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LAW AND LEGAL INTERPRETATION

Fernando Atria and
D. Neil MacCormick

Law and Legal Interpretation

Edited by

Fernando Atria and D. Neil MacCormick

Universidad de Talca, Chile and University of Edinburgh, Scotland

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I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
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Introduction

Interpretation is one of the central elements in legal thought and activity. Lawyers have always needed to ascribe meaning to general terms and face cases in which either the meaning of them is not perspicuous or circumstances are present that are special in some way. For legal theory, however, interpretation and legal reasoning were important but marginal subjects, in the sense that the central questions legal theorists wanted to discuss did not include interpretation as a topic. Thus some of the most sophisticated legal theorists of the twentieth century did not think it necessary to develop a complete theory of legal interpretation as part and parcel of a broader theory of law. As an illustration of this claim one could turn to Kelsen's *Pure Theory of Law* (1970) which explicitly discussed interpretation in the last (and shortest) chapter or Hart's *The Concept of Law* which, as Hart himself conceded some 30 years after its publication, 'said far too little . . . about the topic of adjudication and legal reasoning' (Hart, 1994, p. 259).

During the last decades, however, interpretation (together with the related issue of legal reasoning) has been at the centre of the theoretical reflection about law. What is it that lawyers and judges and laypersons do when they *interpret* the law? Does the process of legal interpretation show that there is some connection between law and morality? Is it constrained by what is interpreted, or is it always (or usually, or sometimes) 'unfettered discretion'? How much of what lawyers do is properly called 'interpretation'? Questions such as these have been hotly discussed at least since the publication of Ronald Dworkin's 'Is Law a System of Rules?' (1970), which has been reprinted so many times that it has not been included in this collection (see, for example, Dworkin, 1977a and 1977b).

Starting from questions of this kind, one could try to systematize the problems surrounding the issue of legal interpretation in current legal theory under six headings, which form the basic structure of the present collection. This arrangement makes the collection more manageable for the reader, but risks giving the impression that only the corresponding subject is being discussed in each essay. In this Introduction we want to discuss generally the relevance of these six topics, and indicate the important contributions made by each of the selected essays. Along the way this will allow us to mention some of the aspects in which arguments or positions discussed in one essay have broader implications for subjects other than that denoted by its respective heading.

Interpretation and Law: Why is Interpretation Important for Law?

That interpretation is central to the practice of law is something that can hardly be denied. But this does not settle the theoretical problem, *why* is interpretation so important? An answer to this problem cannot be limited to pointing out that legal rules are general rules and they are used to solve particular cases, because in many social practices the need to apply general rules to particular cases does not make interpretation as important as it is in law (consider the 'interpretation' of the rules of chess, for example) (cf. Atria, 2002, ch. 1). Hence there must be

something special about law that makes it so dependent on interpretation. As Joseph Raz says in Chapter 2, this seems to suggest that there is something to be learned 'about the nature of law from the fact that interpretation plays such a crucial role in adjudication' (p. 17).

The two essays grouped under this heading provide two different answers to this problem. In his 'Law, Philosophy and Interpretation' (Chapter 1), Ronald Dworkin provides a useful restatement of the theory of law and interpretation he has developed over the last 20 years, particularly in and after *Law's Empire*. Dworkin's theory is particularly interesting when discussing the issue of legal interpretation, because he believes that there is an important sense in which interpretation is not something lawyers and judges sometimes do, but is in a way *constitutive* of law. Traditionally, one would think of interpretation as a specific activity directed to understand a rule or apply it to a particular case. This view seems to imply that there are (first) legal rules that have to be (second) interpreted and applied. Dworkin's thesis of law as an interpretive concept challenges this viewpoint.

In his essay Dworkin emphasizes the fact that interpretation is not a purely legal phenomenon. Reliance upon interpretation is common for practices that share one feature: they are 'regarded by those . . . who take them up not as pointless but as beneficial or worthwhile in some other way' (p. 9).

Now, the particular way in which a particular practice like history or law is valuable depends on the participant's opinions about the practice. Hence, for example, Dworkin explains that there is a significant difference between historical and legal interpretation, in that the latter is not guided by an 'explanatory purpose' (p. 14) as the former is – a difference that will resurface in Detmold's essay, based on the idea of law being practical as sociology is not (cf. p. 36). Legal interpretation aims to make law 'as just as it can be' (p. 14). In this way, Dworkin treats law as inextricably connected with political morality, which is the reason why MacCormick (1976) called him a 'pre-Benthamite'. But this seems to leave Dworkin open to the objection that law is 'subjective' in the same sense in which political morality is. To this, Dworkin has famously replied with his 'right answer' thesis.[1] In its current version, the right answer thesis cashes in on the performative contradiction that prevents any agent from saying *both* that there is no 'correct' answer to controversial questions of political morality (or morality, or law and so on) *and* that something (abortion, say) is right (or wrong). Any objectivity that law may have is founded on the objective nature of the basic truths of political morality, *as perceived by the participants*.

In *Law's Empire* this argument was presented as the distinction between external and internal scepticism: *internal*, interpretive scepticism is *substantive* scepticism, in the sense that it is the conclusion we could reach after having examined the reasons for and against a particular proposition or decision and rejected them all. *External* scepticism is scepticism about the interpretive process: it is not an interpretive claim; it is a claim about interpretive claims. Dworkin believes that we can ignore external sceptics because they do not engage with us. The only scepticism that should give participants to an interpretive practice cause for concern is internal scepticism.[2] But there is no reason to believe that it will be sensible to adopt a generalized internal sceptical position: sometimes we will have reasons to believe that one action, decision or proposition is true (or justified or whatever), and we will have reasons to reject the sceptical position on that issue. And sometimes we might be convinced of the non-existence of an answer that is correct or true or justified, and we will accept scepticism regarding this issue. Notice that if we adopt the internally sceptical position regarding an issue (for example, abortion), then,

when asked, we will have to say that we take the position that there is no way of deciding whether it is right or wrong. This argument of Dworkin's, and the broader subject of the possibility of solutions to controversial questions (hard cases) being correct, is one subject that is discussed by many of the essays in this collection.

Dworkin's rejection of external scepticism, and his claim that only internal, *interpretive* scepticism is to be taken seriously, shows that interpretive practices are self-referential, in the sense that whether or not practices are interpretive is in itself an interpretive question. If we grant Dworkin's point, all the following questions should be understood as being interpretive: 'Is the law interpretive?', 'Are interpretations "objectively correct"?', 'Are there right answers to difficult questions?' and the like.

In his essay, 'Why Interpret?' (Chapter 2) Joseph Raz seems to get close to a Dworkinian theory of interpretation when he writes that '*[a]n interpretation successfully illuminates the meaning of its object to the degree that it responds to whatever reasons there are for paying attention to its object as a thing of its kind*' (p. 23). There appear, however, to be two significant differences between them. First, Raz seems to believe that his (quoted) claim at p. 23 warrants some sort of 'interpretive pluralism' that seems to be incompatible with Dworkin's right answer thesis. Having noticed that different people may have different reasons to understand history, he goes on to say that 'it is plausible to suppose that these reasons will lead to somewhat divergent interpretations of various historical events and processes. Hence pluralism' (p. 24). To establish pluralism, however, it is not enough that different interpretations are possible: one has to claim that they are all equally valid. And Raz indeed adds, '[i]t is possible for them to be good reasons, and they may be valid simultaneously' (p. 24).

Second, Raz differs from Dworkin in terms of the viewpoint from which his argument is formulated. Dworkin's theory of law is, and has always been, formulated from the 'internal, participants' point of view; it tries to grasp the argumentative character of our legal practices by joining that practice and struggling with the issues of soundness and truth participants face' (Dworkin, 1987, p. 9). Raz's is a *detached* perspective – that is, a perspective characterized by the fact that the observer, who is not a participant, *mimics* the attitudes of participants to understand their practices as they appear to them.[3] This helps to explain the notion of interpretive pluralism defended by Raz in this essay: If *I*, as a participant, believe that history is about 'predicting the future' (one of the possible reasons for historical interest in Raz's example at p. 24), I must also believe that those who think that history is about 'understanding God's message to man' are mistaken. But I might be observing an argument between two people holding these two views. If this is the case, I might report *their* disagreement about history as the confirmation that there is more than one plausible way of understanding the value of history.

Turning to legal interpretation, Raz claims that what makes legal interpretation important is that, in law, 'we value . . . continuity [and] authority, legal development and equity' (p. 25). The key to the question, 'Why interpret?' is provided, however, by the values of continuity and authority. Raz believes that law's immanent claim to be morally justified accords to these two values a pre-eminent role in answering this question because 'to understand the law we must understand the way the law understands itself' (p. 26). This is the reason why the answer to the title question is 'the moral respect we owe to [the law]' (p. 27). The two other values, legal development and equity, come in only at a second stage, when the question is not 'Why interpret?' but 'How should we interpret?'.

Raz's essay belongs with a number of his other pieces on legal reasoning and interpretation, a subject to which he has devoted a series of essays including the one offered in this collection (see, for example, Raz, 1994a; 1998a; 1998b). They naturally invite the question, 'How compatible are Raz's considerations concerning legal reasoning with his own theory of law, as deployed in works such as *Practical Reason and Norms* (1992), *The Morality of Freedom* (1986) and "Authority, Law and Morality" (1994b)?'. In another essay also included in this collection, Fernando Atria (Chapter 4) investigates this issue, claiming that they are at odds. The reason for this, in brief, is Raz's characterization of legal rules as exclusionary reasons (Raz, 1992, pp. 142–43). If rules are exclusionary reasons, it seems that, after having understood the meaning of a rule, all that is left for the institutions called to apply it is to act on the basis of that rule, excluding all conflicting considerations. In the terminology of Raz's theory of law, Atria claims, those conflicting considerations would be pre-empted by the exclusionary character of legal rules.

Interpretation and Legal Reasoning: Law and Morality

We have seen that one of the reasons why interpretation became such a fashionable topic for legal theory in the last decades was Dworkin's idea of *constructive* interpretation, of interpretation being, in a way, constitutive of the practices in which they are formulated and consequently of *legal* interpretation being, in some way, *constitutive* of law. But there is another reason that explains the increased interest in the related subjects of interpretation and legal reasoning, and it is that these topics became the battleground in which that very traditional and recurrent problem for legal theory was disputed: that of the existence of some form of necessary relation between law and morality.

In *The Concept of Law* (1994), Hart tried to provide a theory of law that could do justice to the normativity of law – as previous theories like those of Bentham and Austin had failed to do – while holding fast to the distinction that they (and others) had drawn between law and morality (MacCormick, 1981, ch. 2). This he achieved, or so it seemed, with his theory of social rules, and in particular (for law) with his seminal idea of the rule of recognition. The rule of recognition was conceived of as a social practice the existence of which could be ascertained independently from its moral worth, and its function was to set out the criteria for any *other* normative criteria to belong to the legal system. In this way, Hart was able to explain the fact that rules could be both valid *and* unjust. A legal rule exists as such when it fulfils the criteria specified by the rule of recognition, and there was no reason why those criteria *had* to include reference to moral value.

In a way, this point seemed to fit with the way in which legal systems work, in the sense that the criteria for something being a rule of (say) English law seems to be non-moral, pointing mainly to the occurrence of *facts* such as the queen giving royal assent to a piece of legislation that has been voted favourably by a majority of members of both Houses of Parliament and so on.

In this context, and with regard to legal reasoning and interpretation, one might concede (or remain agnostic concerning) Hart's point about rules being valid regardless of their intrinsic moral worth *and* claim that this is not enough to support the positivist's claim about the separation of law and morality. This is the position taken by Atria and Detmold in their essays in this collection, although they offer different reasons to support their claims.

In his 'Law as Practical Reason' (Chapter 3) Detmold takes as his starting point the *practicality* of law. From law's practicality follows the practicality of legal reasoning: 'legal reasoning is practical in the sense that its natural conclusion is an action' (p. 35). In applying rules to particular cases, judges need to cross what Detmold calls 'the particularity void', because:

> . . . there is a radical logical difference between the most highly defined set of universals and a particular case; a radical difference between interpretation and the crossing of the particularity void. (p. 38)

The particularity void occupies a space between a hypothetical rule mandating one normative consequence (nc) to follow the occurrence of operative facts (op) and a particular case in which (op) and indefinite other facts are present.[4]

For Detmold, this is a void 'about which nothing can be said (anything I *say* will be universal)' (p. 55), about which 'only mystical, poetic things can be said or nothing'. Furthermore, '[j]udges enter this realm every day (if they only knew)' (p. 56). Respect for particulars demands that the particularity void be bridged, and to bridge the void the judge needs to address the particular *as particular*, not as simply an instance of a universal rule. In other words, the judge will have to make a *judgment* about the reasonable thing to do in the circumstances, in the concrete and particular case.

Does this not amount to a claim that the judge is never bound by law? Not for Detmold. Here we come to the point made before, of interpretation and legal reasoning as providing a different way of tackling the old problem of the relation between law and morality.[5] In principle, one could accept Hart's view on the rule of recognition, and with it the claim that the existence of a legal rule is something that is not necessarily linked to its moral value, *and* Detmold's claim that legal adjudication is necessarily a matter for practical (moral) judgement. Detmold points this out by distinguishing:

(1) apply what is reasonable
from
(2) apply what is reasonable to apply.

The judge is bound by law insofar as he or she is not supposed to discuss what is reasonable. A rule that fulfils the criteria set out by the rule of recognition specifies what is reasonable, and '[t]here is no question of redeliberating that question' (p. 52). But Detmold makes the point that this still leaves the judge in the dark, because 'what is reasonable to apply has not been decided by the legislature and cannot be decided . . . no respect can be given to a decision that has not been made' (ibid.).

In a likeminded way, Fernando Atria's essay, 'Legal Reasoning and Legal Theory Revisited' (Chapter 4), deals with the relation between a theory of law and a theory of legal reasoning. Atria claims that a theory of law, in answering the question 'What is law?', specifies what counts as a normative premise for legal reasoning. We can then test the correctness of a theory of law by considering whether the picture of legal reasoning and legal interpretation permitted by a given theory is acceptable (see, further, Atria, 2002). Concerning legal positivism, Atria claims that it implies either rule-formalism or rule-scepticism. Reduced to its essentials, the argument is this: we can formulate the central problem of a theory of legal reasoning as an answer to the question 'What does the law require in this particular case?' or, identically, 'What

is the legal obligation of the judge concerning this case?'. Positivism leads to formalism if it claims that rules apply to all cases that are covered by the semantic meaning of their operative facts, regardless of any other feature the particular case may have or lack. To avoid formalism, positivism could claim that the question 'What is the law?' is different from the question 'What is the law *for the case*?', so that from 'the law is: if (op) then (nc)' we could not immediately infer that (nc) is legally required in a particular case displaying (op), because the case may also display some other features that defeat the application of the rule. This, however, would imply rule-scepticism insofar as the link between the validity of a general rule requiring 'if (op) then (nc)' and a particular case displaying (op) would be severed: in order to apply a general rule to any particular case, the judge would have to make what Hart (1994, p. 135) called a 'fresh judgment' to the effect that the rule is not defeated. But, of course, this judgment is one for which, according to legal positivism, the judge has discretion. So judges have discretion in all cases (=rule-scepticism). Atria claims that this problem is visible in the theories of such authors as Neil MacCormick, Joseph Raz and H.L.A. Hart.

Instead of discussing the issue of interpretation and its relation to morality, as Detmold does, or to legal theory, as Atria does, Michael Moore, in 'A Natural Law Theory of Interpretation' (Chapter 5), defends a theory *of* interpretation – a theory that aims at explaining how interpreters should interpret the law. The theory of interpretation that Moore defends, however, is not neutral concerning issues about the linkage of law and morality. It is, in fact, as the title says, a 'natural law' doctrine of interpretation, a phrase that he explains as holding, first, that there is a right answer to moral questions, 'a moral reality if you like' (p. 122), and, second, 'that the interpretive premises necessary to decide any case can and should be derived in part by recourse to the dictates of that moral reality' (ibid.). A further point of importance stressed by Moore in other writings, and relevant here too, is the claim that there is a 'legal reality' that is connected to, but by no means identical with, moral reality. In the same way, however, in both cases there are true statements about law and morality that are true by virtue of the character of the subject matter they describe, rather than by virtue of conventions built into language or social usages that are prevalent here or there. In the view of such a robust metaphysical realism (not to be confused with legal realism!), the essence of a good interpretative practice is that it discloses the true meaning of the object in view, not that it constitutes such a meaning by virtue of being a good interpretation, as Dworkin seems to suggest.

In the essay, Moore examines the relevance that four notions have for interpretation: meaning, legislative intention, precedent and values. All these notions except legislative intention are taken up by Moore's theory in special ways.

Take meaning, for example. In the essay Moore defends a realist position with regard to the issue of the meaning of meaning.[6] Moore believes that our general conceptual terms, including terms like law, refer to real objects, and new discoveries about the nature of the objects in question do not involve a change in the meaning of the term in question but a better understanding of what it means. A prominent feature of Moore's work is to try, in this context, to figure out the idea of 'texts' as the subject matter of activity that is interpretative in the humanistic sense, rather than in the causal sense that would apply in the natural sciences. He puts this concisely in an essay written ten years later than the seminal essay reprinted here:

> There is a text, and thus interpretation in the desired sense, whenever (1) people have some good reason (2) to treat some phenomenon they do not yet know the meaning of, as meaningful, (3) in

> the sense that such meanings give them either reasons for belief or reasons for action. (Moore, 1995, p. 8)[7]

This suggests that interpreting the meaning of a text connects back to the issue of the 'good reason' people have to treat the phenomenon as meaningful. In the case of law, the meaning concerns the organization of the polity and the use of law for the peaceful and just settlement of disputes. To the extent that a legislator's intention, or, more likely, the intention we impute to a legislature on the assumption that it seeks to maintain just conditions of social peace, point towards an interpretation of legislative texts, this would be relevant to elucidating their meaning. But this is not really to do with actual historically held intentions 'in the mind' of legislators or the legislature as a corporate entity. In truth, it leads us back to the issue of the values that the legislation is best understood as serving in the context of the whole complex of a legal system and the great body of precedents and prior elucidations that it contains. Legal realities are thus intertwined with moral ones, and the best interpretation is one that reveals the law in its character as a genuine and sound reason for action.

Interpretation and Application of Legal Rules, Vagueness and Defeasibility

In Chapter 9, 'On Law and Logic', Carlos Alchourrón introduces what he calls 'the master system' and the 'master book' as an attempt to capture a political ideal that, though impossible, has exerted a considerable influence in matters of institutional design and legal thinking over the last centuries, at least in Western countries. The central ideal is that the law works by the application of general rules to particular cases. Rules are applied to cases in a deductive manner: 'in this ideal model the set of rules are the starting points (axioms) for deriving the instructions to follow in each particular concrete situation' (p. 284).

When it comes to legal interpretation and legal reasoning, Alchourrón believes that, influential though this model has been, it is the source of at least two dangers:

> The first is the rationalist illusion of believing that the ideal is realized in some or in all normative systems. The second stems from not noticing that because there are other ideals that point in different directions it may not even be convenient to try to maximize its requirements. (p. 291)

There are, in other words, reasons why there cannot be a master book and reasons why, even if we could have a master book, it would not be worth having.[8] These reasons, in turn, map on to two different problems faced by judges when trying to apply general rules to particular cases.

The master-book ideal is *impossible to achieve*, because it is 'written in ordinary language', and this implies 'well-known difficulties derived from ambiguity and vagueness'. A judicial decision will satisfy the 'master-book' idea if the norm that is being applied has an unambiguous meaning for the legislator *and* has the same unambiguous meaning for the judge. In Alchourrón's view, this will make it necessary to 'compare the meanings attributed to a text by the interpreter and the meanings attributed to it by the legislator' (p. 292). This incorporates the problem of the attribution of intentions to corporate bodies. All these problems make the idea impossible.

But, even if it were possible, the master book would not be a sensible ideal to pursue because rules are *defeasible* (Baker, 1977; MacCormick, 1995). It is the idea of the defeasibility of legal rules that explains the dictum of the Roman jurist:

> Neque leges neque senatus consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quae plerunque accidunt contineri. [Neither statutes nor *senatus consulta* can be written in such a way that all cases which might at any time occur are covered; it is however sufficient that the things which very often happen are embraced.] (D.1.3.10, Jul., *libro LVIIII digestorum*)

In other words, a conditional of the form 'if A then B' is defeasible when A is not a sufficient condition for B, but only under normal circumstances: under normal circumstances, if A then B. A *together with* 'normal' circumstances is sufficient for B (MacCormick, 1995). That legal rules are defeasible means that the legal requirement attached by a rule to the occurrence of some operative facts can be defeated when abnormal circumstances are present. We must keep apart, however, cases in which legal rules are defeated from cases in which the law has not been followed, and, to do this, Alchourrón proposes a 'dispositional analysis' of defeasibility:

> According to the dispositional approach a condition C counts as an *implicit exception* to a conditional assertion 'if A then B' made by a speaker X at time T when there is a disposition of X at T to assert the conditional 'if A then B' whilst rejecting 'if A and C then B'. (pp. 293–94)

It is then, because the master-book ideal is both impossible (because of the vagueness of natural languages) and undesirable (because legal rules cannot be drafted appropriately to solve all cases, but only those that are recurrent) that '[t]he formalist illusion of the purely deductive model has to be given up' (p. 297).

The issue of defeasibility is also the key to understanding Klaus Günther's distinction between 'justification' and 'application' of rules in his 'Critical Remarks on Robert Alexy's "Special-Case Thesis"' (Chapter 7). Writing in the tradition of discourse ethics, Günther believes that a norm is justified insofar as it satisfies the *universalization* requirement – that is, if it can be shown to be in the interest of all those who are affected. But, to know *who* are those potentially affected by a norm and *how* the norm affects them, one would have to be able to consider all possible cases to which the norm will be applied, and this is simply impossible. If a norm can be justified only after one has sustained in discourse the claim that it is in the interest of all those who can possibly be affected by the rule, then the conclusion can only be that no norm can ever be justified.

In order to avoid this conclusion, Günther separates the requirement of universalization from that of impartiality. Norms are justified, Günther claims, when under unchanging circumstances they can be shown to be in the interest of all those affected. But from the fact that a norm is justified it does not follow that it has to be applied to all cases, because sometimes circumstances might not be unchanged. In application discourses this issue is taken up, and the object of the discussion is the application of a justified norm. Conversely, in justification discourses the issue is that of showing a given norm (like 'thou shalt not lie') to be in the interest of all concerned, *ceteris paribus*; in application discourses the general issue is not under discussion (we do not discuss whether 'thou shalt not lie' is in the interests of all those concerned), and what is thematized is whether the particular case at hand (described as fully and exhaustively as possible) presents some special feature that would warrant departure from the justified rule (say, because some brutal dictatorship's secret police is asking about the hiding place of an innocent person, and we have to decide whether or not to lie in response).

However, Günther's distinction is open to two objections. First, it would seem that, since justified norms do not imply the duty to act according to them in any particular case, they are irrelevant. Second, it could be said, as Albrecht Wellmer has indeed said, that moral discourse is always application discourse: 'what is applied is the moral principle itself', a sufficiently abstract moral principle such as 'do good and avoid evil' (Wellmer, 1991, pp. 204–11).

As regards the first problem, Günther's answer has to show that justified norms are important *not only* because of their action-guiding function. Indeed, he claims that they also contribute to define our identities and self-image:

> Moral reasons, which are used for justification in concrete cases, shape the mutual relations between each of us as individuals and as members of a moral community. They represent the characteristic traits of our intersubjectivity, i.e. the general expectations according to which we want to treat each other and how we want to be treated. For example, we don't want to be treated as someone who could be betrayed for any reason. (p. 257)

Thus, justified norms are important even though they can be defeated in particular cases.

Regarding the second problem, Günther believes that the reason why justification discourses do not collapse into application discourses in the manner suggested by Wellmer is that, in each form of discourse, the nature of the arguments and their function is different:

> *In reality*, it may often seem as if justification and application discourses could not be separated analytically from one another. [But] this objection does not hold true; it arises as the result of the appearance that those arguments which are relevant in application discourses can also be relevant in justification discourses. (Günther, 1993, p. 124)

Similar problems are raised by Robert Alexy in his 'Justification and Application of Norms' (Chapter 6). Alexy asks whether an exception that has been found to a justified norm in a discourse of application is in need of justification. Günther believes that it would not, since the exception would have been found because of the need to find *coherence* in the system of justified norms. But, for Alexy, this seems to demote justified norms to the status of rules of thumb: 'With the rise of the discourse of application to a discourse of coherence, the discourse of justification would deteriorate to a mere discourse of *topoi*' (p. 246).

This leads Alexy to consider the basic difference between application and justification. He accepts Günther's characterization of that difference in terms of the goals of each form of discourse: discourses of justification are concerned with the validity of universal norms, while discourses of application are concerned with applying justified norms to particular cases in appropriate ways. But, Alexy asks, is it correct to think that particular cases do not appear in discourses of justification? In fact, 'situations of application' do appear in justification discourses. Alexy distinguishes two ways in which they can appear and claims that Günther is ambiguous between the two. On the one hand, they can appear as illustrations, as 'hypothetical' or 'exemplary situations', in brief as *standard cases* (pp. 247–48).[9] The *ceteris paribus* clause that Günther finds operating in justification discourses has the consequence, on this interpretation, of 'artificially excluding the consideration of different situations of application' (p. 248).

On the other hand, Alexy claims that, in justification discourses, application situations appear not only as standard cases but should be 'as manifold as possible', so that the only reason that should prevent participants to a discourse of justification from considering some situations of application is factual impossibility, in the form of 'limits of empirical knowledge,

of historical experience, and of time' (p. 248). This interpretation would reduce (though certainly not eliminate) the theoretical importance of the distinction. Application situations, in this interpretation, would be fed back to justification discourses. Thus, Alexy concludes, 'any discourse of application necessarily includes a discourse of justification on which its result depends' (p. 249).

When it comes to legal reasoning, the distinction between application and justification helps the explanation of, and is explained by, institutional differences between legislative and adjudicative bodies because the institutional nature of law makes matters of form important as they are not in morality:

> [Application] discourse requires a constellation of roles in which the parties (and if necessary a government prosecutor) can present all the contested aspects of a case before a judge who acts as the impartial representative of the legal community . . . . By contrast, in justification discourses there are only participants. (Habermas, 1997, p. 172)

Here we can see how, in the context of an institutionalized system, many of Alexy's objections lose some weight: one could claim that judges, when conducting application discourses, should try to *mimic* the reasoning of legislative assemblies, but as a matter of fact they are not institutionally designed to serve as adequate fora for justification discourses. The idea of coherence allows the judge to apply a general rule to a particular case in a non-mechanical way because it allows the judge to avoid the conclusion that follows from the semantic meaning of the rule when it would be too inappropriate *without denying* the validity of the rule.[10]

Zenon Bankowski's essay, 'Law, Love and Computers' (Chapter 8), deals, in a way, with the same problem, but from an ethical perspective. The main issue he addresses is that of the 'moral implications of placing ourselves "under the governance of rules",[11] as we try to live our lives among our fellows. What does it mean for the individual and society to organise in this way?' (p. 269). That the answer to this question is not as self evident as one might think is shown by the anarchist challenge to law: 'Anarchists above all oppose law because they think that it takes away decisions that should rightly be my own: that instead of my deciding what to do, I let some external force do this for me' (p. 269). The ideal of legalism that lies behind the rule of law – that is, the ideal of decisions being taken according to pre-intimated rules seems to warrant this criticism. Bankowski makes this point using the analogy of a cash machine. A user has a card, the card is inserted into the cash machine and the PIN number is keyed in. The machine checks the status of the account vis-à-vis the amount presently requested and depending on that status, gives or refuses the money: 'The machine does not see you, the concrete human being with particular pressing needs and problems. It just sees (reads) the card' (p. 273).

As Bankowski is well aware, one could object that this is not what actually happens, for perhaps there is always a human bank teller taking the decision. But should the cash machine metaphor work here as an ideal – the ideal of rule-governed decision-making? Is not the whole point of having rules that one can stop thinking about the particular case in terms of all of its features and give a formally just decision based on some of the features of the case *and some only* – those that are picked up as relevant by the rule?

Bankowski then contrasts the logic of law with the logic of love, because the anarchist critique of law seems to be captured by the idea of 'All you need is love' (p. 275). Love is a 'mysterious force', one that 'makes people do so many things, good and bad but above all