constitutional rulings: the legitimate expectation of the judges of the Constitutional Court that *the justification* given by them will be socially *accepted as a justification*, even if some people may not share the underlying moral and political principles on which the decision is grounded.

In section 3, I briefly explained that the concept of norms, the concept of system of norms have been the central concepts in legal philosophy. I showed that current practical philosophy has shifted from norms to reasons, in order to understand practical

normativity. That is why in section 4, I summarize SCANLON's *reasons fundamentalism*. The plan is to apply SCANLON's ideas to our concern: conflicting constitutional norm cases.

Reasons fundamentalism is a philosophical view on normativity that defends (i) that reasons for action is a fundamental concept that cannot be reduced or explained in terms of natural facts or sociological facts and (ii) that any other normative concept should be explained in terms of reasons for action.

The concept of being a reason is defined as the relationship that holds between facts and persons. The quadruple R(q, x, c, a) stands for the fact that *q* is a reason for a person x to do action *a* in circumstances c. Moreover, there is no need for metaphysical concern: there are no mysterious entities in R(q, x, c, a): facts, persons, actions and circumstances.

Reason R(q, x, c, a) does not need to be a conclusive reason. The reason holds if, for person x, q favours or promotes doing action *a*. SCANLON's quadruple is therefore a *pro tanto* reason.

One crucial advantage of the quadruple R(q, x, c, a) is that it allows us to better understand how reasons interact and how reasons for action are able to define other normative concepts in terms of First-Order logic. That precisely is what is done in section 5.

Following ROSS, in ethics – and in practical philosophy in general – the concept of duty or obligation is usually considered an undefinable or primitive concept. Even deontic logic does not give any concept of obligation. It presumes an intuitive notion of such a concept. In contrast, I used SCANLON's quadruple R(q, x, c, a) to define the notion of obligation. That person x is obligated to do *a* is defined as person x having a reason to do action a and at the same time, for this very same reason, is also a reason not to do anything that prevents *a* from happening. Note that, since the concept of obligation is given in terms of *pro tanto* reasons, the concept of obligation is also *pro tanto*. That is, the fact that I have an obligation does not mean that I have a conclusive reason to do what I am obligated. Our concept of obligation in this respect is equivalent to ROSS's concept of *pro tanto* duty.

Once the notion of obligation and reasons for action have been given, I defined what is a normative conflict or a conflict between two reasons or a conflict between obligations in section 6. Here, I observed that reasons sometimes override other reasons. From the

notion of overriding relationship between reasons, concepts such as sufficient reasons and conclusive reasons were defined.

In section 6, I also devoted a whole subsection to analyse the *obligationes non colliduntur* principle, which states that a conflict of obligations or duties is inconceivable. This principle was famously defended by KANT in his *Metaphysics of morals* and it is also a theorem of standard deontic logic.

However, the *obligationes non colliduntur* principle is in contradiction with our notion of obligation. I then discuss in detail KANT's argument for *obligationes non colliduntur* principle to conclude that KANT reserves the term obligation for actual (toti-resultant) obligations, that is, obligations that are conclusive reasons.

KANT defends that the conflicting situations are explained by the conflict between two 'grounds for obligation'. I defend that 'grounds for obligation' can be explained in terms of reasons for action. This allows us to defend that *obligationes non colliduntur* principle is also true in our account, provided that obligations here are only actual obligations, that is, obligations constituted by conclusive reasons for action.

The fact that KANT does not use the term obligation for *pro tanto* obligations is a terminological discussion. I think, in contrast with KANT, that having pro tanto obligations allows us to make sense of many legal language. If I sign a contract, I normally assume a bunch of obligations, however most of them are not toti-resultant. That is why obligations in terms of reasons for action seems to me an advantage for the legal philosopher. To be fair with KANT, his concerns in his *Metaphysics of morals* were different.

In section 7, I defended that second-order reasons for action are needed to account for certain cases of practical reasoning. Following RAZ, I argued that first-order reasons for action and the overriding relationship are not enough to account for certain crucial cases of practical reasoning. However, my analysis of second-order reasons differed critically from RAZ's. He defends that second-order reasons are reasons to act (or refrain from acting) for a reason. I rejected this view after a careful and detailed analysis of RAZ's examples in his *Practical reason and norms*. I concluded that second-order reasons are reasons to accept, withhold or reject the belief that certain reasons for action hold.

Whenever a second-order reason is present in practical reasoning, the final set of reasons to be considered on the balance of reasons is affected: A reason to accept the belief that

certain reason for action holds is called second-order inclusionary reason because it includes a new reason into consideration. In contrast, a reason to withhold or reject the belief that certain reason for action holds is called exclusionary reason because it excludes a reason from the consideration. Since second-order reasons are reason to believe (accept, withhold or reject) that certain reasons for action hold, First-Order logic is extended by the epistemic operator B in our analysis. I exploit my notion of second-order reasons as epistemic reasons to analyse the concept of negative rights and the concept of legal power. Such concepts are used later in section 11 in our analysis of the constitutional ruling cases.

In section 8, I introduced some concepts that help to accurately describe practical reasoning: underminers, enablers, reversers and excuses. These concepts, the overriding relationship and second-order reasons allowed me to present, in section 9, an account for reflective equilibrium as an algorithm of reasons for action.

In section 10, I introduced the concept of opposable reasons. I argued that when we exchange reasons with one another to decide what to do or justify our actions before others, what others would believe what the reasons for action of the case are is crucial. More precisely, our beliefs about what our opponent would believe about what third parties would consider as valid reasons for action exercise a social grip on us and, if we are right about our opponent's belief, also a social grip on our opponent.

The social grip that accompanies certain reasons for action is what allows us to oppose them to our opponent because we know that the social grip would have an effect on our opponent's beliefs and subsequent behaviour, even if our opponent does not believe that the underlying reasons for action actually hold.

That is why opposable reasons are so important in the social fabric of exchanges of reasons to decide what to do. Opposable reasons do not require that our opponent changes her mind through our exchanges of reasons. Our opponent is free to stick to her initial set of reasons for action. However, when confronted with an opposable reason, even if she does not share the underlying reason for action, the social grip of the opposable reasons will have an impact on her behaviour and therefore on what is finally done.

The existence of opposable is explained by the findings of social psychology in the 1960s and 1970s on the importance of the opinions and views of others in our own beliefs and behaviour. Recent research in neuroscience has confirmed this and, what is more, it shows that the social force of what other would think about a given situation – and this obviously

involves beliefs about reasons for action – is so great that there is no need to explicitly expose or mention what others would think.

In consequence, opposable reasons do not need to explicitly state the assumption upon they work, that is, that others think reason for action to be such and such. The social grip of opposable reasons should be understood in terms of PAUL GRICE's conversational implicatures.

Finally, in section 11, I use the concept of second-order reasons to give an alternative account for solving conflicts of constitutional norms cases. The main drawback in all current accounts is that they are unable to explain that the justification of such rulings aims at being an *erga omnes* justification. In others words, judges of constitutional courts do not only want to have their rulings justified, but that the justification given by them should be seen by everybody else as an acceptable justification, even if they do not agree on the moral and political principles sustaining the ruling.

I showed that opposable reasons allow constitutional court judges to have an *erga omnes* justification of their rulings in cases of conflicting constitutional norms. The social grip that opposable reasons have on others force them to accept that the ruling is socially justified, even if they do not share the moral and political principles sustaining the ruling. Why? Because if judges have used a felicitous opposable reason, we are certainly free not to share the underlying reason for action, but we cannot deny that it is an opposable reason and thus the social grip forces us to accept the social force of rulings justification.

In consequence, opposable reasons are the key concept that allows us to offer an alternative account for solving constitutional conflicting norms cases. However, opposable reasons can do much more than that. Opposable reasons are the key concept for a minimal account of law.

Legal philosophy has been parochial. Legal philosophy assumed that elements such as the legislator, organs of adjudication and legal norms are at the centre of what needs to be considered as law. However, what has been established by the work of anthropologists during the 20th century questions the assumptions of legal philosophy. The outcome is that most anthropologists, in analysing what I believe to be truly legal experiences in societies other than Western law, have abandoned the concept of law and reframed their analysis in terms of order and dispute, leaving to legal philosophers whether what they

analyse is law or not. Legal philosophers won the term "law" from anthropologists, but in doing so, philosophers were condemned to have a parochial concept of law.

Opposable reasons offer an account of law that entitles us to say that what anthropologists reported from other societies on order and dispute experiences is truly law. Each society has obviously its own set of opposable reasons. However, opposable reasons must exist in all society. They are a natural consequence of social rational beings exchanging reasons. Some reasons to believe that an opposable reason holds are publicly available. Those opposable reasons whose reasons to believe in them are publicly available are precisely legal reasons. Of course, what counts as publicly available changes from society to society and through time within a society, which in turn, explains why what counts as law is different in different places and times.

If publicly available reasons to believe that an opposable reason holds is a successful universal definition of law, then new research unfolds and will force us to reconsider the relationship between law and political authority, law and coercion, law and the state[274], law and morality, etc. This, in turn, will force us to reconsider the relationship between the state and the citizen. These notions, while primarily political, are partly determined by law. My guess is that legal reasons understood in terms of publicly available opposable reasons opens the possibility for an account of law fully compatible with libertarian or anarchist ideals. Why? When confronted with a legal reason, one must certainly accept the existence of such an opposable reason. However, one will always be free to accept or deny the underlying reasons for action and follow what one believes to be the dictates of reason.

[274] DAVID F. B. TUCKER in his *Liberalism and the Rule of Law* (Tucker 1994)shows us how liberalism determines our way of thinking about law (Tucker 1994). In recent years, some philosophers have been attacking liberalism tenets, especially state neutrality. For an overview of the metaphysical assumptions of political liberalism see GRAUPERA's *Metaphysics of state neutrality: a critique of liberalism* (Graupera Garcia-Milà 2017). The existing literature about the assumptions of political liberalism invites us to reconsider such assumptions under the light of use legal reasons as publicly knowable opposable reasons, especially those assumptions with regards the Law. I leave this task for a future research.

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