

# **THE LAW IS A FACTISH**

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## ABSTRACT

Drawing upon the work of Bruno Latour, this dissertation defends the thesis that the law is a factish: an indivisible blend of social and natural reality. The dissertation develops, in Latour's terms, a „non-modern“ framework from which it draws, in turn, the philosophical foundations for a theory of factish law. This framework is presented as a paradoxical model of understanding, which situates the law within a broader understanding of reality. The model allows for several distinctions of modern analytical philosophy to be breached, without succumbing to a post-modern paralysis of thought. Applied within jurisprudence, it allows for an account of the law as factish that avoids the clash between positivism and natural law, preferring instead to draw upon insights from each tradition. This factish understanding of the law founds several related observations that together constitute the formative steps towards a theory of factish law. Instead of viewing the law as completely unique, the aspiration towards inviolability is identified as a central attribute of law, shared by actors as diverse as the laws of physics and the laws of the State, whilst the absence of this aspiration from customary law distinguishes it from the law without needing to create an implicit hierarchy of normative systems. Having explicated factish law, the dissertation moves to a proposed model of factish legality, drawing upon the model of paradoxical understanding, in order to explain the process by which the law is created. Alternate understandings of the rule of law and the separation of powers are posited in accordance with this model, as opposed to the dominant views expressed by South African jurists. Having established some of the theoretical commitments of factish law, the dissertation then focuses on the question of justifying the law in South Africa. In the course of the argument, the relationship between law and violence, the distortionary effects of South Africa's celebrated Bill of Rights and the contemporary demand for „African“ South African law are considered and critiqued.

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## CHAPTER 1: INTRODUCTION

### 1.1 Thesis statement: Latour and the factish approach

Bruno Latour is a difficult thinker to describe. He is a self-professed ethnographer, but his work encompasses the domains of anthropology, science, sociology, philosophy and even law.<sup>1</sup> His aversion to theorizing is explicit,<sup>2</sup> but that has not precluded his thinking from being valuable to social/philosophical theorists<sup>3</sup> and, specifically, to legal theorists.<sup>4</sup> He is closely associated with actor-network theory,<sup>5</sup> but his most important accomplishment from the perspective of this dissertation was the establishment of non-modernism as a meta-theoretical approach to understanding reality. Non-modernism is the attempt to understand reality through accepting the need for analysis, but also accepting the need to reintegrate the segregated constituents of reality so as to approximate an understanding of reality made whole again.<sup>6</sup> It is neither modernism, which is primarily concerned with preserving analytical integrity, nor is it post-modernism, which is principally concerned with imploding analytical integrity. These meta-theoretical frameworks do not directly determine any given issue, but they do inform the manner in which theorists engage their own work and also mould how theorists see their roles in the greater enterprise of advancing human knowledge.

An important concept that Latour developed in keeping with this non-modern approach is a factish. The word 'factish' is derived from blending fact and fetish, which reflects a conflation of objectivity and subjectivity.<sup>7</sup> In the context of human understanding, that conflation amounts to a blend between the human mind and the mind-independent universe, which may be rephrased as social reality and natural reality. This means that humans do and do not make factishes.<sup>8</sup> The relevance of Latour's work for jurisprudence is apparent when his account of court proceedings at the Conseil D'État in France is read

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<sup>1</sup> Bruno Latour (translated by Catherine Porter) *We Have Never Been Modern* (1993) at 3; Bruno Latour *Pandora's Hope: Essays on the Reality of Science Studies* (1999); Bruno Latour (translated by Marina Brilman and Alain Pottage) *The Making of Law: An Ethnography of the Conseil D'État* (2010).

<sup>2</sup> Ibid (1993) at 12.

<sup>3</sup> Graham Harman *The Prince of Networks: Bruno Latour and Metaphysics* (2009).

<sup>4</sup> Kyle McGee (ed) *Latour and the Passage of Law* (2015).

<sup>5</sup> Bruno Latour *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005).

<sup>6</sup> Latour (1993) op cit note 1 at 51.

<sup>7</sup> Bruno Latour (translated by Catherine Porter and Heather MacLean) *On the Modern Cult of the Factish Gods* (2010) at 21-22.

<sup>8</sup> Ibid at 23-24.

together with his claim that the law is a factish.<sup>9</sup> Given that his expertise lies outside the philosophy of law, he has deliberately avoided extensive engagement with the implications that his various observations might have for legal theory.<sup>10</sup> This dissertation incorporates his ethnographic insights into the domain of jurisprudence. Its thesis is that the law is a factish. This thesis is advanced through the development of a theory of factish law.

A complete theory of law takes a lifetime to articulate and this dissertation undertakes the first few steps towards that goal. Given the reluctance of Latour to enter directly into the philosophical realm, it has been necessary to engage with the philosophical foundations upon which a theory of factish law may be established. To that end, this dissertation adopts the model of paradoxical understanding, which is a model that attempts to capture the insights of Latour's non-modernism as a theoretical foundation. Whilst heavily reliant upon the work of Latour, the model is not necessarily an accurate reflection of his views. It is the thinking of Latour as it struck me.<sup>11</sup> In particular, the model is developed from the basis of his earlier work, rather than being based directly upon his more recent work on modes of existence, which in turn is also a reinterpretation of his earlier work.<sup>12</sup>

The import of this model is that understanding reality necessitates the use of agency. Even the most seemingly obvious of our understandings could have been different without being more or less accurate than its comparative understandings would have been. When examined at the highest level of abstraction, choices made in context determine what is actually understood. This paradoxical approach to understanding does have a fairly destabilizing effect upon knowledge, but it also reveals many alternate ways of understanding reality. It is in the context of juridical reality that this dissertation demonstrates the usefulness of the model. Despite the potential confusion created by a shared interest in paradoxes and the law, this dissertation remains distinct from the work done by Perez and Teubner towards elucidating legal paradoxes.<sup>13</sup> The dissertation, moreover, engages the influential contemporary aporetic account of law and justice associated with the late work of Jacques Derrida, but ultimately it takes its leave from this understanding.<sup>14</sup>

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<sup>9</sup> Ibid; Latour (2010) op cit note 1.

<sup>10</sup> Ibid (2010) at 256.

<sup>11</sup> Saul Kripke *Wittgenstein on Rule Following and Private Language: An Elementary Exposition* (1982) at 5.

<sup>12</sup> Bruno Latour (translated by Catherine Porter) *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (2013).

<sup>13</sup> Oren Perez and Gunther Teubner *Paradoxes and Inconsistencies in the Law* (2006).

<sup>14</sup> Jacques Derrida „Force of Law: The Mystical Foundation of Authority“ in Drucilla Cornell, Michael Rosenfeld, David Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 3-67.

The model of paradoxical understanding is not based upon any neuroscience or psychology, but accepting its implications as a philosophical model affords significant explanatory power and assists with the integration of imagination into knowledge. Providing a framework of what could exist allows for closer integration between what does exist and what should exist. That may be frustrating for anyone who seeks objective truth or certainty, but it is somewhat unrealistic to pursue either of these goals if our understanding of them is not properly tempered to begin with.

## 1.2 The model of paradoxical understanding

The model of paradoxical understanding begins with the delineation of entities, followed by their analysis. Analysis enables the identification of aspects of reality at the highest level of abstraction. These aspects are paradoxical. Cognitive limitation restricts the ability to sustain the concurrent paradoxical understanding of all aspects of reality. Accordingly, elections are made in order to resolve these paradoxes. This resolution is achieved by altogether denying the paradox, leaving only a particular constituent of the entity to be understood as a simpler, but less accurate, representation of reality. Whatever election is made is partly indefensible at this level of abstraction in the sense that there is no reason that can be offered for the election without recourse to context. It also means that any election is equally available and cannot be rejected outright, with any given election leaving alternate elections still available.<sup>15</sup>

There is no hierarchy of paradoxes within the highest level of abstraction. Accordingly, the order in which they are discussed is arbitrary. The first of these paradoxes that exist at the highest level of abstraction is the subject/object paradox. Reality may be understood either from the entity's perspective or from another perspective. The delineation

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<sup>15</sup>This indeterminacy places greater emphasis upon the implications and observations that arise from the different understandings of entities that are reached through different elections, so as to establish what may be useful in context. The model does not attempt to be a theory of truth. It is simply a medium through which these implications and observations might be reached. By adopting a model in place of directly interrogating and defending how we understand reality, the seemingly endless void of some of our more intractable philosophical problems may be avoided. That would not help a career philosopher, whose enquiry is directed exactly at those problems, but one of the perks of working in the field of law is that something akin to pragmatism tends to be sufficient as a theory of truth. Even if that were not the case, the relative stagnation of philosophy as compared to the progress of science based upon observations suggests that accepting human cognitive limitations allows for significantly greater progress than does stubbornly seeking to surpass those limits. This inconvenient truth is reflected in Alfred Whitehead's famous quote, 'The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.': Alfred Whitehead 'Process and Reality: An Essay in Cosmology' in F S C Northrop and Mason W Gross (eds) *Alfred North Whitehead: An Anthology* (1961) at 607.

of an entity implies both a subject that delineates, as well as the entity as an object to that subject.

The second paradox is the relationship/object paradox. Bobjects(named this way so as to avoid confusion with 'objects' from the subject/object paradox) are anchors within reality. It is perfectly possible for a bobject to be either subject or object or both, but the bobject constituent of an entity is independent of that election. Relationships are the entities that exist derivatively between bobjects. This means that bobjects determine themselves, whilst relationships are determined by the bobjects they relate.

The third paradox is the singular/plural paradox. Singular is to say one. Plural might be within one or of one, which is similar to division and multiplication. Basic mathematics helps to grasp the singular/plural paradox, but it should be stressed that mathematical operations exist within the singular/plural paradox and not as complete expressions of it.<sup>16</sup>

The fourth paradox is the actor/fixture paradox. Actors are entities that act, which includes motion, but action is not limited to physicality. Fixtures are entities that do not act, remaining stable. The only constant is change, but positing change as a constant implies both consistency and change, which is one way of understanding what the actor/fixture paradox reveals.

The final foundational paradox is the order/chaos paradox. Order is the presence of a deterministic pattern and chaos is the absence of order. The order election is closely associated with knowledge and normativity, but it does not necessarily imply that humans are the determinative entities within order. The chaos election is likewise not necessarily about a loss of (human) control, but rather it indicates an attempt to understand an entity outside the domain of what is already known.<sup>17</sup> That may be because the entity is largely unknown or because of a desire to remove the constraints of prior knowledge.

It is not merely a coincidence that these paradoxes are found in the grammar of human languages, because languages would be largely incapable of intuitive human comprehension and expression if they did not incorporate these paradoxes. Language

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<sup>16</sup> Jean-Luc Nancy *Being Singular Plural* (2000).

<sup>17</sup> Whilst not formulated in precisely the same manner, this understanding of order and chaos as elates to knowledge appears to have been accepted already within South African legal academia. Louis T C Harms 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131(1) *South African Law Journal* 3 at 3-4 and 9.

influences how we understand reality to some extent as a feedback loop, but language is principally based upon how we already understand reality.<sup>18</sup>

### 1.3 Jurisprudence

The above outline of the model of paradoxical understanding introduces the more foundational philosophical dimension of this dissertation, but jurisprudence is the field of knowledge within which this dissertation is principally situated. Jurisprudence is the philosophy of law, which could be understood as a merger of the fields of philosophy and law, law in the field of philosophy, philosophy in the field of law or as an occupant of some grey zone between those fields. In short, this definition has the potential to sow more confusion than what it supposedly resolves. What is clear is that jurisprudence names the intellectual space within which the more abstract considerations relating to the study of law are situated. Legal practitioners continue to operate without obvious impediment in the absence of any clear consensus amongst jurists, but their apparent competency does not arise from having greater epistemic prowess. They simply are able to act without knowing exactly what law is, just as people are able to breathe without knowing exactly what air is or how respiration works.

However, if one of the more important ends of a legal system is to facilitate collective, relatively peaceful existence, then it enhances such an end when there is greater understanding of law.<sup>19</sup> Jurisprudence directs its attention to such an understanding. Disputes regarding the ontology of law are a bottle-neck in accessing its conflict discouraging and resolving capabilities. Accordingly, whilst no legal practitioner is presently unable to perform her job for want of jurists still being busy with their investigation of law's ontology, an important aim of law continues to be frustrated by our continued relative ignorance. To be clear, ontology and epistemology are being discussed within the broader domain of understanding in this, not as completely separate disciplines, as those disciplines are already based upon what are seen as elections in the model of paradoxical understanding.

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<sup>18</sup> Whilst not explicitly contradicted, this is contrary to the approach in Ludwig Wittgenstein *Philosophical Investigations* (1953) at 143<sup>e</sup>-144<sup>e</sup>.

<sup>19</sup> Immanuel Kant „Toward Perpetual Peace: A Philosophical Sketch“ in Pauline Kleingeld (ed) (translated by David L Colclasure) *Towards Perpetual Peace and Other Writings on Politics, Peace and History* (2006) at 104.

Engaging jurisprudence as a question of our understanding of law is far from simple. To begin, it raises the problem of perspective. Unlike academics in philosophy who are principal actors in their domains, academics in the field of law are often just supporting actors to legal practitioners of various kinds. This dissertation is written by an aspirant jurist, which is to say a philosopher of law rather than a philosopher who merely happens to be commenting on law. That still leads to cross-disciplinary work, but from the fixed perspective of jurisprudence. The most important implication of this distinction is that law must be understood in accordance with its internal logic and not contrary to it.<sup>20</sup> The internal logic of law is effectively the result of electing to understand the law as a subject and interrogating the various laws and doctrines as objects. This is opposed to the external view of law, which elects to understand other disciplines as the relevant subjects and the law as an object. Jurisprudence seeks to explain what lawyers do, not dismiss them. That being said, it also does not seek to simply replicate what lawyers do. Whilst this dissertation does not provide an exclusively normative account and it is concerned with understanding instead of truth, the following observation by Robin West is nonetheless largely reflective of the defect in legal scholarship that this dissertation orientates itself to address: 'The academy should be aiming for true claims about law, not true claims of law. There is simply no way such a study can get off the ground, if its potential practitioners are ensconced in the very professional practice that should be the object of their inquiry.'<sup>21</sup>

Accepting the internal view of law without falling into the trap of becoming a shadow-practitioner requires that many matters usually associated with the external view of law must also be incorporated into the proper domain of jurisprudence. For the purpose of this dissertation, a distinction is drawn between narrow and broad jurisprudence. Narrow jurisprudence is what one normally thinks of when jurisprudence is referenced as a subject of academic inquiry, dealing with the more overtly philosophical and theoretical questions relating to legality. Broad jurisprudence encompasses narrow jurisprudence, but also includes the jurisprudence usually meant when the judgments of courts are referenced. Such broadening extends even further in this dissertation to include matters more tangentially related from a theoretical perspective, so that the application of and practical matters pertaining to jurisprudence are taken into consideration. This means that legal education, political commentary on the legal community and justifications for violence are also part of

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<sup>20</sup> HLA Hart *The Concept of Law* (1994) at 89.

<sup>21</sup> Robin West *Normative Jurisprudence: An Introduction* (2011) at 190.

jurisprudence in the broad sense that this dissertation adopts. It is anchored in academia, but it is not strictly confined to it. Encompassing so many domains within the ambit of jurisprudence inevitably sacrifices consistency in favour of completeness to some extent, but it is an overarching theme of this dissertation that such a trade is favourable for those who seek to understand more about the law.

The distinction between narrow and broad jurisprudence is not the same as the delineation of general jurisprudence, which is concerned with universality rather than what the ambit of theoretical considerations ought to be. Typically, general jurisprudence limits itself to matters of narrow jurisprudence, but that is because more narrow considerations are more easily defended as having universal applicability. Since the distinction between universal and specific is frequently disregarded in the application of the model of paradoxical understanding, being a non-modern approach, it does not help to follow only general jurisprudence in this dissertation. Costas Douzinas and Adam Geary draw a distinction between general and restricted jurisprudence that mirrors the distinction between broad and narrow jurisprudence, but the proliferated usage of 'general' in relation to „jurisprudence“ unnecessarily heightens the risk of accidentally conflating these two different distinctions.<sup>22</sup>

This dissertation is concerned with the largely ontological matters that Douzinas and Geary sought to escape, although it shares their reluctance to be constrained.<sup>23</sup> Understanding what the law is cannot easily be divorced from what people expect of it, nor can their expectations alone determine its existence. Ontology and epistemology remain distinct inquiries, but that distinction is one that breaks down when precise theoretical clarity is sought. It is equally problematic to either dissolve the distinction entirely or to maintain it perfectly. Accordingly, this theory of law must sacrifice analytical purity in order to explore the law as a factish, which means that descriptions and justifications inevitably blend into the same theoretical account.

#### 1.4 Research questions

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<sup>22</sup> A jurist such as Joseph Raz may, and is obviously perfectly entitled to, refer to his work as general jurisprudence, while Douzinas and Geary will reject such a description of his work: Costas Douzinas and Adam Geary *Critical Jurisprudence: The Political Philosophy of Justice* (2005) at 10.

<sup>23</sup> *Ibid* at 5.

The difficulty with establishing broad jurisprudence as a subject based upon the model of paradoxical understanding is that there is no point at which to begin, because the assumptions that would normally found an analysis of the law have been located in the indeterminacy of unresolved paradoxes and the resolution of them through elections is contingent upon choosing an appropriate way in which to make those elections. The only available solution is to bridge this void with a leap of faith through judgment in context.<sup>24</sup> The starting point that seems most sensible is to adopt the questions jurisprudence typically asks and then make elections that assist in answering those questions. The most obvious of these questions is: what is the law?<sup>25</sup> It is already clear from the question that the law is assumed to be an object, bobject, singular and descriptive entity, so these elections provide some guidance. The actor/fixtue paradox is less clear and there is much to say in answering this question, so rather than electing only one constituent within the actor/fixtue paradox, this dissertation will instead alternate elections and ask this question twice. To be clear, these elections are simply establishing the question so as to have a beginning for the inquiry into factish law. The answers will not necessarily maintain these elections.

The law is the central entity within jurisprudence, but it does not exist in isolation. Broad jurisprudence recognizes that the law is the outcome of a complicated process. In a more particular sense, that process is a legal system, but abstracting beyond the constraints of a particular legal system reveals legality as the domain within which the law exists. Accordingly, another question of importance to jurisprudence is: what is legality?<sup>26</sup> With the factish election set by the thesis and the actor/fixtue paradox already in play, this question allows for a greater exploration of the bobject/relationship and singular/plural paradoxes. These are complicated paradoxes to engage and this dissertation develops the model of factish legality to facilitate clarity of both analysis and explanation. The model allows for a positive account of legality to be presented that challenges the appropriate understanding of the concepts encompassed within it, but it can also be used to show when entities are distorting legality by observing their effects upon the operation of the model.

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<sup>24</sup> Derrida op cit note 14 at 23.

<sup>25</sup> Douzinas and Geary op cit note 22 at 5 and 10.

<sup>26</sup> Scott J Shapiro *Legality* (2011) at 7.

Jurisprudence is not just about how we should understand the law, but also about why we should accept it. That leads to the question: should we obey the law?<sup>27</sup> This question presents an opportunity to engage the descriptive/normative paradox's normative election directly. Rather than attempting to retread the largely accepted general justifications for obeying the law, this dissertation considers the more contextually anchored implications of justifying the law in South Africa. In doing so, the goal of broad non-modern jurisprudence is advanced by extending beyond the law of South Africa to consider the law in South Africa too.

### 1.5 Structure of the paper

Chapter 2 focuses on the general explanation of the model of paradoxical understanding without yet considering specific paradoxes in further detail. The philosophical implications and foundations of the model are explored in brief, aiming to indicate matters of relevance rather than to enter into the many intractable debates within which they are embroiled. Several limitations inherent to the model are acknowledged and justifications are presented for accepting the model.

Chapter 3 investigates the specific paradoxes that have already been referred to in this chapter. These paradoxes were chosen for their relevance at various points within the subsequent chapters of this dissertation. Some of the less abstract paradoxes are situated within the ambit of their respective origins, so as to facilitate reliance upon these less abstract paradoxes later in the dissertation. The role of the specific paradoxes is reintegrated with the general model with a return to the delineation of entities that shows how silent elections underlie even the first step of understanding.

Chapter 4 begins with the fixture election as a basis for examining the thesis that the law is a factish. The social and natural elections are each examined as historically significant theories of law and their mutual dependence is demonstrated, together with some implications of factish law and its explanatory power once the polarization of legal ontology is diminished. Rather than suggesting that this is a unique revelation, it is shown that similar recognition of the need to depolarize understanding of the law is evident in several more

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<sup>27</sup> HLA Hart 'Positivism and the Separation of Laws and Morals' (1958) 71(4) *Harvard Law Review* 593 at 615-621; Lon L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630 at 655-657.

recent theories of law, although they do not explicitly address this and inadvertently perpetuate the constraints imposed by modern analysis.

Chapter 5 switches to the actor election in examining the central thesis. The aspiration towards inviolability is advanced as the primary goal of laws in whatever domain they may exist. At this point, the dissertation will move to a consideration of customary law and argue that it is a normative system that has mistakenly been treated as a legal system, although observing that mistake should not be mistaken for a criticism of customary law as such. Even if the understanding of law is assumed to necessarily extend to any normative system, it is further argued that the goal of customary law as a normative system seeking to facilitate or restore communal harmony is undermined by its treatment as a legal system in the sense that this dissertation understands it.

Chapter 6 introduces and explains the model of factish legality. This model comprises two interlinking relationships, one being lesser legal reasoning as a relationship between authority and text, the other being greater legal reasoning as a relationship between legal sources and the law. The model is used to show that the rule of law is better explained as rule through law, which is a commitment by an authority to restrain itself as a condition of possibility for the existence of a legal system. The model is also used to articulate a reinterpretation of the roles of different branches of the state within the separation of powers that removes the need for deference to be determinative in the adjudication of matters involving the legislature or executive by the judiciary.

Chapter 7 considers the justification for law in South Africa. It considers the intricate relationship between law and violence and blends the distinction between law-maintaining (law-preserving) violence and law-establishing (lawmaking) violence with the order/chaos paradox.<sup>28</sup> It is argued that ordered law-establishing violence is the only defensible use of violence, although it is also found that the plausibility of demanding an abandonment of chaotic law-establishing violence is contingent upon having fostered a reasonable understanding of the law as order. Next, the chapter considers what it calls the distortionary effect of the Bill of Rights<sup>29</sup> within the model of factish legality. It is argued that the Bill of Rights is in large part responsible for the friction that exists between the branches of the South African state, as well as being an inappropriate constraint upon the operation of the

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<sup>28</sup> Walter Benjamin 'Critique of Violence' in Marcus Bullock and Michael W Jennings (eds) *Walter Benjamin: Selected Writings Volume 1 1913-1926* (1996) at 243; Derrida op cit note 14 at 33.

<sup>29</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

State in a context that demands immediate progress towards material liberation. The argument is not a rejection of constitutionalism generally, but rather a rejection of the specific sort of constitutionalism that seeks to morph the role of a constitution from constituting the state to moderating the government. The chapter then considers contemporary demands within law and, especially, jurisprudence that it be or become more „African“. After rejecting the claim that African knowledge is what is sought when the law is under scrutiny, it is instead found that a desire for more African knowers is what drives concern over jurisprudence being insufficiently African. Despite several reservations about this apparently racialized distrust, it is argued that the demand is ultimately cogent in a legal system that is founded within the context of distrust in large-scale communities.

## CHAPTER 2 - THE MODEL OF PARADOXICAL UNDERSTANDING

### 2.1 Introduction

This chapter explains the general operation of the model of paradoxical understanding. It is concerned with the mechanisms employed by the model and the assumptions that support them. After a brief overview of the whole model, each phase is examined more closely. This begins with the delineation of an entity, then the analysis<sup>1</sup> of an entity's aspects into paradoxes and finally the resolution of paradoxes through elections. At each of these stages there are several points mentioned that attempt to provide greater clarity as well as to indicate how the model is situated within the broader realm of philosophical thought. The chapter concludes by identifying some of the inherent limitations of the model and justifying acceptance of the model, despite these limitations.

### 2.2 Basic model

As a result of the necessity of cognitive limitation as phenomenality, human subjects do not access reality in an unmediated way.<sup>2</sup> The process of understanding reality of necessity must delineate some part of reality. This delineation is a part of the analysis of reality into that which is delineated and everything else, with everything else being removed from our consideration and that which is delineated becoming the focus of our attention. That which was delineated is an entity. Nothing aside from this delineation is yet understood about the entity, which in terms of understanding, is otherwise vacuous. An entity does not remain vacuous. In order to understand more about an entity, we must discern its different aspects. These aspects are paradoxical. They are comprised of mutually exclusive states of being, which are nonetheless consubstantial in reality. The existence of these simultaneous states of being as paradoxes is a consequence of having employed analysis in the attempt to understand them, which can only further our understanding of reality through segregation of what is whole into parts. If the paradox in relation to the entity is allowed to remain in this state, then an unresolved paradox (or a multiplicity of unresolved paradoxes) exists.

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<sup>1</sup> See 1.2 and 2.3 of this dissertation for elaboration upon the meaning of „analysis“ as employed within the model of paradoxical understanding.

<sup>2</sup> Allen W Wood *Kant* (2005) at 51.

In order to continue advancing our understanding, we must make an election as to how we will treat an unresolved paradox. We might elect either of the opposing constituents of the paradox and remove the unelected constituent from our consideration. We might also elect to keep both constituents, effectively leaving the paradox unresolved, but that will still be as the separate constituent parts taken together. We cannot undo the analysis which defines the aspect as a paradox, although we can attempt to approximate that move. In most cases we elect just one of the constituents, as it is considerably more cognitively demanding to attempt the election of both simultaneously. In short, we delineate an entity and elect how to handle its paradoxes. The iteration of this process is how we understand reality, at least according to the main influences of this dissertation.

By way of illustrative analogy, the model may be likened to placing a painting upright on a table with one chair in front of it and one behind it. For the sake of this illustration, assume that you can only open your eyes once you are sitting in a chair. If you sit in the chair facing the front you will see the painting as a picture. If you sit in the chair behind it, you will see the canvas and perhaps some supportive structure holding it upright. Clearly, both vantage points are seeing the painting and the painting does not change when you move from one chair to the other. Still, if the only way to see it is from these two chairs and you can only sit in one chair at a time, then it is apparent that the painting will be significantly different depending on which chair you are sitting in. Jumping from one chair to the other in quick succession gives greater perspective, although more physically demanding and still does not mean that you can see both sides of it at the same time. This is a visual representation of what is discussed in this work as an abstraction. The table and chairs represent a paradox, whatever is placed upon the table is an entity, the choice of where to sit is an election and the chair you actually sit in is the understanding that you reach.

### 2.3 Delineating entities

The delineation of an entity occurs at the highest level of abstraction, because it is the only level at which it makes sense to do so. This observation has been made many times across the course of philosophy's development, although each time the observation is referred to somewhat differently. For Husserl, „seeing“ in the figurative sense (presentation) was the act

of delineation, which was the relevant way that some part of reality might be apprehended.<sup>3</sup> For Wittgenstein, it was „showing“ that performed much the same function as seeing, but for the understanding of someone else.<sup>4</sup> To bring some clarity to the idea that there are different levels of abstraction, imagine them as strata layered from the lowest to the highest on top of each other. At the lowest level would be the subatomic particles, somewhere in the middle would be the things we observe in our daily lives and at the top would be the most refined essence of reality itself. All of these levels of abstraction are able to engage with what is always part of reality, but they bring some aspects of reality into focus whilst allowing others to fade away. There is no absolute barrier to understanding anything at any given level of abstraction, but the question of contextual appropriateness indicates that some levels of abstraction are better suited to understanding some things than they are to others.

Entities are the most abstract form of existence. Reality is an entity made of entities, so entities are an abstraction, but not a reduction. Again, this has been observed before in different ways. For Heidegger, it was „Being“.<sup>5</sup> His understanding of Being is the verbal indication of the entity that I understand as a noun.<sup>6</sup> Reality „is“, just as everything in reality is. For Leibniz, the most basic of forms was the monad.<sup>7</sup> Form must have substance to exist, but form may be understood such that we know it will be given greater substance without yet doing so to any but the most minimalistic degree. The part/whole distinction upon which analysis relies will only amount to reductionism when an entity is not established beyond physicality. This situation is avoided when understanding an entity before electing to treat it as mental or physical and there is no limit to the creation of new entities.<sup>8</sup>

Entities must exist as part of reality or as the whole of reality. No entity can exist outside of reality, so entities are necessarily real. Heidegger saw that being (*Dasein*) implied „being-in“ (*in-sein*), which is the fundamental constraint upon our ability to verify the truth of reality independently of our minds.<sup>9</sup> Our minds are also entities and part of the reality we seek to understand. Whatever distinctions we may wish to draw between the mind and body at lower levels of abstraction, they will be of no effect at this highest level of abstraction. The

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<sup>3</sup> David Bell *Husserl* (1991) at 12.

<sup>4</sup> Ludwig Wittgenstein *Philosophical Investigations* (1953) 4<sup>e</sup>

<sup>5</sup> Martin Heidegger (translated by John Macquarrie and Edward Robinson) *Being and Time* (1962) at 78.

<sup>6</sup> Kasper Schiölin „Follow the verbs! A Contribution to the Study of the Heidegger-Latour Connection“ (2012) 42(5) *Social Studies of Science* 775 at 776.

<sup>7</sup> Robbert Merrihew Adams *Leibniz: Determinist, Theist, Idealist* (1994) at 227-228.

<sup>8</sup> The distinction between primary and secondary matter defended by Leibniz is also suspended in the model, so that his thinking is both present in entities and contradicted by them.

<sup>9</sup> Heidegger op cit note 5 at 79-80.

debate between realism and anti-realism is not entirely applicable to understanding.<sup>10</sup> Realism at its core asserts that there is a mind-independent reality which we can know in some manner. Anti-realism denies this claim.<sup>11</sup> The model of paradoxical understanding sees both the natural world (mind-independent) and the social world (mind-dependent) as elections. The mind is a collection of neurons, which is part of the natural world, and it is the experience of reality, which is part of the social world. Neither alone can fully account for reality, so, from the point of view of the model, it is a misplaced debate based upon a false dichotomy. To ask what reality „actually is“, is to enter the specific paradox of actor/fixture, which is already incorporated within the model and does not assist in reaching beyond the constraints of paradoxical understanding. Note that Kant saw the mind as the framework within which the natural world was apprehended,<sup>12</sup> but the point being made in this dissertation is that understanding at the highest level of abstraction is the framework within which both the mind and the natural world exist.

Delineation must be assumed to be possible. If our ability to understand reality is contingent upon our capacity to delineate, then there is no way to prove that delineation is possible. Much as Descartes had to assume that thinking is possible before his „I think, therefore I am“ claim made sense, so too must it be assumed that delineation is possible before the existence of entities makes sense.<sup>13</sup> That is not a particularly potent assumption, because this is already a model of understanding, so the existence of intelligibility and an existing subject/object relationship between delineator and delineated is already being assumed. An investigation of reality that does not assume the possibility of delineation within the context of human understanding is vastly more difficult, perhaps entirely inaccessible, and definitely beyond the scope of this dissertation.

Delineation has no enduring exclusionary capacity. It only excludes the rest of reality whilst creating an entity. The entity endures in our understanding, but the exclusion of the rest of reality during delineation must be only temporary so that other entities may be created through delineation afterwards and so that the entity being delineated can be reintegrated with reality as a whole so as to allow for understanding in context. Failure to do this results in the

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<sup>10</sup> Stuart Brock and Edwin Mares *Realism and Anti-Realism* (2007) at 2-5.

<sup>11</sup> The model already accepts that entities exist as part of reality, which leaves only their mind dependence/independence in suspense.

<sup>12</sup> Wood op cit note 2 at 66.

<sup>13</sup> Gary Hatfield *Descartes and the Meditations* (2003) at 102.

platonic thinking that allows for a separate realm of perfect forms.<sup>14</sup> The entity is real, so it must remain in reality. The separation of it from the rest of reality was only out of analytical necessity. This necessary distortion should not be allowed to continue merely for the sake of consistency which arbitrarily begins at the point of delineation, rather than attempting to return to consistency that begins before delineation when reality is assumed as whole.

#### 2.4 Analyzing aspects into paradoxes

We analyze as a matter of necessity. Our cognitive resources are finite. Analysis is a trade in which we reduce the level of abstraction and multiply the details. It is the inversion of the trade we make in transcendence. Abstractions are more difficult to grasp cognitively, but greater abstraction brings about greater coherence, when attempting to understand reality more holistically. Details, on the other hand, are easier to grasp cognitively, but the totality of details are fragmented.

The aspects of reality are common to all entities. This level of abstraction is too high for the details that distinguish one entity from another. Delineation means that we have apprehended entities, not that we have granted them any unique content or have come to know them. Accordingly, the paradoxes exist for all entities. A similar observation has been made by Chomsky about the possibility of a universal language with switches built into it that determine the specific languages as humans speak them.<sup>15</sup> The relationship between language and understanding is evident from the presence within language of many of the specific paradoxes that arise from the model of paradoxical understanding. This stems from the need to articulate their corresponding aspects of reality if any understanding is to be communicated. Language is determined by how we understand reality. Of course, language will influence our understanding in turn as we communicate, but that pertains to particular instances of understanding, not how we understand reality generally. This implies that the language constraints focused upon by Wittgenstein are not the outermost constraints upon our ability to engage reality.<sup>16</sup> Language is only the determinative constraint in situations where we seek to communicate. Knowledge is still very sensitive to language constraints, because

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<sup>14</sup> Plato (translated by R E Allen) *The Republic* (2006) at 181-182 (475D-476B).

<sup>15</sup> Chomsky's recognition that the appropriate level of abstraction is required for theorizing about language is equally applicable to understanding: Noam Chomsky *Lectures on Government and Binding* (1981) at 2-3.

<sup>16</sup> Wittgenstein op cit note 4.

testimony is integral to the creation and sharing of knowledge.<sup>17</sup> Accordingly, the philosophy of language remains a central influence in academia, which is especially reliant upon testimony for knowledge.

The analyzed aspects of entities must be assumed to form paradoxes. If that were not assumed, then it might instead be contended that the resultant mutually exclusive constituents form a contradiction from which anything might follow and accordingly nothing may be determined reliably.<sup>18</sup> It is only through the demonstration of satisfactory explanatory power that the assumption in favour of the existence of paradoxes may be defended.<sup>19</sup> Note that a paradox is not a spectrum. A spectrum means that an increase in one constituent results in a decrease in the other constituent, but that is not what the model of paradoxical understanding defends. Elections might create this perception and the imagery of spectra might be helpful when considering how elections are chosen, but they have no influence on the paradox. Put differently, spectra offer a useful heuristic, but the heuristic is not being defended.

The unresolved paradoxes and the aspects of entities from which they are derived form part of reality. The implication of this that matters most is that reality as we understand it is paradoxical. No amount of thinking about it or care in thinking about it will change that, because the paradox is not a mistake in our thinking to be remedied through the untangling of complicated reasoning. That does not extinguish the need for having assumed that the aspects of reality are paradoxical, because that was needed in order to avoid them being dismissed as contradictions. This point is about the futility of attempting to unravel the paradoxes. Perez and Teubner have already extended far into the study of paradoxes in the law, but their work is focused on the particularity of legal paradoxes as a question of semantics, rather than as a foundational model for how all of reality is understood.<sup>20</sup>

## 2.5 Resolving paradoxes through elections

When we elect only one of the constituents of an unresolved paradox, we are engaging in iconoclasm. Prior to election, the indivisibility of the paradox dominates the entity's

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<sup>17</sup> Martin Kusch *Knowledge by Agreement: The Programme of Communitarian Epistemology* (2002)12.

<sup>18</sup> Oren Perez and Gunter Teubner *Paradoxes and Inconsistencies in the Law* (2006) at 5.

<sup>19</sup> The usual progression of beginning with acceptable premises is not available when working at the highest levels of abstraction, much as Heidegger observed when seeking to formulate his inquiry into Being: Heidegger op cit note 5 at 27-28.

<sup>20</sup> Perez and Teubner op cit note 18 at 12.

meaning. When we elect in the way described above, iconoclasm prevails and amounts to the destruction of previously dominant meaning without relegating that meaning to a subservient status in the course of accepting a new dominant meaning.<sup>21</sup> In the model of paradoxical understanding, before elections, the dominant meaning would be the indivisibility of the unresolved paradoxes. It is a mechanism that excludes a great deal of reality, but reduces the cognitive burden accordingly.

When we elect both constituents concurrently, we engage in what Latour calls iconoclasm.<sup>22</sup> Iconoclasm is the process by which competing claims are accepted such that one is the more broadly accepted and dominant claim, but without destroying the subservient claim. It is infeasible to attempt understanding without a dominant interpretation, but that does not extinguish the subservient constituent and it does not change the relevance of either constituent within the unresolved paradox.<sup>23</sup> If we could feasibly understand both constituents without oscillating our preferential treatment, then we would not have created a paradox to begin with. We would simply understand reality directly. That said, by allowing for both constituents to be elected and accepting that we must oscillate between them in granting one constituent dominance over the other, we can still approximate the paradoxical aspects far more closely than the iconoclastic alternative.

Elections are the output of the model of paradoxical understanding. That is far from the end of their role beyond the model. Arguments often adopt elections as their premises. To be an assumption is to be the unsubstantiated input for some mental process, but that does not mean it cannot or has not been substantiated for other processes. This is often displayed in the shift towards discussing assumptions later in this dissertation when matters more directly centred on law are under discussion, as attempting to trace every relevant claim to the model of paradoxical understanding is both infeasible and confusing.

Indiscriminately electing both constituents equally in every instance erodes knowledge. Omniscience is subject to the paradox that although it is defined as knowing everything, it amounts to knowing nothing specific. There would be no absence of knowledge to give form to the existing knowledge. This can be likened to the absence of an image if a page is coloured entirely as opposed to the presence of an image if only part of it is coloured

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<sup>21</sup> Bruno Latour (translated by Catherine Porter and Heather MacLean) *On the Modern Cult of the Factish Gods* (2010) 70.

<sup>22</sup> Ibid at ix.

<sup>23</sup> Latour describes iconoclasm as being *about* iconoclasm, but I prefer to portray this dynamic more directly by describing iconoclasm in the same manner that iconoclasm is described: Ibid at x.

in a particular shape. Of course, the space that the shape occupies is coloured in both instances, but it reveals nothing of the shape when the whole page is coloured. This is not to be confused with the shadows cast in Plato's cave analogy.<sup>24</sup> The shadows were merely reflections of what really existed outside of the cave. In this case, the same analogy would treat the shadows themselves as knowledge and would observe that knowledge is lost if the entire cave entrance were to be obscured, casting the cave into darkness and obscuring the shape of the shadow that was there before, even though strictly speaking that shadow is still there. Knowledge of reality is much the same. If one knew everything there was to know about reality, then one would know nothing of reality or at least nothing specific about it. Paradoxes will reveal nothing about reality if they are employed indiscriminately to elect each opposition without any exclusionary effect.

This model only seeks to accommodate some of the many limitations of perspective and incompleteness into its structure and thereby improve its capacity to facilitate understanding, much as a person improves these through the recognition of biases in forming judgments without having to eradicate them all. Buddhism has responded to such difficulties by cautioning against investigating such matters too closely. It acknowledges the paradoxical way in which we understand reality to a significant extent, but sees little use in moving beyond that observation. It seems that the wisdom implicit in this stance may still be respected while pursuing greater understanding, so long as this counter-intuitive<sup>25</sup> consequence of unfettered pursuit is remembered and avoided. Perhaps the frustrations resulting from post-modernity's nihilistic tendencies are grounded in failing to respect this wisdom.

This may also be seen as an instance of the trade between completeness and consistency. Gödel's completeness theorem cannot be said to be directly applicable, but the more abstract implication of it appears to have very broad applicability.<sup>26</sup> If all elections are made concurrently, then reality will be understood nearly completely, but almost entirely inconsistently, which would result in very little actual understanding. Likewise, faithful adherence to electing only one constituent of each paradox in a fully iconoclastic manner would result in consistent understanding, but much of reality would remain outside our

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<sup>24</sup> Plato op cit note 14 at 227-228 (514A-514C).

<sup>25</sup> This is much the same sense of being 'counter-intuitive' that van Marle and Brand use to describe the reasoning of Michelman as being a description of what is already there without being apparent: Karin van Marle and Danie Brand 'Being Counterintuitive' (2013) 24 *Stellenbosch Law Review* 264 at 267.

<sup>26</sup> Hao Wang *A Logical Journey: From Gödel to Philosophy* (1996) at 2-3.

understanding. This is one way to draw the distinction between continental and analytical philosophers, with the former trading in favour of completeness and the latter trading in favour of consistency.

Attempting to resolve the paradox is counterproductive. It was the analysis of the whole aspect into constituent parts that created not only the paradox, but also the greater understanding that we seek. If the paradox were to be resolved, it would be through transcendence from the paradox back to the whole aspect. That would leave us back at the start where we were unable to understand reality. Much of the more philosophical work done by Nancy seems to be on this trajectory.<sup>27</sup> His work thus far has been a helpful contribution towards averting the post-modern dilemma reached by the portrayal of these paradoxes as outright contradictions, but moving further to resolve the paradoxes would unravel much of the value of his singular-plural contribution. We may understand much more about reality than we presently do through manipulation of the paradoxes than through their resolution.

## 2.6 Acknowledging and justifying the model's limitations

There are two limitations inherent within the model of paradoxical understanding. The first of these limitations is that the model cannot escape uncertainty. If one accepts that all claims are contingent, then certainty is an asymptotic end at best. Accordingly, theories that seek to describe reality begin with assumptions and then proceed to make other claims with a significant degree of reliability based on those assumptions.<sup>28</sup> Ensuring that there is indeed reliability is the domain of logic, which is concerned with the preservation of truth.<sup>29</sup> Establishing what the assumptions should be involves the normative dimension of philosophy and as such does not represent an exercise in „pure“ logic. Separating out assumption from the reasoning that follows from it allows the ethico-political dimension to remain separated from the logical to a significant extent, which in turn allows for the kind of theorizing that preserves space for differing opinions in assumptions. It is, however, still able to apply stringent checks to whatever reasoning is employed from the point at which assumptions are adopted as premises, onwards. The less work an assumption performs in describing reality, the more work is left for reason by way of logic, but the greater the faith we may place upon

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<sup>27</sup> Jean-Luc Nancy *Being Singular Plural* (2000) 37.

<sup>28</sup> Owen Anderson *The Natural Moral Law: The Good After Modernity* (2012) 2.

<sup>29</sup> Nicholas J J Smith *Logic: The Laws of Truth* (2012) 3-4.

the outcomes of our reasoning. None of these claims can avoid the core problems inherent in seeking certainty from assumptions, but it does show that a theory that seeks to increase reliability will need to reduce the work of its assumptions and increase the work of its logic.

Whilst the imperative of assumption is a significant constraint upon the pursuit of certainty for the model, a more immediate limitation exists in human cognition. These cognitive limitations include language limitations,<sup>30</sup> but also extend to processing deficits, the overcoming of which would require our brains to handle quantum computing and the like in order to overcome them. Progress is being made in drawing attention towards the effects of cognitive limitations as a question of resource allocation in juridical reality by Vermeule,<sup>31</sup> but this dissertation is more concerned with the limited capacity of humans to comprehend regardless of available resource allocation. Given that most people are not experts in logic and that even the experts in logic do not fully understand all of it, it seems plausible that we may yet learn, by way of logic, far more about reality than we already know, even though there is probably no way for us to achieve absolute and lasting certainty. The pursuit of knowledge remains as valuable and potentially successful a goal as it ever has been, although a downward revision of expectations ought to bring about significantly less grand interpretations of what constitutes success. That should not necessarily be seen as a disappointment. A goal which we can pursue and which yields rewards without being extinguished by its accomplishment is far better suited to driving human action over time than an easily and exhaustively achievable goal would be.<sup>32</sup>

The second inherent limitation within the model is the absence of determinative capability. If the paradoxes of this model indicate that entities might be understood in different ways without one way being more correct than another, then taking only that into consideration might lead one to question whether we have any understanding at all, much as some post-modernists have done.<sup>33</sup> The solution to such problems lies in the caveat that the model is a theoretical enterprise. It does not take even close to all relevant factors into account. It only seeks to elucidate a fraction of how we understand reality, accepting that we

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<sup>30</sup> Wittgenstein op cit note 4 at 48°.

<sup>31</sup> Vermeule seeks to draw attention to how the judiciary ought to function given that cognition is a finite resource, much as money or labour are understood to be limited resources. He focuses upon reaching the best decisions through appropriate allocation of this resource, not upon how human understanding is shaped by inherent cognitive limitations: Adrian Vermeule *Law and the Limits of Reason* (2009) 1.

<sup>32</sup> Anderson op cit note 28 at 265.

<sup>33</sup> This is what Cornell immediately seeks to distance from deconstruction: Drucilla Cornell *The Philosophy of the Limit* (1992) 1.

are incapable of totally dominating reality through our intellect.<sup>34</sup> Through the medium of judgment, context must provide the determinative input that the model lacks, with context remaining outside the model and beyond the totalising grasp of reason.<sup>35</sup> Application of this model increases our explanatory power, but it does not aspire to predictive power.

The implication that arises from the above limitations is that the model has a destabilising effect upon both future pursuit of knowledge and previously established knowledge. The destabilisation occurs as a result of the implosion of distinctions (that have been arrived at through analysis) when transcendence is pursued to arrive at the highest level of abstraction. It is, however, important to remember that this process does not amount to a deletion of those distinctions. They remain just as useful as they ever were, but they would hinder the purpose of the model of paradoxical understanding if they were to be included in this dissertation. Accordingly, it should be remembered that this loss of particularity is simply a means to the elucidation of more abstract patterns that offer more indirect potential for knowledge generation on a broader scale.

Accordingly, the model's inherent instability is in need of some justification. As there are no more basic reasons upon which to base justification, with the model already operating through assumptions made at (what is, in turn, assumed to be) the highest level of abstraction, the effects of the model in context must be drawn upon instead. Given that this dissertation is situated within the academic discipline of jurisprudence, the effect that the model has upon jurisprudence and especially the jurists who develop jurisprudence seems a suitable context within which to judge the desirability of the model.

Describing jurisprudence as a subject or body of knowledge is often useful, but also rather misleading. If there is any truth to the observations that are made throughout this dissertation, then it should be clear that philosophically inclined disciplines are less like collaborative excavations of hidden truths and more like intellectual battlegrounds loosely centred on interesting questions. The absence of consensus regarding assumptions does not stop the presence of dominant elections, but it does vitiate much of our capacity to work collaboratively. As with most of philosophy, the goal is usually to contest present theories or to develop new ones, rather than to make incremental contributions based upon nearly

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<sup>34</sup> The attempt to understand all aspects of reality, completely and concurrently, approximates Jung's description of neurosis: Ann Casement „The Shadow“ in Renos K Papadopoulos (ed) *The Handbook of Jungian Psychology: Theory, Practice and Applications* (2006) at 100.

<sup>35</sup> Jacques Derrida 'Signature Event Context' in Gerald Graff (ed) (translated by Samuel Weber and Jeffrey Mehlman) *Limited Inc* (1988) at 3.

universally agreed upon knowledge. Argument, not knowledge, is the basic constituent of philosophy.

That makes sense and is not meant as a veiled criticism. If assumptions are left open to challenge, then the risk of spending time developing upon one set of assumptions is greatly increased as compared to a situation in which assumptions are not open to challenge and competing assumptions are disallowed. Given that most academics are dependent upon their careers, it would be risky indeed to stake their substantive contributions entirely to the acceptance of another theory. The relative independence of contributions based upon the strength of their own claims, whether positive or negative, provides a risk averse strategy that is more appealing for securing the income that staves off destitution. Those with a preference for risk loving strategies are more likely to be found chasing greater fortunes in practice than in academia. References are certainly integral to academia, but the strategy of incorporating redundancy through reference to a broad range of opinions is further evidence of the preference for risk aversion. In short, academic jurists – in contradistinction to professional lawyers and judges - are usually unwilling to trust their predecessors to the extent that they will stake their careers on them.

A justification for the model of paradoxical understanding may be established on account of its *capacity to alleviate the problem of trust* at least to some extent in the domain of jurisprudence. Certainty would be increased if elections were made explicitly and accepted as being equally viable alternatives. That would create different branches of jurisprudence, not based on the objects they seek to interrogate, but rather upon their shared elections. If assumptions are the anchors and there is no way to refute an assumption, then that is a very reliable anchor. The popularity of elections might vary over time, but that would not change the basic cogency of the work done on any given set of elections. Academics would only be risking marginal shifts in relevance, not wholesale rejection of their work and that of the prior knowledge upon which they are building. Progress would be served better by accepting parallel development of knowledge within the field than by pursuit of the largely competitive model of theories seeking to displace each other. Such progress may be difficult to achieve when jurists are typically trained as lawyers and channelled towards adversarial argumentation early in their education, but the goal is at least clear. Accordingly, despite uncertainty being a limitation of the model, its effect on the trust academics may place in

their foundational elections creates greater certainty when compared to the adversarial approach that jurists are incentivised to adopt in the absence of the model.<sup>36</sup>

Parallel development in perpetuity would not be desirable, but engagement does still occur at the later stage when legal theory is applied to divergent contexts. Jurists would not be able to engage the greater community of jurists and other interested parties through the medium of their preferred theory alone. Contributions would be based upon what had already been found about law based on the relevant assumptions in the more abstract matters, but any attempts at persuading decision makers and advisors at a lower level of abstraction in the contexts with which they are concerned would necessitate the inclusion of theories built upon alternate assumptions. A paper aimed at altering policy considerations based only upon one theoretical viewpoint would be inadequate without the claim to having chosen the appropriate viewpoint that is either relevant or true as the case may be. This would amount to an inversion of the present method that sees iconoclastic contestation in the higher levels of abstraction leading to the silencing of subservient theories at the lower levels where they are meant to be of use. Let the academics present the options for policy makers to decide upon, rather than deciding in advance based upon indefensible claims which viewpoints they should include in their assessments. Accordingly, whilst the model of paradoxical understanding may destabilize knowledge, it also allows for knowledge to compete more effectively within the contexts in which it is useful. The cumulative influence of these effects that the model has upon jurists within academia justifies the theoretical limitations that the model cannot escape.

## 2.7 Conclusion

This chapter has presented the model of paradoxical understanding as a general framework within which the specific paradoxes may be investigated in the following chapter. Beginning with the delineation of an entity, the model allows for the analysis of reality into various aspects to be engaged through the paradoxes that are simplified through the elections that people make in order to bring reality within the ambit of our cognitive limitations. The

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<sup>36</sup> For an illuminating example of the latter, see the Fagan-Davis debate: Anton Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 611; D M Davis 'How Many Positivist Legal Philosophers Can be Made to Dance on the Head of a Pin? A Reply to Professor Fagan' (2012) 129 *South African Law Journal* 59; Anton Fagan 'A Straw Man, Three Red Herrings, and a Closet Rule-Worshipper - A Rejoinder to Davis JP' (2012) 129 *South African Law Journal* 788; D M Davis 'The Importance of Reading - A Rebutter to the Jurisprudence of Anton Fagan' (2013) 130 *South African Law Journal* 52.

resultant perspective that this model adopts allows for the interrogation of reality whilst retaining a flexibility that is useful when seeking to apply it to less abstract problems. Rather than seeking to provide a complete account of reality, the model has treated philosophy in this foundational sense as a means by which to improve our understanding of these less abstract problems, which would be forsaken both in cases when only the highly abstract matters are investigated and when abstraction is abandoned entirely.

## CHAPTER 3 - SPECIFIC PARADOXES IN THE MODEL OF PARADOXICAL UNDERSTANDING

### 3.1 Introduction

In the previous chapter, the model of paradoxical understanding was explained in general terms, focussing on how the model operates and the philosophical influences that inform it. The model begins with the delineation of an entity that is analyzed into aspects that exist as unresolved paradoxes. The resolution of these paradoxes requires elections to be made for each of the specific paradoxes. This chapter investigates several of the specific paradoxes in the model. These paradoxes support the work of subsequent chapters in this dissertation. It is unclear whether there are any limitations upon the number of specific paradoxes we can create in our attempts to understand reality at the highest level of abstraction and according to this model. Each paradox is indicative of an aspect of reality, which indicates that the number of paradoxes is tied to the number of aspects. However, the latter still leads to the problem of induction which is to say that simply because we have delineated a definite number of aspects to reality it does not mean that there are no further aspects to reality to discover. The possibility of additional aspects beyond our perception or recognition must be retained as a persistent caveat. The chapter concludes with a consideration of how the specific paradoxes integrate with the general model of paradoxical understanding.

### 3.2 Subject/object paradox

Perspective is unavoidable and bounded, in that every entity is both a discrete part of reality and co-habitant with other entities. The subject is the assumed perspective, while the object is that with which the subject relates. Subjectivity and objectivity are extensions of this paradox and this is where difficulties arise. Objectivity amounts to adopting the perspective of an object, which is to make the object the subject, but without accepting that this has actually occurred. Likewise, to claim the existence of discreet subjectivity is to deny that objects exist with which the subject may relate as entities existing outside of subjectivity, whilst nonetheless commenting on them. It would also leave a perplexing question as to what exactly it was that was experiencing a perspective, since it could only be observed as an

object, even when observing itself. An unusual implication of all entities being capable of both subjectivity and objectivity is that, prior to considering questions about intentionality, it is necessarily the case that everyday things like cups and tables have their own perspectives from which reality may be understood. Being a subject does not require having a mind.

The Cartesian division between mind and body has preoccupied philosophers for centuries without any meaningful resolution to the many problems it produces for epistemology and ontology.<sup>1</sup> The social/natural paradox is a more specific instance of the subject/object paradox that accounts for this division, which merits particular attention due to the inherently anthropocentric orientation of the human understanding that this dissertation investigates. Social reality is the domain of human minds, usually referring to their interlinking.<sup>2</sup> Natural reality is whatever exists in the absence of the human mind, including not only the human body, but everything else reality has to offer apart from the human mind.<sup>3</sup> Perhaps it is because of the dominance of the social/natural paradox in the context of anthropocentric understanding, that non-humans are neglected within the broader subject/object paradox.

There is no clear delineation to be made between entities as either purely social or purely natural. Reality is both constructed by humans and independent of humans concurrently. This is similar to the views held by Kant in attempting to reconcile the extremes of rationalism and empiricism,<sup>4</sup> whose work also appears to have been a significant influence upon Latour. One may treat the human mind as being based in natural reality, beginning with the firing of neurons and progressing to the experience of thoughts, but there comes a point at which a leap occurs from describing the unintentional natural world to describing the social world of intentionality. As yet, this leap has not been successfully articulated.<sup>5</sup> If the social election is made absolutely, then there is no way to explain how the mind might apprehend anything, since it does not exist in the natural world. If the natural election is made absolutely, then consciousness becomes inexplicable. These are the problems arising from dualism and they have been thoroughly explored by many philosophers, but for the purpose of this dissertation it is sufficient to note that the distinctions between realism and anti-

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<sup>1</sup> Michael J Loux *Metaphysics: A Contemporary Introduction* (2ed) (2002) at 1.

<sup>2</sup> John Searle *Making the Social World: The Structure of Human Civilization* (2009) at 4.

<sup>3</sup> Bruno Latour (translated by Catherine Porter) *We Have Never Been Modern* (1993) at 30.

<sup>4</sup> Cees Marais and Frans Jacobs (eds) (translated by Jacques de Ville) *Law, Order and Freedom: A Historical Introduction* (2011) at 176.

<sup>5</sup> Searle op cit note 2 at 4.

realism, as well as between monism and dualism, do not arise prior to making an election to resolve this paradox.

Factishes are products of the hybrid election within the social/natural paradox, which is why they are both created by humans and also not created by them. They are created by humans in the sense that human understanding or meaning is integral to them being what they are, which is particularly obvious in the case of symbols. When this constituent is being favoured, it usually results in factishes being 'invented' or 'designed'. However, they are also 'discovered', which is what occurs when the natural election is favoured. A symbol does not exist without depiction, so it must leave the human mind in some manner. Calling a statue both a divine being and a stone figure is not a contradiction if the non-modernist point of view is maintained, because it is both depending on the elections made within the social/natural paradox. If the hybrid election is made then this duality does not present any difficulty.<sup>6</sup> Modernity mistakenly dismisses the views of people who are employing more complicated modes of understanding reality as being nonsensical.

A potential source of confusion is the apparent similarity between what may be called 'artifacts' and factishes. Factishes are both social and natural without there being a fixed distinction within the entity as to which part is natural and which part is social. That does not preclude using elections to draw out some elements of an entity that may not have been apparent before, but the entity itself is both natural and social. Artifacts are natural entities that serve a purpose for humans. The social dimension of artifacts does not arise within the entity. A rock becomes a hammer when it is used as a hammer, for the purpose of being a hammer, but once it is put back on the ground and left alone it becomes just a rock again. The point is that it is just a rock that sometimes is used as a hammer and sometimes not. Returning to the stone statue, it is not being used as a divine being. It is a divine being. Human minds are using a natural entity when artifacts are involved and they are part of the entity when factishes are involved. Artifacts can only be invented. They cannot be discovered nor the indivisible blend of invention/discovery that a factish allows.<sup>7</sup>

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<sup>6</sup> Bruno Latour (translated by Catherine Porter and Heather MacLean) *On the Modern Cult of the Factish Gods* (2010) at 23.

<sup>7</sup> Popper's World 3 is not exactly the same as a factish, but it is sufficiently close when non-physical entities are concerned that it may be seen as one of the precursors to factishes. Physical entities would probably be treated more as artifacts: Karl Popper (translated by Laura J Bennet) *In Search of a Better World: Lectures and Essays from Thirty Years* (1992) at 25.

### 3.3 Relationship/bobject paradox

It is patently obvious that things (objects, subjects, both or neither) of all shapes and sizes are separate from each other, but are also connected to each other in some way, even if that connection is not directly perceptible. Bobjects (to differentiate from objects in the subject/object sense) are what we specify as anchors within reality, be they rocks on the ground or ideas in our heads. Relationships are what connect bobjects to each other, but which are not anchored like bobjects. Instead, they change and exist as a consequence of bobjects. That does not mean all bobjects are visible and all relationships are invisible, although it is easy to make that mistake by confusing this paradox with the natural/social paradox. If only bobjects existed, then we would be unable to explain their interactions with each other. If only relationships existed, then nothing would give content to them as particular relationships.

There is a significant bias within ontology towards bobjects, which is understandable given that relationships are incapable of having directly determinable existences that favour complete description. Indirect determination is more about being derivative than it is about changing, which would be more the domain of describing actors ontologically. A relationship is not independently discernible. It can only be described with reference to the bobjects that it relates. Attempting to avoid this problem results in turning the *relationship* into a bobject, which means that the entity is now being understood according to its opposing constituent. For example, the distance between two people sitting on opposite sides of a table may be about a meter. The relationship between them is the distance between those two people, not a meter of space. As those two people move, so too does the relationship between them change in terms of the measurement of the distance between them. If the space itself is identified, being the roughly one meter that approximates the length of the table, then it is the bobject of that space that is now being understood.<sup>8</sup>

The precise intersection between bobjects and relationships is not a matter of clear distinction. If there is a road between two towns, then where does the connecting road end and the road within the town begin? Is it still the same road once it crosses the border of either town? Latour has responded to arguments of this variety with appeals to transcendence, which in his taxonomy means that there is more to this than merely a town and a road, but I

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<sup>8</sup> Bruno Latour, Graham Harman and Peter Erdélyi *The Prince and the Wolf: Latour and Harman at the LSE* (2011) at 115-116.

would prefer to explain this anomaly as a consequence of how we delineate entities.<sup>9</sup> The degree of arbitrariness in making such delineations is what is encountered when the precise beginning and end of mutual oppositions is interrogated, which means that it is transcendence in the sense of inverting analysis that provides the account of why the town and road example is unresolved at one level of abstraction, but unproblematic at a higher level of abstraction.

### 3.4 Singular/plural paradox

In basic terms, singular means one and plural means not one, assuming positive numbers. Mathematics has primed us to understand this paradox with little difficulty, but its implications outside that domain warrant further explanation. To that end, consider this simple scenario. If a sheep stands alone in a field, it is clearly a singular sheep. If many sheep stand in that same field, then there are multiple sheep. We could say there are many singular sheep or a collection of sheep, expressed as a single flock of sheep. However, even when there was just one sheep in the field, it was only discerned to be a sheep because of an understanding of other sheep not present in the field. Is it a singular sheep or a member of the species of sheep? That which is singular is readily distinguished from its counterparts, while that which is plural is understood together with its counterparts. A person may be seen as an individual, the singular understanding of a person, or as a member of the human race in the company of other humans, the plural understanding of a person. There can be no plurality without singularity to constitute it and there can be no singularity without plurality to distinguish it. The singular/plural paradox has been discussed specifically by Nancy, but it is used in this dissertation in a broader sense than he has defined it on account of being able to elect either the singular or plural constituents largely in isolation of each other.<sup>10</sup> It appears that his goal is to resolve the paradox eventually, which extends beyond the scope of this dissertation, but his work thus far is nonetheless very helpful as an approximation of what a hybrid election entails.<sup>11</sup> Affect plays a central role in his theory of how we interrelate, which, translated to the terms of this dissertation, is a dynamic that traverses the singular/plural and actor/fixture paradoxes.

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<sup>9</sup> Ibid at 62.

<sup>10</sup> 'Being is singularly plural and plurally singular.': Jean-Luc Nancy *Being Singular Plural* (2000) at 28.

<sup>11</sup> Ibid at 37.

The singular/plural paradox is capable of explaining our intuitions about categories, but it is not limited to that framework of understanding. Electing to understand an entity singularly does not preclude understanding it plurally and neither election counts as the assumption for the other. Categories assume that whatever holds for the category must hold for each instance within it, but that is precisely the sort of modern thinking that the model rejects. There will usually be alignment between the singular and plural elections, as each is attempting to understand the same entity, but the fracturing of reality through analysis as represented in the polarized elections will not create perfect consistency between the elections. Accordingly, whilst each instance within a category probably shares a determinate set of characteristics, that is not necessarily the case when viewed as an instance of the singular/plural paradox. A close approximation of this effect is the family resemblances analogy posited by Wittgenstein.<sup>12</sup>

### 3.5 Actor/fixture paradox

Spatio-temporal reality is in a state of flux for as long as it exists, which is what distinguishes it from the unchanging state of eternity. As such, everything knowable is changing as we seek to understand it. However, something only exists as something because it is not always changing. This underlies the paradox of actors and fixtures. Actors are entities that change, both in the sense that they are changed and that they change other entities. Actors form the exclusive basis of actor-network theory, which traces how actors change in their interactions with other actors and how these may be used to understand more about the actor.<sup>13</sup> Fixtures are entities that are stable and inanimate. Latour refers to placeholders, termed „black boxes“ in his taxonomy, as the effect that allows us to treat an actor as a stable entity.<sup>14</sup> These placeholders may be cast aside to see actors as being composed of other actors when the need arises. This leads to actors being treated as collections of other actors with convenient simplifications to separate them according to our needs. In place of black boxes, this model prefers fixtures. The difference between fixtures and black boxes is that fixtures are not a matter of perception. They are just as real as actors. An entity is either an actor or a fixture,

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<sup>12</sup> The family resemblances analogy suggests that there is no single trait that all family members must share in order for the collection of traits that they possess to create a familiar resemblance between them: Ludwig Wittgenstein *Philosophical Investigations* (1953) at 32°.

<sup>13</sup> Bruno Latour *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005) at 23.

<sup>14</sup> Bruno Latour *Pandora's Hope: Essays on the Reality of Science Studies* (1999) at 191.

depending on how we understand it at any given point, but it is both at all times regardless of how we understand it.

The need for both actors and fixtures is apparent from the limitation that we cannot understand everything in motion or everything stationary, as they allow each other to exist intelligibly. We understand that a pool of water is gaining and losing water molecules as we observe it, but we need the stable referent of the pool to explain and comprehend what it is that is gaining and losing molecules. The anchoring effect of „the pool of water“ is undone, but this is needed so that the undoing of it may convey some meaning. The pool of water is assumed to be a fixture when an anchor is needed, when it is said that there is a pool on the table, but it is assumed to be an actor when the explanation of how molecules arrive and depart is given. Then it is said that the pool gains and loses molecules or that it accepts and rejects them. Clearly the pool is both actor and fixture, but it is equally clear that it is not thought of as both at the same time when we contemplate it in accordance with these different assumptions.

Perhaps the most difficult implication of the work inspired by actor-network theory is the acceptance that actors of all varieties act.<sup>15</sup> A cup on a table is acting when it rests on the table or stands on it. A cup is acting when it holds coffee inside itself. Those are fairly common and readily acceptable examples, but it is less palatable for many theorists to accept that the cup also influences the decisions that people make and that this is also an action of the cup. When the cup is too hot, it makes me drop it if I try to pick it up. The coffee also acted upon the cup and the boiling water before that acted on the coffee beans and the kettle acted on the water and so forth, but the chain of causation does not displace the observation that the cup acted upon me.

Typically, we would respond that the cup did not actually act on me, that it was merely a hot cup and that I dropped it because it was hot and nothing more. However, that response has only adopted the contrary assumption of the cup as a fixture. It does not preclude the cup also being an actor when that assumption is made. As the ease of changing assumptions indicates, there was no *necessary* reason for choosing to assume the cup was an actor or a fixture. In this case, the reason was because it was more useful to treat it as an actor when describing the effect initially and it then became more useful to treat it as a fixture when seeking to avoid the general implication that actors are not necessarily limited in their

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<sup>15</sup> Latour op cit note 13 at 61.

actions, even when those actions may seem to infringe upon what we defend as the exclusive domain of human actions. That may be a reasonable and pragmatic manner for making elections, but it has no further apparent justification or effect on alternate elections.

### 3.6 Order/chaos paradox as the ground of normative / descriptive paradox

Order is the presence of deterministic patterns and chaos is the randomness that exists in the absence of order.<sup>16</sup> For any actor to be free to any extent, it acts with both ordered and chaotic energies. If one knew absolutely everything, then all of reality would be ordered to that observer, whereas knowing nothing would render reality totally chaotic. Put differently, order is a consequence of knowing, whereas chaos is a consequence of ignorance. In keeping with the earlier observation that omniscience implodes knowledge, absolute order would also implode order through the absence of comparatives that elucidate the pattern upon which order is predicated. In resolving this paradox, one elects whether to treat an entity as that which lies within what one already knows or whether to treat it as lying outside of pre-existing knowledge. A cup is understood in terms of order when seen as a known whole, but it is seen in terms of chaos when seen as a great many loosely connected particles that could be anywhere within a probabilistic region at any given moment. One way to understand potential is that it is reality in accordance with the order election, so that an entity may be understood even in the future according to its potential as a consequence of assuming that what it may be is determined by what people know about it. What occurs in actuality is the combination of actor and chaos elections, to which the description of 'actuality' is appealing. Accordingly, the existence of potential can be understood without having to enter into debates regarding determinism.

A more specific instance of the order/chaos paradox is the normative/descriptive paradox. Normativity is the domain of what reality ought to be. Description is the domain of what reality is. To observe a norm is to describe it. A great deal of trouble is encountered by any theoretical enterprise when the limits of normativity are interrogated. Haphazard behaviour does not give rise to norms, except perhaps that there ought to be no relevant norms. Behaviour that forms a pattern seems to create at the very least an expectation of the

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<sup>16</sup> L Douglas Kiel and Euel Elliot (eds) *Chaos Theory in the Social Sciences: Foundations and Applications* (1996) at 2. Whilst there are resonances between the theory advanced in this dissertation and chaos theory, neither the dissertation as a whole, nor the paradoxes discussed here associates itself with the conventional wisdoms of chaos theory.

pattern being continued, but often it goes beyond that. For instance, I decided to stop pouring milk over my cereal to compensate for a binge of pizza and cheesecake I had undertaken. I explained this to a friend, who expressed not merely surprise at my failure to continue the pattern of behaviour I had previously exhibited, but went further by condemning my deviation. She insisted that I ought to return to pouring milk over my cereal, citing as her reason that „that was how it was done“. The interesting part of this exchange was that she did not cite a pre-existing norm as her reason, but rather a widely distributed pre-existing pattern of behaviour in support of her contention that my behaviour *ought* to conform to a norm. I do not think she made a mistake, but rather that the norm to which she was appealing was so fragile, being less than even a custom or a moral, that to provide a reason in support of it she needed to move back into the realm of directly observed and described patterns of human behaviour.

It is this sort of fringe case that demonstrates the limitations upon the contention that a normative claim may never be derived from a descriptive claim. That impossibility only arises once elections have already been made and if they are not allowed to change, as with each of the other specific paradoxes. It is the mutability of elections once they are seen as being part of how humans choose to understand reality that reveals how Hume's prohibition never to derive an ought from an is, as a product of modern thinking, may be circumvented.<sup>17</sup>

### 3.7 Transcending the specific paradoxes

The explanation of each of the specific paradoxes reveals why the model of paradoxical understanding is necessarily a distortion of reality on account of the analysis it employs. An entity is not truly vacuous once it is understood that each of these paradoxes has already been applied provisionally in order to be able to delineate the entity in the first instance. A vacuous entity is a provisional entity with the elections of object, bobject, singular, fixture and chaos.

It is the initial chaos election that allows for subsequent elections to be made with ease as the entity moves towards greater order later in the operation of the model. The distinctions between specific paradoxes are subject to similar dissolution under close inspection as the constituents within paradoxes, which is consistent with the inherently distortionary effects of analysis. As with the internal resolution of paradoxes, it is important

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<sup>17</sup>David Hume *A Treatise of Human Nature* (1888) at 469.

to return to the inescapable observation that reality remains whole despite analysis and to attempt a reconciliation not only within the paradoxes, but also between them. Transcendence is the opposite of analysis, beginning with parts of reality and melding them together. Analysis loses accuracy in favour of clarity and transcendence loses clarity in favour of accuracy. Complete success in this endeavour will probably always be beyond the scope of human cognition, which is why it is necessary to begin with analysis, but the appreciation of this need advances human understanding nonetheless.

Perhaps the best available analogy for the relationship between the general model of paradoxical understanding and specific paradoxes, as well as that between the specific paradoxes, is the collection of human senses. There are many different senses, but the simplified model, taught to children in schools, according to which there are only five senses (hearing, seeing, touching, smelling and tasting) is much like the model of paradoxical understanding. The general model of understanding is the central manner in which understanding occurs, much as senses are all processed by the central nervous system and the specific paradoxes are segregations that allow for different aspects of reality to be understood, much as sensory organs are segregations that detect different aspects of reality to be sensed. If my brain could not integrate sight and sound, I would not be able to perceive that the sound of the fan was coming from the computer I see on my desk. It would just be sound and sight, but not the two brought together to determine a source for the sound. This blends sense and comprehension somewhat, but that only reinforces the inescapability of integration.

The common inclination to seek the 'essence' of entities provides another demonstration of multiple specific paradoxes interacting. The usual explanation of essence refers to what is natural about an entity, but even if that is partly correct, being natural only establishes mind-independence and not immutability. In order to attain immutability, the fixture election is needed. It also requires the singular election, as it is unification despite minor differences that is captured by an essence. Essence is not understandable without acknowledging that it exists across the specific paradoxes, even as it remains beholden to them.

Transcending the specific paradoxes results in potentially confusing integrations. Subject and object are bobjects with a relationship in which one of the bobjects is the perspective and the other is the perceived with perception being their relationship. The

relationships between objects are perceptible with order and imperceptible with chaos. A object is singular until it is plural with relationships within the object, transforming from a fixture into actors. The change of an actor is a plurality of fixtures. This sort of mind warping interweaving forms the Gordian knot that Latour accuses modernity of having sliced in half and that needs to be painstakingly untied and retied if it is to be understood properly.<sup>18</sup> The vacuous entity is a lie, but so are all assumptions. They pretend to be true so that the implications of truth might be discovered, but thinkers still need to return to that lie and find some other lie to rely upon if they are to avoid making the critical error of believing it.

### 3.8 Conclusion

This chapter provided a brief account of the specific paradoxes that exist within the model of paradoxical understanding. It is now apparent that the model must be applied both to whatever we seek to understand and to itself so that our understanding may achieve some degree of simplification without succumbing to the comfort of unreflective certainty. The value of these paradoxes applied separately is superseded by their explanatory power when they are combined, illustrating how sensitive our understanding of reality is to changes in the elections we make. With each of the more relevant and abstract specific paradoxes having been explained, the philosophical foundations upon which a theory of factish law may be built are now sufficient for the thesis to be engaged directly. The following chapter begins the exploration of the law as a factish from the vantage of the fixture election.

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<sup>18</sup> Latour op cit note 3 at 3.

## CHAPTER 4 - FACTISH LAW AS A FIXTURE

### 4.1 Introduction

By adopting the fixture election in relation to law, this chapter argues directly in favour of the thesis that the law *is* a factish, in the narrower sense that ontology usually investigates. I begin with a consideration of how the iconoclastic strategy of exclusive election influences the social understanding of law, arguing that, through belief, both the ontological and epistemic pathways to establishing social reality become, perhaps inadvertently, but certainly inappropriately, mutually dependent. A similar treatment is provided for natural law, showing the inaccessibility of mind-independent normativity and the irrelevance of such entities even if they could be found. With social law and natural law, each implicitly relying upon the elections of each other, the explicit articulation of factish law is presented with some demonstration of the proximity of social and natural law that more recent theories of law have achieved. This makes it not so much a strange take on legal theory as a progression of what already existed within the more traditional modern approach to jurisprudence, much as Latour observed decades ago that we have never truly been modern when we implicitly have relied upon non-modern thinking in our ignorance.<sup>1</sup>

### 4.2 Social law

There are many variations on the theme of social law. Legal positivism is probably the most prominent theoretical position claiming that law is a social fact, but any theory sharing this claim counts as social law theory in the context of this analysis.<sup>2</sup> In this dissertation the attribute of law being „social“ is identified as the outcome of an election, which means that it could always have been natural instead. It might simply be claimed that the theoretical framework of this dissertation is incorrect in suggesting that the natural election is equally plausible and proponents of social law may instead focus upon defending the internal consistency of law as a social fact. However, this chapter argues that the exclusive reliance upon the social election unduly limits our understanding of law, because it fails to explain a great part of the law’s reality. This means that the inadequacy of social law as a sufficient

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<sup>1</sup> Bruno Latour (translated by Catherine Porter) *We Have Never Been Modern* (1993) at 46-47.

<sup>2</sup> John Gardner „Legal Positivism: 5½ Myths“ (2001) 46 *American Journal of Jurisprudence* 199 at 199.

theory of law must be demonstrated on the grounds of internal inconsistency. That is not only to restate the trite point that that positivism provides a partial account of law, but more pertinently that in its attempt to provide a *complete and consistent* account of law, it has adopted the restriction of avoiding any reliance upon the natural election. This iconoclastic strategy renders social law's foundations implausible.

Not much has been said about social facts directly within jurisprudence, but the more recent trend of identifying the sociological and philosophical underpinnings upon which jurists are relying, has provided a means for further interrogation. For instance, in a recent contribution, Neil MacCormick cites John Searle as one of the theorists upon which his understanding of social institutions is based.<sup>3</sup> Searle has developed a theory that explains social facts and institutions as part of a sea of social reality.<sup>4</sup> Social facticity, according to Searle, is not an entirely separate realm from the natural world, since it is generated by and thus arises from the organic brains of human beings. However, what distinguishes a fact as 'social' is that it is entirely dependent upon human minds for its existence. Brains as natural, organic entities are the basis of minds, but the theory only operates at the level of abstraction at which minds are understood, not at the neurological level of understanding brain chemistry. Accordingly, the theory of social facticity fits within the bounds of social theory. The existence of social facts, in turn, is not entirely subjective. On account of the multiple people who contribute to their existence, social facts are more objective through being widely dispersed. However, they remain founded in the beliefs of those widely dispersed contributors and in that sense they maintain a 'subjective' aspect.<sup>5</sup>

According to Searle, collective intentionality is the principle mechanism underpinning the creation of complicated entities within social reality. According to this account, the individual intentions of people act in concert to create widely distributed networks of intentions.<sup>6</sup> If I throw a ball in the air and you hit the ball, then it is clear that we each acted intentionally. It is a case of collective intentionality if I throw it with the intention of setting you up to hit the ball and you hit the ball with the intention of exploiting the opportunity I have intentionally created for you. We are serving the ball together, but each of us has clearly

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<sup>3</sup> Neil MacCormick *Institutions of Law: An Essay in Legal Theory* (2007) at 12.

<sup>4</sup> John Searle *Making the Social World: The Structure of Human Civilization* (2009) at 90.

<sup>5</sup> *Ibid* at 18.

<sup>6</sup> *Ibid* at 8.

defined and interlinking intentions within the joint enterprise. There is no indivisible hive mind, but each of the intentions incorporates the intentions of other subjects.<sup>7</sup>

In terms of this theory, rules are created when we agree on how our intentions must be structured in this joint enterprise. Failing to conform to the requirements of the rules would vitiate the basis for collective intentionality. Given that we may remember and repeat such interactions, carrying them with us in our minds in the form of memory, it is only a matter of expanding their intricacy and ensuring the accurate conveyance of their parameters that is required in order to create and sustain social reality from fairly simple social facts all the way up to complicated social institutions and the enormously complex societies in which we live.

What makes Searle's position appealing as an explanatory theory is that it allows for entities to be created as comprising of many other interrelated entities. Social institutions are entities that can be easily referenced whilst still being able to show that they are ultimately grounded in the individual beliefs of subjects who are acceding to the joint enterprise of creating and maintaining such social entities. A degree of resilience is incorporated into these entities by their capacity to withstand the loss of individuals and their beliefs so long as not all beliefs are lost, allowing them to endure through time beyond the memory of any one person. Records might be kept to help people remember what the rules are, but they are only reminders and representations of the rules that exist only in the minds of people.

Of course, as Searle well knows, the Achilles' heel of his theory is knowledge where knowledge must be understood according to its classic articulation as justified, true belief.<sup>8</sup> In order to ground our understanding of reality in the fullest sense, knowledge needs to be something other than merely social. If that were not the case, then we could create mountains just by following the same process that we follow to create rules: collective intentionality. In Searle's model, knowledge must temper belief, so that belief does not spin on its own axis. Unfortunately for Searle, Martin Kusch has already shown how Searle's theory of social reality is able to explain knowledge as precisely a *social* institution.<sup>9</sup> Kusch does this in his account of communitarian epistemology, which is a theory of knowledge that understands knowledge to be a social institution that imbues claims with the social status of knowledge. This means that once rules are followed, a claim that would otherwise be treated as merely a proposition is instead accorded an elevated status which removes it from the realm of opinion

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<sup>7</sup> Ibid at 50-55.

<sup>8</sup> Ibid at 18.

<sup>9</sup> Martin Kusch *Knowledge by Agreement: The Programme of Communitarian Epistemology* (2002) at 70-72.

and speculation into the domain of what is reliable and attested to by people who are well placed to determine and defend its reliability.<sup>10</sup>

The social institution responsible for this process of imbuing claims with the status of knowledge is based upon the theorising of Searle.<sup>11</sup> Agreement is the foundation of what creates knowledge according to this process, as it is the acceptance of testimony by those who are well placed to do so that ultimately satisfies the requirements of knowledge as a social institution and results in the granting of the social status of knowledge.<sup>12</sup> In short, beliefs are granted the social status of knowledge in keeping with a more complicated set of interrelated beliefs. This still means that many checks and balances are required in order to vet which beliefs are able to become knowledge, but ultimately they all are based upon beliefs - and counter-balanced by other beliefs. These constraints upon what counts as knowledge might be described as reliabilism determined by testimony and agreement. Because it removes truth and replaces justification with agreement, communitarian epistemology is, admittedly, a departure from the classic epistemology that understands knowledge to be justified true belief. Belief and agreement, both within the exclusive domain of the human mind, are social elements and all that remain of knowledge as communitarian epistemology understands it. The natural election present in classic epistemology is entirely removed, because truth and justification were the elements that were outside the exclusive domain of human minds.

Accordingly, communitarian epistemology creates a short circuit between ontology and epistemology within social reality. Beliefs found what things are in social reality as described by Searle, but they also found our knowledge of them as described by Kusch. The model of paradoxical understanding might appear to be sympathetic to such an approach, but the major difference is that the model of paradoxical understanding admits that our understanding is not founded entirely upon our beliefs, so that whilst understanding might blur the distinction between ontology and epistemology it does not situate itself in the exclusive domain of human minds. It accepts that reality is not simply what we understand it to be, but rather that understanding is the medium through which we engage reality and that complexity arises from that medium being part of reality too. The blurring between ontology and epistemology in the communitarian epistemological theory in social reality, should the work of Searle and Kusch be understood together, falls straight into the trap set by Cartesian

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<sup>10</sup> Ibid at 12 and 166.

<sup>11</sup> Ibid at 63.

<sup>12</sup> Ibid at 12 and 166.

skepticism and gives no foundation upon which reliabilism might rely other than the politics of consensus.

Even if that were not of concern, the shared foundation in belief creates a bleeding between the pathways that ought to be followed according to the different social institutions involved in social reality. It is extremely unlikely that people would hold one belief about what an entity is and a different belief about what they know it to be. A change in one would result in a change in the other, though not necessarily through the processes that make these different social institutions. Instead of beliefs being elevated through a particular process, they would be changed to align directly with their counterparts.

Consider the implications of the social account of law for its ontology and epistemology, respectively. If law is a social fact, then it is based in beliefs as processed by the social institution of law (Searle). In constitutional democracies, the creation of law typically involves some sort of parliamentary process together with presidential enactment. The crux of the process is proper authorization, itself a matter of social fact and thus, of belief. The legislature is thus the archetypical social institution that creates the law, making it the pathway for legal ontology. Courts, then, are the archetypical social institution that knows the law, making it the pathway for legal epistemology. However, if knowledge is also a social institution (Kusch), then knowledge of law is based in beliefs and processed by the social institution of knowledge, juridically represented by the judiciary. It is beyond controversy that judges do not create law *ex nihilo*.<sup>13</sup> However, if the Kusch-Searle trajectory is pursued to its full consequences, we would have to admit that judges, in determining what „the law is“ (known to be) and through their influence being ossified in judgments giving rise to binding case precedent, create law.

Accordingly, in the social account of law, there is a short circuit between what the law is and what we know it to be, because the distinction between legal ontology and legal epistemology becomes a nullity. Perhaps that does not establish a *necessary* dissolution, especially since no single judge determines all of law, but it does establish a significant likelihood of dissolution and that is enough to cast serious doubt over the integrity of law. In a world where the above was a sufficient account of law, it would be extraordinarily difficult to challenge the truth of any matter of law once prominent actors like judges had pronounced

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<sup>13</sup> Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 149.

upon it. Legal realists might say that they already know this, but it is only practical implications to which they point. Positivism provides the basis that makes the domineering role of judges not only a matter of power or expediency, but also theoretically consistent. Put differently, whilst each theories' proponents appear to disagree with each other, the most avid supporters of both legal realism and legal positivism (as social theories of law) actually share the same core commitments and ought to accept the same conclusions when their theories are carried through. Positivism is the theoretical framework that results in the conclusion from the legal realists that law is whatever judges say it is, with no pathway to contradict them.

The above has a certain ring to it, but experience indicates it is not entirely the case. Judges often do make mistakes, even though the above account of social law suggests that it is not plausible for them to do so. An exasperated reader may point out that there are obviously constraints upon what people believe, because they read the statutes and they apply logic and other people would never believe judges who simply made up the law without reference to documents that indicate what the law is. If that is the response advanced, then it is a recognition that the natural election needs to be included, which is precisely what this discussion seeks to demonstrate. Clearly social law theorists do not intend for this to be the outcome of their theories, but that is what their theories suggest nonetheless.

Roger Cotterrell conveniently presents the central dilemma of social law theorists when he claims: „Social theory seeks to explain the *nature* of the *social* in general terms.“<sup>14</sup> He goes further to observe: „What makes doctrine “legal” is its institutionalization: the fact that it is created, interpreted or enforces in certain socially established ways, through the use of recognized procedures and agencies.“<sup>15</sup> As this section has shown, Cotterrell's understanding of the law leaves social theories in the unenviable position of either having to accept that beliefs are all that found the social or to accept that the social election cannot explain the law without help from the natural election.

All of this trouble could be avoided in the argumentative sense by disavowing specific theories of social reality, like the one developed by Searle or refuting Kusch, but then it becomes unclear once again what is generally meant by a social fact. At the core of its meaning, to be social is to be exclusively in the realm of human minds. Epistemology might

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<sup>14</sup> Roger Cotterrell *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006) at 1. (emphasis added)

<sup>15</sup> *Ibid* at 1; Bruno Latour 'The Strange Entanglement of Jurimorphs' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 335-337.

save this problem by requiring mind-independent truth as a constituent of knowledge. That is just another way of admitting that social reality cannot exist on its own, because it would be internally inconsistent as a theory of reality. Without some anchor in the mind independent part of reality, social reality is inherently unstable and probably meaningless. If that is so, then is it clear that a theory of law that only treats law as a social fact is not a sufficient account of law. Communitarian epistemology could be remedied by admitting non-humans to provide testimony that would diversify the range of actors contributing towards knowledge, but that too is a recognition of the importance of including the natural election in knowledge.

### 4.3 Natural law

Natural law theories have existed far longer than social law theories and their evolution has already responded to much of the internal inconsistency created by an exclusive reliance upon the natural election.<sup>16</sup> Ever since Aquinas posited that natural law is discovered through the exercise of human reason,<sup>17</sup> the social election has existed without being recognized as such in natural law. The clear need for such an inclusion arose from the implausibility of claiming that laws existed entirely independently of human minds.

That has alleviated to some degree the severity of the effects that natural law might otherwise suffer, but even present day theorists do not completely evade the internal inconsistencies of natural law theory. Finnis has accepted the role of reasoning to a significant extent, but still relies upon innate human goods to found that reasoning.<sup>18</sup> Similarly, Fuller's „internal morality of law“ offers what is clearly a social account of law (basically liberalism) but grounds the theory in natural law.<sup>19</sup> The problem is not that these theorists may be wrong about what the specific human goods are, but that they claim them to be determined independently of our influence. If they were determined by human reason too, then they would be significantly less natural than they are claimed to be. If they are natural, then they refer to humans either as bodies or as minds. If they refer to humans as minds, as they almost exclusively do, then these goods are not independent of the social election, but

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<sup>16</sup> It is commonly accepted that one of the earliest accounts of natural law occurs in Sophocles' Antigone, believed to have been written in (or before) 441 BC.

<sup>17</sup> Thomas Aquinas 'Treatise on Law' in Robert M Hutchins et al (eds) *The Summa Theologica of Saint Thomas Aquinas: Volume II* (1952) at 206 (Q. XC, A. I, Reply 2).

<sup>18</sup> John Finnis *Natural Law and Natural Rights* (1980) at 85-90.

<sup>19</sup> Lon L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630 at 645.

instead are completely determined by it. The human mind might not have chosen those goods, but it is the particular existence of the human mind as the human mind that determines what those goods are. They are implications of the human mind, certainly not nature. If human goods refer to humans as bodies, then they are inexplicable as goods. Normativity in this moral sense does not affect bodies as moral agents. Rocks and cows cannot pursue the good. Nobody suggests that there are natural cow goods. The closest to that would be entities that are good for cows, but they are understood descriptively as entities that make cows healthy and such, not normatively as entities that determine how a cow ought to live its life.

If the human goods or any other natural entity were to be understood as the foundation of law in the sense that human minds did not determine them, then law would face a legitimacy crisis in any secular state. In religious states that might be less problematic when a divine being is seen to be the foundation, but it would still mean that legislating in an advanced society distanced from the technological constraints of the times when religious texts were mostly written for the major structural religions, would be extremely difficult to justify. Many matters would become so strenuous in their connection to the natural foundations of law that attempting to legislate on them would leave those laws open to constant challenges. The *determinatio*<sup>20</sup> that underlie much of the utility of legal systems would be indefensible whatever they might be, not unlike the elections made in resolving paradoxes within the model of paradoxical understanding, although in a domain that requires a great deal more certainty and defensibility. Law becomes justice and is made redundant to the extent that it constitutes a separate normative system.<sup>21</sup>

Legal systems are infeasible if they are not at least partly political, otherwise there would be little prospect of reaching clear determinations of what the law is.<sup>22</sup> This is a mirror image of the problems arising from relying exclusively on social reality. Natural reality keeps not only ontology, but also epistemology firmly rooted in objective truth. Where social reality founds law solely upon belief, natural reality renders belief irrelevant. Even though law is justice, justice may not be what people want it to be. The capricious whims of divine beings might just as plausibly determine the contents of justice and decide that humans are beings better swept off the face of the earth, as is implied by the biblical story of Noah and the ark.

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<sup>20</sup> John Finnis 'The Truth in Legal Positivism' in Robert P George (ed) *The Autonomy of Law: Essays on Legal Positivism* (1996) at 201.

<sup>21</sup> See, generally, chapter 5 of this dissertation for elaboration upon distinct normative systems.

<sup>22</sup> Kyle McGee 'On Devices and Logics of Legal Sense' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 63-67.

Finnis tries to avoid this by grounding his theory of natural law in human goods, but as explained above this either means he has already incorporated the social election into his theory or he cannot justify why these are the good at all.

There is an alternate dimension to natural law theories in that they are often the domain within which questions are asked not about what the law is, but about what it ought to be. This is an important and largely neglected enquiry within jurisprudence.<sup>23</sup> However, whether the good is used to determine what the law is or what it ought to be, it remains within the social/natural paradox. The descriptive/normative paradox is being neglected in this case, not the natural election. That being said, it is just as distorted to isolate the normative dimension of the law as it is to isolate the descriptive dimension from the perspective of non-modernism. The descriptive bias in narrow jurisprudence is the reason why it receives extra attention in this dissertation, so as to address the central concern of jurists, but that should not be interpreted as an implicit agreement with that preferential treatment.

#### 4.4 Factish law

How might these problems arising from social law and natural law be remedied? Leaving them as criticized for being internally inconsistent without attempting to reconcile those problems would amount to a version of post-modern thinking that is not sufficient for making intellectual progress. Despite his later equivocation,<sup>24</sup> Latour has proposed that we treat law as a factish.<sup>25</sup> A factish is a blend of fact and fetish that draws simultaneously upon the natural and social elections within the model of paradoxical understanding. A wooden idol is understood to be both a god (social election) and also just a carved piece of wood (natural election) without one extinguishing the other (paradoxical understanding).<sup>26</sup> However, it is worth noting that this explanation still adopts each assumption separately in order to conjoin them without avoiding the paradox. Instead, it is an acceptance of the paradox in its unresolved state. One might observe that the social/natural paradox is just a peculiar instance of the subject/object paradox, which is indeed correct, but given that anthropocentrism is our

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<sup>23</sup> Robin West *Normative Jurisprudence: An Introduction* (2011) at 2.

<sup>24</sup> Bruno Latour, Graham Harman and Peter Erdélyi *The Prince and the Wolf: Latour and Harman at the LSE* (2011) at 102.

<sup>25</sup> Bruno Latour (translated by Marina Brilman and Alain Pottage) *The Making of Law: An Ethnography of the Conseil D'État* (2010) at 276.

<sup>26</sup> Bruno Latour (translated by Catherine Porter and Heather MacLean) *On the Modern Cult of the Factish Gods* (2010) at 3.

inescapable condition it seems sensible to retain this special treatment. Accordingly, a factish is a hybrid of both the social/natural and subject/object elections.

The social election is evident in the role of human minds, both in determining the contents of legal sources and in applying legal reasoning. There is undoubtedly also a need for people to draw together the otherwise disparate texts that make up the web of law and determine what that web should be to some extent when there is no constraint imposed by reason. That there is a legal community at all is indicative of this.

There are two dimensions of the law that draw on natural elections. The first is logic, which is integral to legal reasoning. Logic may be discovered by people, but these are the laws of truth, in the sense that whatever truth is assumed to be present in the premises is guaranteed to remain in the conclusion. Any given form that logic takes and the application of it surely require the social election to explain, but we have no control over the conditions that preserve truth. We did not invent them any more than we invented the elements. Whilst I do not share his commitment to the particular array of human goods that he identifies as the relevant normative premises, I do agree with Finnis that the logical conclusions drawn from normatively charged premises are naturally part of the law. The second dimension is that of the more overtly physical legal artifacts upon which Latour focuses, such as the documents that constitute legislation or the marks that we understand as signatures.<sup>27</sup> The law is not only the tracing that links these natural entities together meaningfully, largely coextensive with legal reasoning,<sup>28</sup> but also those natural entities, largely coextensive with legal sources.

Upon close enough examination, each of the entities that is understood as either social or natural is constrained by a reliance upon the alternate silent election, so that attempting to be absolutely accurate results in an explosion of complexity with no curtailment. If we remain committed to iconoclastic understanding, then there is no end to such debates. The acceptance of iconoclasm, on the other hand, is less palatable to those who seek clarity upfront, but it avoids this cascade by incorporating ambivalence immediately into our understanding. This illustrates that the paradoxical existence of this aspect of reality is inescapable as we attempt to understand entities. There is little use in continuing a debate premised upon a false dichotomy. That is not to say that these theories are useless. Far from that, they help to develop our understanding of the law immensely. There just is no point in

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<sup>27</sup> Latour op cit note 25at 90.

<sup>28</sup> See, generally, chapter 6 of this dissertation for elaboration on the roles of legal reasoning within the model of factish legality.

putting them against each other, since they each describe the law according to the exaggerations of their respective elections.

The debate between social law and natural law has continued to inform competing theories of legal interpretation. Positivism leans towards more literal interpretations based in conventional readings of legal texts, whilst natural law leans towards interpreting legal texts so as best to advance the ends of justice. Taken to their extremities, legal positivism might accept that outright evil law must be understood in its evilness as the law, whilst natural law interpretation might be unable to reach a plausible outcome and be compelled to reject the source under consideration as part of the law.<sup>29</sup>

Factish law provides the ontological foundations that allow for theories of interpretation to avoid either of these situations. It does not do so by providing a clinically consistent theory of interpretation that must be adhered to in any circumstance, but instead undermines the capacity of other theories to do so through recognition of the law's hybrid<sup>30</sup> existence. That does little to help with deciding the puzzling fringe matters of which jurists are so fond, but it does provide a theoretical basis that avoids the excesses of theoretical dogma whilst fending off the nihilistic effects of claiming that there simply is no cogent theoretical framework to be found. That is a particular instance of the more general pattern observable in non-modernism seeking to avoid the pitfalls of both modernism and post-modernism.

Scott Shapiro has argued that legality arises from our trust and distrust in each other.<sup>31</sup> We adopt legal systems as a means to avoid having to always trust each other. In defending the value of legality in terms of this understanding, he contends the following:

„The Rule of Law is valuable not only because it allows *us* to plan our lives, but because it enables *the law* to plan our lives. The law is morally valuable, I have argued, because we face numerous and serious moral problems whose solutions are complex, contentious, and arbitrary. The only conceivable way for us to address these moral concerns is through social planning. Morally and prudentially

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<sup>29</sup> HLA Hart 'Positivism and the Separation of Laws and Morals' (1958) 71(4) *Harvard Law Review* 593 at 615-621; Fuller op cit note 19 at 655-657.

<sup>30</sup> On the meaning of hybridity, see Mikhail M Bakhtin 'Discourse in the Novel' in Michael Holquist (ed) (translated by Caryl Emerson and Michael Holquist) *The Dialogic Imagination: Four Essays by M. M. Bakhtin* (1981) at 304 and 324.

<sup>31</sup> Scott J Shapiro *Legality* (2011) at 336.

speaking, we desperately need norms to guide, coordinate, and monitor our actions. If a regime did not normally produce standards that were general, promulgated, clear, prospective, consistent, satisfiable, and stable, and then did not apply them to cases that arose, it would not provide the guidance, coordination, and monitoring we need to solve the problems we ought to solve.’<sup>32</sup>

The above explanation draws upon both natural and social elections to explain law. The social plan provides an alternative to directly trusting other people because it creates natural non-human actors. Humans develop a plan, but that plan gains an independent existence, which is highlighted by the coordination that the law provides through actively guiding human conduct. Shapiro was never bound by the strictures of either positivism or natural law, but the social/natural paradox explains why he needed to avoid such limitations and also why he cannot articulate his position without appealing to the apparently contradictory claims of law being both social and natural instead of a perfectly blended claim that appeals overtly to neither election.

The theory of law as institutional normative order developed by MacCormick could also be interpreted as implying factish law.<sup>33</sup> Treating social institutions as just institutions and allowing them to be non-humans through the natural election would result in much of his theory remaining intact. Decentralization of the law from humans under the influence of those non-human institutions is only a step away from recognizing that the law is equally capable of being understood as a natural institution with a little manipulation of the singular/plural paradox to move between the institutions that comprise the law and the law as an institution.

The significant attention afforded to state institutions in South Africa over the last few years is illustrative of their factish existence. State owned enterprises like South African Airways and state institutions like the National Prosecuting Authority have received much media attention on account of their leaders purportedly undermining the functionality of these institutions.<sup>34</sup> Focusing closer to home, the University of Cape Town has been at the centre of

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<sup>32</sup> Ibid at 396.

<sup>33</sup> MacCormick op cit note 3 at 11.

<sup>34</sup> Stephen Grootes 'State-Owned Enterprises: Chaos Inside a Mess, Wrapped in Politics' (06 August 2015) [http://www.dailymaverick.co.za/article/2015-08-06-state-owned-enterprises-chaos-inside-a-mess-wrapped-in-politics/#.V3xE\\_19670](http://www.dailymaverick.co.za/article/2015-08-06-state-owned-enterprises-chaos-inside-a-mess-wrapped-in-politics/#.V3xE_19670) last accessed 06 July 2016; Stephen Grootes 'Analysis: The NPA's World of Ever-

debate regarding the effects of changes to hiring policies that seek to accelerate racial transformation.<sup>35</sup> The debate is precisely about what effects this will have on UCT as an institution in the years to come, with strengthening or weakening of the university depending on the advocates being asked about the matter. What nobody disputes is that there will be change and that this will be occasioned primarily by the change in staff and student composition, not that there will be some fundamental change in the powers granted to UCT by the statute that creates it or in some other way that changes what the powers of UCT are. Academic or institutional freedom may provide good reason for desiring this flexibility, but more sensitive organs of state have very specific functions to fulfil that are compromised to the detriment of the public.

This sensitivity to the people who staff an institution suggests that there should be significant emphasis placed upon who may staff institutions, not just on their structural design. Laws that simply require a suitable candidate to be selected or that give general discretion to make appointments are just as inadequate as laws that give institutions general discretion to do as they please or to have as many leaders concurrently as they like or to account for only as much as they desire.<sup>36</sup> The idea that institutions remain unaltered as their staff come and go is a result of polarizing social and natural elections.

However, it is equally important to note that humans alone cannot account for any of these institutions. They change far more dramatically than is often acknowledged when the people who staff them change, but they do remain the same institution. That is because the non-humans remain. If every building and document in UCT was to disappear overnight, there would not be a university any longer. Of course, if every person were to disappear, the same fate would befall the university. Both humans and non-humans are both social and natural. People, institutions and the law are all subject to the same paradoxical understanding. Our theoretical and practical endeavours are severely limited if they do not accept this.

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Increasing Conflict' (22 February 2016) <http://www.dailymaverick.co.za/article/2016-02-22-analysis-the-npas-world-of-ever-increasing-conflict/#.V3xB3Pl9670> last accessed 06 July 2016.

<sup>35</sup> R W Johnson 'Can UCT be Allowed to Die?' (29 April 2016) <http://www.politicsweb.co.za/opinion/can-uct-be-allowed-to-die> last accessed 06 July 2016.

<sup>36</sup> D M Davis 'Separation of Powers: Juristocracy or Democracy' (2016) 133 *South African Law Journal* 258 at 268.

#### 4.5 Conclusion

This chapter drew the traditions of social law and natural law together in showing how they each rely implicitly upon the election of the other. Understanding the law as a factish is a short step from seeing the social and natural theories of law as mutually dependent, as is reflected by the increasing merger of social and natural elections in more recent theories of law, without them even having claimed this hybridity directly. By understanding the law as a factish in terms of the fixture election, this chapter has provided a more juridically inclined philosophical basis for explaining factish legality. However, in order to explain the operation of the law, the law must also be explicable as an actor. Accordingly, an account of factish law in terms of the actor election is provided in the following chapter.

## CHAPTER 5 - FACTISH LAW AS AN ACTOR AND CUSTOMARY „LAW“ AS MISNOMER

### 5.1 Introduction

This chapter shifts the perspective and adopts the actor election in relation to law in order to continue the investigation of what the law as a factish means. I begin by identifying the aspiration towards inviolability as the singular unifying goal adopted by all that we call law. I argue that the laws of the state and the laws of physics are not merely homonyms, but entities that succeed to varying degrees in their pursuit of inviolability. Focusing on the law of the state, various strategies that the law adopts in order to more effectively pursue inviolability, are explained. These strategies include maximising its objectivity and incorporating one or another, or even several different versions of, „justice“. The insights obtained from this focus are consequently applied to the currently topical example of customary law in South Africa. Viewed from the angle adopted here, I argue that customary law is mistakenly understood to be a legal system, not on account of being insufficiently systemic, but on account of not possessing the aspiration to be inviolable. Customary law is a *normative* system of value to communities just as the law is, but its goal is to see harmony restored to relatively more homogenous (and smaller) communities that enjoy relatively high levels of trust amongst its members. In Latour’s language, the example of customary law as distinguished and distinguishable from law, reveals how subjects inhabit what he calls different „modes of existence“ simultaneously.<sup>1</sup>

### 5.2 Aspiring towards inviolability

It is commonly accepted that, as a product of authority, law operates under the principle of a general claim to obedience.<sup>2</sup> The negative correlate of this claim is that its subjects should not violate (in the sense of disobey) law, at least provisionally and in the absence of overriding

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<sup>1</sup> Latour has not identified customary law as a distinct mode of existence, as he has with law, but it seems plausible that he either would do so or that he would find customary law adequately described by other modes of existence: Bruno Latour (translated by Catherine Porter) *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (2013) at 18.

<sup>2</sup> Lon L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630 at 632.

considerations. Put differently, there is a duty to obey law according to most understandings of duty and authority.<sup>3</sup> It is, accordingly, uncontroversial to conclude that morals, ethics and / or politics implore us to obey law. However, it does not follow *ipso facto* from this conclusion what the law as a discrete entity „wants“. Let us, accordingly, assume that law is an actor. It is consistent with that election to understand law as an intentional being, because much the same inferential processes employed to understand the intentions of other humans would allow for the intentions of non-human actors to be inferred. Direct experience of intentionality is only available to the entity itself, which is to say that direct intentionality is subjective to the entity. Both the entity in question and other entities can indirectly infer intentionality through objective means, such as seeing behaviour and judging from its methodical execution that it was intentional, rather than unintentional behaviour when it is haphazard.

We see a person climbing a flight of stairs and infer that they intended to act the way they did, but we infer that their actions are unintentional when they roll down the stairs a few moments later yelling in surprise. We as humans find it easy to attribute intentionality to other humans because they behave the way we do. It was thought for a long time that animals were automatons, which eventually was thoroughly rejected, but the point is that the difference between humans and other animals was enough to deny full intentionality to animals for a long time. Certainly the intentionality of cups and tables is far less complex than that of humans and they should not be anthropomorphized, but applying the same indirect assessment of intentionality to non-human actors to the extent that objective evaluation of them allows, is all that is suggested by the actor election. This goes beyond the claims of autopoiesis, which is concerned with the legal system as a social system in terms of functionality and not intentionality.<sup>4</sup> Law as an actor with intentionality is capable of far more.

According to mainstream conventions, law might not have emotions, but it appears to have goals. That is very close to teleology, but the difference here is that actors are not treated as the indirect placeholders of human intentions alone as they are in teleology. A goal is the result of electing to understand an entity in accordance with the actor, natural and subject elections. A purpose is the result of electing to understand an entity in accordance

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<sup>3</sup> Immanuel Kant 'The Metaphysics of Morals' in Hans Reiss (ed) (translated by H B Nisbet) *Kant: Political Writings* (2ed) (1991) at 143.

<sup>4</sup> Niklas Luhmann *Law as a Social System* (2006) at 142-143.

with the actor, social and object elections. Something has a purpose for something else, not for itself, but it does have goals for itself. A small dog may have been purchased by its human owner for the purpose of being shown to other people and providing company from within a handbag, but that does not determine its aspirations, perhaps to run around on an open field chasing the shadows of birds or whatever else it is that small dogs want to do. In short, actors have a degree of agency and law is no exception. The restriction of only having a purpose would be tied to assuming that law was a social fixture. The distinction between factishes and artifacts is also apparent in terms of the actor election. Factishes can have goals. Artifacts are natural entities that have been assigned social *purposes*. The artefact is not an entity that is indivisibly social and natural as the factish is. This accounts for the difficulty that arises when an artefact is not used for its intended purpose (e.g. when a rock is no longer used as a hammer), because then it ceases to be an artefact, even though it is still understood to be that entity (the rock).

Law aspires to be inviolable which means that inviolability is its primary goal. That applies to everything we call law, whether it be the traditionally natural laws of physics and chemistry or the traditionally social laws of the state or the somewhat hybridized laws of various religions. Different laws are successful in this aspiration to varying degrees, but none is totally successful, though its mere existence as a law implies at least partial success. The laws of physics are considerably more successful than those of the state, but they are only different in degree of success. Law is not merely a homonym across largely different things, but a relatively stable indicator of the presence of this aspiration towards inviolability present in whatever it is we describe as law. An implication of this is that laws must exist within some sort of system, otherwise they could not ensure consistency, which is essential to avoiding contradictions that themselves necessitate violation.

Cotterrell denies that law has a viewpoint and that it can understand as a non-person, whilst also claiming that law is inherent to society.<sup>5</sup> Cotterrell draws these conclusion from elections implicit in the sociological understanding of law, but it is of particular significance to note here that understanding law as an actor with aspirations is not something necessarily bound up with the internal/external view of law. Cotterrell takes the external view and

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<sup>5</sup> 'But it is not "law" that has these understandings, as if law had some outlook or point of view of its own, as a unified discourse or system of communication. Legal ideas are the varied understandings of lawyers, judges and other participants in legal processes[...] So, legal understandings are *people's* understandings; a diversity of people to be studied by sociology[...] Putting the matter differently, wherever community exists, so does law.': Roger Cotterrell *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006) at 3-4.

nonetheless disagrees with the aspiration approach, as would any legal positivist who bases their internal view of law upon its existence as a social fact. For those concerned with the internal view of law, the aspiration towards inviolability could be understood as a way to rationalize the internal mechanisms of a legal system. For those who follow the external view, the aspiration can function as a distinguishing factor between law and other kinds of normativity. These features of the aspiration to inviolability, as well as the mutual dependence of their rationale, will be considered contextually below.

### 5.3 Strategies in the pursuit of inviolability

The first strategy, which is the only one considered here that applies to all laws, is creating objectivity.<sup>6</sup> Law and science are both practices that seek to create laws and it is telling that they employ similar elections to do so. It is difficult for laws to pursue inviolability without also pursuing objectivity to a significant extent, and these practices are able to do so through a largely shared set of elections. They achieve this through the construction of a subjectivity that can be shared by anyone who adopts these practices. As such, they are modes of existence. Despite their being discrete modes of existence, law and science understood as practices are much more similar to each other than either of them is to the social sciences or humanities more broadly. Plural subjects are seen as central to the social sciences, which undermines the pursuit of objectivity. The continuing emphasis on empiricism in the social sciences is not sufficient to establish objectivity.

The dominant set of elections made in the understanding of law is fixture, object, bobject, order and singular. That leaves the dominant set of elections today much the same as they were for Austin. To the best of my knowledge, there exists no theory of law based upon a set of elections completely opposed to these or one based completely upon hybrid elections. The dominance of this set of elections indicates the aspiration inviolability, as the other elections that could have been made in their place are resisted on account of the corrosive effect upon inviolability that they would have. This is the same set of elections that informs the understanding of science. Practitioners are aware that their craft is not accurately portrayed by these elections alone, but the dominance of these elections is what matters in

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<sup>6</sup> Bruno Latour (translated by Alain Pottage) „Scientific Objects and Legal Objectivity“ in A Pottage and M Mundy (eds) *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (2004) at 73; Bruno Latour (translated by Marina Brilman and Alain Pottage) *The Making of Law: An Ethnography of the Conseil D'État* (2010) at 223.

this case. As is the case with each of the binary elections, the dominant elections nonetheless rely implicitly upon the subservient elections, explaining why even though it is dominant to understand law as a fixture, it nonetheless contributes towards understanding the law as an actor with the aspiration to be inviolable. Perhaps the philosophy of law is returning to this point in the absence of further provocation, as suggested by John Roberts' insight that the universe is governed by laws even in the sense that scientists would refer to them, rather than events simply being either fully determinative or fully indeterminate as they transpire.<sup>7</sup>

The second strategy is the vindication of violations. This dissertation is principally concerned with state law, even though it seeks to advance understanding of it by looking beyond the immediate limitations of this entity, so it is more pressing to establish the plausibility of this aspiration towards inviolability in that domain. Multiple doctrines exist within state law that are consistent with this aspiration. Perhaps the most obvious one is that crimes should be punished. This is evident from the presence of sanctions, as well as the requirement that a prohibition be accompanied by a sanction for it to constitute a crime (*nullum crimen sine poena*).<sup>8</sup> It also accords with one of the classic positivist definitions of law, namely that of Austin who claimed that law is an authoritative command plus a sanction in consequence of its breach.<sup>9</sup> It is difficult to justify directly the punishment of a person in philosophical terms, but it is simple to justify vindication of the law.<sup>10</sup> Our intuition that a legal system would not endure if breaches of it were not vindicated is a corollary of the aspiration towards inviolability. Of course, it will already have been violated by the commission of a crime initially, but the punishment of the perpetrator means that the crime and punishment taken together are not violated, which brings such prohibitions closer to inviolability than they otherwise would be if their breach was not met with such a response in accordance with another claim from the same body of law. The law anticipates its own breach and compensates, so that it was never fully broken in a certain sense.

Even when the police are unable to apprehend the perpetrator, the fact that they seek him out is an indication of the aspiration's presence. Failure to apprehend does not harm the existence of law so long as it does not become pervasive enough to call into question whether the system properly seeks to vindicate itself. This explains the related intuition that a law that

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<sup>7</sup> John T Roberts *The Law-Governed Universe* (2008) at 26.

<sup>8</sup> Jonathan Burchell *Principles of Criminal Law* (5ed) (2016) at 40.

<sup>9</sup> John Austin *The Province of Jurisprudence Determined Etc* (1954) at 11-18.

<sup>10</sup> Lode Walgrave 'Integrating Criminal Justice and Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of Restorative Justice* (2007) at 568-569.

is not enforced ceases to have the force of law.<sup>11</sup> Failure to enforce at all or an implicit acceptance of noncompliance leads to an inference that there is an absence of the aspiration to be inviolable. The only alternate plausible explanation of this reluctance to allow unenforced law is that uneven application of enforcement would be unfair, but then it becomes difficult to explain other situations. For instance, if many people break a law and the police actively seek all perpetrators, but only manage to catch one, it would not be feasible to argue fairness in defence of the perpetrator. One might respond that this is because there was equal treatment in the effort to apprehend them, so the outcome is not as important, but that defence is entirely consistent with the explanation which is offered in terms of aspiration. The effort to vindicate the law is obvious because all of the perpetrators were sought and so the aspiration remains apparent. Fairness as an explanation relies upon the same process-based reasoning as aspiration and is better seen as a mutually acceptable explanation.

Not violating the law is not the same as upholding the law. The latter implies a more onerous burden. This is why legal subjects are required not to violate the law, but police officers are required to uphold it. The law is concerned primarily with not being violated, rather than with being upheld. It is much the same as a person who spends most of her time in an argument laying out caveats that are meant to avoid her being wrong, rather than making the claims directly that are meant to pursue her being right. It is also part of why the law struggles to keep up with technological progress and especially moral progress.<sup>12</sup> It is risk averse with respect to being violated and this risk is increased when its subjects believe it is wrong about the issue at hand. It is better not to be wrong than it is to be right if not being violated is the primary goal. The polarization of being either violated or not, with no degrees of violation, adds to the conservative risk aversion.<sup>13</sup> To be clear, being inviolable does not require being obeyed, although obedience does promote inviolability. Actively upholding the law is more onerous than obeying the law, which is more onerous than not violating it. To obey the law, one must know what the law is, but it is possible to be ignorant of the law and still not violate it. Besides, the duty to obey the law is a moral duty over which the law has no direct influence, so it cannot employ the duty to obey the law as a strategy.

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<sup>11</sup> Jacques Derrida „Force of Law: The Mystical Foundation of Authority“ in Drucilla Cornell, Michael Rosenfeld, David Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 6.

<sup>12</sup> Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 168. The description of law as inherently „conservative“ is well known in Critical Legal Studies.

<sup>13</sup> Bruno Latour 'The Strange Entanglement of Jurimorphs' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 337.

The third strategy is the incorporation of „justice“. At the ideological level, the inclusion of the ideal of justice within positive law is another indication of how seriously law seeks to avoid being violated. Instead of allowing justice to be a competitor, law absorbs it and avoids hard clashes between what the law requires and what justice requires to create a complicated, but undeniably close relationship between the law and justice.<sup>14</sup> Including justice does make the process of deciding upon the specificities of law in any given case much less clear, but once the outcome has been reached it is that position which is protected from violation. The incorporation of justice in this way is consistent with the theory of exclusionary reasons that has been provided in the work of Joseph Raz, but it goes further to explain why it is that law makes this trade. We seek the certainty that it brings, but law seeks a more readily defensible position from which to defend itself against violation. It becomes much more difficult to defy law in the name of justice when justice was part of what made the law in the first place. The dominant normativity capable of threatening legality supported even the historically evil legal systems, like Apartheid. The majority of white people voted to uphold the apartheid legal system because they found it at least acceptable and likely desirable with reference to a conception of justice, however warped. The radical shift in the understanding of „justice“ in law that took place in the early nineties, reveals precisely how the conception of justice that the law employs must adapt to ethico-political variations if the law is to endure.

Conscientious objectors may exist, but it is only if their views of justice gain traction that they need to be incorporated into the law. Shifts in the dominance of the ethico-political standing of different normativities may well lead to changes in the law so as to continue incorporating the demands of justice. Such fluidity of normativity is evident from remarks that pertain to the threats facing South Africa in its failure to incorporate sufficient justice into its legal system:

'It is clear now that the decision to focus on peace as the founding principle of our new democracy was taken at the expense of justice. This is evident everywhere in our society, not just on our campuses. Most South Africans should now be able to accept that our country has been muddling through a superficial peace: for the vast majority of South Africans, the last two decades have continued to offer daily

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<sup>14</sup> Derrida op cit note 11 at 15.

indignities. The failure to prioritize justice has left poor black people trapped in a cycle of poverty at the very same time that it has given white South Africans the freedom to reinvent themselves. At some point in the last two decades whites became the strongest victims in the world, and blacks – still poor, still under-represented in every area of human endeavor that marks progress – have become the oppressors.<sup>15</sup>

What appears to be represented above is a shift from emphasizing restorative justice to emphasizing retributive justice. That is not surprising, given that legal systems are well suited to retributive justice in keeping with the strategy of vindicating violations of the law, but it is telling from this shift that it is important for the justice incorporated by the law to be in sync with the justice that enjoys ethico-political dominance within the community over which the law applies.

The fourth strategy of the aspiration to inviolability is the creation of thresholds. Support for this strategy is present in the maxim of *de minimus non curat lex*, which is to say that the law does not concern itself with trivialities. From the perspective of the State as the creator and enforcer of law, it is infeasible to prevent minor infractions in any widespread sense, so once again the law avoids the risk of violation by removing itself from minor matters. Just as an overly controlling parent will lose its effective control over the conduct of a child or at least risk doing so to a significant extent, so too does the law risk further violations if it overreaches in trying to dictate the conduct of other actors.

The fifth strategy is the pursuit of order. It is considerably easier to motivate compliance with directives that are considered to be just than those considered to be unjust. It is often less disruptive to grant freedom of action in minor matters than to be prescriptive to the point of provoking rebellion. When law seeks to be inviolable, it is quite unsurprising that it also pursues order. What about an unusual case? If the law simply directed that chaos should reign, then a chaotic state of affairs would not constitute a violation of the law, keeping its aspiration satisfied. The trouble is that the chaos would be directed, which is to say it would be ordered chaos. To actually be chaotic, there would need to be an absence of directive, but then there would be nothing to guard against violation to begin with. If law is

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<sup>15</sup> Sisonke Msimang 'The Strongest Victims in the World' (25 February 2016) <http://www.dailymaverick.co.za/opinionista/2016-02-25-the-strongest-victims-in-the-world/#.VtDkFf197RY> last accessed 27 February 2016.

understood as that which aspires to be inviolable, then it cannot but pursue order in at least some measure.

Perhaps this goes some way to explaining our intuitions surrounding vigilantism. A vigilante presents a dilemma because they supposedly operate outside the law, but if it were that simple then there surely would not be a dilemma to begin with. Instead, the vigilante may be understood as serving the greater goal of minimizing violation of the law through acceptance of lesser infractions on their part. That still presents a dilemma, but not one opposed to law. It is now a dilemma as to what best preserves law and whether the initial infraction or the greater protection is focused upon in the assessment of the vigilante. From the perspective of law as an actor aspiring towards inviolability, there is no such thing as being above the law or outside of it, but one may either further or frustrate the aspirations of it and in so doing either consolidate or undermine its existence.

#### 5.4 Customary law

In the context of South African law, an important implication of the aspiration towards inviolability is that there is an irreconcilable tension between the living incarnation of customary law, on the one hand and state law, on the other. There has been a fair amount of debate regarding whether customary law is actually law at all or just a misnomer.<sup>16</sup> The aspiration of law to be inviolable presents an additional reason for answering that customary law is not law, although it is a normative system.

It is a strength of customary systems that they are flexible and sensitive to the circumstances of most matters with which they are concerned.<sup>17</sup> To be clear, that is not a veiled insult. It is entirely plausible that the smaller the number of people living within a functional community, the more desirable adaptability will be. States prefer rigidity and predictability, whilst smaller communities often prefer flexibility and sensitivity. Those jurists who argue in favour of restorative justice in the criminal law claim that even in large

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<sup>16</sup> Chuma Himonga „The Future of Living Customary Law in African Legal Systems in the 21<sup>st</sup> Century and Beyond with Special Reference to South Africa“ in J Fenrich et al (eds) *The Future of Customary Law* (2011) at 32; A J Kerr 'The Nature and Future of Customary Law' (2009) 126 *SALJ* 677.

<sup>17</sup> Chuma Himonga and Craig Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *South African Law Journal* 306 at 319.

communities there should be greater preference given towards circumstantial adaptability as regards the parties involved in any given matter.<sup>18</sup>

A customary system does not aspire towards inviolability. That is not to say it does not seek compliance generally, but it is meant to guide and inform decisions, not constrain them in favour of its own integrity. This is clear from the emphasis that South African courts have placed upon the importance of preferring living customary law, that which a community actually practices, over official customary law, which may purport to be indicative of customary laws, but which is not necessarily practiced.<sup>19</sup> The factors identified by Kuwali as part of his account of African legal theory are indicative of customary law.<sup>20</sup> They represent the strategies that customary law adopts in order to pursue its goal of communal harmony, although he intended for them to describe attributes of the law in African societies, rather than customary law as a different normative system. These strategies include the foundation of custom, the pursuit of societal equilibrium, emphasis on restorative justice and reliance upon consensus decision-making amongst other strategies. Whilst there are surely factors that relate specifically to being African, it appears that these are mostly the strategies of customary normativity. There is no inherent tension between being African and legal, but there is a tension between being customary and legal.

The propositional content of the normative claims under discussion, be they from customs or laws, is largely irrelevant. Here again, parallels between aspiration and purpose present themselves, but deceptively. It is not sufficient to claim that customs may simply be repurposed and remain what they were before, as that has no bearing on aspiration. What this means is that practices may be preserved through incorporation into law, but not customs and certainly not customary normativity as a whole. The Constitution did not preserve customary law. It created a body of law that aspires to resemble the contents of the customary system from which it draws. If preservation of discrete practices was the goal of such incorporation, then it was a success to some extent. If preservation of a way of life and normativity was the goal, then it was an instantaneous failure that is being realized in increments. This is consistent with the concerns already voiced about indirect colonization of customary law

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<sup>18</sup> Lode Walgrave 'Integrating Criminal Justice and Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of Restorative Justice* (2007) at 574.

<sup>19</sup> *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 46.

<sup>20</sup> Dan Kuwali 'Decoding Afrocentrism: Decolonizing Legal Theory' in O Onazi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) at 78-87.

through the legislation and courts of the State in opposition to the Traditional Courts Bill, even by those who see the substance of the Bill of Rights as valuable.<sup>21</sup>

Perhaps it may be said that customary law and state law are both law due to their shared aspiration to create and maintain order? Certainly they both share this aspiration, but their divergence as regards the aspiration to be inviolable is sufficient to indicate that they are not both legal systems. The shared pursuit of order is a hallmark of their shared existence as normative systems, not the more specific kind that is law. They go to quite different lengths in their pursuit of order. Customary systems give greater weighting towards the social election in the ascertainment of its norms, whilst legal systems give greater weighting towards the natural election when compared to each other. This is clear from the emphasis upon oral conveyance of norms in living customary law, whilst the recording of official customary law is seen as a perversion. This much greater preference for being grounded in social context is an asset under the right circumstances. The rigid distinctions and reliance upon natural actors characteristic of legal systems is not universally desirable.

Why then is the denial of customary law as a legal system a politically scorned claim? As is so often the case, it appears to be the result of a lack of trust. Legal systems have been treated as hierarchically superior in our past. Being law is seen as a means to being recognized and accepted by the authorities that have already invested in law. This leads to the strange situation in which it is claimed that customary law is very different from the law in many functional respects, but is identical ontologically. If it is the same, then it would operate in much the same way, but it does not. The strategy of claiming to be law requires becoming more like law to remain plausible, which means abandoning the value it had to begin with. Customary law goes from being an exemplar of customary normativity to being an inferior attempt at legal normativity:

'For the purpose of an advanced legal system, however, with its strict rules arising out of statutes and precedents, and its concern with certainty and foreseeability, the definition of *ubuntu* is insufficiently resolved, and its application vacillates from context to context.'<sup>22</sup>

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<sup>21</sup> Thuto Thipe and Mbongiseni Buthelezi 'Democracy in Action: The Demise of the Traditional Courts Bill and Its Implications' (2014) 30(1) *South African Journal on Human Rights* 196 at 204.

<sup>22</sup> Frank Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) at vii.

The above quote was directly critiquing the role of *ubuntu* in the Truth and Reconciliation Commission, but the author certainly did not see any problem with the existence of *ubuntu* within customary law. Perhaps a direct comparison might have alerted him to the undesired implication of his choice of words, but that is how these sort of comparative value judgments are often revealed and a lack of direct intention does nothing to undermine this demonstration of the implication of insisting on understanding customary law as a legal system. This form of thinking is also presented by Hart, who provides an account of the law's development as arising from custom.<sup>23</sup> The idea that there is a path along which these normative systems develop entrenches the comparison between them as nascent versus advanced and also explains why the social election remains dominant for both customary law and the law of the state, despite the unacknowledged addition of the natural election to allow for the codification and institutionalization of the law, because the core of the law is seen as customary law.

The legal systems of different states are different from each other at the lower level of abstraction at which they are territorially bounded, but identical as legal systems at the higher level of abstraction. Customary law is not able to make such a claim, since it shares the same territory and citizenry as the South African state at lower levels of abstraction. If it also seeks to be delineated as the same entity at higher levels of abstraction, then where are all the differences between South African state law and customary law to be found? Responding with claims to legal pluralism does not answer this question. Legal pluralism amounts to an observation that different legal systems affect people concurrently. It is important to note that not all normative orders are legal. If they were, then they would all be judged by the extent to which they are successful in pursuing the aspiration towards inviolability. If it is absolutely necessary to see all normative systems as some variation on the theme of legality, effectively equating normativity with legality, then customary law is less successful as a legal system than state law is.

Judging customary law as a legal system would have further bizarre implications, such as the significantly diminished importance or relative failure of morality, even as many people would seek to use morality as a form of normativity to which legality ought to be accountable.<sup>24</sup> Even as legal pluralism accepts that different forms of normativity can and do

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<sup>23</sup> HLA Hart *The Concept of Law* (1994) at 91.

<sup>24</sup> HLA Hart 'The Legal Enforcement of Morality' in Robert Baird and Stuart Rosenbaum (eds) *Morality and the Law* (1988) at 44.

exist that ought to be treated with equal respect, it makes the assumption that legality is their common denominator and that this is universally desirable. It is ironic that Eve Darian-Smith chooses to criticize *doctrinal law* for conflating the theoretical understanding of law, when that is the mistake that legal pluralism makes at a lower level of abstraction and with normativity as the relevant conflated category:

„Law and society scholars are critical of doctrinal law as it is typically taught in law schools because it represents a one-size-fits-all set of abstract legal principles that supposedly apply to a variety of situations and legal actors.“<sup>25</sup>

One might retort that this has become just a play on words and that we all know that legality here is being used in a broader sense. I accept that the term may be used broadly. The point is that it is either being used so broadly as to mean all of normativity, in which case it would cause both confusion and inappropriate preferential treatment of the attributes usually associated with the law, or it is being used for overtly political reasons. If the insistence upon understanding customary law as a legal system is a political strategy, then it is a losing strategy. Arguing for the inclusion of customary law into the law whilst simultaneously resenting the law is ambiguous at best and paralytic at worst.

Why can this inclusion or exclusion of customary law from being a legal system not be treated as a paradox as so often is done in this dissertation? Well, one can assume that customary law is legal, but the implications of assuming customary law to be legal are precisely what I am arguing are harmful to that normative system and it is very unclear to me how a „legal/normative paradox“ might be applied universally as a foundation for how humans understand reality.<sup>26</sup> Attempting to create paradoxes at fairly low levels of particularity is exactly what this dissertation rejects as lazy theorizing that seeks to do too much of the work that should have been left to reasoning in the pursuit of a desired conclusion. It is better for customary law that it be judged according to its own metric, rather than by the metric of a normative order that has repeatedly sought to eradicate it.

To be clear, the point of this observation is that the relevant difference between the law of the state and customary law lies primarily in their normative existences, with

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<sup>25</sup> Eve Darian-Smith *Laws and Societies in Global Contexts: Contemporary Approaches* (2013) at 2.

<sup>26</sup> Latour’s articulation of the modes of existence as being discretely discernable as, for instance, religion, law and science, rather than trying to conflate them all into a *preferred* mode of existence, militates against such an understanding.

comparatively little distinction in their systemic existences.<sup>27</sup> It is not an attempt to show the influence of informal control as Ellickson does when investigating the non-legal norms that influence behaviour in disputes.<sup>28</sup> To be even clearer on this often terribly misunderstood point, the importance of the difference between state law and customary law has nothing to do with their development or maturity or complexity or formality or any other such comparators that seek to place one ahead of the other on the same track, at least not for the purpose of any argument that I am making. I am arguing that they ought to be seen in precisely the opposite light, as *normative systems with divergent aspirations that cannot sensibly be judged according to each other's aspirations*.

The trouble with the ascertainment of customary law in the state's courts is already well documented.<sup>29</sup> However, taking as a given that courts will seek to ascertain living customary law, there remains the problem of norm supremacy. Even if evidence could be led without difficulty, the trouble remains that the relevant norm is being established independently of the parties involved in the dispute. This is consistent with creating a legal system that aspires to inviolability, as a norm cannot be protected if it is not first clearly ascertained, but it is not consistent with a focus upon the parties to a dispute, which customary law dispute resolution appears to prioritize. To be clear, the issue is not the ossification of the norm over time in this case, but rather the inevitability of the state's courts seeking first to determine with certainty what the determinative norm is independently of what the circumstances of the affected parties may be. Of course it must have some idea of the nature of the dispute in order to decide which norms are relevant, but this is about determining the appropriate norms, not ascertaining the specifics of any given norm. Living customary law in the state's courts is still beholden to legal reasoning.

A final observation to make regarding the distinction between legal and customary normative systems concerns trust. In keeping with the understanding of law advanced by Shapiro, the legal system is premised (at least partly) upon an absence of trust.<sup>30</sup> This is why faith is placed in laws ahead of people for resolving disputes, with judges required to remain as distant as is feasible for them to facilitate the application of law. Customary normative

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<sup>27</sup> Whilst Latour would reject the normative dimension of both law and customary law, his insistence that there be no hierarchy of modes of existence is similar to the non-hierarchical comparison between the normative systems of law and customary law that I seek to defend: Latour op cit note 13 at 334.

<sup>28</sup> Robert C Ellickson *Order without Law: How Neighbors Settle Disputes* (1991) at 136.

<sup>29</sup> Himonga and Bosch op cit note 17 at 337; A J Kerr 'The Constitution and Customary Law' (2009) 126 *South African Law Journal* 39 at 43-47.

<sup>30</sup> Scott J Shapiro *Legality* (2011) at 331.

systems appear to do exactly the opposite, assuming that members of the community trust each other and that the customs are intended to frame what is primarily a negotiated resolution to any conflict that may arise. For all that is said about the superior status of law, it is sadly because of the inferior status of trust in their own communities that those who praise law find it to be an appealing normative system.

What is the practical import of these observations? Treating unlike cases alike is compelling them to be alike, as customary law being assumed to be like common law is making it into a variation on the same theme that is made to be ever less different in the contents of particular norms as they are subjugated to the same tests by the Bill of Rights. What has been presented in this section is an additional reason based upon differing aspirations for understanding legal and customary normative systems to be alike in normativity, but not alike in legality. This particularly matters for the preservation of customary law as a system, which cannot occur if it is treated as a legal system or if it is subject to the Constitution with the demands of the rule of law that mean it is required to become a legal system even if people wished to understand it differently.

How might this undesirable situation be remedied? The Constitution still needs to recognize customary law, but it must also be exempt from the application of the Bill of Rights and the rule of law requirements.<sup>31</sup> Nothing can stop the Constitution from being the supreme law of the land, but that hierarchical status can be used against itself to limit its own ambit. That would leave the Constitution as the supreme law, but it would create space for customary law to exist as a separate normative system. Legal pluralists might not find that an appealing solution, but pluralists of normativity more generally would hopefully recognize that creation of an autonomous normative space is a prerequisite for customary law to function as a customary system. Freedom of conscience and religious belief already does this for morality and divine law. There is nothing unusual about the suggestion, provided that it is accepted that customary law is well understood as a customary system and that it provides greater value and support to its communities when it is treated accordingly. If removing customary law from the jurisdiction of the Bill of Rights seems unacceptable, then a deeper issue concerning trust and cultural relativity is probably the cause of that discomfort.

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<sup>31</sup> This still addresses the concern expressed by Himonga and Bosch that the right to culture not be ignored, but without the unintended consequences of pursuing the Procrustean goal of understanding customary law as law in the sense that both the Constitution and legal theorists understand the law (factish law concurring in this regard): Himonga and Bosch op cit note 17 at 328.

## 5.5 Conclusion

This chapter has explored the law as an actor, focussing especially on its aspiration towards inviolability as a central goal of all that is law, whilst also distinguishing the law from other normative systems. This understanding of factish law is observable in the prevalence of various strategies within legal systems that are directed towards protecting itself from being violated, including the compromises that the law must adopt in order to evade unfavourable clashes with competing normative systems. The absence of this aspiration towards inviolability in customary law was shown to be a reason for rejecting the understanding of customary law as a legal system. Whilst the distinction was drawn on largely ontological grounds, it was demonstrated further that it serves the interests of customary law as a distinct and valuable normative system for this distinction to be recognized and liberated from the constraints of being twisted into a legal understanding both theoretically and under the auspices of the Constitution. In the following chapter, this understanding of factish law, both as a fixture and as an actor, is drawn upon to present a model that accounts for the law as the result of a greater process of factish legality.

## CHAPTER 6 - THE MODEL OF FACTISH LEGALITY

### 6.1 Introduction

This chapter investigates and approaches legality as the process that results in the creation of the law.<sup>1</sup> In order to do so, I begin by outlining a model of factish legality. The model comprises two interrelated relationships that assigns a dual role to legal reasoning. The entities within the model assist in showing how the law inevitably is factish on account of the social and natural influences that exist within the process that creates it. Having established this framework, the chapter proceeds to an examination of the rule of law that is then reformulated as 'rule through law', where the latter is defined as a commitment by an authority to restrain itself and act only through the medium of legality.<sup>2</sup> I also reinterpret the separation of powers in adherence to the model, showing how each branch of the state plays distinct roles in contributing towards legality. On account of not sharing functions, these roles should not require deference or respect to manage their interactions. Positing that these roles should not require deference or respect to manage the interactions between the branches of the state, does not amount to a contention that the traditional „checks and balances“ implicit in the separation of powers should be abandoned.

The model draws upon a distinction between laws and the law to show that the democratic legitimacy of judges is unproblematic, because judges do not, as adherents of transformative constitutionalism have asserted,<sup>3</sup> make *laws*. From the perspective of factish legality, judges only contribute to the creation of *the law* through technical expertise that falls outside of the domain of the authority that rules through law.

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<sup>1</sup> Scott J Shapiro *Legality* (2011) at 7.

<sup>2</sup> This reformulation resonates with the thought of Michelman concerning republican constitutionalism and jurisgenerative politics: Frank Michelman 'Law's Republic' (1988) 97(8) *The Yale Law Journal* 1493 at 1499-1502.

<sup>3</sup> Klare does not distinguish between legal sources and the law sufficiently to sustain both of the claims that judges do not make laws and that they do contribute to the law: Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 162-163.

## 6.2 Basic model

The basic outline of the model of factish legality begins with the relationship between authority and text.<sup>4</sup> What that authority is depends on the political system in question. For a representative democracy that is an intricate matter in its own right, but for the purpose of this model it is sufficient to observe that authority flows from whoever rules in the relevant domain.<sup>5</sup> The ruler may be singular, like in dictatorships, or plural, like in oligarchies. There is no perfect litmus test for establishing who rules and what the ambit of rulership is, but at its core it means that the will of that entity is determinative of how the collective acts.<sup>6</sup> That does not mean it is completely determinative, but rather that it is substantially so, so that whilst opposition to the ruler may exist, such opposition is not effective in terms of impeding the will of the ruler.

The next entity is text. Again, texts come in many different forms, but for the purpose of this model it is sufficient to observe that text exists even before its propositional content is discerned.<sup>7</sup> It is possible to recognise an entity as text written in another language without being able to understand that language. The relationship between authority and text is termed lesser legal reasoning. It is deliberately labelled as „lesser“ so as to distinguish it from greater legal reasoning that will be described later in the model. It is legal reasoning nonetheless in the sense that it is a particular form according to which legal actors apply their minds and that pertains to the operation of the legal system. The relationship of lesser legal reasoning entails the transportation of authority into text, which might also be described as attributing authority to text or imbuing text with authority.<sup>8</sup> It is important to observe at this stage that to whatever extent authority and text might be fused, it is entirely dependent upon the continued presence of this relationship through lesser legal reasoning. The text does not become independently

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<sup>4</sup> Bruno Latour (translated by Marina Brilman and Alain Pottage) *The Making of Law: An Ethnography of the Conseil D'État* (2010) at 270 and 274.

<sup>5</sup> Frederick Schauer 'Authority and Authorities' (2008) 94(8) *Virginia Law Review* 1931 at 1956-1959.

<sup>6</sup> In terms of the distinction Raz adopts, only *de facto* authority is necessary for rulership in this sense, rather than needing to establish the legitimacy of those who wield *de facto* authority as effective rulers: Joseph Raz 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) at 195.

<sup>7</sup> „An uninterpreted legal authority may have a physical existence – a case report collecting dust in the library – but it cannot be said to have a meaning until a legal actor works with the authority using the culture’s repertoire of argumentative conventions“: Dennis M Davis and Karle Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403 at 442.

<sup>8</sup> Latour op cit note 4 at 274.

authoritative. That being said, provided that this relationship is maintained, this process establishes authoritative texts known as legal sources or laws.<sup>9</sup>

The legal sources created in the first process have propositional content. It is that propositional content that begins the second process, in which the text is now recognised as a legal source or to put it in Latour's language, the text is „black boxed“.<sup>10</sup> Legal sources are the assumptions or premises employed by the process of greater legal reasoning. This is legal reasoning in the sense more closely associated with logic and interpretation as it has been extensively discussed in the context of transformative constitutionalism.<sup>11</sup> To be more particular, it is most plausibly modelled by the logic of coherentism.<sup>12</sup> That is not to say that propositional logic is not employed, but that it operates within the broader ambit of coherentism. This heuristic description of the process is not intended to be prescriptive or complete but endeavours to provide an account of what greater legal reasoning typically or mostly involves. The conclusion reached by this reasoning is *the law*.<sup>13</sup> It is the normative propositions of the law to which people respond when they are complying with the law, not the propositions of legal sources directly. To the extent that the law may be said to contain rules that people must follow, those rules are part of the law. There are still many clarifications and implications that require further explanation, but this concludes the basic description of the model.

The relationship (of lesser legal reasoning) between the objects of authority and text, taken together with those objects, is a legal source. This makes legal sources overtly factish. Authority is a thoroughly political concept, understood nearly always in accordance with the social election. Text is understood as a factish in its own right, with the visual symbols being more natural and their meaning as symbols being more social. That factish existence is what underlies the link between the two processes involved in the model of factish legality, as the first process is more concerned with the natural existence of legal sources and the second process is more concerned with their social existence, but they are inseparable nonetheless. Lesser legal reasoning is more intuitively understood as social, but its existence is inherently

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<sup>9</sup> This mirrors the transition described by Serge Gutwirth from the material sources to the formal sources of law: Serge Gutwirth 'Providing the Missing Link: Law after Latour's Passage' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 125.

<sup>10</sup> Ibid at 143.

<sup>11</sup> Klare op cit note 3; Davis and Klare op cit note 7; Karin van Marle 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stellenbosch Law Review* 286.

<sup>12</sup> Amalia Amaya 'Ten Theses on Coherence in Law' in Michał Araszkiewicz and Jaromír Šavelka (eds) *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (2013) at 262.

<sup>13</sup> Davis and Klare op cit note 7.

bound up with the text in its natural understanding. Clear analysis of this entire process as either social or natural is simply infeasible.

The relationship (of greater legal reasoning) between the objects of legal sources and the law, again taken together with those objects, is less clearly factish. The social election is more prominent in how this process is understood, especially as there is no prominent artefact created at its conclusion as with legal sources.<sup>14</sup> However, the legal sources remain inseparable from the law in that it is only through the continued relationship of greater legal reasoning that the law exists. Greater legal reasoning with its more prominent reliance upon logic and interpretation is also grounded in what might be understood as the laws of truth preservation. The operation of logic is more discovered than developed, although clearly this is a factish too, but the point remains that greater reliance upon logic and interpretation brings with it a greater reliance upon matters beyond the direct or unfettered control of human minds.

This draws attention towards the anchoring effect of texts in legal systems. To the extent that the law is understood as a network that links various entities together, the nodes of that network are texts.<sup>15</sup> These texts include a very diverse array of entities, such as statutes, judgments, contracts, signatures, pleadings, memoranda and statements. State legal systems would be difficult to imagine without texts. They are integral to extending the reach of legal systems and to their aspiration towards inviolability. One reason is that they provide a degree of resilience to interpretational influences, which might be the most obvious reason to people who spend their careers engaging legal texts. However, the more influential reason is the capacity for texts to exceed the limitations of oral communication. They can be replicated with high accuracy and low cost, they do not require constant maintenance as thoughts do, they can facilitate asynchronous communication and they can be transported independently. None of that is strictly necessary for developing complexity, but it certainly helps.

Latour demonstrates this influence to great effect through his ethnographic account of court proceedings that includes the tracing of case files as they progress through the hearing of cases.<sup>16</sup> He observes that these files are the threads that connect each stage of the proceedings, as well as the various parties involved in them. The loss of a case file, especially when copies of its contents have not already been made, is devastating to the continuation of

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<sup>14</sup> The case of a judgment is considered thoroughly below.

<sup>15</sup> Latour op cit note 4 at 261.

<sup>16</sup> Ibid at 70-106.

a hearing. What the model of factish legality illustrates is that this is not simply a matter of practicality, but rather an implication of what legality is as a factish. Its understanding of legality might be theoretical, but it needs to incorporate both the social and natural dimensions if it is to provide a plausible account, rather than relegating its more natural aspects to the practical domain.

Legislation is easy to understand according to the model, as parliaments writing legislation that is enacted falls comfortably within the process that creates legal sources. Judgments are also developed according to this process in general terms, but there are several differences that require elucidation so as to avoid the trap of perceiving all legal sources as homogenous. A starting point for describing those differences is to note that judgments are more like academic opinions in their substance than legislation. The writing of a judgment involves greater legal reasoning, as do academic opinion articles. The principle difference between them is that the process employing lesser legal reasoning only pertains to judgments. However, the difference between judgments and legislation is contained in that process. To be clear, the first process from the model of factish legality – lesser legal reasoning - is mostly shared between legislation and judgments, whilst the second process – greater legal reasoning - is mostly shared between judgments and opinion articles within legal academia. They all involve legal reasoning, but lesser legal reasoning pertains principally to the former pair, whilst greater legal reasoning pertains principally to the latter pair.

The difference between judgments and legislation as legal sources is due to authority. Whilst the Constitution recognises both the legislature and the judiciary as authorities, the authority that pertains to legislation is derived from the political system as a whole. In a representative democracy that would be the authority of the people vested in their elected representatives. The authority pertaining to judgments derives from the hierarchy of courts, which is to say that it is institutional authority alone. The precedent system and the appeal system are products of that same institutional authority to which the judiciary responds. If the judiciary was understood only as a singular entity, then there would be no need to treat judgments as legal sources. It is because the judiciary is also a decentralized institution with many courts at varying levels within a hierarchy that judicial precedent functions as a source of law. To put it differently, judgments are determined endogenously and legislation is determined exogenously, at least insofar as the sources of their authority are concerned.

Judgments are indications of legal reasoning that must be followed by other courts within the judiciary in accordance with the various and sometimes intricate rules of the precedent system. The *ratio decidendi* of those judgments might be understood as the propositional content that founds further legal reasoning, but in this case the *ratio* is not an independent proposition as was the case with legislation. It is open to being wrong because it is only an indication of greater legal reasoning that might be found to have been incorrect. An assumption cannot be correct or incorrect for the argument it founds. In that way, legislation as a legal source is far more impactful than judgments, as the process that determines legislation is inaccessible to judges, whilst the process that determines judgments is open to the kind of interrogation that the precedent system allows. Superior courts within the hierarchy can reject the process that determines judgments as legal sources, because it is their own authority upon which they rely, but they cannot reject legislation in this way on account of it having been determined outside their ambit. Even when the judiciary declares legislation unconstitutional or invalid for other reasons, an appeal still has to be made to a legal source that is superior or carries greater weight.

This understanding of judgments resolves some concerns over the democratic legitimacy of the judiciary. A democracy allows citizens to decide which laws they wish to enact indirectly through their elected representatives. A democracy does not directly decide what legality is, nor does it decide what legal reasoning is or how to apply it. That is a technical matter left to those with expert knowledge. It would be very strange to expect that citizens in a democracy should decide what mathematics is or how to apply it. We all accept that citizens should decide who the members of parliament are and what the formula for assigning them places in accordance with the outcome of voting should be. We do not expect citizens to decide how the multiplication of fractions works. We expect that to be a given field of knowledge into which the formula is inserted. It would make no sense to decide upon a formula if the field of mathematics was not taken as a given. The same may be said of legality in a democracy. For citizens to decide upon what laws they should have, it must be assumed that legal reasoning is not theirs to decide.

Not all power in a democracy is wielded by citizens, no matter how indirectly. Citizens exert no control over physics, yet nobody accuses scientists of being undemocratic. That is because we do not think that physics is a domain within which citizens should have choice, even though physics may be seen as wielding a great deal of power. If judges are performing tasks and exerting influence of the kind that is not of the domain that democracy

ascribes to citizens, then how can they be acting undemocratically? It appears that the confusion arising from similar terms describing different entities is partly responsible for this conflation. Citizens decide upon laws, not legal reasoning. They exert partial influence over the law through their control over laws, but they do not directly or completely determine the law. On this understanding of legality, there is no issue with judges in a democracy. Much of this concern appears to stem from a focus upon power, but that is more the domain of sociological analysis than either legal or philosophical analysis. In any event, the idea that any public power is undemocratic if not subject to control by the citizenry amounts to little more than a thinly veiled desire for aggregated anarchism. The central justification of the state is the idea that we should not all have power.<sup>17</sup>

Accordingly, judgments do not create laws in the sense that parliaments do. They are legal sources, but only in the sense of being very good indicators of how judges subject to institutional mandates will apply legal reasoning when the same assumptions are present. That is not to say that legal reasoning is only about predictive value, as legal realists appear to believe. The predictive element is that a judge will accept being bound by case precedent (and, to a lesser extent, legislation), but once that political element has been concluded then the resolution of disputes before courts will return to the more „formalistic“ domain of legal reasoning. Judgments often alter laws, but that is only as a consequence of the appropriate application of previously existing and hierarchically superior laws or because of a direct conflict that must be resolved through legal reasoning in the absence of any other means for resolving it. This returns to the difference between the exogenously determined laws that rely primarily upon lesser legal reasoning and the endogenously determined legal sources that are determined primarily by greater legal reasoning.

Judgments are perhaps more helpfully understood as being like academic opinions that other judges have to agree with if the doctrine of case precedent requires them to do so.<sup>18</sup> The self-restraint of the authorities is discussed further in examining the rule of law, but for the purpose of considering judgments it is sufficient to note that judgments only operate as sources of law to the extent that the judiciary seeks to be internally consistent. This is part of what makes greater legal reasoning conform to the logic of coherentism. Greater legal reasoning draws upon multiple entities in its operation, but it is ultimately only through

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<sup>17</sup> Thomas Hobbes 'Of Commonwealth' in J C A Gaskin (ed) *Thomas Hobbes: Leviathan* (1998) at 114 (XVII. 13.).

<sup>18</sup> Davis and Klare op cit note 7 at 439.

greater legal reasoning that judgments are created and they only affect greater legal reasoning in return. If legal reasoning could only be understood singularly, then that would seem inconsequential, but it is the plural election that allows for the multitude of instances in which legal reasoning is employed by different actors to be both generated by itself and alter itself without serious contradiction.

This discussion is not about how to interpret the law or how to determine the truth of legal propositions. It is about what legal reasoning is and more particularly how the law is created through the process of legality. Non-modern understanding may not recognize an absolute distinction between these, but this model of factish legality certainly emphasizes the more ontological side of legal reasoning and accordingly leaves consideration of semantics aside.<sup>19</sup>

There is an implication of this attempt at judicial coherence in the model of factish legality that relates to the theory of law's integrity developed by Dworkin.<sup>20</sup> In his theory, legal reasoning is employed to draw law into a more coherent whole, which describes law as an acting relationship rather well in terms of greater legal reasoning. His mistake in this regard was to conflate authority, law and text into one monolithic entity called „law“ that required judges to engage directly with both fit and justification.<sup>21</sup> The difficulty he had in his theorizing was with authorities making laws that defied the attempted greater legal reasoning or texts that stubbornly did much the same. The law supposedly had a coherent rationale, but then new legislation would arrive that messed it up. If the law is seen only as one amalgamation, instead of seeing legality as a multi-part process that results in the law, then Dworkin's theory must repeatedly be hamstrung by outlier laws that do not fit palatable justifications within coherentist logic. However, if the political and literary analyses are segregated from law to some extent, then this is no longer a problem, which is precisely what occurs when lesser legal reasoning links them whilst keeping them as distinct objects. The separation of lesser and greater legal reasoning allows law to keep its integrity and internal logic intact in the face of authorities and texts being uncooperative, as well as allowing legal reasoning to adopt coherentism without limiting the capacity for new legal sources to be created. That alleviates Dworkin's problem to some extent without sacrificing the basic insights he sought to defend.

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<sup>19</sup> Raimo Siltala *Law, Truth and Reason: A Treatise of Legal Argumentation* (2011) at 14.

<sup>20</sup> Ronald Dworkin *Law's Empire* (1986) at 225-226.

<sup>21</sup> *Ibid* at 255.

### 6.3 Rule through law

Broaching the subject of how legality draws upon itself to determine itself leads to further consideration of the self-referential paradox,<sup>22</sup> which is also captured by the observation that law always already exists.<sup>23</sup> Defining law without reference to legality is a significant challenge. The model of factish legality suggests that this is partly due to the duality of legal reasoning. Lesser legal reasoning precedes greater legal reasoning in determining the assumptions that greater legal reasoning employs, so from the perspective of greater legal reasoning it is clear that legal reasoning is always preceded by legal reasoning. This division is similar to that drawn by the legal theory of autopoiesis, which requires a selective process to determine what will be allowed into law (legal/illegal) and what will remain excluded from the legal system.<sup>24</sup> Both approaches acknowledge that law is only already law when neglecting to observe the initial process that determines what counts as law. It is telling that autopoiesis made such progress in this regard by understanding legality according to insights from biology, as this would bring it closer to adopting insights from natural elections. If legality is understood entirely in accordance with the social election, then self-referential paradoxes are to be expected, but understood as a factish it is able to circumvent such concerns.

However, the appearance of tautology also depends on failing to observe that there are multiple actors determining what the law is. The law does not determine itself. There is an input that does not stem from legality, but that is instead a precondition of possibility for legality. That input is authority from the political system.<sup>25</sup> It exists throughout legality, but it is not created by legality. In particular, it is the willingness of authority to restrain itself that makes legality possible.<sup>26</sup> If the authority of the political system simply rejected legality, then it would be destroyed. It is the injection of authority and the texts it creates that sustain the existence of the legal system. As the preceding discussion shows, lesser legal reasoning is principally the domain of overt political authorities, such as a democratic legislature. These authorities create legislation, they do not simply write. Judges will interrogate whether they did so correctly/validly, but the action is that of the authority and judges are simply

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<sup>22</sup> Oren Perez and Gunter Teubner *Paradoxes and Inconsistencies in the Law* (2006) at 15; Jacques Derrida „Force of Law: The Mystical Foundation of Authority“ in Drucilla Cornell, Michael Rosenfeld, David Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 14-15.

<sup>23</sup> Latour op cit note 4 at 256.

<sup>24</sup> Niklas Luhmann *Law as a Social System* (2006) at 94.

<sup>25</sup> Derrida op cit note 22 at 36.

<sup>26</sup> Michelman op cit note 2 at 1499-1502.

confirming or disconfirming whether the action is in keeping with previous commitments of that authority that have been ossified as laws. Contrary to the views of Hart, the foundation of the legal system is not a progression arising out of more primitive systems, even if his account is only seen as an explanatory device.<sup>27</sup> It is a commitment by authority to restrain itself and only act through the medium of law.<sup>28</sup> The historical account of law's creation might not look much like that, but whenever a government commits itself to the rule of law it is confirming that same commitment to self-restraint. It would be more accurate to refer to the rule of law as rule *through* law. Once legality is understood to be a medium, the inclination to view it as self-referential is displaced by the recognition that the reflexivity is only on account of the self-restraint by the authority.

Latour identifies that the reason why the legal system nonetheless is an effective restraint is due to another attribute of law, which is that one is either wholly within it or one is outside of it.<sup>29</sup> There is no such thing as degrees of legality. Legality yields a binary outcome of either legal or illegal. It is either infringed in its entirety or it is not. The authority cannot act only partly through law. It either acts through law totally or rejects it totally. Attempting to do otherwise results in a political crisis, as occurred when the executive disregarded the order of court that Omar al-Bashir be prevented from leaving the country.<sup>30</sup> It is this polarized operation of law that makes it an effective inhibitor, because the costs associated with an absence of legality are far too onerous for almost any authority in domains as large as modern states to bear. It is worth noting that the rule of law does not create trust, nor does a breakdown of the rule of law create distrust. It is because of persistent distrust that the legal system exists in the first place.<sup>31</sup> Whether between the State and citizens or amongst the citizenry itself, law acts as a treatment of the symptoms of distrust, but we remain distrustful to some extent even when everyone acts in accordance with the law. Shapiro claims that legality takes advantage of both trust and distrust between people,<sup>32</sup> but what he does not

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<sup>27</sup> HLA Hart *The Concept of Law* (1994) at 94; see also 5.4 of this dissertation for elaboration on how the theory of factish law understands customary law.

<sup>28</sup> Michelman op cit note 2 at 1499-1503.

<sup>29</sup> Latour op cit note 4 at 256-258; Bruno Latour 'The Strange Entanglement of Jurimorphs' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 337.

<sup>30</sup> Stephen Grootes „The al-Bashir Case: Government Strikes Back“ (14 July 2015) [http://www.dailymaverick.co.za/article/2015-07-14-the-al-bashir-case-government-strikes-back/#.V37HQ\\_197IU](http://www.dailymaverick.co.za/article/2015-07-14-the-al-bashir-case-government-strikes-back/#.V37HQ_197IU) last accessed 07 July 2016.

<sup>31</sup> According to Luhmann, it is the function of law to facilitate the time binding of expectations, which allows for greater certainty and trust to be placed in expectations being met: Luhmann op cit note 24 at 148.

<sup>32</sup> Shapiro op cit note 1 at 334.

observe is that it is the greater emphasis upon distrust that differentiates legal systems from other normative systems.

People trust in the restraint upon the authority, not in the authority and not in each other. Too many people stand to lose if that restraint is disregarded. The restraint represented by legality remains a trusted intermediary because of the self-interest of both the authority and its subjects. In a publication written in his capacity as an academic commentator, retired justice of the Constitutional Court, Sandile Ngcobo ostensibly contradicts this reasoning.<sup>33</sup> However, his explanation for why the rule of law fosters trust within society relies upon the non-human actors of rights, contracts and courts rather than making any appeal to people trusting each other directly. People need to trust the judiciary, but that is because these non-human actors need to be effective mechanisms before people will rely upon them and judges are the most influential humans available to trust, because they are the most determinative authority in contemporary constitutional systems.

It is in the context of democracies that the rule of law is justified through reference to how ordinary citizens rely upon legal mechanisms, because the citizenry need to retain the will to be self-restraining. In a dictatorship there would be no need for the citizenry to expect effective enforcement of the law, as it would only be the will of the dictator to be self-restraining that would be relevant. The incorporation of justice is an important strategy in the pursuit of inviolability, but in the context of the rule of law in democracies it is also relevant as a contributor towards the willingness of the citizenry to be self-restrained, as is their perception of the reliability of the law so as not to have to trust each other or to have to rely upon themselves more for their continued safety and to incentivise other people not to betray them through intimidation tactics that employ their own violence.<sup>34</sup>

At this point it is worth returning to the observation that the relationship between authority and text continues to exist over time only so long as the relationship is maintained. If there ceased to be any relevant authority, then the relevant text would not be law. This means that if a law exists in the present, then it is the authority of the present that makes it law, not the authority from the past when the law was initially created.<sup>35</sup> Present authorities cannot dissociate themselves from laws so long as they seek to rule through them. That

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<sup>33</sup> S Sandile Ngcobo 'Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role' (2011) 128 *SALJ* 5 at 7.

<sup>34</sup> Whilst I disagree with Ngcobo's claim that people trust each other when the law is upheld, his observation that a breakdown in rule through law results in several negative effects remains undoubtedly correct: *Ibid* at 7.

<sup>35</sup> Hans Kelsen (translated by Anders Wedberg) *General Theory of Law and State* (1961) at 117-118.

means laws from old regimes taint new regimes if they are allowed to remain, no matter how much the new regime might protest against their complicity, as is the case when the post-apartheid government retains security legislation enacted by the apartheid government on the statute books and even invokes it as the legal source that permits their security measures.<sup>36</sup> Even if the new government does not wish to be associated with the old government, the continued existence of any law from previous governments is an authorization of that law by the present government just as much as that was the case for the previous one.<sup>37</sup> Procedural inertia does nothing to affect lesser legal reasoning, so arguing that the laws remain without being authorised in the present while waiting for an opportunity to amend them does not suffice as a deflection of the active association. This inescapable active association provides further reason to consider the often practically nightmarish option of removing the legal systems of old regimes in their entirety and accepting a *de novo* State, because otherwise there is no way to avoid stepping into the shoes of the previous authority to the extent that the laws they passed remain on the statute books.<sup>38</sup>

Emphasizing rule through law instead of the rule of law should also draw attention to the related misconception that law is or purports to be authoritative, legitimately or otherwise.<sup>39</sup> Authority only describes why it is necessary to obey the State, not why the law itself should be obeyed.<sup>40</sup> Literary reasoning allows for the comprehension of the texts and political reasoning allows for the recognition of legitimate authorities, but only legal reasoning links them together so that laws may exist. Legal reasoning cannot be that which it transports. Legal reasoning is not political, at least *not in the same sense that authority is*. Laws may be authoritative in a trivial sense, but only because they are connected to authority. If the authority being transported by legal reasoning ceased to be an authority, then the texts would cease to be authoritative. What this means is that laws cannot possess or purport to possess authority directly or independently of the authority by which they are created. They merely are vessels for that authority. In the absence of a direct duty to obey the law, it is

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<sup>36</sup> National Key Points Act 102 of 1980 ; Rebecca Davis „What’s the Point of National Key Points?“ (24 May 2014) <http://www.dailymaverick.co.za/article/2013-05-24-whats-the-point-of-national-key-points/#.V37KQfl97IU> last accessed 07 July 2016.

<sup>37</sup> Kelsen op cit note 35 at 117-118.

<sup>38</sup> Ackermann explicitly acknowledges that the *process* of revolution was not accomplished in South Africa, with only the *substantive* constitutional revolution occurring: Lourens W H Ackermann 'The Legal Nature of the South African Constitutional Revolution' (2004) 2004 *New Zealand Law Review* 633 at 646.

<sup>39</sup> Joseph Raz 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) at 199.

<sup>40</sup> Hannah Arendt 'What is Authority' in Hannah Arendt *Between Past and Future: Eight Exercises in Political Thought* (1968) at 93.

instead the authorities behind the law to whom the duty is owed. That might sound obvious, but that means there is more than just a grain of truth in the claim made by natural law jurists that there are factors outside of legal validity affecting the duty to obey the law in the sense that one ought to act in accordance with its dictates. The law is the law regardless of any direct moral or political dimensions, but that has nothing to do with the duty to obey it as the law in the sense of legitimate and binding normative claims.<sup>41</sup>

Much of the literature regarding the rule of law is intertwined with the principle of legality and the separation of powers. Whilst these are no doubt closely related concepts, they should remain distinct in a constitutional democracy such as ours. The rule of law is a theoretical concept that exists independently of any given legal system of a particular state. For us, the principle of legality is a consequence of interpreting the Constitution. The separation of powers is a theoretical concept that exists independently of any given legal system, although the particular form it takes for a given legal system will vary. A direct focus on the rule of law is somewhat scarce in the South African academic literature. To the extent that discussion of the rule of law amounts to interpreting a constitutional provision, it is not part of this enquiry and more often than not it is part of an enquiry into judicial review of either executive or administrative action, as seen in contributions like that of Alistair Price.<sup>42</sup>

The reason why it matters that the rule of law be understood distinctly is that it precedes questions about constitutions. That a constitution may include a commitment to the rule of law is not necessarily a problem, but it is redundant. If that commitment did not already exist as a condition of possibility, then a constitution would be meaningless. This is effectively recognized by Dyzenhaus in his observation that the rule of law was present both during and after apartheid, indicating that the commitment to the rule of law precedes the contents of a given constitution:

'The fact that law was used as an instrument of apartheid ideology could then simply show that the principle of legality or the rule of law is by itself morally insignificant. What matters is the content of the law - the nature of the ideology of which the law is the instrument. It would follow that the explicit commitment in the Constitution to the supremacy of the constitution and the rule of law is not what marks

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<sup>41</sup> HLA Hart 'Positivism and the Separation of Laws and Morals' (1958) 71(4) *Harvard Law Review* 593 at 620.

<sup>42</sup> Alistair Price 'The Evolution of the Rule of Law' (2013) 130 *SALJ* 649 at 658.

the difference from the apartheid era, since such a commitment is merely formal, requiring that any exercise of public power be authorized by law. Rather, what marks the difference is the fact that the Constitution also guarantees a list of rights and liberties, and utterly rejects the discriminatory ideology of the previous order.<sup>43</sup>

It is often acknowledged that the apartheid state ruled through law, but it does not appear to have registered as widely that ruling through law is the rule of law. Whether the state operates according to parliamentary sovereignty or constitutional sovereignty is not a significant distinction at this point and only becomes relevant once the separation of powers is in question. This is partly why it is so important to stress that the rule of law does not mean that the law has authority or actually rules anything. It is an actor, but one that aspires towards inviolability, not rulership. These observations are apparently missed within what appears to be the dominant view on such matters:

'When the interim Constitution came into force in 1994, it reversed decades of colonial and apartheid policies of racial fragmentation and marked the beginning of a new legal order in South Africa. Whereas previously the combination of the executive and Parliament had exercised a virtual monopoly of power, this was replaced with a system where the Constitution became the supreme law of the land and any law or conduct inconsistent with it was invalid.'<sup>44</sup>

It is worthwhile reflecting a little more closely upon the claim that the rule of law is morally insignificant. If 'rule of law' is understood as rule through law, then that seems to be a reasonable conclusion. If instead rule *by* law (as independent superior actor) is meant, then there are some significantly disturbing implications that should be considered. It is dangerous to allow a normative system to exist that has its own enforcement capabilities and responds to its own logic. The safeguard built into normativity has always been that it is dependent upon humans, whether that be authority in the case of law or consensus in other normative systems. By ossifying our norms and allowing them to be self-validating, we risk them contradicting our widespread behaviour. Many would see that as a good thing when human rights and the

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<sup>43</sup> David Dyzenhaus 'The Past and Future of the Rule of Law in South Africa' (2007) 124 *SALJ* 734 at 736.

<sup>44</sup> Pius N Langa 'Symposium 'A Delicate Balance': The Place of the Judiciary in a Constitutional Democracy' (2006) 22 *SAJHR* 2 at 4.

like are entrenched in law, but the momentum of legality does not have any specific glass ceiling.

What happens when the dictates of moral excellence make their way into law? Over time that has the potential to create norms that presuppose legal subjects that are not human as we understand that term now, but something better than humans. Our biological fallibility is placed under increasing strain as it is expected to conform to the ever increasing demands of moral reasoning. If human accession restrains normativity, then our fallibility would undermine that automatically, but being ruled by laws would militate against exactly that effect. Just as the inexorable progress of programming in the domain of synthetics may someday move past the tipping point, so too may the progress of moral reasoning in the domain of legality someday do the same.

Even now there are signs of this occurring. The moral values implicit in the Bill of Rights exert significant influence over South Africans, for better or worse. The Constitutional Court as an actor pursuing its goal of promoting and defending the Constitution, together with the Bill of Rights as an actor promoting and defending itself, has already taken several counter-majoritarian decisions that are legally binding. That is not a democratic problem, but it is a problem for human agency. The law aspires to inviolability and the steady creep of moral progress does not provide clear moments for objection, much like the frog in slowly boiling water, so we unwittingly allow non-humans to take greater control over our lives. We are not yet ruled by law, but proponents of such a development would either need to be misanthropic in their disdain for the value of human agency or they would do well to review their reasons for supporting it carefully.<sup>45</sup>

#### 6.4 How factish legality „works“: the example of the separation of powers

The model of factish legality provides an alternate way of understanding the separation of powers doctrine which is often treated as co-extensive with the rule of law. Factish legality attempts to explicate the separation of powers on account of how different parts of the state contribute towards and influence the process of legality. As a point of departure, factish legality in the separation of powers will emphasize that the legislature creates legal sources and sometimes the executive refines them. The executive acts upon the law in accordance

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<sup>45</sup> Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 122-126.

with its understanding of legal reasoning, whether it be in anticipation of judicial application or in response to what has already been decided.<sup>46</sup> The judiciary applies legal reasoning and determines what the law is, rejecting or altering legal sources where they are inconsistent with the already established totality of law. There are several complexities not yet articulated, but the above constitutes the core of how each branch of the state relates to the others through their contributions towards legality.

The separation of powers has become a focal point in the assessment of judicial review in the context of administrative law,<sup>47</sup> as well as in disputes relating to socio-economic rights.<sup>48</sup> The courts and legal academics both seek to articulate the limits of judicial influence in these matters, which bring the judiciary and executive into conflict. Sometimes the limiting factor is referred to as deference or respect, indicating the notion that the full extent of judicial power is limited by a normative barrier, but failing to indicate what considerations inform it specifically.<sup>49</sup> Complexities arising from polycentricism are also raised, indicating an epistemic deficiency on the part of the judiciary and an unintended set of ramifications for interrelated matters.<sup>50</sup>

How would this alternate understanding of the separation of powers handle the issues relating to deference and respect? Where a matter is unresolved for lack of the level of specificity that the executive could provide, it would be better to refer it to the executive. Where the specificity already exists, the matter is best handled by the application of legal reasoning by the judiciary. That is consistent with the practice of ordering the executive to create policy documents and then returning those documents to the judiciary for their consideration. What this understanding does not support is a practice of treating some subjects as the „proper“ domain of the executive and others as the „proper“ domain of the judiciary. Anything that is settled through the application of legal reasoning, being a process rather than a given topic, is properly settled only by the judiciary. The notion that the executive understands some matters better and accordingly that the judiciary ought to defer to its greater knowledge or expertise is entirely at odds with the division between legal sources

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<sup>46</sup> Gutwirth op cit note 9 at 130-131 and 142.

<sup>47</sup> Lauren Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130(4) *South African Law Journal* 810 at 812.

<sup>48</sup> Danie Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614 at 615.

<sup>49</sup> Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *South African Law Journal* 484 at 501-502.

<sup>50</sup> Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383 at 392-394.

and legal reasoning. The input of expertise by the relevant branches of the state is already catered for in the power of the legislature to create legal sources *de novo* and the power of the executive to provide specificity where it is absent from those assumptions. Likewise, there is no room for the legislature or executive to have an understanding of legal reasoning that conflicts with that of the judiciary. Their understanding is only there to improve the odds of their actions being consistent with the law and not being frustrated when their actions are overturned or defeated in legal disputes.

This means that the limits of judicial power lie at the limits of legal reasoning. The latter is a descriptive barrier, not a normative barrier. Deference or respect simply do not apply, because the judiciary has the sole entitlement to decide upon the proper application of legal reasoning. There is no other entity with a hierarchically equivalent claim to that of the judiciary once greater legal reasoning is found to be the relevant domain within which the matter before the courts is to be resolved. It seems to me that the concern is not normative in the more objective sense, but rather a more subjective matter of pre-empting unwanted reprisals from a disaffected executive. Much the same applies in the context of striking down laws enacted by the legislature. Polycentrism provides little justification for restraint in any unique sense. Courts call for evidence precisely because they do not know everything relevant to a given matter in advance. Court orders always affect matters beyond their intended effects. If that were enough justification to avoid making orders of court in the cases that involve executive policy, why should it not also be a justification in matters involving families or businesses? Family life and business practice are just as complex and interrelated as government policy.<sup>51</sup> Again, the difference seems to be that families and businesses pose little political threat to courts.

## 6.5 Conclusion

The distinction between legal and moral reasoning has been difficult for theorists to distinguish due to their shared existence as normative systems. That means they inevitably share many attributes, such as similar language and propositional constructions. The important point is that the different forms of moral reasoning are reflected in legal reasoning,

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<sup>51</sup> Fuller is fully aware that most adjudication implies at least some degree of polycentrism and cautions that the recognition of this effect should not necessarily be used to militate against the involvement of courts in the adjudication of rules relating to these problems: Lon L Fuller 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353 at 397 and 403-404.

but in a far more limited way than morality allows. Legal systems are framed according to deontology. Rights and duties are the functional units determining what legal subjects may or may not do. This is why legal systems are so mechanistic, because they rely primarily upon the decentralized functioning of these components to direct conduct. They do employ utilitarian reasoning, but always in the determination of how this deontological base resolves itself, not as independent reasons. Rule utilitarianism may be the justification underlying the deontological system, but the system does not have recourse to this directly.

Why does this matter? It means that powers factor into the operation of legal reasoning, but not power. Mechanistic analysis, not power analysis, provides the best account of how legal reasoning occurs within legal systems. Legal realism correctly identifies that people bring predetermined judgments into their reasoning, but that is quite different from claiming that power determines how legal disputes will be resolved. Power analysis makes assumptions about how legal reasoning will occur. If someone has a legal right to act in a given manner, that right only confers power if that right is determinative of the legal position on the matter or to a less determinative extent, if the anticipated legal position is leveraged to claim that entitlement. Whether already pronounced upon or anticipated, it is a legal conclusion that founds the power, but not power that determines the legal reasoning. Power lies with judges, but it is the power to engage in binding legal reasoning. That does nothing to influence any given conclusion from legal reasoning. Even if a judge has strong biases, they are biases that influence legal reasoning. They do not replace it. Absent legal reasoning, there is no premise upon which to found the power analysis. That is why sociology is relevant to legal theory, but does not substitute for jurisprudence in the narrow sense.

Perhaps one explanation for why many theorists find it difficult to believe that the legal and moral convictions of judges may diverge is that they are committed to social law, as is the case for both legal positivists and legal realists. If there is no natural election in effect, then the same effect that existed with bleeding belief between social ontology and epistemology would also operate between morality and legality. It is the significant influence of the natural election in factish law that indicates why moral convictions have limited influence upon legality as judges engage it.

This chapter has presented the model of factish legality as the process that results in the creation of the law. Factish legality allows judges to be understood as influential in the determination of the law without becoming law-makers. This is consistent with an emphasis

on rule through law and a separation of powers that does not need to yield to various principles of judicial self-restraint in order to avoid clashes between branches of the State. In the following chapter, the distortionary effects of the Bill of Rights within the model of factish legality are examined, as well as the influence of violence and calls for more African law within the context of justifying the law in South Africa.

## CHAPTER 7 - JUSTIFYING THE LAW IN SOUTH AFRICA

### 7.1 Introduction

This chapter considers three issues that relate to the attempt to justify the law in South Africa. The first of these issues is the role of violence in support of the law and in defiance of it. The analysis of Walter Benjamin in distinguishing law-maintaining and law-establishing violence is examined in accordance with the order/chaos paradox. It is argued that only the ordered law-maintaining violence is justified, but that the understanding of the legal system as established order is not to be taken for granted. This does not mean that this dissertation categorically militates against law-establishing violence. There are cases in which, or times when, the pursuit of change through ordered law-maintaining violence<sup>1</sup> will not be plausible and the armed struggle against apartheid was one of these cases.<sup>2</sup> Some spaces in South Africa experience the police as a chaotic disruption, even if their violence is purportedly law-maintaining.<sup>3</sup> Whilst that does not justify recourse to chaotic law-establishing violence, it does militate against simple condemnation of subjects who adopt that pursuit when their contextually reasonable understanding of the State does not offer ordered violence as a plausible approach to meeting the challenges that face their communities.

The second issue is what I argue to be the distortionary effect on legality (understood in a factish sense) of the Bill of Rights in the Constitution. The question of how the Bill of Rights should be applied, also referred to as horizontality, shows that the especially philosophical and abstract rights included in the Constitution require recourse to much more philosophical reasoning than is desirable within legality.<sup>4</sup> Moreover, I will contend that the

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<sup>1</sup> The pursuit of (ordered) change through law should be distinguished, as I will argue later in this chapter, from the idea that law is or should be the driving force of that change.

<sup>2</sup> Jacques Derrida 'The Laws of Reflection: Nelson Mandela, in Admiration' in Jacques Derrida and Mustapha Tlili (eds) *For Nelson Mandela* (1987) at 39-40.

<sup>3</sup> Ranjeni Munusamy 'Editorial: Never Forget Marikana' (17 August 2014) <http://www.dailymaverick.co.za/article/2014-08-17-editorial-never-forget-marikana/#.V4BPz.19670> last accessed 09 July 2016; Daneel Knoetze 'Court Victory Vindicates Shack Dwellers' Rights' (26 August 2015) [http://www.groundup.org.za/article/court-victory-vindicates-shack-dwellers-rights\\_3246/](http://www.groundup.org.za/article/court-victory-vindicates-shack-dwellers-rights_3246/) last accessed 17 July 2016.

<sup>4</sup> The Davis-Fagan debate is an example precisely of the significant philosophical repertoire required to come to terms with horizontality: Anton Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 611; D M Davis 'How Many Positivist Legal Philosophers Can be Made to Dance on the Head of a Pin? A Reply to Professor Fagan' (2012) 129 *South African Law Journal* 59; Anton Fagan 'A Straw Man, Three Red Herrings, and a Closet Rule-Worshipper - A Rejoinder to Davis JP' (2012) 129 *South African Law Journal* 788; D M Davis 'The Importance of Reading - A Rebutter to the Jurisprudence of Anton Fagan' (2013) 130 *South African Law Journal* 52.

standards set by the Bill of Rights onerously serve to frustrate the efforts of the government because it over-relies upon the State to mould the actions of the government. This does not mean that I necessarily align this dissertation with the negative views that have been expressed against the Constitution and the Bill of Rights (especially by spokespersons of the party in government) in the recent past. It does, however, mean that I contest such an over-reliance on the State to the extent that it inappropriately invests actor properties in „the State“ at the cost of a disinvestment in individual and collective human responsibility and action. In this regard, a degree of wilful ignorance appears to underlie the general celebratory attitude adopted towards the Bill of Rights, rather than questioning whether these rights are justifiable within the Constitution specifically.<sup>5</sup>

The third issue is the objection to Eurocentricity which supposedly renders the law „un-African“. The limited extent to which knowledge of the law can be Africanised outside of contextual additions suggests that it is more the role of knowers that explains the importance attached to the demand that law be more African. The centrality of trust in the acceptance of testimony, together with the racial dimension that appears to have gained prominence in the determination of what constitutes an African jurist, brings the matter of racial distrust into question. After considering how this racial distrust should be understood, the common thread of distrust is separated out and found to be acceptable in a legal system that is founded upon the presumption of distrust. Failure to address this ethico-political demand and restore trust in testimony undermines jurisprudence and its justifications for obeying the law in Africa.

## 7.2 Legal violence

Walter Benjamin draws a distinction between law-maintaining (law-preserving) violence and law establishing (lawmaking) violence.<sup>6</sup> Law-maintaining violence is the violence that entrenches or enforces the existing legal system.<sup>7</sup> Law-establishing violence is the violence that creates an alternate legal system to what is already the dominant legal system in existence.<sup>8</sup> It is apparent from Benjamin’s analysis that law-establishing violence concerns

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<sup>5</sup> Du Plessis might explain this lapse in critical scrutiny as a failure to remain watchful in allowing the Constitution as monument to dominate our thinking: Lourens Du Plessis 'The South African Constitution as Memory and Promise' in Charles Villa-Vicencio (ed) *Transcending a Century of Injustice* (2000) at 69.

<sup>6</sup> Walter Benjamin 'Critique of Violence' in Marcus Bullock and Michael W Jennings (eds) *Walter Benjamin: Selected Writings Volume 1 1913-1926* (1996) at 243.

<sup>7</sup> *Ibid* at 241.

<sup>8</sup> *Ibid* at 240.

the development of a potential legal system that would come into existence once it succeeded in being the dominant entity competing to be the legal system, rather than one that exists already in fragmented form. From the perspective of factish law, law-maintaining violence is part of the law aspiring towards inviolability, whilst law-establishing violence is part of a normative challenge that is not yet the law, but that aspires to become the law. This distinction shows that violence and normativity are bound together, with instances of violence being part of a normative struggle to be or become the dominant normative system. Where the law claims jurisdiction, it is clear that the law is that dominant normative system. Normativity and violence are both ubiquitous. Justifying the law is not about justifying violence, but about justifying the law's violence over the violence of its competition and / or contestation.<sup>9</sup>

Benjamin's distinction is bound to the order/chaos paradox. It will be recalled from earlier discussions that the order/chaos paradox represents the presence of deterministic patterns in order (known) and the absence of such patterns in chaos (unknown). Violence is only law-maintaining when it is ordered. Rogue police officers who act chaotically in their divergent self-interests cease to entrench the law and become its opponents. They do not exercise law-maintaining violence. Law-establishing violence is more complicated. There is a normative order behind it, but the law-establishing dimension to violence is chaotic because it is not yet the dominant order. It must first undermine the existing legal order, even in cases of revolution when a new normative order is being pursued, because disruption is necessary for displacement. Otherwise, the normative orders would co-exist rather than compete and there would be no violence (although there may be contestation) between them to begin with. Accordingly, any defence of law-maintaining violence must also be a defence of order against the chaos of law-establishing violence.<sup>10</sup>

A relatively benign instance of law-establishing violence arguably occurred with the country wide student protests towards the end of 2015. Many supporters seem willing to overlook that the students forcibly entered a national key point and resisted the attempts of the police both to keep the gates of Parliament closed and to eject protesting students after they gained entry. The pursuit of conditions that promote access to education for the poor is a laudable goal, but the means were nonetheless chaotic and forceful. Endorsing some protests

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<sup>9</sup> Jacques Derrida „Force of Law: The Mystical Foundation of Authority“ in Drucilla Cornell, Michael Rosenfeld, David Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 35.

<sup>10</sup> Austin Sarat and Thomas R Kearns (eds) *Law's Violence* (1993) at 5.

and not others in hindsight may give the illusion of order, but at the time there clearly was little order, with twitter-based organization around a hash-tag being the closest resemblance to coordination and knowledge that existed.<sup>11</sup> More recent events appear to bolster this understanding. The burning of paintings, vehicles and offices by members of the Rhodes Must Fall movement at the University of Cape Town, as well as the burning of an entire building by protesters at North-West University, is not so unexpected if the actions of many of the student demonstrations and movements are understood as chaotic. Sometimes that chaos turns out well, sometimes not so well. Either way, it is not ordered. Being unpredictable and unrestrained is perhaps one of the few predictable attributes that these protests possess.

A more sinister instance of chaotic law-establishing violence is on disturbingly frequent display in the vigilantism that has taken hold within South African communities.<sup>12</sup> Whilst these are attempts at creating order in communities suffering from largely unchecked and unsuccessfully policed crime, they do not constitute a legal system. Instead, the chaos of criminality is being countered with the chaos of vigilantism that too often results in subjects suffering unauthorised forms of violence such as being beaten to death by angry mobs. The community members who pursue vigilantism do not have the overwhelming power that is required to maintain an effective normative order in such conditions, let alone consolidate a legal system. Accordingly, chaotic violence that erodes the integrity of the legal system within these spaces continues indefinitely.

The trouble with trying to justify chaos and chaotic processes is that there is little to knowingly endorse. Chaos is the absence of knowledge,<sup>13</sup> so the greater the extent of chaos, the lesser the extent to which one can know what should or should not be endorsed. The normal justification that the ends justify the means, or any other variation founded upon utilitarianism, cannot apply when the means are indeterminate. The violence that is perpetrated in chaos is not the problem, because the legal system also relies upon violence. It may be rational for a person with little to lose in dire circumstances to embrace chaotic law-

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<sup>11</sup> The most prominent movements in the protests, namely #RhodesMustFall and #FeesMustFall repeatedly rejected hierarchical structure and asserted that they were leaderless: Vito Laterza and Ayanda Manqoyi „Looking for Leaders: Student Protests and the Future of South African Democracy“ (06 November 2015) <http://www.dailymaverick.co.za/article/2015-11-06-looking-for-leaders-student-protests-and-the-future-of-south-african-democracy/#.V37LzPI97IU> last accessed 07 July 2014.

<sup>12</sup> Stephen Grootes 'Vigilante Killings: The Erosion of Public Trust in the Police and Criminal Justice System' (07 November 2013) <http://www.dailymaverick.co.za/article/2013-11-07-vigilante-killings-the-erosion-of-public-trust-in-the-police-and-criminal-justice-system/#.V4BMdvl9670> last accessed 09 July 2016.

<sup>13</sup> See 3.6 of this dissertation for further explanation of the order/chaos paradox.

establishing violence, but that is not the same as justifying it. Only order is capable of the kind of rational justification about which Mureinik wrote.<sup>14</sup>

When the contents and processes of order (the legal system, the State bureaucracy), are excessively violent and thus undesirable, they should be changed through the legal system. The law is a medium through which indirect 'social' change may occur, not an immovable obstacle in the path of progress.<sup>15</sup> Violence remains either way, but law-maintaining violence can be justified not least because it is knowable. That does not make it justified, but it does allow it to be justified. The law should not be obeyed because it is good, but because it is only through the law that the good can be pursued in large-scale communities. In this regard, the factish account of law maintains the position in relation to evil legal systems adopted by HLA Hart in his debate with Fuller: if the law is evil, then the law must be changed and not obeyed, but it is still the law.<sup>16</sup>

One strategy for defending chaotic law-establishing violence is to deny the claim that violence is ubiquitous. This is achieved through defining violence to require a structural dimension, so that violence becomes structural violence only.<sup>17</sup> Non-structural violence becomes resistance against oppression, whether that be in the form of protest or self-help. This largely semantic strategy fails to address the observation that the application of force is ubiquitous in the existence of large-scale communities. Compulsion can be given different names, but that does not change its dynamic. To the extent that non-structural violence is implied to be justified when directed at structural violence, the claim is unsubstantiated. Attempts of this nature, working to avoid the claim of ubiquitous violence, are disingenuous. They dissolve into the same question of whether chaotic coercion can be justified when ordered coercion is available as an alternative.

A more difficult challenge to deflect is that the election to understand the state's violence as ordered, and challenges to it as chaotic, is not only philosophically indefensible, but contextually loaded. Law-maintaining violence relies upon the understanding that the state legal system is ordered, so that the violence maintaining the legal system is ordered by extension. I find it sensible to understand the state as ordered, but perhaps that is not so

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<sup>14</sup> Jaco Barnard-Naudé 'The Greatest Enemy of Authority' - Arendt, Honig and the Authority of Post-Apartheid Jurisprudence' (2013) 10 *No Foundations* 120 at 130.

<sup>15</sup> Anton Kok 'Is Law Able to Transform Society?' (2010) 127 *SALJ* 59 at 59.

<sup>16</sup> HLA Hart 'Positivism and the Separation of Laws and Morals' (1958) 71(4) *Harvard Law Review* 593 at 620.

<sup>17</sup> Structural violence is similar to the 'systemic' violence described by Žižek, which he identified as only one of three significant forms of violence, indicating the inadequacy of seeking to equate all violence with structural violence: Slavoj Žižek *Violence: Six Sideways Reflections* (2008) at 1-2.

obvious to those subjects whose experiences of the state have been fraught with inconsistent and inexplicable instances of violence against them at the hands of the police.<sup>18</sup> That might all be understood as an unjust order, but it also might be understood as chaos. If the latter is the case, then all of the above reasoning that relies upon the order election is misplaced in this context. If there is no effective rule through law in some communities, then the arrival of police might better be understood as chaotic than as ordered, even though it remains, at least ostensibly, law-maintaining.

The more one knows about the workings of the state, the more intuitive the order election will be when seeking to understand it. Receiving news about the state's legal system through mainstream media reinforces this ordered inclination, even if the news is of chaotic matters. Situating the state as the central actor in the country is sufficient to establish the intuition that the state is better understood in accordance with the order election. That intuition is even stronger for those who have studied the state's regulatory and legal system for years, which is to say that strong confirmation and perspective biases exist within the legal community. In keeping with the model of paradoxical understanding, there is nothing right or wrong about any given election and this case is no exception. That being said, presuming that any given election is shared by others in different contexts does run the risk of being completely wrong. Understanding the state as chaotic does not necessarily mean that there is a competing candidate for order, but it does undermine the connection between law and order.

Order remains the only justifiable form for violence, but the state and its enforcers need to be understood as order by citizens before citizens can be expected to endorse, primarily in the form of obedience, the legal order. It is uncontroversial that justice must not only be done, but also be seen to be done. A similar observation could be made about order. All, or at least the vast majority, of the state's citizens need to understand the state's legal system as order (or, at the very least, a reasonable approximation of order), which is to say that they must *know* the state, not just encounter the state in seemingly unpredictable and capricious interactions. It is the law that must be experienced in communities as the law, not as haphazard police raids in spaces where the police otherwise do not exist. Order need not be extreme and indeed it is better that it is not so, but if its presence is so limited that it may be

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<sup>18</sup> Ranjeni Munusamy 'Editorial: Never Forget Marikana' (17 August 2014) [http://www.dailymaverick.co.za/article/2014-08-17-editorial-never-forget-marikana/#.V4BPz\\_19670](http://www.dailymaverick.co.za/article/2014-08-17-editorial-never-forget-marikana/#.V4BPz_19670) last accessed 09 July 2016.

understood as chaos when it does intervene, then it has failed in establishing a condition of possibility for large-scale collective existence.

Factish law explains why the presence of the state is so important in how citizens understand the law. The more intuitively social dimensions of the law are not immediately accessible to people who are not involved with the operation of the legal system. It is the more intuitively natural dimensions of the law that bring the law into spaces where people live. Police in uniforms and marked vans, police stations, social workers employed by the state and ward councillors who live in the communities they represent, are all part of the law. The law is not just an idea and it is not just the presence of police officers. The law is those police officers acting in accordance with the idea of laws, bringing the social and natural dimensions of the law together. If that confluence does not exist in communities, then it is reasonable to understand the law as chaotic.

If the state and its legal system remain understood as chaotic, then there is no justifiable form of violence available. To be clear, that does not mean that chaotic law-establishing violence should be the primary form of recourse in spaces where ordered law-maintaining violence is not a plausible understanding of the actions undertaken by the police. It means that the pursuit of chaotic violence is less easily condemned in those spaces. People who have lived most of their lives in those spaces will carry their understanding of the state and legal system with them, even into spaces where that understanding would not easily have formed. Students who reject engagement with the established order of universities in pursuit of their goals may be drawing upon pre-existing understandings of the state to view public teaching institutions as more chaotic than they otherwise would if they had more ordered engagement with the state whilst growing up and passing through the state's schooling system. Students would not be justified in rejecting pursuit of their demands through order, given that order does exist clearly within the spaces of universities, but perhaps it makes their reluctance to embrace the universities' order more explicable.

In practical terms, the effective and perpetual policing of all communities and spaces in South Africa is a priority. Whatever the resource implications may be for extending the influence of the police, they are surely less onerous than the resource implications of dealing with a citizenry that understands the state as chaos. This appeal is not for increased violence

in those spaces, but for a trade in favour of greater order.<sup>19</sup> That means it would be equally mistaken to interpret this as an appeal for less violence. Repeatedly calling for people to cease employing violence is utterly hypocritical when the state is the principal actor employing violence in the country.

### 7.3 The horizontality debate and the distortionary effects of the Bill of Rights in the Constitution

#### 7.3.1 Horizontality

Whilst explaining the model of factish legality in the previous chapter of this dissertation, the uncomfortable position of the Bill of Rights was alluded to briefly. Attempting to make sense of ss8<sup>20</sup> and 39<sup>21</sup> of the Constitution has drawn several courts and academics into a protracted dispute about the central functionality of the Bill of Rights. Whatever the judicially endorsed particularities might be, the debate elucidates much about what the Bill of Rights is

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<sup>19</sup> Catherine O'Regan and Vusumzi Pikoli (commissioners) 'Towards a Safer Khayelitsha: The Report of the Commissioner of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha' (August 2014) <http://www.khayelitshacommission.org.za/final-report.html> last accessed 23 July 2016; Marelise Van der Merwe 'Beyond Khayelitsha: Just How Unequal is Distribution of the Police in South Africa?' (08 April 2016) [http://www.dailymaverick.co.za/article/2016-04-08-beyond-khayelitsha-just-how-unequal-is-distribution-of-police-in-south-africa/#.VwcUp\\_19670](http://www.dailymaverick.co.za/article/2016-04-08-beyond-khayelitsha-just-how-unequal-is-distribution-of-police-in-south-africa/#.VwcUp_19670) last accessed 08 April 2016.

<sup>20</sup> 8 Application

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

<sup>21</sup> 39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

understood to be in contemporary juridical work and also reveals further understanding of what is fundamentally wrong with it. It should, however, be noted at the outset that the resolution of the proper interpretation of those sections is not the goal of this discussion.

To begin, it is prudent to demonstrate just how polarised this debate has become. The strongly purposive approach that favours emphasis upon s39 is articulated by Roederer:

'The Constitution is not a piece of text, a book of rules or even a definitive set of values written down for all time. Rather, it is the legal embodiment of the *values* of post apartheid South Africa. The Constitution is nothing less than South Africa in *legal form*. With its inception, no law in South Africa lives outside it.'<sup>22</sup>

On the face of it, this is a near complete rejection of legality as understood and described in the previous chapter. The distinction between morality and legality is not immediately apparent once Roederer's approach is adopted. It is also unclear why these values should be given the entrenchment of legality whilst everything else that exists in the law is only a product of having considered these foundational values with no independent value of their own. The strongly opposite approach, which emphasises s8, is articulated by Fagan:

'Once one grasps the distinction between the justification provided by a rule and that provided by its purpose, one should have no difficulty understanding the distinction between a justification provided by a *right in*, and one provided by the *objects of*, the Bill of Rights.'<sup>23</sup>

Of course, such distinctions are seldom as clear as they are held to be in this refutation. The theoretical distinctions underlying Fagan's claims are drawn from Hart, whose theory is vulnerable to the observations that Woolman articulates:

'The contradiction should be clear. By saying the words possess a hard core of meaning insensitive to changes in location, Hart is indeed saying that words and the fact situation that they describe are neatly labelled and can have their meaning neatly read off by a judge. He

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<sup>22</sup> Christopher J Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57 at 80-81. (emphasis added)

<sup>23</sup> Anton Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *SALJ* 611 at 616. (emphasis added)

cannot have it both ways. Nor does he want to have it both ways. He wants a core meaning that will remain settled by the normal user and judge alike. That leaves us with penumbral meanings that remain neither settled by the core nor by previous usage. If core meaning does not dictate unique results in penumbral cases, than how does it do so in core cases? Hart offers us no theory.<sup>24</sup>

Attempting to create a balance between these approaches has been attempted by Friedman, who adopts a compromise position that begins with s8 and then extends to s39 in much the same way as Hart's core/penumbra distinction, but with a more even distribution of influence so as to give effect to both sections and avoid either of them becoming largely redundant:

'Thus, in all the instances I have just described, we meet the condition – developing the common law – which triggers our s 39(2) resort to the Bill of Rights. The consequence of this reading, of course, is that s 39(2) does not add much to the analysis when we are already developing the law under s 8 – that is just my point. Instead, the section derives its meaning and value from the critical difference it makes when developing the common law for one of the many other reasons listed above.'<sup>25</sup>

The positions above fit a pattern that is by now rather familiar in this thesis. They are making elections in attempting to resolve a paradox. That paradox is a rule/purpose paradox. Roederer makes the purpose election, Fagan makes the rule election and Friedman makes the hybrid election. Of course, each of them and the many other theorists who have engaged this debate are grounding their analyses in the interpretation of the Constitution, but how they choose to do so seems remarkably close to these assumptions that they appear to have made about what constitutes a desirable Bill of Rights in the South African context.

As has already been observed, when explaining the model of paradoxical understanding, a debate about foundational assumptions cannot be resolved on its own. The difference in this case is that this paradox does not occur at the highest level of abstraction. It

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<sup>24</sup> Stu Woolman 'Language, Power and the Margin: Eliot's Philosophy of Language, Wittgenstein on Following a Rule, and Statutory Construction in *Mankayi v AngloGold Ashanti Ltd*' (2012) 129 *SALJ* 434 at 443.

<sup>25</sup> Nick Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *SAJHR* 63 at 76.

exists within legality and more specifically within the South African Constitution. The problem facing these theorists and the courts that have had to work with these same provisions is that the Constitution has not been drafted in a manner that fits comfortably within legality. Any proposition can be incorporated into a legal source,<sup>26</sup> but it is not wise to do so in all cases. Not only were vaguely articulated and philosophically loaded rights included in the Constitution,<sup>27</sup> but so too were even more vague values incorporated with a high degree of ambiguity in the drafting as to what their inclusion means for invoking the Bill of Rights. However, more damaging to the proper functioning of legality than any of this is that the 'spirit, purport and objects' of the rights was included as part of the propositional *content* of the Bill of Rights (s 39). As with any other paradox, imploding it undermines understanding. In this case, it makes greater legal reasoning a legal source, because it is only the reasoning that can exert the anchoring effect of laws within legality when so much philosophical reasoning based upon highly abstract principles must be relied upon in order to ascertain any given proposition of the law.

Including various presumptions or articulating the standards of proof that are required in trials are instances of hybrids that can assist in promoting clarity in the legal system, but those are instances in which the propositional content is used to give particular direction for the application of greater legal reasoning. They channel it by including propositions that legal reasoning must incorporate into the law, but the more that legal sources direct judges to engage in open-ended moral reasoning, the more they will fray the fabric of legality. Of course law incorporates justice in its pursuit of inviolability, but trying to make law into justice is quite a different matter. It is arguably for this very reason that the philosopher Jacques Derrida, in his famous „Force of Law“ text, insisted on an irreducible gap between justice and law even while admitting that there is a close relation between the two.<sup>28</sup>

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<sup>26</sup> Bruno Latour 'The Strange Entanglement of Jurimorphs' in Kyle McGee (ed) *Latour and the Passage of Law* (2015) at 344.

<sup>27</sup> Whilst Judge Davis is frustrated more by the Constitution as a whole in failing to form a normative framework, the same vagueness that frustrates his efforts are present in the Bill of Rights as a whole and also in most of the specific rights contained within it: D M Davis 'Separation of Powers: Juristocracy or Democracy' (2016) 133 *South African Law Journal* 258 at 263.

<sup>28</sup> Derrida op cit note 8 at 10-15.

### 7.3.2 The distortionary effects of the Bill of Rights as actor

From the point of view of factish legality, a wise usage of a Constitution is to use it to establish the terms that constitute the State. The Bill of Rights does not further this function. Instead, like many human rights treaties across the world, it constrains the ambit of the government and the citizenry. It has been shown that this approach creates tension within the separation of powers by according greater influence to the judiciary than is desirable in terms of the anchoring effect of rights as hierarchically superior norms.<sup>29</sup> It has now also been observed that this approach attributes too much influence to the judiciary by using its rules to dissolve the prominence of rules in favour of purpose. Aside from the hypocrisy inherent in defending purpose in favour of rules as a desirable approach whilst having recourse to rules as the reason why purpose should be given preference in the first place, the cumulative effect of these influences is that *the Constitution and the judiciary with it* comprise the collective hybrid of actor and fixture, fixture and actor, that in practice functions as a hierarchically superior governing council so long as the political will to significantly amend the Constitution does not exist.

As was the case with misattributing the rule of law as a uniquely post-apartheid approach (discussed in the previous chapter), so too is the claim that parliamentary sovereignty was a source of evil a misplacement of blame. The exclusion of the majority of citizens from being part of the authority was obviously the root cause of parliamentary impunity. One might retort that post-apartheid South Africa also has a dominance in Parliament, but nobody is excluded from being part of the authority. Even without the Constitution, apartheid would still no longer exist and indeed it was before the Constitution or even the Interim Constitution existed that the central legislation upholding the apartheid regime was repealed.<sup>30</sup> Political will, not constitutional supremacy, ended apartheid. Former Deputy Chief Justice Moseneke, speaking in his capacity as an academic commentator, disregarded these distinctions when he defended constitutional supremacy in the following terms:

'It is so that if we were to recall the past, parliamentary sovereignty would re-install Parliament as the sole arbiter of the rationality and reasonableness of the measures it passes. The will of the majority in

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<sup>29</sup> See 6.4 of this dissertation for elaboration on the separation of powers within the model of factish legality.

<sup>30</sup> Lindsay Michie Eades *The End of Apartheid in South Africa* (1999) at xix and 173-174.

Parliament would be unrestrained. Socio-economic rights which are now justiciable and are a significant bulwark in favour of the vulnerable, worker rights which are now constitutionally entrenched, and other fundamental rights would be enjoyed at the pleasure of Parliament. But, as we have seen, that is the constitutional option through which apartheid, Nazism, Fascism and post-colonial Africa blossomed.<sup>31</sup>

No doubt human agency has been responsible for many mistakes, but that does not justify its subordination to non-humans (in this case the Constitution). It is interesting that this justification is presented as a balance when it is constitutional supremacy being defended. However, it should be noted that the model of factish legality does not centre itself on democracy alone and the objections levelled against the Bill of Rights have not been founded upon unqualified acceptance of the argument of proponents of counter-majoritarianism. Whether a dictatorship or a democracy, it is the authority that founds legality through its willingness to restrain itself. Even when that willingness extends to and is articulated in constitutions, those constitutions themselves cannot be supreme authorities. At most, they can be supreme laws. That distinction matters enormously, because it means that the reasons advanced in this dissertation for criticising the Bill of Rights are not defeated by the defence provided by counter-majoritarianism. It is accepted already that the authority is willing to restrain itself as a condition of possibility for legality. That was already established in the investigation of the rule of law. A defence within the model of factish legality, one that makes an appeal to how the separation of powers operates, is needed to refute these concerns.

Courts do and should exist within the separation of powers with a function that is of central importance. Exclusive control over legal reasoning is not a minor influence, but rather it is the network that draws legal sources together as the law. It is broadly accepted that representative democracies have a democratic deficit on account of representation,<sup>32</sup> but that does not mean that the deficit justifies undermining the contribution of the legislature towards legality.

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<sup>31</sup> Dikgang Moseneke 'Striking a Balance between the Will of the People and the Supremacy of the Constitution' (2012) 129 *SALJ* 9 at 15.

<sup>32</sup> Geoff Budlender 'People's Power and the Courts: Bram Fischer Memorial Lecture, 2011' (2011) 27 *SAJHR* 582 at 583.

The model of factish legality does not find any issue with the democratic legitimacy of courts. It finds serious concern with respect to the Bill of Rights as it exists in the South African Constitution. It is deeply ironic that the primary justification offered from within a perspective that treats the Bill of Rights and the Constitution as a progressive actor, is the conservative claim that people cannot be trusted. That, as has been discussed, may be true of the law in general, but the extent to which this irony is elevated in the Bill of Rights threatens the rule of law in the long run by removing enough agency from the authority that it may no longer be willing to accept self-restraint. It is strange that the Constitution, and especially the Bill of Rights, has been so exaggerated in its positive effects and yet that acknowledgement of significant influence is not also directed towards the plausibility of it having distortionary effects:

'The Constitution embodies our best hopes and our highest aspirations, not only for others, but for ourselves. It contains a series of binding promises we as South Africans have made to one another. Those promises represent what we aspire to in our dealings with each other through society's institutions. If we abandon them, we abandon all hope that a civilized and mutually respectful society will emerge in our country.'<sup>33</sup>

The Constitution as it exists is not a necessary condition for the existence of legality and the commitment to rule through law. If some of the rights were to be amended or the conditions for their application were altered or the entire Bill of Rights was removed, the State would continue to exist and the operation of legality would continue. If the claims made in this dissertation are correct, it would even assist in the functioning of legality and the separation of powers in the long run.<sup>34</sup>

Another way to understand the problem presented here is in accordance with the actor/fixture paradox. Understanding an entity as a fixture is consistent with a preference for seeking stability, whilst understanding it as an actor is consistent with a preference for seeking change. By design, a constitutional State presupposes that the constitution is tasked

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<sup>33</sup> Edwin Cameron 'Rights, Constitutionalism and the Rule of Law: The Alan Paton Memorial Address' (1997) 114 *SALJ* 504 at 510; for the antithesis of such confidence in human rights, see Slavoj Žižek 'Against Human Rights' (2005) 34 *New Left Review* 115.

<sup>34</sup> Jeremy Sarkin 'The Political Role of the South African Constitutional Court' (1997) 114 *South African Law Journal* 134 at 148-149.

with preserving stability.<sup>35</sup> It sets the rules by which other rules may be created. Changing legislation does nothing to affect a constitution, so it may be preserved regardless of how many disagreements or changes may be attracted by policy decisions enacted by parliaments. A Bill of Rights seeks to do largely the opposite. Understanding it as a fixture is apparently what the authors of the Constitution sought to achieve by embedding it in the Constitution, but that is a double edged sword. Using those rights as a mechanism for policy determination also means that the Constitution comes to be understood as an actor. A fixture may not be a political adversary, but an actor is far more readily able to become an active political opponent. Pitting the government directly against the State is not a sound plan, but entrenching such a feud in the cornerstone of the State's legal order is even worse. Perhaps if the enjoyment of those rights were sufficiently widespread that the Bill of Rights had little impact, the tension would not be so problematic, but where that is not the case it creates significant harm through its effect on our understanding of the Constitution.

That this is occurring is beyond controversy. Every time the Constitution is referred to as a transformative Constitution in academia or even judgments, the understanding of the Constitution as an actor is recognized. The problem is that the dangers of endorsing this understanding are not acknowledged. Even if treating the Constitution itself as an actor is unpalatable to some people, the implications of the adversarial tension between the Constitution and government are transferred to the judges of the Constitutional Court who become the newly relevant actors instead of the court as a whole. An acceptance of the separation of powers according to legality still creates serious friction when the guardians of the entity designed to be understood as a fixture (the Constitution) must give effect to it in ways that make even the guardians (the judiciary) into actors of not only significant influence, but also significant interventionist action. Theoretical distinctions do little to ease political fallout in such a scenario.

The balancing of rights provisions might be seen as a pressure valve for this sort of concern. The provision that some resource intensive rights are only binding within the means of the State also helps. However, nothing helps when government simply does not live up to the standards expected of it by the Bill of Rights. There is a silent compromise that accepts a degree of incompetence in favour of expediency, but that is nowhere to be found in the

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<sup>35</sup> AJ Van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1 at 4-5. Van der Walt portrays the dilemma of seeking transformation from a constitution, but he does not situate the tension as that between the Bill of Rights and the Constitution as a whole.

Constitution. If the government had little difficulty with operating in accordance with these hierarchically superior legal standards, then this would not be a problem, but the sheer volume of litigation based upon the Bill of Rights indicates otherwise. I hasten to add that this argument should not be taken as a condonation of corruption. Corruption is different from both compromise and incompetence, as it is always corrosive to governing capacity, whereas acceptance of compromise or incompetence in the short run may still lead to development of governing capacity in future.

By way of analogy, in explaining why it is problematic for a government to continuously encounter significant impediments from the same source in its attempts to govern the country, consider a computer gamer. If he plays on a low difficulty setting, then most of the time he will progress through the game and not be frustrated by the relatively few times that he is killed by his computer controlled rivals, operating according to the standards set by the programme. The gamer might even be bored if it was too easy. However, if the difficulty setting is elevated dramatically, his avatar will die far more often. If that difficulty is increased to the extent that he stops making progress and his avatar spends most of its time getting killed or being dead, then the gamer will become frustrated rather quickly. Imagine that the difficulty settings become fixed, so that he may no longer reduce them and he is compelled to keep playing the game. His most likely response will be to blame the game for being too difficult, unreasonable in its expectations. He will likely either stop trying to play altogether or he will set about trying to find cheat codes that allow him to effectively bypass the difficulty by making his adversaries in the game artificially weak or making his avatar artificially strong. Very few gamers would instead treat the game as a benevolent guardian of standards that is helping them to become more skilful gamers through inflicting exacting lessons upon them. Negative reinforcement is effective in small doses, but too much of it makes the teacher the problem in the eyes of the learner.

Not everyone plays computer games and that analogy also keeps the difficulty level as a fixture, so another analogy may be used to treat that function as an actor instead. This involves the parenting relationship. If a young child is presented with a code of conduct enforced by the parent and mostly lives up to that code, then instances of punishment for failure to do so may be educational in a constructive manner. If the child frequently fails to meet the standards of the code, then attempts to enforce the code are likely to result in the child growing to resent the parent instead of their own misconduct. Rather than creating a rebellious teenager, it is often prudent to accept lower standards of conduct for the child,

whilst still keeping some basic semblance of normativity which is then elevated gradually as the child matures into an adult. In time, it will likely come to adopt that code of its own volition, but not if it has come to see it as its enemy.

Much the same effect seems to have taken a hold of the executive. The Constitution is set at a very high and complex level of governance difficulty. It sets aspirations as standards. The growing number of comments directed towards judicial overreach are symptomatic of the executive seeing the judiciary as the problem it faces, rather than its own skills deficit. The judiciary is only applying legal reasoning to the relevant legal sources. It takes both legal sources and legal reasoning to create the law. Legal reasoning is not susceptible to direct manipulation, but legal sources are.

A direct way of alleviating much of this pressure is to remove the Bill of Rights from the Constitution. Of course, that is much easier to observe than to do and there may be more important considerations that justify its continued inclusion, but until that is done (or until a superiorly experienced, superiorly skilled, *much less constrained by global conditions*<sup>36</sup> government comes into being) there will be no lasting resolution to the conflicts between the legislature and executive on one side and the judiciary on the other.

I suspect that a fundamental lack of trust can be singled out as the root cause of this controversy. Shapiro sees legality as a means to alleviating the effects of our distrust in each other, which helps to explain why the direct solution of repealing the Bill of Rights is also politically infeasible. The Constitution, especially the Bill of Rights, and the Constitutional Court were created as actors, so that non-humans could be entrusted where our trust in each other was insufficient at the dawn of the new democracy. That non-human actor is now trusted more by many elements of our society than is the government that cannot operate without our trust. Perhaps there are good reasons for being distrustful, but in the long run it will result in admitting defeat in the pursuit of effective governance.

Lenta articulates what is seen to be the difficulty with judicial restraint or deference towards the other branches of the state as it is experienced according to the traditional separation of powers:

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<sup>36</sup> Upendra Baxi „Postcolonial Legality“ in Henry Schwarz and Sangeeta Ray *A Companion to Postcolonial Studies* (2005) at 552.

'Judicial self-restraint is complex and controversial in part because it seems to presuppose a rigid dichotomy between law and politics, according to which judicial review deals with matters of principle and the elected branches deal with policy, whereas, although conceptually distinct, principle and policy are inevitably interlaced in the context of adjudicative practice.'<sup>37</sup>

The separation of powers according to the model of factish legality has avoided these problems. Whilst there is a distinction between the political and legal concerns, they are not rigid. The significant role of the authority is part of the law inescapably, but the mode of analysis remains legal by affirming the centrality of greater legal reasoning. The political considerations that arise regarding institutional dynamics are not necessary in theory and the exacerbation is primarily on account of interference from or intervention by the Bill of Rights. Principle and policy are unproblematically interwoven in Lenta's understanding of the separation of powers, but the Bill of Rights once again polarizes this by hierarchy and vagueness that makes it difficult to treat it as anything other than principles that determine policy constraints directly and overtly.

It is worth singling out a commonly employed comparison between the US and South Africa.<sup>38</sup> Whilst it is not new, citing the US is not a particularly favourable strategy for proponents of the Bill of Rights. Even without the factors that make it so distinguishable from the South African context,<sup>39</sup> it is clear that the myth of societies that remain homogenous in the long run is losing traction. The traditional understanding of the separation of powers that draws upon the US system is at present not only deadlocked on a number of matters, but also results in the same distortions of judicial involvement that is as much the fault of rights in their constitution as it is of improper judicial conduct.<sup>40</sup>

To put it quite bluntly, the problems relating to deference and respect are not matters arising from the separation of powers, but rather from the political strain accompanied by having located normative provisions that affect all manner of policy measures in the Constitution. The application of legal reasoning is not where the awkwardness arises. It is the relatively uncontentious application of legal reasoning that means that any attempts to strike

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<sup>37</sup> Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544 at 547.

<sup>38</sup> Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 168-171.

<sup>39</sup> Davis op cit note 25 at 264 and 268.

<sup>40</sup> Ibid at 264-266.

compromises in policy that affect the rights enshrined in the Constitution are going to be cast aside as a necessary implication of the hierarchical superiority granted to those rights. Policy making in the political arena is about compromise, but legal hierarchy is not. Legal realists might see this as an instance of their theoretical commitments put into practice, but it is also an instance of formalism in practice. The political question arises so starkly because there is no space for it to be settled with less confrontation in a domain where legal reasoning precludes directly political considerations by virtue of crowding out.<sup>41</sup>

At the level of ideality, the pursuit of certainty remains one of the central goals of law, even though it fails to realise this goal in daily circumstances. Formalism as a theory of law is often viewed as descriptively naïve, but as an expression of the goal of legal certainty it has considerable appeal. The usual line of attack has been to criticize the failure of formalism to accommodate interpretational divergences. The latter does create uncertainty, but following a single method of interpretation could alleviate this to a significant extent. Mathematics is not very powerful if left in the form of only its most basic axioms, but the development of them into the body of knowledge we possess today is massively more powerful and able to accommodate vastly more complex situations than might seem feasible when only those axioms are present. We might expect that, given time and effort, legal interpretation could follow a similar path if its axioms were left unchallenged.

This is where the real difficulty lies. The problem is not the complexity of descriptive reality or the burden of developing a complex method of legal interpretation. The problem is that the assumptions we employ are always challengeable. The more interesting question is this: why are some forms of knowledge so much more developed than others when all forms of knowledge are based upon assumptions?

I suggest that the answer lies in how much legal actors care about the assumptions and processes that create different fields of knowledge. The more they care about them, the more difficult it is to establish clear and uncontested axioms or assumptions that follow likewise clear and uncontested processes. The outcomes might attract far more interest from people, but the body of knowledge as a whole is not shaken by the contestation of discrete outcomes, unless it results in the assumptions and processes being questioned as a means of better contesting the undesirable outcomes. Very few people engage with the philosophy of mathematics or science, seeing little point in wondering about what these disciplines are so

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<sup>41</sup> Emiliós A Christodoulidis *Law and Reflexive Politics* (1998) at 101.

long as they produce useful results. People discuss the philosophy of law to a greater extent, not simply wanting law to have good outcomes, but frequently wanting law itself to be something good. People almost always discuss the philosophy of human conduct, perhaps the only form of philosophy to form a substantial portion of daily conversation.

To put it differently, the problem with legal certainty is not the complexity of reality generally or the inadequacy of legal interpretation specifically. The problem is that we care too much about the assumptions and processes of legality for us to simply accept them and suffer the consequences. Shapiro has already commented upon this in the form of our distrust in each other, but the reason that our distrust is determinative is because the subject matter with which legality concerns itself is obviously important to begin with. Law is simply too relatable, in the sense that it relates obviously to so many matters of importance in peoples' lives, for it to develop to its full potential.

It is usually assumed that a more developed legal system becomes more technical because of its development requiring more finely tuned processes. I agree with that, but I also suggest that the more obscure processes feed back into that development by creating a less relatable environment. This creates an interesting trade-off. We want to have a developed legal system, but we also want to have an accessible legal system. Whilst the trade may not be absolute, there appears to be an extent to which preferring one goal detracts from the other. The more readily subjects understand and engage the system, the more they will be interested in seeing it change to suit their divergent ends and the less it will be able to develop upon a clear and uncontested basis.

Why does that matter? Take for instance the call for greater use of plain language in the drafting of laws.<sup>42</sup> Assume that the actual meaning of law would remain entirely unaltered. Even so, legal certainty would be undermined, just indirectly. The certainty of how a given law might affect their lives increases for persons to whom it may apply if they read only that law, but the certainty of how a decision might be made in court about a dispute regarding that law is diminished. The claim that plain language increases both legal certainty and access to justice applies to those less invested in the legal system, not to the system itself or those more invested in it. The question of whether that is acceptable as a trade is an ethico-political matter of great importance.

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<sup>42</sup> Joseph Kimble 'Plain English: A Charter for Clear Writing' (1992) 9 *Thomas M Cooley Law Review* 1 at 8.

It is equally apparent that direct interest in the foundational mechanisms of the Bill of Rights is having a similar effect on certainty in the South African legal system. It may be more accessible in its present form, but that has come at the cost of the certainty gained from less contested specificities. It is consistent with this understanding that there is little stability within the jurisprudence relating especially to socio-economic rights.<sup>43</sup> Of course there are other factors, but the point of this observation is to draw attention to just how unlikely it is that the jurisprudence of courts will ever find stability in this domain.

### 7.3.3 *S v Jordan* as a case in point

An illustration of how central assumptions can be in legal reasoning is provided in the case of *S v Jordan*<sup>44</sup>, which also illustrates the importance of judges articulating their elections as best they can and the influence of providing scarce content in assumptions. The right in the Bill of Rights that pertains to human dignity is often misunderstood. Section 10 articulates the right to have one's inherent human dignity respected and protected, not a right to human dignity.<sup>45</sup> Human dignity is presupposed by the law, not granted by it.<sup>46</sup> That being said, it is still of central relevance what human dignity is. By failing to define it further in the Bill of Rights whilst also making it clear that it precedes legal instantiation, the philosophical enquiry is allowed to hold greater sway than it usually would in legal disputes.<sup>47</sup> This leads to a second confusion between inherent human dignity and *dignitas*, which is what is usually meant when observing that someone acts in a dignified manner.<sup>48</sup> Human dignity cannot be lost, even when acting in an undignified manner.<sup>49</sup> Whether handing out one's wealth to those less fortunate or stealing money out of their pockets, the marked difference in these behaviours being dignified or undignified has absolutely no impact upon the worth of people as human beings possessed of human dignity.

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<sup>43</sup> Even strong supporters of socio-economic rights in the Bill of Rights acknowledge that there are fundamental issues requiring theoretical defences beyond what is present in the jurisprudence of courts to date: Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) at 223-227.

<sup>44</sup> *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC).

<sup>45</sup> Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) at 95.

<sup>46</sup> Immanuel Kant 'The Metaphysics of Morals' in Hans Reiss (ed) (translated by H B Nisbet) *Kant: Political Writings* (2ed) (1991) at 153.

<sup>47</sup> This is arguably the motivation behind much of the invocation of philosophical sources in the early jurisprudence of the CC. See for instance *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>48</sup> Jonathan Barrett 'Dignatio and the Human Body' (2005) 21 *SAJHR* 525 at 526.

<sup>49</sup> Allen W Wood *Kant* (2005) at 140.

Observing that these distinctions have been confused is one way of criticizing the judgment of the Constitutional Court in the case of *S v Jordan*. By labelling the work of sex workers as reprehensible and undignified, the court has done nothing directly to address the question of having their inherent human dignity respected.<sup>50</sup> The idea that sex workers are failing to respect their own inherent human dignity is completely at odds with the emphasis placed upon human agency in understanding what human dignity means – an emphasis that the Constitutional Court has articulated vehemently in other judgments.<sup>51</sup>

However, there is another way to understand this seemingly brazen contradiction within the outlook of the court. With many of the same judges comprising the benches that heard these matters, it seems suspicious that such a serious deviation would occur without some semblance of an underlying rationale to justify it. One such possibility is apparent when these judgments are viewed according to the singular/plural paradox. When matters such as the provision of housing are in question, the focus is upon the individual without a house. There is no doubt that we all would like for each person to live in a house. When has anyone ever proclaimed that it is immoral or sinful to live in a house? These cases are about compelling the government to respect the human dignity of an individual human or humans even as they form part of a community. It is fairly obvious that the judges elected to understand human dignity in accordance with the singular election in such circumstances. With the proliferation of socio-economic rights cases brought before them, there was not much reason to adopt the alternate election, since such cases each concerned either a single human or a small community that was singularly understood as a unit. The requirements for legal standing are influential in this by crafting singular identities that may be handled more easily by a litigation system that deals with readily identifiable and stable parties.

The *Jordan* case did not fit this mould. Like other cases of moral or religious sensitivity, it concerns not only the individual, but also the collective. This means that the elections under the singular/plural paradox become less obvious. Human dignity in terms of a plural election is about humanity. All humans have an interest in humanity, because it is what makes them human. The question of agency that was previously used to indicate how the collective should accommodate the individual under a singular election is now turned around to indicate how the individual should accommodate the collective under a plural election.

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<sup>50</sup> Botha portrays this absence as focusing only on the objectification of people, which captures much the same selectivity: Henk Botha 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch Law Review* 171 at 202-204.

<sup>51</sup> Barrett op cit note 45 at 539.

Individuals are failing to respect the human dignity of humanity or a smaller collective that still dwarfs the individual in question, or so goes the argument, when they act in certain ways that violate the agency of the collective as expressed in moral or religious convictions.

The crux of this is that the human identified in the Bill of Rights could be understood as singular or plural and there is no way philosophically defensible way to prefer one over the other. Taken together as the singular/plural paradox, the judges of the Constitutional Court are simply beholden to the same paradoxical limitations as everyone else. That exonerates them from the criticism of having confused human dignity with *dignitas*. But that is not the end of the matter. These judges are not moral philosophers. They are determining the appropriate manner in which to apply legal reasoning, setting precedent for future decision makers. Their mandate is to promote consistency within the law, not to promote completeness as the moral philosopher or legal academic is required to do.

This indicates that it is important for judges to indicate the elections upon which they base their legal reasoning. Legal realism again could be said to have identified this, but the distinction is that the *elections* are always open to being made differently, so this is about identifying which elections have received precedent. If a judgment is based upon one election, then a future case may freely argue on the basis of an opposing election or the appropriateness of having chosen that election might be contested in future. It is not political reasoning displacing legal reasoning, but rather the inescapable presence of elections within legal reasoning. The role of assumptions is significant, but those assumptions are contained in the legal sources as part of legality. It is only the extent to which those assumptions are insufficiently clarified that judges must make their own determinations as to what the remaining content of those assumptions should be. When such supplementation is required, it needs to be expressed so that it may be available to future courts as a more determined assumption. Of course, it would be better for such deficiencies to have been absent from the initial drafting of the legal sources, but there will always be some degree of finer determination required and this process is a desirable supplementation under such feasibility constraints.

It is tempting to attempt a reconciliation of the singular-plural paradox as it applies to humans by seeing each person as one of the many. Whilst it is certainly one way to see people, it does nothing to resolve the paradox. It has equated the emphasis of singular and plural, but that never extinguishes the plausibility of seeing each extremity separately. That

means both selfish individualism and selfless communitarianism are concurrently plausible interpretations within the singular-plural paradox. Accordingly, the option of adopting an equally defensible and different view is always available. In communities with porous delineations and massive populations, the feasibility of avoiding this problem through unquestioned conventions of the variety that many structural religions still employ, is simply infeasible. A true acceptance of diversity does not arise from adopting a position that everyone can accept, but rather from adopting a position that anticipates a failure to do so.

One of the tasks of legal systems in liberal democratic states is to solve this problem of creating singular laws that allow for pluralistic patterns of behaviour and also for pluralistic understandings of the singular-plural paradox itself. Clearly that is no simple task. The attempt to preserve customary law might be seen as an attempt to accomplish this, but the inevitability of its incorporation into the state's legal system as embedded within the act of preservation is equally testament to the ease with which such attempts fail. Law would cease to be law if it simply admitted multiple norms of equal hierarchical importance to exist, as the aspiration towards inviolability would be frustrated to a critical extent. The Constitutional legal system, with competing bases drawing from common law and customary law, is feasible only because it creates a singular structure within which singular patterns may be derived from pluralistic possibilities.

The trouble is that there is no long-run solution. We each have individualistic identities that justify themselves only to themselves. We all have communitarian identities that justify themselves to the community. A legal system that adopts either extremity is not simply difficult to sustain, but makes no sense at all. If each person was a law unto herself, then there would be no legal system of which to speak. If only the community was protected by the legal system, then every person who is subject to it would have compelling motivation to reject it. It is only when the position is adopted that members of a community are the entities that law protects, which is to say the discrete people in their singularity who are associated pluralistically in the communal form, that a legal system can exist. That is precisely the position that does not resolve the paradox as stated at the beginning of this section, but independently of that observation it is also the only position that admits of a legal system, so it is the fate of legal systems to exist within the paradox and never to resolve it. It may aspire to be inviolable, but the goal is unobtainable. *S v Jordan* is a case that illustrates vividly why this is the case and why the continued presence of the dignity right in the Constitution eternally defers its stability.

How does anyone create and maintain a legal system that can survive in the long-run? The answer is that nobody does. The best we can hope to achieve is to avoid excessive harms as we negotiate our way through divergent short-runs together. There is no consistent theoretical solution, but there are still ways in any given context at a low level of abstraction in which people could behave such that order is enhanced instead of frustrated through the synchronizing of individualistic and communal interests. That is the domain of economics and it explains the intuitive appeal of the economics and law theoretical movement within jurisprudence. Law is not whatever economic reasoning would suggest, but it is likely that law will approximate some form of economic rationale in its attempts to avoid violation.

Again it is apparent that the Bill of Rights is subject to this pitfall. In seeking to resist change in the short run, it also undermines adaptability in the long run on the mistaken assumption that such rights would not require adaptation. That is not to say that they cannot be amended, but rather that they will be amended too late at the point when there is such broad consensus regarding the need for their amendment for the changes to provide prospective stability. Taken together with the concern about letting moral development occur through law as a non-human, it becomes apparent that humans seeking to change these moral tenets of the Constitution will find both that the legal system resists such changes and that the plurality of interests in democracies will also resist such changes. The search for lasting solutions is not so important that it should come at the expense of human agency.

#### 7.3.4 Wilful ignorance

There is a dimension to this uncritical engagement with the Bill of Rights that originates from the teaching of law. At present, certainly within the South African context, teaching centres on descriptive instruction of various domains of doctrinal law from the perspective of the internal logic of law.<sup>52</sup> There are injections of normativity, but these tend to take the form of musing about what provisions should be altered within or added to these domains and discussions about human rights. Recent calls for greater inclusion of legal ethics within the overall syllabus point towards a deficiency in the instruction of how lawyers ought to behave in their respective practices and calls for greater academic focus within undergraduate legal

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<sup>52</sup> Lesley Greenbaum 'Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with Our Educational Legacy' (2015/2016) 60(2) *New York Law School Law Review* 463 at 480.

education are also on the rise, but this still does not address the heart of the normative election.<sup>53</sup> That is only suitably addressed by the external view of law, which can ask what law should be.

At no point in the curriculum is the desirability of law itself questioned. At no point is the desirability of the *form* that law takes in a constitutional democracy questioned, especially that of the Constitution in South Africa. Introductory courses might extol the virtues of law, usually through listing the benefits of the rule of law, but that is a far cry from questioning it. Questioning whether or not evil legal systems should be obeyed focuses on the propositional content of the law, not on legality itself. We must assume that legality is good in order for that dilemma to arise. It is understandable under the weight of this observation why many African customary law scholars are so invested in establishing the status of African customary law as law. We question the desirability of customary systems regularly, but shield positive law from that same scrutiny.

The failure to discuss these questions is just as political as any discussion of them would be, although the prospective participants of such discussions might remain less politicized in silence.<sup>54</sup> Questions about transformation of the judiciary and law schools stem from much the same perspective.<sup>55</sup> It is strange to question the desirability of legal professionals as they are, but not to question the law. In both cases stability is enhanced in the short run by silence, but in both cases the increased likelihood of unquestioned injustices contributes towards an increased likelihood of significant instability in the long run. Asking law students to question themselves but not the law is asking them to put blinkers on just as they had them before, but with different concerns obscured from their vision. To be clear, the criticism I am levelling at legal education in South Africa is that it does not ask whether the law should be, only *what* the law should be.

The implication of this is that legal education in South Africa seeks to prioritize descriptive over normative elections and when normative elections are made they are largely confined to lawyers instead of the law.<sup>56</sup> Whilst it is clear that lawyers are mostly concerned

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<sup>53</sup> Jonathan Campbell „The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?“ (2004) 25(1) *Stellenbosch Law Review* 15 at 29.

<sup>54</sup> Duncan Kennedy „Legal Education and the Reproduction of Hierarchy“ (1982) 32 *Journal of Legal Education* 591 at 597-599; Greenbaum op cit note 49 at 480.

<sup>55</sup> Joel Modiri „Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education“ (2013) 24(3) *Stellenbosch Law Review* 455 at 458.

<sup>56</sup> Karin van Marle and Joel Modiri 'What Does Changing the World Entail? Law, Critique and Legal Education in the Time of Post-Apartheid' (2012) 129 *South African Law Journal* 209 at 211-212.

with the internal view of law as implied by the subject election, and there is nothing wrong with this, it seems this preference has come with a corresponding distaste for the external view of law as implied by the object election. No matter how much case law is included in a syllabus to increase academic rigor, it remains part of the internal view of law. It is interesting that this same reluctance to question law as an object in legal education underlies the formalism that apartheid era lawyers have been condemned for displaying.

That is not altogether surprising when the legal community remains just as protected by law now in the face of politics as it was then. The unwavering call for respecting the rule of law is principally consistent whether it is used to defend policies of segregation or to lambast executive decisions that contravene the law even in cases where political fallout would be massive. A clear demonstration of this was the case of failing to arrest the Sudanese president upon his visit to South Africa. The legal community seemed oblivious to the magnitude of the political fallout which would have occurred, focusing instead on the risk to the rule of law from failing to respect a single order of court.<sup>57</sup> Whether it is conservative or liberal in its ideological outlook, the legal community on the whole remains an elite surrounded by a poor majority that is able to defend itself against the masses through law and little more. Whether under apartheid or liberal democracy, lawyers stand to gain or lose much depending on the extent to which others hold the law in reverence. Our legal education seems suspiciously well suited to advancing that interest and averting dissent from within our ranks.

None of this is to suggest that law is not valuable. The point is that there is a division between universities, charged with investigating and researching matters of importance, and the government, charged with determining how we ought to behave collectively at a policy level. The research of universities prioritizes completeness, whilst the policy formulation of government prioritizes consistency. If policy prohibits the expression of some ideas or associations with some people, then that constitutes a legitimate curtailment of the completeness of research, but otherwise the goal of university teaching and research should be to cover all available viewpoints and investigate the full range of arguments. Instances of hate speech are a clear category excluded from the completeness that universities pursue. In some countries, Holocaust denial is a specific viewpoint prohibited by law. These are concessions made to the consistency sought by government, whilst academic freedom is the

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<sup>57</sup> Pierre de Vos 'Flouting a Court Order: Government Risks Making a Paper Tiger of the Law' (15 June 2015) <http://www.dailymaverick.co.za/opinionista/2015-06-15-flouting-a-court-order-government-risks-making-a-paper-tiger-of-the-law/#.V4gMBf9670> last accessed 15 July 2016.

concession made by government towards the completeness sought by universities. The acceptance of some arguments or ideals and the rejection of others is not the primary focus of universities. Of course, researchers still do and should make suggestions based upon their work and debate within universities is good for helping to cover the range of arguments and viewpoints more thoroughly, but acting upon the contents of that work is not the purview of universities. Failing to provide a proper account of both the positive and negative implications of legality amounts to acting upon such decisions. Whether that is seen as failing to pursue their own goal or usurping the goal of government, such an omission remains unjustified.

#### 7.4 „African“ law, racism and identity politics

The student protests discussed above, frequently employ one or the other version of a charge that order and, by extension, law in South Africa is „un-African“. At the outset, allow me to exclude two related matters that are frequently confused with this inquiry. The first matter concerns customary law. As has already been argued in this thesis, customary law is a normative system of extreme importance in South Africa and several other countries where it shapes the lives of millions of people, but it is not a legal system. Suggesting that the law would be more African if it instantiated customary law more frequently is conflating the discussion about whether the law is African with the discussion about whether Africa would be better served by adopting the law or customary law as its dominant normative system. The second matter concerns *ubuntu*. Entering into discussion about African ethics is a conflation of questioning what would make good laws in Africa with whether the law is African.<sup>58</sup> A hybrid election within the descriptive/normative paradox would allow for greater complexities to be investigated, but the question of whether the law is African already makes the descriptive election.

It can be difficult to establish what exactly it is in the charges of protesters (and their sympathisers) that is being labelled as „un-African“. The law in its most specific sense refers to the law of South Africa in the context of this dissertation. The more the focus is narrowed to the legal system or even further to particular laws, the more the inquiry answers itself,

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<sup>58</sup> For further explanation of *ubuntu* as an ethical basis for deciding what would make good laws in Africa, see Drucilla Cornell and Karin van Marle 'Exploring *Ubuntu*: Tentative Reflections' (2005) 5 *African Human Rights Law Journal* 195.

because the law of South Africa is inherently African and uniquely South African at this very low level of abstraction.

The discussion only becomes contentious when focus is shifted towards the higher levels of abstraction, which is the domain of *jurisprudence*. Accordingly, whilst there are many implications from this matter that affect the law of South Africa, the central questions pertain to jurisprudence and that is where the focus of this chapter will remain. As an independent positive claim, there probably is no singular expression of what makes an entity African. Africa is a vast continent with considerable diversity amongst the people who live on it. Factors including geographical, cultural and biological connections may be drawn upon, but they do not provide uncontested definitions. That is not unique to Africa, because much the same difficulty arises in trying to establish what makes an entity European. The difficulty is only alleviated partially by relying on comparative negative claims, which is to say that it is often easier to establish when an entity is un-African than when it is African. That being said, whatever is established as African or un-African should be justified prospectively, not retrospectively. Whether or not an entity reflects pre-colonial Africa is only of historical significance, which may play a role in determining what influences have affected African identity over the past few centuries, but that is ancillary to determining what it means to be African now and moving into the future. Anthropologists would likely accuse this approach of treating Africa as a singular entity as essentialism, but this dissertation is concerned with abstractions that exist largely outside the domain of anthropology, so the loss of detail is acceptable in this context.

An important distinction between knowledge and knowers lies at the heart of this inquiry. This distinction seeks to separate non-humans from humans, which can be understood as separating out the natural and social elections within knowledge as a factish. By extending upon that distinction, the objects of inquiry can be separated into jurisprudence and jurists. Once jurisprudence is further isolated in this manner, the potential for polarization of the African/un-African description is also further exaggerated. If jurisprudence in this sense is un-African on account of it not being developed in Africa, then there is very little available that could satisfy the search for African jurisprudence. Centuries of recorded reflections upon a normative system that was mostly developed outside of Africa has a powerful crowding-out effect upon attempts to contribute anything further to the philosophy of law that is not derivative of what has already been established, even without considering the origins of those contributions. Rejecting that extensive accumulation of knowledge as un-

African means that it will either largely be rediscovered for no apparent gain or it will remain discarded and amount to an unmitigated loss of knowledge about a normative system that is likely the dominant normative system employed by states across all of Africa. This purist approach to understanding what makes knowledge African does not serve the interests of Africa.<sup>59</sup>

A more moderate approach that advocates greater involvement of African knowledge in the totality of jurisprudence avoids the loss of pre-existing knowledge whilst increasing the influence of African knowledge and providing contextual variety.<sup>60</sup> However, that process has a much less immediate and dramatic effect on jurisprudence in Africa, because the share of what Africa contributes to the totality of jurisprudence, even once it is contributing to its full potential, is only a portion of the total contributions and it is arriving centuries after other regions have established jurisprudence as a recorded field of knowledge. That is not necessarily undesirable, but it does not respond meaningfully to the objection that jurisprudence is un-African. This moderated approach would still result in most of the jurisprudence taught in African universities being what it would be without any attempt having been made at changing the largely Eurocentric existence of this academic discipline. The propositional content would be given additional contexts in which to be understood, but the basic propositional content would probably remain mostly unaltered.

So long as the pursuit of African jurisprudence remains additive, rather than displacing the pre-existing body of knowledge that constitutes jurisprudence, it is difficult to see why anyone would oppose it. More knowledge is precisely what the academy seeks to acquire. Africa is contributing to jurisprudence already, but without rejecting the discipline to rewrite it on a clean slate. The absence of a clear problem suggests that the criticisms of jurisprudence being un-African are not directed primarily at the knowledge of jurisprudence.

That shifts the inquiry to African knowers. Focusing upon knowers appears to be an indirect examination of the variations in testimony that contribute towards knowledge creation and transfer.<sup>61</sup> One way to understand the role of testimony is to equate it with the contextual variations brought to knowledge, as discussed above in the moderate approach

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<sup>59</sup> Chikosa Mozesi Silungwe 'On 'African' Legal Theory: A Possibility, an Impossibility or Mere Conundrum?' in O Onazi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) at 29.

<sup>60</sup> Dominic Burbidge 'Connecting African Jurisprudence to Universal Jurisprudence Through a Shared Understanding of Contract' in O Onazi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* (2014) at 95.

<sup>61</sup> Morreira, Shannon „Steps towards Decolonizing Higher Education in Southern Africa? Epistemic Disobedience in the Humanities“ (2015) *Journal of Asian and African Studies* 1 at 5.

towards African knowledge. This approach would suggest that articles written about the rule of law in South Africa by South African citizens should suffice as African knowers contributing towards African jurisprudence. The law journals in South Africa are laden with such articles. Understood in this way, there is still no apparent problem.

It is when considering the role of testimony that the problem of un-African jurists begins to appear. Testimony relies upon the trustworthiness of the testifier. Whether that is in court with witnesses before a judge or in a classroom with lecturers before students, the effectiveness of a testifier depends upon the extent to which the recipients of testimony trust in its source. Trust is not an assessment of objective truth, but rather it is an assessment of the motives or intentions of other entities. Trust and distrust frame how testimony is received and interpreted.

I suspect that I saw an instance of this effect at a recent panel discussion on the transformation of legal education.<sup>62</sup> During his address, Joel Modiri bemoaned the deficit of reading that students were required to undertake in their university courses, suggesting that the prevalence of alternate teaching media hindered critical engagement with texts in their greater complexity. Many students in the audience expressed their support for this claim with very clear visual and auditory indicators. On its own, that seems entirely unproblematic. What struck me was that in the same audience sat Anton Fagan, smiling and perhaps ever so slightly chuckling, but otherwise mute. I remember the adverse reaction of my jurisprudence and delict classmates when he made exactly that claim about the loss of skills caused by shielding students from complicated readings. I remember the reactions of his subsequent classes being similar when I was tutoring his courses a few years later. This might just be an idiosyncratic shift between classes, regardless of how sharply polarized the reactions are. It might be that a larger sample of students would have had a more negative reaction at the panel discussion. I do not know for certain. However, it raised my suspicions when I observed that Modiri and the overwhelming majority of the students expressing support for his proposition were black, whilst Fagan is white. Fagan would probably prefer not to see this racial dynamic and provide any number of alternate explanations, but I am willing to entertain it as a possible interpretation of the situation. I accept that the change may be attributable to a change in the zeitgeist of the students, but that change is overtly racial too. It has become common to hear that students want to be taught by someone who looks like

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<sup>62</sup> Transformation of Legal Education (23 January 2016) University of Cape Town.

themselves, another claim expressed with no discernible controversy at that same panel discussion. Indeed, the desire to be taught by people who looked the same as the students they teach was a widely expressed and infrequently challenged claim. Even if my interpretation of the events at this panel discussion is inaccurate, or if my interpretation is not sufficiently trustworthy, there have been several other situations within recent months that reflect similar dynamics.<sup>63</sup>

Trust and race are often closely linked. That is precisely what motivates racial profiling in security matters. If there is a distrust of un-African jurists and being African in this context is contingent upon being black, then the pertinent question is whether this distrust is acceptable? That depends of how this distrust is understood, so the appropriate normative interpretation of racial mistrust in this context requires consideration. Beginning with the most problematic case, is this racial distrust racist? A distinction needs to be drawn between racialism and racism. Racialism is the delineation of categories of people based upon race. For instance, noting the ratios of different racial groups who are practicing lawyers is a racial observation. To be clear, this is racialism in the sense of 'seeing' race, as would be required for transformation to occur,<sup>64</sup> not in the sense of the ideological deployment of race that is opposed by 'non-racialism'.<sup>65</sup> Racism is founded in the belief that some races are inferior to others.<sup>66</sup> Racist conduct is a consequence of racism, but conduct is not required for racism to exist. Inferiority implies at least some extent of normativity, which may also be described as prejudice.

Accordingly, it is not racist to allege variation in skin colour between races, but it is racist to allege variation in intelligence between races, as diminished pigmentation lacks the prejudicial import of diminished intellect. Some accounts of racism also require an imbalance of structural power to be exerted through domination.<sup>67</sup> In effect, this results in all of racism being restricted to structural racism. There can be no doubt that structural racism accounts for the vast majority of racism, both past and present. There is also no doubt that the

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<sup>63</sup> Christi van der Westhuizen 'Anti-Democratic Element in Student Movements Holds Warnings for South Africa' (30 June 2016) <http://theconversation.com/anti-democratic-element-in-student-movements-holds-warnings-for-south-africa-61448> last accessed 01 July 2016.

<sup>64</sup> John A Powell 'Transformative Action: A Strategy for ending Racial Hierarchy and Achieving True Democracy' in Charles V Hamilton, Lynn Huntley, Neville Alexander, Antonio Sérgio Alfredo Guimarães and Wilmot James (eds) *Beyond Racism: Race and Inequality in Brazil, South Africa, and the United States* (2001) at 386-387 and 397-402.

<sup>65</sup> *Ibid* at 373.

<sup>66</sup> Albert Atkin *The Philosophy of Race* (2012) at 115.

<sup>67</sup> *Ibid* at 116.

overwhelming culpability for racism over the last few centuries rests with structural racism. That does not mean that racism can only exist so long as it is structural. All people of all races are capable of forming prejudicial beliefs about racial inferiority or superiority, as contemporary news reports in South Africa continue to show.<sup>68</sup>

A further distinction can be drawn between racism that is direct or indirect,<sup>69</sup> partly reflecting the corresponding distinction drawn from intention in South African criminal law. Direct racism is the overt racism that flows from intending to be racist and pursuing that goal. Obvious cases of this include assaulting people of different races out of hatred for their race or calling people of different races by demeaning names. Indirect racism is what occurs when beliefs about the inferiority of other races are part of the reasoning behind other beliefs one holds or that motivates one's conduct. This includes the understanding of indirect intention from criminal law, but also includes the intention of eventuality and even negligence. The reason for amalgamating the finer distinctions from criminal law is that, unlike criminal courts, I am not able to call for evidence under threat of sanction that will likely result in the truth of peoples' intentions being revealed with sufficient complexity that the finer distinctions may be determinative in this analysis.

What does indirect racism look like in everyday life? One instance is the prevalence of stickers and other forms of advertisement that many people attach to their cars, calling on their fellow drivers to „save the rhinos“. There is nothing wrong with saving rhinos, but it is telling that those same cars usually do not also have signs seeking to motivate their fellow drivers to save the millions of people living in their own cities who are living in abject poverty and whose lives are at risk. Whilst those drivers would likely deny accusations of racism, it is difficult to explain such cases without recourse to indirect racism.<sup>70</sup> Another example is the writing of this thesis. How could I defend myself against accusations of indirect racism if I chose to focus solely on matters of universal abstraction to the exclusion of matters related to my subject that are of considerable importance to the lives of people all

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<sup>68</sup> Jeff Wicks 'Furore after KZN Estate Agent Labels Black People as 'Monkeys' (04 January 2016) <http://www.news24.com/SouthAfrica/News/twitter-furore-after-kzn-estate-agent-labels-black-people-as-monkeys-20160104> last accessed 23 January 2016; Thulani Gqirana 'Khumalo in Hot Water over Racist Facebook Post' (07 January 2016) <http://www.news24.com/SouthAfrica/News/khumalo-in-hot-water-over-racist-facebook-post-20160107> last accessed 23 July 2016.

<sup>69</sup> Atkin op cit note 63 at 118.

<sup>70</sup> This point is quite clear to people who are at the receiving end of this indirect racism: Richard Poplak 'Trainspotter: Fringe Festival - How Gayton McKenzie Spells the Onset of the Coalition Era' (27 July 2016) <http://www.dailymaverick.co.za/article/2016-07-27-trainspotter-fringe-festival-how-gayton-mckenzie-spells-the-onset-of-the-coalition-era/#.V5rkn7h9670> last accessed 29 July 2016.

around me? A world that recognizes indirect racism is uncomfortable, but also one step closer to answering the question of how we should treat each other.

An important implication of failing to draw the distinction between direct and indirect racism is that accusations of racism and defences against them often fail to meet. For instance, the University of Cape Town has received many accusations of being racist, which it has denied vehemently. Much of the difficulty with discussing the matter seems to stem from accusations of indirect racism meeting defences centred on denial of direct racism. UCT is perhaps overly reliant upon formal equality in keeping with its liberal tradition, but that commitment to formal equality is precisely what makes accusations of direct racism so implausible, even as it rejects the racialism necessary for racial redress and fuels accusations of indirect racism.

Is racial distrust racist? This question turns on whether distrust is prejudicial. Claiming that anyone is untrustworthy is a moral indictment, because it is a claim that they cannot be relied upon. That indictment may not be particularly strong when applied to a complete stranger and one might take the view that trust has to be earned, but the context in question is not about the trustworthiness of individuals. If that same reasoning is applied on the basis of a person's race, then there is little room to claim that the distrust is simply based upon ignorance of strangers. To the extent that race is the determinant, the distrust is based upon a known attribute. It is that attribute of race that founds the justification for believing the person being assessed to be untrustworthy in the mind of the assessor. However, that does not mean that the assessor is fully aware of this thought process. There probably are many instances of direct racism when racial distrust exists, but if only racial distrust is established without any further context, then the benefit of the doubt should be given to the assessor and indirect racism becomes the appropriate assumption.

One response to this assessment of distrust may be that it places too much emphasis upon how people view others. Instead of forming independent views of others, people may simply be forming trust or distrust on the universal assumption that everyone acts in their self-interest. Accordingly, people can only be relied upon to promote the interests of others to the extent that they share the same interests as others. Following on from this thinking, shared identity between people suggests that they have shared interests, so identical people can be trusted and non-identical people cannot be trusted. This is the basis of identity politics.

The trouble with embracing identity politics in the context of the academy is exposed by the subject/object paradox. It is indeed correct to note that there is no purely objective perspective, but it is equally the case that there is no purely subjective perspective. This has ramifications beyond matters of trust in the more obvious sense, returning to the role of testimony in knowledge and extending further to experiential capacity. Identity politics is correct to the extent that it advises caution when engaging matters foreign to our own familiar contexts, but that does not mean we cannot engage that which is outside our familiar contexts. We begin from the simplified positions of objective and subjective according to the elections we make under the constraints of our cognitive resources, but that does not mean that after careful consideration and investigation there is still good reason not to form defensible beliefs about the experiences and domains of other people or collectives. If that were true, then the claim of identity politics would turn against itself and prevent the claim from being made, since the normative domain within which the claim is being made would need to be largely shared in order to be persuasive as an argument. Claiming rights is an appeal to normativity at the same time as it is an appeal to law. Much of the protection offered by a legal system is, however, incongruous with identity politics. The social/natural paradox underscores this point even further, because identity politics when unbound from its arbitrary exclusion of non-humans suggests that science is a profoundly unreliable source of knowledge. The differences between humans are negligible compared to the differences between humans and the plethora of non-humans, so identity politics is left unable to explain why scientists can know anything about non-humans.

Identity politics does not lend itself towards negotiation, since it does not admit of a link between different subjectivities. Seeking to be heard by others is self-defeating, because strong versions of identity politics posits that others cannot hear. It is not surprising that most claims are phrased as demands by those who understand themselves and their interests in great measure according to identity politics, as it is only the creation of a threat in the subjectivity of others to which others can be expected to respond that is seen as effective. It is also unsurprising that pain is a focal point, since pain is deeply subjective. None of this should be taken as a claim on my part that any of the claims made within identity politics (as currently articulated) are wrong. They cannot be wrong. The problem is that they also cannot be right. It is the adoption of identity politics that I challenge on account of its corrosive effects on discourse, reason and inclusivity. I do not accept that my effective *locus standi* to engage intellectually is dependent upon my race, sex or any other inherent attribute.

Identity politics does not promote change. That may seem a strange claim to make in the context of it being adopted by those seeking change, but the experience of States around the world (especially, though not exclusively, in the context of relatively recently having acquired independence) has been of identity politics being used to stifle political progress.<sup>71</sup> Identity is a relationship, a very specific one. Identity means exact sameness. If identity remains the over-riding perspective in our outlook, then we are not leaving room for change, as that which is not already part of the identity is excluded in order for identity to exist. (This is similar to the exclusion required by delineation in the model of paradoxical understanding, which is part of why delineation is used only to create an entity and then discarded, otherwise there would be little space for different understandings to exist.) This conservative effect might be remedied by leaving variables open within identities, but that means foregoing the sort of identities that are so easily shared by a collective on account of their durability. Ethnic identity or class identity, however, only makes sense because it does not leave variables undecided. Classification restricts change. Demanding change in the context of identity politics is really demanding that the subject not change, but that everything else change to accommodate you. Whilst it may not be intentional, it is selfish in the sense that its primary commitment is to the preservation of the self. If one cannot understand the perspective of another, accepting that this will never be perfect, then it is a failing on the part of the person who could not understand. It is not a predetermined impossibility. With sufficient effort and availability of knowledge, it should in most cases be feasible to improve one's understanding of another significantly. To rule out such a capacity is not only destructive to engagement, but also shields those who fail from any form of condemnation as they cannot be culpable for that which they cannot do.

It is clear from the above reasoning that identity politics is antithetical to the academic enterprise. Embracing it is not desirable in the academy.<sup>72</sup> However, what is undesirable should not necessarily be outright rejected. Whether distrust of jurists based upon their race is attributed to direct racism, indirect racism or identity politics, the fact of distrust remains. Independent of its causes, distrust is pervasive in large-scale communities. It is because of high levels of distrust that the legal system is adopted as the dominant normative system employed by the state. The law presumes distrust. It would be bizarre for a legal system to be

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<sup>71</sup> Bruce J Berman 'Knowledge and the Politics of Ethnic Identity and Belonging in Colonial and Postcolonial States' in Avigail Eisenberg and Will Kymlicka *Identity Politics in the Public Realm: Bringing Institutions Back In* (2011) at 71-75.

<sup>72</sup> Judith Butler *Giving an Account of Oneself* (2005) at 136.

founded upon distrust and then to condemn distrust, as that would be undermining itself in contradiction of its aspiration towards inviolability. Racism should be resisted, but demanding trust because its absence may be founded upon racism does not follow. That suggests a positive duty to trust each other, which is straying even further into the realm of legislating thought. The ethico-political demand for the teachers, researchers and judges who contribute towards jurisprudence to be mostly black Africans is not a demand that can be denied on the grounds of problematizing racial distrust. Moral excellence is not a standard to which beliefs can be held for the purpose of rejecting the demands that they found. That is not to say that such rejection is impossible, but rather that it would be hypocritical and lack cogency.

African jurisprudence appears to be rooted in having Africans as jurists who are able to bring greater contextual understanding of Africa to the global body of knowledge about the law. The emphasis on race that seems to guide the choice of suitable jurists is understandable on account of the role it plays in establishing trust in their testimony. Whilst there are several problematic dimensions to this racialized distrust, it is ultimately acceptable in a legal system that is founded upon distrust. The ethico-political need for African jurisprudence to be advanced cannot be dismissed without damaging the justification for accepting the law. The Eurocentric origins of the law and a continual failure to make the philosophy that justifies the law more African are eroding the acceptability of the justifications for obeying the law in Africa. Other forms of normativity will take the place of the law if that erosion is not arrested.

## 7.5 Conclusion

This chapter has considered three issues relating to the justification of the law in South Africa: violence, the Bill of Rights and African law. Each of these issues raises concerns that are both complicated and divisive, but there are solutions available for addressing each of these matters. It is likely to be prohibitively unpalatable for many South Africans to accept violence and racism, even with all the caveats provided in this chapter, as well as to accept that the Bill of Rights should not remain within our Constitution. Factish law, within the broader context of factish legality, does not celebrate these uncomfortable conclusions, but it does not support wilful ignorance of them either.

Perhaps the difficulty with pursuing change through the law is in remembering that, whilst it is indeed necessary for change to occur through the law, the law cannot be the driving force for that change.<sup>73</sup> The impetus for change must, in a very significant sense, precede the law and act through the law.<sup>74</sup> It is likely that adherents of transformative constitutionalism will continue to be disappointed for as long as they continue to place their faith in the law instead of the political system. Fault does not lie with a diverse array of people pursuing divergent interests for not realigning their interests out of altruism, but with the intellectuals who conveniently forget that their investment in the legal system is a product of their own circumstances and interests that cannot be ascribed to everyone else simply because we all live within the same jurisdiction. South Africans do not need to embrace the Bill of Rights because it is the law, they only need to avoid violating it and the difference between these positions accounts for the shortfall in collective action that curtails the ambitions of transformative constitutionalism, even as it safeguards South Africa from chaotic violence and provides us with a medium through which to solve the problem of our significant distrust in each other.

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<sup>73</sup> Roscoe Pound *Jurisprudence: Volume III* (1959) at 370-373 (§102.2).

<sup>74</sup> Sachs J's argument in the *Fourie* judgment that the law can be a „great teacher“ is worth recalling here: *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at para 138. As the process that followed this landmark judgment unequivocally illustrated, the law cannot be a „great teacher“ if the political will of the people and their elected representatives in government is not receptive to being taught/changed. True, the *Fourie* judgment did result in the recognition of same-sex marriage in South Africa, but the law, whilst it may have been a significant part of this change, was not the driving force of that change: Pierre De Vos and Jaco Barnard 'Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga' (2007) 124 *South African Law Journal* 795 at 797-798.

## CHAPTER 8 - CONCLUSION

### 8.1 Review

The thesis of this dissertation is that the law is a factish. Explaining and defending this thesis required both a philosophical foundation capable of incorporating factishes into a general account of how reality is understood, as well as a general theory of law that can account for the implications of the law being a factish. This is provided by a model of non-modernism that requires both analysis and transcendence, as well as the pursuit of understanding in context. Accordingly, the descriptive and normative dimensions of the theory of factish law are grounded in the context of the South African legal system. The conclusion of this dissertation presents an opportunity to apply the approach of non-modernism reflexively by transcending the analysis of this dissertation from discrete chapters into an integrated understanding of South African factish law.

However, before I provide such an application, it is useful to re-capture the central findings of this dissertation by way of a brief summary. The first task of this dissertation was to establish a non-modern theoretical framework within which the law could be understood. To that end, the model of paradoxical understanding was established. Chapter 2 articulated the general structure of the model, beginning with the delineation of entities and progressing to the resolution of paradoxes through elections. Chapter 3 investigated some of the specific paradoxes that arise at the highest levels of abstraction, selected for their relevance in subsequent chapters.

Having established the non-modern theoretical framework of the model of paradoxical understanding, the dissertation began to develop an account of factish law. Chapter 4 focussed upon the law in accordance with the fixture election, showing how the traditional approaches of social law (positivism) and natural law are mutually dependent. The hybrid factish election was presented as a more accurate account of the law, which already appears to have been grasped by more recent theories of law, although only implicitly. Chapter 5 shifted to the actor election, showing that the law aspires towards inviolability. The sharing of this aspiration unites the law with other forms of law, such as the laws of physics, even as it distinguishes the law from other normative systems with which it does not share this aspiration, such as customary law. Far from being a slight against customary law, this

dissertation found that the protection of customary law as a uniquely valuable normative system requires that we stop trying to twist customary law into fitting within our understanding of law and instead allow it to be understood as a competitor to law within the broader realm of normativity.

Chapter 6 extended from factish law to an account of factish legality as the process by which the law is created and sustained. The model of factish legality showed that legal reasoning is ubiquitous within legality, but that its two distinct forms of lesser and greater legal reasoning allow for interrelated processes to exist that preserve the integrity of legal sources without neglecting the significant influence of judges. The model challenged the traditional understandings of the rule of law, preferring instead to recognise 'rule through law' as a commitment to self-restraint by authorities, and posited a separation of powers that has little need for 'deference and respect' as a supplementary principle guiding the judiciary.

Having established the basic tenets of a theory of factish law, the dissertation considered several justifications of the law in the South African context. The first of these inquiries focussed upon the use of violence, situating it within the order/chaos paradox. Whilst only the ordered use of violence is defensible, it was acknowledged that the pursuit of change through the State's legal order is contingent upon the reasonableness of understanding the State as ordered. When context does not support this understanding, the embrace of chaotic violence is much more difficult to condemn. The next inquiry focussed upon the Bill of Rights contained within the Constitution. Although its propositional contents might be applauded philosophically, the inclusion of these overly abstract rights within the Constitution serves to undermine the role of the Constitution within factish legality and is in large part responsible for the difficulties that have arisen within the separation of powers. It was found that the removal or substantial alteration of this Bill of Rights from the Constitution would protect the proper functioning of legality, although such an action within the present political context may be implausible. Finally, the dissertation inquired into the contemporary demand for 'African' South African law and especially African jurisprudence. Whilst several concerns were raised relating to the racial dimension of this apparent insistence upon African knowers, the dissertation ultimately found that these concerns are based upon distrust, which is consistent with the distrust that constitutes a significant reason for the law's existence.

## 8.2 Transcendence

With the dissertation reviewed in brief, I now return to the matter of transcendence. Although specialist knowledge of any given field may be significantly ahead of what is employed in this dissertation, there is good reason to believe that drawing upon different fields of knowledge is a powerful resource for advancing understanding of the law. The philosophical domain from which the model of paradoxical understanding arises is present throughout each of the examinations of the law and its justifications. An understanding of the political context within which the law exists is essential to considering the merits of challenges to its legitimacy. A largely coherent framework that can both describe law and consider challenges to it is needed to be able to bridge the divide between ontology and ethics that encourages theorists to talk past each other instead of facilitating meaningful engagement between them. Drawing this dissertation together is the imagery of a vast network that passes through all of reality, binding it together whilst allowing for the delineation of precise points within the network that exist apart from each other. Models present suggestions as to how to interpret that confusing mass of strands and nodes, much like constellations bring shapes to stars in the night sky. Tracing those networks helps to bring constellations into relief that advance our understanding of reality, but they do not displace other ways of drawing them.

Factish law is in many respects an attempt to read jurisprudence such that the completeness of its theoretical divergence is balanced against the aim of coherent interpretation. There is no way to do this without relying upon paradoxes to a significant extent, as these goals are necessarily in tension with each other when pursued in extremity. The factish approach takes seriously the suspicion that there is some element of truth in each of the prominent theories of law, whilst admitting that there is no way to separate out that truth so that one true theory of law that combines them all may be created. Instead of denying the relevance of theory, it instead accepts that theory is more useful when it is impure. That is what happens when analysis has created clarity that is then undermined by transcendence, but clarity is only a means to advancing understanding, not an end in itself. Transcendence reveals the problem with a knowledge economy that has become overly invested in the specialization that accompanies analysis. There is nothing wrong with specialist knowledge, but there is a lot at fault when specialization displaces the general knowledge required in order to situate the relevance and integration of specialist knowledge into the broader body of human knowledge and even broader realm of human understanding that founds the justification for having specialist knowledge to begin with.

At the heart of factish law is the melding of humans and non-humans. Judges, lawyers, policemen, parliamentarians, criminals and shopkeepers mingle with files, pens, phones, buildings and computers in a web of interactions that nobody knows completely. Morality, physics, politics, religion, mathematics and logic interweave with this web of legality that nobody understands consistently. These are the insights that flow from the work of Latour. Whilst the theory of factish law does seek to frame an understanding of the law that is reasonably complete and consistent, it does not fail to recognize how unattainable a goal it has set for itself, nor does it seek to render its task more practicable through the categorical exclusion of confounding complexity. The incremental development of imperfect understanding is the best that a non-modern theory can hope to achieve.

The law and its justification are intrinsically linked in the explanation of why the law exists. Humans trust and distrust each other to varying degrees in varying contexts. The law is like a plan towards which different people contribute and they can direct their efforts towards changing it, rather than trying to control other people directly when they seek to influence their communities. It takes advantage of trust and militates against the harms of distrust. These insights flow from the work of Shapiro. However, it is of central importance to factish law that the solution to the increasing levels of distrust that accompany growing communities is for humans to instead place their trust in non-humans. Rule through law is a precondition for large communities precisely because anthropocentric politics implodes when humans are required to trust strangers. Humans must trust the law and its non-humans more than they trust each other if the law is to be effective and lasting as a normative system.

This is why the justification for accepting the law is important not as a matter of universalist philosophy, but rather as an ethico-political matter within the community in which the law exists. The reasons for adopting legal systems may be common to the problem of distrust that exists within all large human communities, but it is the relationship between the community and the law that determines whether they will prefer to trust the law or each other. If the law is considered to be untrustworthy on account of being a colonial institution or an obstacle in the path of meaningful change then it becomes plausible that fellow humans may be more trustworthy and the justification for accepting the law would be undermined accordingly. That is especially the case when trust is based upon shared aspects of identity, such as shared race being a basis for trust in strangers that is greater than trust in non-humans.

It may be somewhat convenient for someone who is threatened by the law to complain of it dealing only with cold facts whilst forgetting the warm bodies to which those facts appeal, but that observation is accurate nonetheless. The law is as heartless as critics of legal positivism fear it can be, but that is because humans need it to be so. Justice is a strategy the law adopts to promote compliance, a means to an end, not a desire or compulsion it experiences. The law has goals, particularly the aspiration to be inviolable, but it does not have emotions or operate emotionally. With emotionality might come compassion, but also rage. If the law was sensitive to warm bodies, it would be no more reliable a medium through which to bind communities in collective action than humans acting without it would be. If the law had compassion of its own, then it would not be able to convey the compassion or retribution of humans. Just as law cannot have its own authority, it also cannot have its own compassion. It is a delicate balance that allows for trust in the cold calculations of the aspiration towards inviolability above the warm empathy of emotive humans. The law fails if it becomes justice, but it also fails if it becomes manifestly unjust. A factish understanding of law captures this and reveals why legal systems are simultaneously strong and fragile.

The factish account is not a complete theory of law and much remains to be considered in future research. At one level, the account presented here creates an opportunity to bridge some of the divide between the dominance of Eurocentric legal theory and the need for more African knowers to contribute towards legal theory. Rather than falling into the trap of continuing either to advance universal or South African knowledge, this non-modern approach of factish law provides a link that avoids the need to forfeit the significant body of jurisprudence already in existence for the sake of promoting greater relevance and local involvement. Perhaps the most obvious candidate is a rationalization of the law of South Africa in accordance with this approach that identifies and weighs the elections made within the substantive provisions of the law as it has attempted to create a coherent understanding of how humans and even non-humans should behave in accordance with it as a normative system. This would require an extensive knowledge of all branches of the South African legal system, in addition to being familiar with the non-modern approach. Comparative work with other legal systems would strengthen the value of that contribution by allowing for common strategies to be identified that might yield some insight into the way that legal systems view reality, not just how we view them. Another avenue for future research is to develop accounts of adjudication, interpretation and argument within the theory of factish law. It seems that factish reasoning would permit moral and other normative considerations within the

determination of legal propositions without succumbing to the extremes of either making law into morality or making it purely positive. However, with the significant attention that has already been given to this topic within general jurisprudence, it would require a more epistemically focused investigation than the largely ontological ambit of this dissertation.

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