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LAW AS PRACTICAL REASON

M. J. DETMOLD*

LAW is practical. Legal reasoning is practical reasoning. We could make nothing of a judge who having listened to counsel's arguments and reflected about the law governing his case thought that the state of knowledge that he had achieved was the natural termination of his enterprise and submitted his conclusions to the editors of Halsbury's Laws of England rather than performed the action of giving judgment. The parties would be outraged, and rightly. And if the judge continued to do such a thing he would be dismissed. Legal reasoning is practical in the sense that its natural conclusion is an action (in the judge's case the action of giving judgment) rather than a state of knowledge. This is taking "practical" in a strong sense. By this definition thought is practical whose natural conclusion is an action (or decision against action): its strongest contrast is with theoretical thought whose natural conclusion is knowledge. But it also contrasts with hypothetical thought about action (say, my thinking it would be good to play cricket again). I do not call this practical because it does not conclude in an action or decision against action (others do; for example John Finnis in *Fundamentals of Ethics*[1]; my reasons for differing in this matter will emerge). A judge's practical reasoning towards the action of giving judgment has priority for our understanding of law over that vast range of practically idle things that lawyers do, from the construction of digests like Halsbury to casual reflection about the rule in Shelley's case (of course there is one sort of doing involved in both these, but not legal doing). It is important here to be clear about this priority. It is a priority of practicality, not a priority of judges or lawyers.

Joseph Raz has pointed out that:

> there is something inherently implausible in adopting the lawyers' perspective as one's fundamental methodological stance. There is no doubting the importance of the legal profession and of the judicial system in society. It is entirely appropriate to make them the object of a separate study and to regard legal theory as that study. It is, however, unreasonable to study such institutions exclusively from the lawyers' perspective. Their importance in

* Reader-in-Law, University of Adelaide.
[1] Oxford, 1983.

> society results from their interaction with other social institutions and their centrality in the wider context of society. The law is of interest to students of society generally, and legal philosophy, especially when it inquires into the nature of law, must stand back from the lawyers' perspective, not in order to disregard it, but in order to examine lawyers and courts in their location in the wider perspective of social organisation and political institutions generally.[2]

But an analytical priority given to what judges (and attendant lawyers) do is justifiable not as the priority of judges in the philosophical analysis of law but as the priority of practicality. Sociology is theory not practice (except in the Marxist way that what we think about the world changes the world); that is, sociology is reasoning that contemplates no particular action (except an occasional rather distant one such as joining a political party to change a theoretically revealed evil). It is obvious that sociology itself as theory must accord priority to practice: if those humans it studies are not doing what it says they are doing it fails in its own terms. And if it is a difficult and philosophically contestable thing to say what humans are doing (even to say what humans think they are doing) then so much the worse for sociology.[3] But Raz is right to see something wrong in a court-centred legal theory. Law is for citizens before judges (judges are for citizens, not citizens for judges) and there is something very wrong in a theory which overlooks this. One of my purposes in this essay is to show how the practicality of judging (by judges) connects necessarily to the practical judgment[4] of the particular citizens concerned. With this connexion the practicality of legal reasoning becomes the whole practicality of law in society. In the first part I examine the place of reason in law; in the second the essential particularity of practical reasoning; in the third, I draw both together to offer a theory of the practicality of law.

I Reason and Law

Law is a certain sort of practical reason. Coke's exceedingly controversial words in *Dr Bonham*'s case[5] propose a relation between reason and law:

> The common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible

[2] "The Problem about the Nature of Law" (1983) 31 U. of Western Ontario L.R. 202 at 211–212.

[3] See my *The Unity of Law and Morality* (London, 1984) pp. 37–38.

[4] This connexion makes it difficult (I think impossible) to accommodate the conventional spelling distinction between judgment (of judges) and judgement; so I abandon it.

[5] 8 Co. Rep. 107a at 117b–118b.

> to be performed, the common law will control it, and adjudge such act to be void.

But between reason and law there is a very complex relation. When a judge determines the law to be such-and-such he does so by reason; but the reason is different in different cases. In order to begin to understand the relation between reason and law it is necessary to identify and distinguish four types of law-determining process:

1. The decision of particular cases according to law or right. Such decisions are never just the automatic application of a pre-existing norm to the particular case. They have an element of creativity in them which justifies us in regarding them as a type of law-determining process. We shall call this first type *the adjudicatory process.*

2. The giving of an advisory statement as to some general proposition of law or right. This may be for purposes of confirmation, exhortation, warning, or simple advice. It may be substantive, as when a penalty is increased, the better to exhort and warn. It may simply be informative advice. Or it may be to forestall some of the inconveniences of necessarily retrospective adjudication. The Supreme Court of Canada has this latter power in relation to constitutional law; and it has been mooted as a power for the High Court of Australia, where it has been held to be a non-judicial power.[6] It should be noted that the declaratory judgment of administrative law is not usually a case of this sort of law-determination, since it is usually the adjudication of a particular case and clearly judicial. We call this quasi-legislative type of law-determination *the advisory process.*

3. The explanation, exposition, particularisation, interpretation or amplification of some pre-existing law or right. This process spells out the detail of or enlarges upon the meaning of pre-existing law or right. It is a more creative process than simple advice which might just reproduce undisputed law; and is really a sub-legislative function. It must also be distinguished from adjudicative "interpretation". It is common to say that modern courts exercise an interpretative function in respect of Acts of Parliament. But what they do is really adjudication. Adjudication is the decision of particular cases. This is not the same thing at all as the sub-legislative interpretation of a term in a law. Suppose there is a law referring to motor vehicles. This covers the class of motor vehicles. An interpretation of the term, say, to include motor cycles preserves the same logical character. What we can now say is that the law covers, *inter alia*, the class of motorcycles. There is as yet no adjudication; just sub-legislative interpretation. No matter how highly we define the term (say: vehicles with

[6] *In re the Judiciary and Navigation Acts*, (1921) 29 C.L.R. 257.

characteristics a, b, c, . . . n) we still have a class, the class of vehicles with characteristics, a, b, c . . . n, and not yet a case of adjudication. Adjudication is the application of the class of the law (however finely defined) to a particular case; to pursue our example, the decision that a particular contraption is or is not close enough to the central case to be called "vehicle with characteristics a, b, c . . . n". We may suppose that a b c . . . n is the ultimate refinement of definition (of course no single human life would be long enough to construct this refinement); there still remains the question of the application of the defined class to the particular (later in this essay we call this question the particularity void). It is common to call the process of refining a definition particularisation; but actually this is a corruption of the term, for the most highly refined definition is still universal (a, b, c . . . n are all universal properties and relations): 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 (as we shall put it). Adjudication is the decision of the particular case, and it contrasts radically with the (sub-legislative) progressive definition of a term in a law. In the modern common-law legal systems there are no strong examples of the sub-legislative interpretative process, but it is occasionally to be found in what the courts do, and perhaps in certain types of delegated legislation. It is not common for the courts to interpret in this sub-legislative way, though it perhaps appears to be so. Meaning *is use*, not some mental entity established prior to use; so that when a court applies, say, the statutory term of our example, "motor vehicle", to a particular contraption the meaning of "motor vehicle" is found only in its application or use.[7] Occasionally a court might make a sub-legislative interpretation of a term (say that "motor vehicle" means *inter alia* "motor cycle"). In which case the term it applies in its adjudication (the term it uses) would be "motor cycle" or "motor-vehicle-including-motor-cycle". Such a thing is not as common as it seems; and is obiter dicta anyway, since all that was necessary for the decision was the application of the word "motor vehicle" to the particular contraption. If this last point is thought strange, think what the case would be like if it concerned the first motor cycle ever constructed, when no word for the contraption was yet in the language. There is now no possibility of sub-legislative interpretation, but the case is no different: it is now as always the case of the application (by adjudication) of "motor vehicle" to the particular contraption. Despite the current thoroughly glib use of the word

[7] This Wittgensteinian idea I have developed in *Courts and Administrators* (London, 1989). See particularly pp. 69–73.

"interpretation" to describe the courts' adjudicative application of Acts of Parliament, there is no better word for the true sub-legislative type, and so we shall call this sub-legislative type *the interpretative process*.

4. The making of novel law. The first three processes are creative processes. But they determine the law essentially from some sort of pre-existing base in law or right. Where there is no such base, or where the base is irrelevant to the process, we have what we shall call *the legislative process*. Something very fundamental occurs when a legal system admits legislation in this sense. To apply, advise about, or interpret pre-existing law or right is justified simply in reason: the fact that pre-existing law or right is not self-executing is sufficient rationally to require these processes. But legislation is strictly novel with no necessary rational relationship to prior law at all. The King coming under law in English constitutional history was a denial of his legislative power (the assertion of *common*, that is pre-existing, law); but the English Revolution was two revolutions, and this very denial of the King's power brought the establishment in the Parliament of legislative power in the fullest sense. What is the justification for so revolutionary a thing? This is *the* fundamental question of political philosophy, and we shall offer no answer to it except to say that in a democracy part of the answer is that legislation is justified as an expression of the will of the people. Certainly, the contrast between legislation and our first three types of law-determination is the fundamental contrast in political philosophy between will and reason. But even with the strongest example of the legislative process, the modern Act of Parliament, there is a tendency to its corruption. For example, some Australian Parliaments have repealed the common law doctrine that courts searching for the meaning of a statute (*i.e.*, how to apply it) should not look to Hansard or parliamentary papers.[8] The common law doctrine is of course precisely consistent with the idea that legislation is a pure act of will. On the new conception whereby we look at Hansard, what do we say is the legislation, statute or Hansard? Some may think that the Members' speeches and attached papers are interpretations of Parliament's legislation. Perhaps occasionally they are that; but most often the statute is the expression of the reasons that led to it; that is, it would be truer to say that the statute is an interpretation of those reasons. So which is legislation and which interpretation? We only have the legislation of Parliament (as opposed to the hopelessly vague idea of the informal legislation of occasional ministers and of the bureaucrats who write their papers) if the statute is the base point, *i.e.* absolute in itself

[8] For example, the (Victorian) Interpretation of Legislation Act 1984, s.35.

(though subject to subsequent processes including judicial ones). Now, we should not underrate the extent to which the Westminster constitutional systems have been corrupted to the position that the lawmakers are actually the departments of state. But I suppose the more palatable account of the idea behind the Australian repeals is to say that Hansard and the papers are to be aids to judicial law application. This is confused. For the question is, which law is it that is to be applied? The tendency of the Australian repeals is to degrade the purely legislative process of Parliament to the third of our law-determining processes, whereby an Act becomes in part a sub-legislative interpretation of a prior base, namely ministers' speeches and attached papers.

Now, the first three of these types of law-determining process are processes of reason in the sense that reason is intrinsic to them; and they contrast with the fourth legislative type which is a process of will having no reason intrinsic to it. This point is best explained by looking at the fourth type first.

The point is not that the legislative process has no relationship to reason. We may, of course, presume that legislators make their legislation for reasons. And secondly, their act of will is to be accepted or recognised only in so far as it is (legally) reasonable to do so (constitutional law is this process of legal reason). But this double relationship to reason is extrinsic to the act of will. When we look at a modern Act of Parliament we see nothing but a set of absolute norms (this is the sense in which the Australian repeals of the Hansard–excluding rule are a corruption of legislation). The thing itself is a pure act of will: there is no reason intrinsic to it. By contrast when we look at modern precedent decisions of courts we may see what can at first glance look like a similar set of absolute norms. But by the common law theory of precedent the norm of a precedent is tied rationally to the facts of its case. Thus if a new set of facts arises which is rationally distinguishable from the precedent facts the norm of the precedent is not applied, *notwithstanding that by its (normative) terms it is applicable.* A simple illustration of this is the following: suppose that the norm that we find in *Donoghue* v. *Stevenson* is "persons are liable for their negligence to their neighbours". When the case of a barrister arises the norm is not simply applied, *though as a norm it is applicable* (a barrister is a person, his client a neighbour). Since the case of a barrister is rationally distinguishable from the case of a manufacturer, *Donoghue* v. *Stevenson* is distinguished. Its norm is taken with reason intrinsic. A statutory norm on the other hand is tied to no particular set of facts. Thus there would be no question of distinguishing the case of the barrister if the above-stated norm had been enacted in a statute. If the norm is in

its terms applicable it must be applied unless there is a question as to its validity. And though the judgment of validity is a matter of reason, it is extrinsic to the norm. This distinction between extrinsic and intrinsic reason is fundamental to any conception of law as practical reason.

Reason is not so obviously intrinsic to the advisory and interpretative processes as it is to the adjudicative. One problem is that the result of an advice or an interpretation may look like simple legislation. Suppose there is legislation:

A: No motor vehicle shall be taken into a park,

and the following interpretation is given of it:

B: No motor car or motor cycle shall be taken into a park.

Or suppose that norm A is for some reason obscure, controversial, or not well-known, and that the following is offered as an advisory opinion:

C. No motor vehicle shall be taken into a park.

The trouble with both B and C is that they take the same form as A (and C looks identical). They might have been enacted in the first place by Parliament as A was. Instead of enacting A, Parliament might simply have enacted B. But these looks are deceptive. This enacted B is logically a quite different thing from B as an act of interpretation. The difference is simply that the latter is only explicable as an act of interpretation by virtue of a *rational* (interpretative) relationship to A. And its derivative and rationally dependent constitutional status would follow. If A were later discovered to be not what was thought, the necessity in reason to amend B immediately follows: this is the sense in which reason is intrinsic to B, the process of interpretation. And it will be obvious that a similar analysis applies to the advisory process. If an advice is given (C) as to A and A is subsequently found to be different from what was thought the reason intrinsic in C requires its amendment.

To revert now to Coke's theory, which as a theory of the relation between reason and law is a theory of intrinsic reason. But first a word of explanation about our four categories of law-determination. Perhaps there is a temptation to say that only adjudication and legislation are of fundamental importance in the modern common-law legal systems (the courts, we have seen, generally do not advise or sub-legislatively interpret). But to say such a thing would be a strong example of a distorting court-centred jurisprudence; excluding from primary concern the extraordinarily important case of a solicitor's advice to his client. Anyway, all four law-determining processes

are necessary to provide a complete conceptual basis for the analysis of Coke's theory. Now, Coke's theory. There is proposed by him a relation between reason and law (law being something that has been determined by one or more of the law-determining processes). It is obvious that the relation of reason to something intrinsically reasonful (we cannot say "reasonable", because that implies a favourable recommendation) is different from its relation to something which is not. The law-determining process with which Coke's reflections are concerned is that of Parliament. So, the first question must concern the nature of Parliament's law-determining in Coke's time. If it is intrinsically reasonful there will be much care needed in translating Cokes' theories about the relation between reason and law to the modern Act of Parliament. For that, we have seen, is not an intrinsically reasonful thing.

In *The High Court of Parliament and its Supremacy*,[9] C. H. McIlwain proposed the following theses:

> (a) England after the Norman Conquest was a feudal state, *i.e.*, its political character is better expressed by the word feudal than by the word national. (b) As a consequence, her central assembly was a feudal assembly, with the general characteristics of feudal assemblies. (c) One of those characteristics was the absence of law-*making*. The law was declared rather than made. (d) The law which existed and was thus declared was a body of custom which in time grew to be looked upon as a law fundamental. Rules inconsistent with this fundamental law were void. Such a law was recognised in England down to modern times. (e) Another characteristic of the times was the absence of a division of labour between different "departments" of government and the lack of any clear corresponding distinctions in governmental activity, as "legislative", "judicial", or "administrative". (f) Parliament, the highest "court" of the Realm, in common with the lower courts, participated in these general functions of government. It both "legislated" and "adjudicated", but until modern times no clear distinction was perceived between these two kinds of activity, and the former being for long relatively the less important, we may say roughly that Parliament was more a court than a legislature, while the ordinary courts had functions now properly called legislative as well as judicial. (g) "Acts" of Parliament were thus analogous to judgements in the inferior court, and such acts were naturally not treated by the judges in these courts as inviolable rules *made* by an external omnipotent legislative assembly, but rather as judgements of another court, which might be, and were at times, treated as no modern statute would ever be treated by the courts to-day.

Declared law is law determined in one or more of our first three types of process (McIlwain's book is full of examples of all three).

[9] Yale, 1910, pp. vii–viii.

The idea of declaration implies logically some pre-existing source, which is the distinguishing-mark of our first three types: McIlwain's contrast between declared law and made law (our fourth type) is clear enough (though we must be careful with it: our first three types of law-determination make law, too—they make it with a relation of reason to some pre-existing source). Its function of declaring law rather than making it in a completely novel way makes the medieval parliament, McIlwain argued, more like a court than a modern legislature. In particular, we can say, all its determinations are to be taken as intrinsically reasonful.

The argument is clearly established. Indeed it was anticipated by a number of scholars including Jenks, as J. W. Gough shows.[10] There is scholarly contest at the edges of the argument. For instance, McIlwain maintained that it was at the time of the civil war that Parliament first clearly undertook a law-making role; but Jenks disagreed, holding that the critical first steps towards that role were taken by the Reformation Parliament in the time of Henry VIII, a view which McIlwain later accepted.[11] And there is contest as to when it can be said that Parliament's modern exclusively legislative (fourth type) role was established. On this matter Maitland argued that it was not until the 19th century that Parliament gave up governing particularly (adjudication) in favour of the (legislative) laying down of general rules.[12] And Gough replied that Maitland had forgotten that the 19th century Parliament was very much concerned with saying what (particular) railways should be built.[13] But the evidence for McIlwain's central thesis is beyond doubt. Our question is what is the implication of this for Coke's conception of the relation between reason and law?

A crude interpretation of Coke's theory is to see it as a forerunner of the modern American doctrine of judicial review. Gough, quite rightly, refutes this interpretation;[14] and also refutes the implication of the same in McIlwain's *The High Court of Parliament* (an implication not easily attributable to McIlwain himself). "Americans", Gough writes:

> approach the English seventeenth century with a different bias. They are familiar with the principle of a limited legislature, and disposed to regard the idea of fundamental law, embodied in the American Constitution, as one of the most precious safeguards of political history. Hence, so far from belittling or seeking to explain away the references to fundamental law with which they

[10] *Fundamental Law in English Constitutional History* (Oxford, 1955) p. 5.
[11] *Constitutionalism Ancient and Modern*, 2nd edn (Cornell, 1947) p. 170–178.
[12] *Constitutional History of England* (Cambridge, 1908) p. 382ff.
[13] *Op. cit.*, note 10 at p. 24.
[14] *Ibid.*, chapters 1–3.

> meet in studying the seventeenth century, they are apt to greet them with enthusiasm, sometimes misplaced, as forerunners of their own constitutional principles.[15]

The reason that Coke is no forerunner of Marshall is simply that there is a radical difference between the questions that each had to face. When Coke thought of an Act of Parliament he thought of it as something to which reason was intrinsic, that is as an example of one or all of our first three processes, but not the fourth (we should say thought of it primarily as that: for it had begun the process of transformation into a legislature of our pure fourth type). That was its logical status, and to the extent that it failed to be reasonable relative to its prior base it failed to be what it purported to be (void or null for what it purported to be; just as a judicial precedent in modern times is liable to be overruled or not followed (void or null) by virtue of its lack of reason). For Marshall on the other hand an Act of Congress was purely legislative, and when it failed (as when it was unconstitutional) it failed in extrinsic constitutional reason: it did not fail in what it purported to be, namely, a pure act of will. The difference between the two things is substantive as well as logical, and may be represented by the following pair of norms:

A. Accept what is reasonable.
B. Accept what it is reasonable to accept.

Since it is obvious that it is often reasonable to accept something unreasonable (reasonable to say that an unreasonable statute is nevertheless constitutional) it is obvious that there is a quite fundamental difference between Coke's doctrine (A) and judicial review (B); between intrinsic and extrinsic reason.

Gough does not appear clearly to understand this difference. He writes:

> How, then, does Professor McIlwain's theory stand in the light of what we have seen? I think we must, in the first place, dismiss the notion that law was only declared and not made. This may have been true of the early Middle Ages, but in the later Middle Ages, or in Tudor times, it was certainly no longer so. It remains true that parliament often, perhaps generally, continued to be thought of as primarily a court, and this may have impeded the recognition of the fact that it was at the same time becoming more and more of a legislature,[16]

and he is here thinking in terms of our fourth (legislative) type of law-determination, where the question of reason is extrinsic. But the distinction between declaring and making is too stark: our first three

[15] *Ibid.*, p 3.
[16] *Ibid.*, p. 27.

types of law-determination are cases of making as well as declaring (making reasonably if intrinsic reason holds a place, as it does in Coke's doctrine). Gough's failure to see his way right through the problem emerges in what he says about one of his principal examples of early law making, the Statute of Uses (1536). Of the analysis of that statute which Montague CJ offered in *Wimbish* v. *Taillebois*[17] Gough writes:

> Yet strained and unnatural though Montague's interpretation seems to us, there was obviously no question of the court trying to set aside the Statute of Uses, or pronounce it void for contradicting common 'law' or reason.[18]

The implication here is that there is a fundamental opposition between what Montague did and Coke's idea of voidness. But they are complementary parts of the same doctrine of intrinsic reason. Montague's interpretation of the statute is actually a strong example of the approach to something intrinsically reasonful. It would have been flatly contrary to the reason of the middle ages for an act of parliament to expropriate property (property was sacrosanct in reason). So the statute could not have been seen as that. Montague sees it in this way:

> When the statute of 27 H.8 was made, it gave the land to them that had the use. And, sir, the Parliament (which is nothing but a court) may not be adjudged the donor. For what the Parliament did was only a conveyance of the land from one to another, and a conveyance by Parliament does not make the Parliament donor; but it seems to me that the feoffees to uses shall be the donors, for when a gift is made by Parliament, every person in the realm is privy to it, and assents to it, but yet the thing shall pass from him that has the most right and authority to give it. . . . So here it shall be said the gift of the feoffees by Parliament, and the assent and confirmation of all others. For if it should be adjudged the gift of any other, then the Parliament would do a wrong to the feoffees in taking a thing away from them, and making another the donor of it. . . . And here the land is by act of Parliament removed from the owners, that is to say the feoffees, to the *cestuy que use*, and the statute would do wrong if it should not adjudge them the donors, for they have the greatest authority to give it, and the Parliament is only a conveyance, and therefore it shall be adjudged the gift of the feoffees by Parliament. . . .[19]

Prior law for Montague and for all English judges up to his time was not just the common law but it included natural reason (right) and

[17] I Plowden, 38.
[18] *Op. cit.*, note 10 at p. 27.
[19] *Op. cit.*, note 17 at p. 59.

the law of God. In *Partridge* v. *Strange & Croker*,[20] we find him saying the following (of another statute, 32 H8 C9):

> This statute was made in affirmance of the common law, and not in alteration of it, and all that the statute hath done is, it has added a greater penalty to that which was contrary to the common law before. . . . For to construe the statute that he, who is in possession, shall not make a lease . . . except he had been in possession . . . for a year before, would be a hard law, and contrary to all reason and equity: and such an exposition of the statute was never intended by the makers of it. . . . And that which law and reason allows shall be taken to be in force against the words of statutes.

Natural reason and the law of God ordained the sanctity of property. Thus it was necessary to see the Statute of Uses (and 32 H8 C9) as a *reasonable* working out of that prior state. And this is what Montague did when he said that the Statute of Uses was a conveyance. Now this (the conveyance process) is not quite like any one of our first three law-determining processes (perhaps we should see it as a fourth type), but it clearly shares with them the same logical character: it is an expression or working out of some prior right or law, and that character is intrinsic to it. Had Montague not been able to see it as that, then it would have failed to achieve the status it sought and Coke's idea of voidness would have come into play.

One of Coke's own examples is instructive here: he cited various precedents in *Dr Bonham*'s case, one of which was *Thomas Tregor*'s case from the eighth year of Edward III:

> And therefore in 8E. 3.30 a.b. Thomas Tregor's case on the Statute of W.2.c.38 & *artic. super chartas*, c.9. Herle saith, some statutes are made against law and right, which those who made them perceiving, would not put them into execution.[21]

It is a strange thing in our constitutional history that there should be so many trivial interpretations (both conceptual and political) of such as Coke, a jurist both profound and courageous. One of them is Pollock's interpretation of the passage on *Tregor's* case:

> plenty of modern statutes have been inoperative in practice, not because the common law controlled them, but because they were in fact unworkable.[22]

Now, it is true that Coke interpolated in his quotation from Herle the words "against law and right"; but it is also clear, as McIlwain shows,[23] that he did not regard this as changing their sense. So what is the sense of the words? McIlwain gets close:

[20] I Plowden, 77 at p. 88.
[21] *Supra* note 5 at p. 118a.
[22] *First Book of Jurisprudence*, 5th ed (London 1923) p. 266n.
[23] *Op. cit.*, note 9 at p. 288.

> One very striking thing about the whole case is the fact that Coke is apparently citing these words of Herle—"There are some Statutes made which *he himself who made them* does not will to put into effect"—as proof of the power of the *judges* to disregard the statute concerning the college of physicians which was under discussion in Bonham's Case. What possible relation can there be between the opinions of the *judges* and the opinions and desires that *the makers of the law* begin to entertain subsequent to the passage of the Act? . . . When Herle says that the *makers* of the statutes often will not to enforce them, is it certain, as is usually assumed, that he means the "*legislature*" exclusively? Is it not possible that Coke was as nearly right when he cited the statement to prove the right of the *courts* to review "legislation"? But would it not be still nearer to the truth to say, in view of the close relations of judges and Parliament, of the fusion of functions judicial and legislative which we have found in both the High Court of Parliament and the inferior courts, and above all in view of the manifest absence of any clear distinction between a judgement and a law, between judicature and legislation, in the time of Edward III,—in view of all this, would it not be better to say that Herle would probably have considered an alteration of a statute by a subsequent statute, and a modification of it, or even a refusal to enforce it, by the *courts*; as actions not essentially different in character?[24]

The judicial process is a process of intrinsic reason. And so, at the time, in the way we have been arguing, was the process of Parliament. Hence the identity between court and Parliament that McIlwain finds. Coke's words ("those who made them perceiving, would not put into execution") actually express the point more perspicuously than McIlwain's. A person does not will the conclusion of a process of reason about prior right except in so far as it is reasonable. When its lack of reason appears the will supporting the conclusion slips away and the prior right reasserts itself. And it is thus with the old parliaments. Their statutes obtain to the extent of their intrinsically reasonful relation to prior law and right. Perhaps we who are familiar with the wholesale legislative overturning of old ideas, find it hard to understand this. But this is because we are familiar with Parliament *the legislator.* The nearest that we have to the old idea in the law these days is when a judge talks of an earlier judge as "going too far" or "speaking incautiously" or "per incuriam". The point is not to say that the judge has willed something which later reason holds void; it is that the perceived unreasonableness limits what is willed.

The most common trivial interpretation of Coke's words in *Dr Bonham*'s case is that he was merely expressing ordinary principles

[24] *Ibid.*, pp. 289–291.

of statutory interpretation. So held C. K. Allen[25] and Gough[26]; and Holdsworth wrote of the cases relied on by Coke that they were:

> decisions that the courts will . . . interpret statutes *stricti juris* . . . that is, so as to give them a meaning in accordance with established principle . . . These are principles of interpretation which would be accepted at the present day.[27]

But it is literally possible for a proposition with meaning to be null as an expression of reason (as an expression of something to which reason is intrinsic). For example, the law "all judges shall give judgment standing on their heads" is meaningful but null in point of intrinsic reason. Whereas in the modern matter of the interpretation of purely legislative acts (adjudicative interpretation: as we have seen, the word "interpretation" is used loosely in that context), if a statutory proposition is meaningful there is a quite early point beyond which interpretation cannot go and remain interpretation. How far could the judges strike *by interpretation* at the just-stated law? And for another example, if Dicey's famous statute requiring the execution of blue-eyed babies were held to apply only to babies whose whole eyes were blue (that is, to none), though it might be pretended that that was interpretation, it would not be. In truth, it would be a simple case of extrinsic reason (judicial review) refusing to recognise the statute; that is, holding it to be invalid; and concealing the fact. And that also is quite different from the nullity of an intrinsically reasonful act. The difference we shall express again.

A. Refuse to accept what is unreasonable (Coke).

B. Refuse to accept what it is unreasonable to accept (judicial review).

It is well-known that Coke also said of the power and jurisdiction of Parliament that it was:

> so transcendent and absolute as it cannot be confined for cause or persons within any bounds.[28]

There are trivial political explanations for what is conceived to be an inconsistency between this passage and the other doctrines of Coke that we have been discussing in this section (for example, Holdsworth[29]). But there is no such inconsistency. There is no inconsistency between the absolute finality of a court's settlement of the particular case it adjudicates and the non-final, non-absolute

[25] *Law in the Making*, 4th edn (Oxford 1946) p. 369.
[26] *Op. cit.*, note 10 at p. 355.
[27] Holdsworth, *History of English Law*, ii, p. 443.
[28] 4 Inst, cap 1, 36.
[29] *History of English Law*, iv, pp. 186–187.

intrinsic reasonfulness of the general pronouncements it makes in the course of that settlement. Nor is there any suggestion that the absoluteness of a particular adjudicative settlement has any connexion to the absoluteness of a modern Act of Parliament (true legislation). McIlwain[30] and Gough[31] are subtler. The jurisdiction of Parliament was absolute for Coke (they held) in the indisputable fact that it was the highest and final court: it could not be "confined" by any further proceeding. Such a doctrine only applies to Parliament's adjudication, its settlement of single cases. Obviously when the Parliamentary process in question is interpretative or advisory (our second and third types) there is possible any number of further proceedings; but when a single case is settled by the adjudication of the highest court there is nothing further in the legal system. Gough gives an apt example. Coke writes of the attainder of Thomas Cromwell:

> And albeit I find an attainder by parliament of a subject of high treason being committed to the tower, and forth-coming to be heard, and yet never called to answer in any of the Houses of Parliament, although I question not the power of the Parliament, for without question the attainder standeth of force in law: yet this I say of the manner of the proceeding, *Auferat oblivio, si potest; si non, utcunque silentium tegat*: for the more high and absolute the jurisdiction of the Court is, the more just and honourable it ought to be in the proceeding, and to give example of justice to inferior Courts.[32]

Now, this takes us to the fundamental point of constitutional law. The jurisdiction of the highest *court* is necessarily self-validating. If an administrator claims jurisdiction over me I can argue in a court that he does not have it: his decision is not self-validating. However, if the highest court makes a decision over me there is no place for me to argue that that decision is beyond jurisdiction. That is the meaning of the common law proposition that the superior courts have a self-validating jurisdictional power.[33] And it is this ultimate jurisdictional power in the old parliaments that Coke is talking about in this matter of absolute and transcendent jurisdiction. The attainder of Thomas Cromwell settled his case finally. But general utterances in the course of that settlement, perhaps interpretations of prior law and right, would be, like the general utterances of the modern superior courts, and the other general (universal) things that the old parliaments laid down, intrinsically reasonful in their relation to pre-existing law and right, not final and absolute. This is the sense in

[30] *Op. cit.*, note 9 at p. 129.
[31] *Op. cit.*, note 10 at pp. 42–43.
[32] 4 Inst, cap 1, 37.
[33] *Scott* v. *Bennet* (1871) L.R. 5 H.L. 234. This remarkable case and its doctrine of the ultimacy of adjudication is discussed extensively in *op. cit.*, note 7.

which the true successors of the old parliaments are the superior courts. But we have to be careful in this comparison: the superior courts are not, as the old parliaments were, in the process of becoming legislatures in the true sense (or are they? but with what democratic justification?).

Parliament was a court. Parliament is now a legislature. The (Diceyan) doctrine of the omnipotence of Parliament is based upon a fundamental failure to understand history. It is a simple *non sequitur* to reason from the ultimacy of an intrinsically reasonful process (with all the qualifications that that particular nature implies) to the ultimacy of a purely legislative process. That latter ultimacy denies reason altogether: reason is neither intrinsic nor allowed to hold extrinsically. When history transformed Parliament from an intrinsically reasonful court to a legislature that point was overlooked; that is to say, the (rational) necessity to replace the lost intrinsic reason with extrinsic reason was overlooked. These points could hardly be clearer than they are in Willes J's well-known words in *Lee* v. *Bude & Torrington Railway*:[34]

> Acts of Parliament . . . are the law of this land; and we do not sit here as a court of appeal from Parliament.

Of course not! We must distinguish again:

A. Accept (from Parliament) what is reasonable.
B. Accept (from Parliament) what it is reasonable to accept.

Only if the courts acted on the intrinsically reasonful A would they presume to be a court of appeal from Parliament. Appeal is concerned with rightness or reasonableness (in administrative law it is contrasted with review on this very point). Only A raises the rightness or reasonableness of Parliament's Acts. The extrinsically reasonful B is a different matter entirely: it is obviously often reasonable to accept unreasonable legislation. The fact that Willes J. found it necessary to deny A but not necessary to deny B shows that the idea of extrinsic reason (what it is reasonable *to accept*) entirely eluded him. The (Diceyan) doctrine that whatever Parliament enacts is the law is nothing; neither history (for it has not caught up with the history that transformed Parliament from a case of intrinsic reason to extrinsic) nor reason (for intrinsic reason has been lost and no extrinsic reason has replaced it).

Many philosophers of law overlook the difference between A and B. One of them is Joseph Raz. In "The Problem About the Nature of Law", Raz argues that the "inclination to identify the

[34] (1871) L.R. 6 C.P. 576 at p. 582.

theory of law with a theory of adjudication and legal considerations with all those appropriate for courts is based on a short-sighted doctrine overlooking the connection of law with the distinction between executive and deliberative considerations."[35] He accepts that courts make their decisions on the basis of both moral and legal considerations. But that very fact, he says, shows that it is wrong to take a theory of adjudication to be a theory of law; a theory of law must at least distinguish between these legal and moral considerations. The distinction for Raz turns upon the concept of an "authoritative positivist consideration". The need for this concept in a theory of law:

> is clearly seen by contemplating its negation. There are forms of arbitration in which the arbitrator is instructed merely to judge the merits of the case and to issue a just judgment, without being bound to follow any authoritative positivist standard. We can imagine a purely moral adjudication taking the same form. Positivist considerations are those the existence and content of which can be ascertained without resort to moral argument. Statutes and precedents are positivist considerations whereas the moral principles of justice are not. A moral adjudicator will rely in his deliberation on the existence of positivist standards but he is not bound to regard them as authoritative. But one does not have a court of law unless it is bound to take as authoritative some positivist standards such as custom, legislation or precedent.[36]

It is true that if there were no considerations that judges were bound to take as authoritative without moral test they would not be judges in law but simply moral adjudicators. And Raz is surely also right to hold that the point of having, say, a legislature in the first place is to settle something. If legislation did not in some way settle the question it addressed, the community would in truth have no legislation, for it would in its institutions still be deliberating the legislative question (the community would be just like a person who could never make up his mind: Raz draws heavily upon analogy with personal decision). The point is presented by Raz as one of "paramount importance to social organisation,"[37] and it is, but it is perhaps even stronger than that. It may be logical. Just as in the case of a man who never made up his mind we would be logically precluded from saying he had made a decision, so for a community which redeliberated legislative questions we would be logically precluded from saying any legislation (any law) existed (and does not this logical point prove the case for legal positivism?).

But Raz mistakes the question that legislation settles. Suppose a

[35] *Supra* note 2 at p. 217.
[36] *Ibid.*, at pp. 213–214.
[37] *Ibid.*, at p. 216.

statute is passed: Where A, B and C, persons shall do X. By moral deliberation this statute settles the question implicit in what it says, should all persons do X where A, B and C? Raz says:

> Since law belongs to the executive [*i.e.* non-deliberative] stage it can be identified without resort to moral arguments, which by definition belong to the deliberative stage.[38]

This does not follow at all. The legislature has decided that all persons shall do X. And this must be accepted without resort to further moral argument. But the only court that would fail here would be a court that acted on:

A: Apply only what is reasonable.

The true principle of judicial action in relation to true legislation (our fourth type of law-determination) is, we have seen,

B: Apply only what it is reasonable *to apply*.

And this second principle preserves the sense of legislation in a community. There is, consistent with it, a legislative question which has been settled, namely, what is reasonable. There is no question of redeliberating that question. But what it is reasonable to apply has not been decided by the legislature and cannot be decided. This is so even if our legislation is taken to contain a second norm:

All persons shall do X and all courts shall apply this first norm.

We may accept that the legislature has now deliberated upon and decided: first, that the first norm is reasonable, and, second, that it is reasonable to apply the first norm. But not a third thing, that it is reasonable to apply the second norm. The question that remains is whether it is reasonable to apply the second norm. And so on. Nor is the issue avoided if the second or any subsequent norm is self-referring. There would remain the question whether the now self-referring whole entity is to be accepted. This is just as the question whether the Cretan is a liar remains unresolved—no matter how much we believe him—by the Cretan's statement "I am a liar." No matter how much we believe him: no matter how much respect we give to Parliament. The point is a logical one: no respect can be given to a decision that has not been made.

The distinction between what it is reasonable to legislate and what legislation it is reasonable to apply obtains even in a legal system in which the courts judge it reasonable (right, required, the law) to apply any legislation at all (as Dicey believed was the case with the legal system of the United Kingdom). The question of application is,

[38] *Ibid.* at p. 217.

even in such legal systems, a distinct, logically required, question which the courts and not the legislature answer (affirmatively, so it is said, every time).

If we think again of Raz's comparison with personal decision the importance of the difference between A and B will become apparent. I make a decision to go to Nottingham, Raz supposes (this is one of his examples of personal decision). For that decision to subsist it must be the case that I do not reconsider it (though I may actively consider subsidiary questions such as where to stay and so on). This analogy is very misleading for there is out of account in the sphere of personal decision just what it is that makes it important in law to distinguish A and B, legislation and adjudication. I decide to go to Nottingham and I can immediately set about executing that decision because there is no question but that it is *my* decision. What if it were your decision to go to Nottingham. Of course *I* wouldn't go! Nor even if it were your decision that it is reasonable that everyone go to Nottingham. And even if it were your decision that *I* go to Nottingham I wouldn't go unless there were some mediation connecting your decision to me: I am not your slave. There are various things in the personal sphere (a contract, for example) which might provide that mediation. In law the mediation is adjudicated upon and completed by the courts. Our contract under which you claim I must go to Nottingham if you direct me would be adjudicated upon by a court, and if against me I must go to Nottingham. The whole law of contract bears witness to the distinction between A and B: the court decides upon the *application* of contracts (B: Apply what contracts it is reasonable *to apply*); not whether what they stipulate is reasonable (A: Apply what contracts are reasonable) (though there are obviously some minor qualifications to this). The application of statutes is similar. The statute of our example has (reasonably) decided: where A B C, persons shall do X. This might just be your decision (yours and certain other citizens), just like your decision to send me to Nottingham. It might be a reasonable statute, and even if not it can be accepted as having decided what is reasonable (total respect for what it *does* decide). But for me to do X requires some particular connexion of me to the statute (some mediation as in the contract case). Thus B rather than A. Reasonable *application* to me rather than reasonableness. A and B can be distinguished on the ground that they are simply different questions governed by different reasons.[39] But the fundamental distinction now seems to be that a particular connexion to me is necessary before any norm can justly

[39] *Op. cit.* note 3 at pp. 251–259.

be applied to me. The reasonableness of the norm (A) is no warrant for B. The distinction between A and B is fundamental to freedom.

It is also fundamental in the practicality of law. Where law is seen as essentially theoretical, *i.e.* as something to be known, the distinction between A and B gets no hold. Something known is the law regardless of whether it might be assessed in point of reasonableness or in point of whether it should be applied to a particular person. When law is seen as practical there is raised a question of practical reason. A particular action is contemplated and the question is one of reason about that action (B . . . reasonable *to apply*). By contrast, A, though it mentions the action ("*apply* what is reasonable"), raises no question of practical reason about it. It is this action and the accurate focusing of reason upon it that raises the distinction between A and B. A theoretical view of law (some versions of legal positivism) has seemed attractive in the interests of freedom; for one's freedom appears to be the greater when the law is something to be known prior to action (thus, it is thought, we can calculate clearly and act the more freely). This always has been the most plausible argument for any legal positivism. But the great destructions of freedom (all the fascisms) are built upon a denial of the distinction between A and B: humans are conscripted or obliterated in the service of what is reasonable (what glory or destiny the tyrant or state holds reasonable); whereas it is states that are conscripted in the case of what it is reasonable to apply to citizens (for then they are accountable to their citizens' rights).[40]

II The Particularity of Adjudication

My deciding to go to Nottingham is one thing. Your deciding it in respect of me is another. And yet another is whether it is reasonable for anyone (or all) to go there. This last is not practical until the determination of the will of at least one person is effected or at least contemplated. It is universal and not practical; whereas the first two are particular and practical (the first connecting to my action in going to Nottingham; the second to yours in, say, forcing me to go). What is the connexion between these things? How does a universal decision become practical?

Suppose I am seeking to acquire judicial office by exam. I am given a problem to solve consisting of facts A B and C. I work it out and conclude, the defendant must pay damages. My conclusion is universal: *a* defendant in circumstances A B and C must pay damages.

[40] *Op. cit.*, note 7, where the argument is that the proper function of the courts in administrative law is to preserve citizens' rights against the state, because individuals' rights (which determine *particular* applications of law) are absolute against the state.

But am I right? I check my reasoning and conclude I am right. I finish the exam, content. But being rather introspective, I go to my books after the exam to make sure. Yes, the defendant must pay damages. I am sure. I am now sure that I have an answer to the (universal) question: where A B C must the defendant pay damages? But it is not a practical answer. My will is not determined to any action, for there is no particular A B or C, nor any (particular) defendant to act against. Some would say that my conclusion was theoretical. This is not strictly true because it is a practical sort of question that I have considered (it is not a question of mere knowledge): it is better to say my conclusion is hypothetical. My answer will become practical when it becomes particular. But is this just a matter of waiting until a particular comes along which fits my universal judgment?

I was right. I pass the exam, am appointed, and my first case turns out to be exactly the case of my exam: A B and C are proved and the plaintiff seeks damages. Let us in this (philosophical) analysis hurry over all the pleading, proof and argument to the point where I sit alone in my chambers and commence to contemplate judgment. Where A B C the defendant must pay damages. I know this is right. I have done that reasoning. What more is there? Is not my will coiled appropriately, ready to be unleashed? Yes. But what is required to unleash it? Why does it not just unleash itself? The six weeks or so between my exam and the case are nothing (in another case, D E F, suppose I work out my judgment and it is six weeks before I give it; bewigged and berobed, I sit myself in the place of judgment and notwithstanding the six weeks delay my will does just unleash itself). But not here. What is it that gives me pause in the A B C case? It is not that I doubt my conclusion. I remember my reasoning very clearly. It is not that I wish to go off to Halsbury to see if there is something I've overlooked (though I might do that, stalling for time). I know I've overlooked nothing. It is just that I now have a radically different problem. A particular, practical problem, which universal hypothetical (theoretical) reasoning does not solve. And the whole problem is that no reasoning can solve it. It is particular, about which nothing can be said (anything I *say* will be universal). I am strictly at a loss, and if I keep on thinking I will give no judgment at all. This moment of indecision (a whole realm) is a recurring theme in literature. Think of Hamlet, whose inaction was tragic (true to an unconsoling, unanswering world) not a simple flaw in character. Think of the confrontation between Pierre and Davoût in *War and Peace*. The moment of indecision is what saved Pierre from being shot as a Russian spy on Davoût's orders (Russian spy=A B C; so the relevant rule of action, for Davoût is, execute where A B C):

> Davoût looked up and gazed intently at him. For some seconds they looked at one another, and that look saved Pierre. Apart from conditions of war and law [A B C] that look established human relations between the two men. At that moment an immense number of things passed dimly through both their minds, and they realized they were both children of humanity and were brothers.
>
> *War and Peace* Book XII, Ch X

I, the judge, and Davoût, at the moment of practicality entered the unanswering void of particularity, the realm of love, about which only mystical, poetic things can be said (children of humanity, and such like); or nothing (Hamlet: "the rest is silence"). Judges enter this realm every day (if they only knew).

Before proceeding I wish to recall the question of Finnis's wider definition of practicality in *Fundamentals of Ethics*. Finnis includes hypothetical practical thought (terminating in practical knowledge) in his conception of practical as well as thought terminating in action (or a decision against action). With this definition he excludes the particularity void. Thus he says:

> [A certain] argument would work *in just the same way* if the question were not hypothetical but required of you a choice here and now . . .; thus its being hypothetical does not remove its radically practical character.[41]

Of course the matter is not just a definitional one: Finnis has deep reasons for this, which we shall later discuss. In part I we identified two problems of particularity: the adjudication of particular cases (the crossing of the particularity void, as we now call it) and the greater refinement in definition of a certain class. Hart said:

> Different legal systems, or the same system at different times, may either ignore or acknowledge more or less explicitly such a need for the further exercise of choice in the application of general rules to particular cases. The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way. To do this is to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose

[41] *Op. cit.*, note 1 at p. 17. My emphasis.

> composition we are ignorant. We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified.[42]

And so we have, according to Hart's argument, institutions to settle these issues by greater refinement of definition. This is like Raz's idea of adjudication, being (when it is not mere execution) sub-legislation: the progressive refinement of the categories of law according to experience. But this is not true particularisation. Sub-legislative interpretation is really (as we saw in part I) just specification. It doesn't matter for the problem of the particularity void how highly-defined A B and C are. We might have set out a very large number of very detailed facts and our problem would be exactly the same (though somewhat disguised). How to act in respect of a particular? How to cross the void? This is one important thing that we learn from example. Sometimes example is thought of as greater, though somewhat indeterminate, specification. Many things cannot be stated definitively; for example, how to dance the eightsome reel. But they can be taught by example. And it is often thought that the example is just greater, unarticulated, specification. It is this, but not just this. The first thing that its particularity teaches, and what it constantly teaches, is the overcoming of the particularity void.

The particularity void is simply respect for the particular. Respect for the particular is not respect for any (universal) quality or relation attaching to the particular, not respect for A B or C or any further refinement of them. It is respect for the particular itself. Respect for any particular is respect for the mystery of the existence of the world: the world might be simpler, *i.e.* any particular might be the whole world, and the mystery of existence would be the same.[43] But there is a certain bleakness in this conclusion. A judgment in respect of A B and C cannot be a practical judgment because it cannot cross the void. Of course it can justify *a* judgment in the matter: a theoretical/hypothetical, whatever you call it, judgment right up to the void. But the final rationality of practical judgment seems in doubt here. Neil MacCormick has attempted to reassert that rationality against certain theories of particularity[44] by reconsidering the idea of justification. He sees that the act of justification is incapable of solving the problem for it immediately raises the question, why justify?; and the answer, like that to the original question, will be ultimately particular, not universal; so it will have its own particularity

[42] *Concept of Law* (Oxford, 1961) at p. 126.

[43] *Op. cit.*, note 3 at p. 17.

[44] In "Universalisation and Induction in Law", in *Proceedings of Conference on Reason in Law* (Bologna, 1984), where he considers three theories of particularity: Adam Smith, *Theory of Moral Sentiments* (1759), R. S. Summers, "Two Types of Substantive Reasons" 63 Cornell LR 707 (1978), and my *The Unity of Law and Morality* (London, 1984).

void. MacCormick seeks to derive the desired universality by the postulation (following Adam Smith) of the ideal impartial spectator:

> By abstracting from one's particular involvement and confronting an issue either in universalised terms or as it would appear to an ideal impartial spectator, we objectify the issue. One poses it as anyone's question, open to anyone's answer. Exactly what made Smith the most persuasive of the particularists turns out to be in truth a surrogate for universalisation in his theory.[45]

But anyone's question is anyone's void. What MacCormick and Smith have not shown is how the impartial spectator's judgment is not also incorrigibly particular; why he does not also confront the particularity void. There are two questions of universalisation in practical judgment. If I judge p the two questions of universalisation concern I, the self, and p. The first question is whether I am to be universalised to all moral agents judging p. That is one question of universalisation and objectivity, and that one Smith's theory approaches. But the other, which it does not deal with, is whether p is universal or incorrigibly particular. Wittgenstein thought of two god-heads: "the World and my Independent I".[46] Being god-heads both are particular, resisting universalisation. But I don't make any judgment about I: the self is not in the world, as Wittgenstein showed.[47] Thus it is p which opens the particularity void and casts doubt on the truth of all practical judgments, subjective or objective.

In this essay I want to pursue the idea that the negotiation of the particularity void depends upon the particular in respect of which my action is contemplated speaking for himself. Suppose again that I am a judge and I am contemplating judgment against a particular citizen. If my respect is such that I allow him to speak for himself then I respect him as an end in self. And is that not precisely respect for his particularity? Is not his being particular his being an end in self?

Not quite. I have used the word "particular" so far (rather than, say, "individual") to indicate my view that ultimately other humans are just particular arrangements of the matter of the universe (other humans: it is meaningless for me (I) to say it of myself). This austere ontology is Wittgensteinian: "My attitude towards him is an attitude towards a soul. I am not of the *opinion* that he has a soul."[48] This in my view is the state of nature that political philosophers have searched for. There are no souls in nature awaiting discovery under some super microscope. But the bleak loneliness of such a world is an inducement to love (Wittgenstein's "attitude"), and in love the soul

[45] *Ibid.*, at p. 14.
[46] *Notebooks 1914–1916* (Oxford, 1961) 74e.
[47] *Tractatus*, 5.632–5.633.
[48] *Philosophical Investigations* (Oxford, 1953) 178e.

of the other is attributed. Thus from the state of nature by love emerges politics in which humans are souls or, as we are putting it, ends in selves.[49] Particular arrangements of the matter of the universe become particular ends in selves[50] capable of speaking for themselves.

Now, I am a judge contemplating action against a particular citizen. My contemplated action is connected to his action (what he did to warrant judgment). And it is by our hypothesis connected to his being an end in self. What is the connection between these two things, that is between his action and his being an end in self (between practicality and particularity)?

Action is purposeful. If I knock a glass from a table in the course of a muscular spasm I perform no action. And, similarly, if you by overriding strength force my hand the action of knocking the glass from the table is not mine. But if there is a purpose in my movement (attract attention, demonstrate the law of gravity . . .) there is an action I have performed. And, of course, there are many intermediate cases; for example, when I knock the glass in great anger, or drunkenness. Any philosophy of action must be a philosophy of purposes (ends). Now, law being a practical enterprise, it is concerned to guide, influence or control the *actions* of citizens. This is not the only way to achieve peace. We might cut off the hands of potential pickpockets, whose subsequent omissions in the matter are not then actions of obedience to the law. Or we might double the strength of bank-vaults (or their defensive soft-ware); and we would not say that a decrease in the number of bank robberies has been achieved by law. Or we might achieve our ends by the force of war. We have in these cases simply modified the world; not influenced, guided or controlled the actions of citizens. More borderline cases occur when citizens are tranquillised; or put in great terror to the point where the law's sanction, so-called, is not just a reason for rational action but, rather, an overwhelming domination of the person. Is compliance in these circumstances a case of the action of citizens? Or is it, rather, a modification of the world (a modification of certain brain-states in citizens)? These cases are borderline, but the point is still clear: law concerns not peace as such, nor the bringing-about of a certain peace, but the actions of citizens in peace.

Action is necessarily particular. And this in two senses. First, an action must be in relation to a particular or set of particulars. Thus I might generate the purpose, intention or end to drink burgundy; but until a particular bottle comes my way there is no question of my

[49] This whole process I have examined in more depth in *op. cit.*, note 7.

[50] Note that the particularity void pre-exists the other soul; as can be seen if you really think hard about (say) chopping down a tree.

performing the relevant action. This sense is, of course, quite obvious; the second, perhaps, not quite so. For there to be an action there must be a particular purpose or end of a particular agent. It may in some vague way be a purpose or end of humankind to drink wine; but unless it is particularly the purpose of a particular person it will not feature in any description of anyone's actions. Thus in the matter of obedience to the law, the law must be a particular end or purpose of a particular citizen if he is to *act* in obedience to it. A statute for example, must in some sense be his statute (taken into his ends).

Suppose it is a statute which provides the law for my case as a judge (where A B and C judgment against the defendant). Now, if we are able to say that the statute is the defendant's own statute has not the crossing of the particularity void been authorised in the only way possible; that is, by the authority of the particular himself? Of course the statute does not have to be his statute in any immediate way. He may not even know about it. But if the statute is authorised by *his* community or constitution (the community or constitution taken into his ends) that may be enough.

Usually these questions are not explicitly raised, for the simple reason that, generally speaking, only citizens are brought to answer charges before courts, and citizens are precisely those of whom it can be said: the laws, including the statutes, are their laws. The point should not be misunderstood. Because someone breaks a law it does not follow that he disowns the law. Most convicted criminals do not do this, but, rather, maintain their basic allegiance to their legal system notwithstanding even an inclination to offend again when the opportunity arises. What charges them is their community, and since it is their community its laws are their laws in the fundamental sense. Of course some law-breakers do disown the whole legal system that charges them. And thus the laws are not their laws: they are external to the law and strictly speaking at war with the community in the Hobbesian sense (there are many problems with the analysis of particular reasoning in war which we shall not here consider). But occasionally the accused's particular connexion to the statute can be raised. Consider this well-known case from Jennings:

> Parliamentary supremacy means, secondly, that Parliament can legislate for all persons and all places. If it enacts that smoking in the streets of Paris is an offence, then it *is* an offence. Naturally, it is an offence by English law and not by French law, and therefore it would be regarded as an offence only by those who paid attention to English law. The Paris police would not at once begin arresting all smokers, nor would French criminal courts begin inflicting punishments upon them. But if any Frenchman came into any place where attention was paid to English law, proceedings might be taken against him. If, for

> instance, a Frenchman who had smoked in the streets of Paris spent a few hours in Folkestone, he might be brought before a court of summary jurisdiction for having committed an offence against English law.[51]

Now, what will the Frenchman say, hauled up from Folkestone to the magistrates? Quite simply: "It is not my law. You may punish me if you like but it is not for an offence against law. I have broken no law. You don't even pretend that I should in Paris have looked to your law rather than my own." Were the trial to proceed it would not be the trial of the Frenchman; it would be an argument (you may call it a trial) between Englishmen as to what to do with this Frenchman, who necessarily is thought of not as an end in self, but as a means to (English) ends. The status of this (French) means to an end in such a proceeding is no greater than that of, say, an (English) dog the impounding of which Englishmen are arguing about in court (it is of course an abuse of words to talk of an impounding case as the trial of a dog). Now, this point must be insisted upon: if the Frenchman is treated as human rather than dog then he is an end in self, and if he is an end in self the fact that the laws are not his laws (*his* end) is critical. There is no authority to cross the particularity void. Only if the laws are his laws may they justly (respectfully) be applied to him.

It is highly possible that English courts would follow Jennings and apply the statute. This would not be to apply the laws to the Frenchman. It would be to apply them in respect of him (as with the dog) to others: we may take it that our statute authorising the arrest of the Frenchman at Folkestone and his imprisonment applies *to* the English officials involved). This would be to achieve peace (in relation to the Frenchman) by force rather than the guidance of action. It would not treat the Frenchman as an end in self. It would cross the particularity void in respect of him by force. It would be a simple act of war not law.

Jennings thought that his case was an illustration of the omnipotence of Parliament. And it may be, even if it is admitted that the statute cannot be applied to the Frenchman. There is nothing in this part of our argument which suggests any limit at all to what Parliament may enact for its citizens. Who are citizens is a question limiting the application of the statute (B, what it is reasonable to apply) not a limit on A, what it is reasonable to enact. Thus Raz's requirement that the reasons for legislation not be reconsidered is absolutely satisfied. But accepting that, its application is not the simple execution of it. Nor would it be if the statute contained a section stating that it

[51] *The Law and the Constitution*, 3rd edn (London, 1943) p. 149.

only applied to citizens (in our example adding a fourth universal to A B and C); for the question would still be: who can *that provision* be applied to? This last reflection shows that citizenship is always a matter for the courts not the legislature; and citizenship is always a matter of the determination of particular connexion (the connexion which enables one to say: this is my statute) not the application of a universal quality.

Jennings's case is a very good example of the difference between

A. Accept (apply) what is reasonable,

and

B. Accept (apply) what it is reasonable to accept (apply).

It might be highly unreasonable to ban smoking. Thus if the question before the courts were the intrinsically reasonful A the legislation would in the case even of a citizen be invalid (null in intrinsic reason, as we put it earlier). But the question is B, and for citizens it is reasonable (in a democracy) to accept the legislation notwithstanding its unreasonableness. So it is reasonable to apply the unreasonable ban on smoking. On the other hand the legislation might be highly reasonable, and if its reasonableness were the judicial test it would be applied to the Frenchman without further question. But the question is B not A. And it is unreasonable (unreasonable if the particularity void is respected) to apply this reasonable statute to one to whom it is foreign: the reasonableness of A B C gives no authority to cross the particularity void. In extreme cases the two questions, A and B, merge. Dicey's statute requiring the execution of blue-eyed babies may be said to be so wicked (so unreasonable) that it is foreign to any human enterprise, and therefore the statute of no-one. Likewise the case of Jews at Auschwitz. It is important to see here that the argument does not turn upon killing, or wholly upon even wickedness. Socrates before his execution was invited to escape. But he said no. He had no law but Athenian law (where else might he go at his age?). Thus the law that authorised his death was his law. It was reasonable, Socrates judged, to accept his lawful execution. Socrates himself authorised the law and the crossing of the particularity void to his own death.[52]

III The Fullness of Practical Reason

Wittgenstein's two god-heads were "the World and my independent I."[53] A god-head is a point of mystery, a point where there is a void

[52] Having one's law as a deep end in this way is a very complex thing. In *op. cit.*, note 7 I have argued (particularly in chapter 7) that law becomes the law of particular citizens not by original contract but by a much more complex particular consensual connexion.

[53] *Loc. cit.*, note 46.

of reason. The god-head, world, is simply the world's particularity. Reason led Davoût to the acceptance of the norm: execute all Russian spies. But the void of reason (the particularity void as we called it in part II) stood between this norm and the particular Pierre. Wittgenstein's second god-head is I, or the self: Davoût might also have said to himself, "it is reasonable to execute the enemies of France, but why should *I* do it?:"

> 'man disobeying
> Disloyal, breaks his fealty, and sins,
> Against the high supremacy of Heaven,
> Affecting godhead'
> *Paradise Lost*, Bk III

There is thus a second particularity void: one for the god-head I, as well as the god-head, world; one for subject as well as object.

It is this subject void which defines the modernist predicament; which activates, amongst other things, Critical Legal Studies. The crisis of modernism, the very idea of modernism is of a self without transcendent connexion:[54] Without God, I am god-head and tragic hero. For non-modernists (those who have God as their friend) the fullness of practical reason comes from its connexion to God. John Finnis's last chapter in *Natural Law and Natural Right*[55] is an argument towards that fullness. First the *idea* of God:

> the originators of natural law theorizing, who did not suppose that God has revealed himself by any such act of informative communication, believed none the less that through philosophical meditation one can gain access to the transcendent source of being, goodness, and knowledge. Nor is this belief of Plato and Aristotle irrelevant to their development of a teaching about practical reasonableness, ethics, or natural right, in opposition to the sceptics, relativists, and positivists of their day. For at the foundation of such teachings is their faith in the power and objectivity of reason, intelligence, *nous*. And there is much reason to believe that their confidence in human nous is itself founded upon their belief that the activity of human understanding, at its most intense, is a kind of sharing in the activity of the divine nous.[56]

If human practical reason leads to a certain conclusion about action then its participation in divine reason would seem authority enough to cross both particularity voids: on the simple precept that my reason is God's reason, I may do it (whatever it is). Of course I may get it wrong. But that is an ordinary human possibility: it is no category

[54] R. M. Unger, "*The Critical Legal Studies Movement*" (1983) 96 H.L.R. 563 at p. 561. See also *op. cit.* note 7, Postscript 3.
[55] Oxford, 1980.
[56] *Ibid.*, at pp. 392–393.

mistake. Yet still particularity holds out. Why I? Why this it? There is required here a category leap: the particularity void cannot be crossed by reason. In the end, according to this reasoning, it is only God as particular (as my particular friend), rather than God as the (ideal) conclusion of a philosophical meditation, who can make the whole fullness of practical reasoning. Finnis notices the deep uncertainty of Plato and Aristotle in their knowledge of God's nature and relation to the world;[57] and holds that only a revealed and particular (therefore loving) God can cover that void (that void which we can see as a particularity void).

> Without some revelation more revealing than any that Plato or Aristotle may have experienced, it is impossible to have sufficient assurance that the uncaused cause of all the good things of this world (including our ability to understand them) is itself a good that one could love; personal in a way that one might imitate, a guide that one should follow, or a guarantor of anyone's practical reasonableness.[58]

It is friendship with the particular God which overcomes the subject void: my rebellion to god-head is quelled. And it overcomes the object void too in a way that is not merely definitional. Finnis's broad definition of practicality (we earlier saw) is one which ignores the object void. I set out more fully a passage I quoted briefly earlier:

> But as the argument unfolds, we can see that it *works*, *i.e.* induces understanding and knowledge of what is a full and proper human existence, precisely by getting you to "imagine yourself in a situation where you would be . . .", and asking "Would you settle for this?"
>
> True, the argument gets you to acknowledge something which can indeed be expressed in a proposition about human nature. But it does this by getting you to consider a question which, though hypothetical, is none the less practical. (For the argument would work *in just the same way* if the question were not hypothetical but required of you a choice here and now between the alternative lives (forms of life); thus its being hypothetical does not remove its radically practical character.)[59]

A "full and proper human existence" conceived in friendship with a particular God is particularity enough. The wonderfully incisive definition of practicality that Finnis offers (the proposition "I think X" is practical if the "I think" is not transparent to X)[60] focuses practical thought in the subject, which is not god-head when it is the friend of the particular God. The object void is then not noticed. I,

[57] *Ibid.*, at p. 397.
[58] *Ibid.*, p. 398.
[59] *Supra*, note 41.
[60] *Ibid.*, at p. 3.

the friend of the particular God, see no object void. God is particularity enough.

For modernists the two particularity voids remain, and the main problem in the philosophy of (modernist) practical reason is to give an account of their crossing which can stand in their reasoning as Finnis's account of the particular God does in his. Only then comes the fullness of practical reason.

. . .

The common law is the ordinary law in two main senses. The term came into our law from canon law:

> The term *common law (ius commune, lex communis, commun dreit, commune lei)* is not as yet a term frequent in the mouths of our temporal lawyers. On the other hand, *ius commune* is a phrase well known to the canonists. They use it to distinguish the general and ordinary law of the universal church both from any rules peculiar to this or that provincial church, and from those papal *privilegia* which are always giving rise to ecclesiastical litigation.[61]

These two senses of ordinary, not a local peculiarity and not a privilege, passed into the secular law of England to give it its name:

> From the ecclesiastical it would easily pass into the secular courts. A bishop of Salisbury in 1252 tells the pope how, acting as a papal delegate, he has decided that the common law makes in favour of the rector of one church and against the vicar of another. The common law of which he speaks is the common law of the catholic church; but this bishop is no other than William of York, who owes his see to the good service that he has done as a royal justice. In connexion with English temporal affairs we may indeed find the term *ius commune* in the Dialogue on the Exchequer; the forest laws which are the outcome of the king's mere will and pleasure are contrasted with the common law of the realm. A century later, in Edward I's day, we frequently find it, though *lex communis (commune lei)* has by this time become the more usual phrase. The common law can then be contrasted with statute law; still more often it is contrasted with royal prerogative; it can also be contrasted with local custom: in short it may be contrasted with whatever is particular, extraordinary, special, with "speciality" *(aliquid speciale, especialte).*[62]

The king's mere will: something not intrinsically reasonful in the sense used in part I of this essay, that is, something which as *mere* will has no intrinsically reasonful relation to prior law or right. Modern statutes, we have seen, are mere will, too, in this way. They

[61] Pollock and Maitland, *The History of English Law*, 2nd ed (Cambridge, 1898) p. 176.
[62] *Ibid.*, p. 177.

are not intrinsically reasonful and (which is the same thing) they are not common. Of course, the law of the *recognition* of statutes (or of the King's will) is common law: "apply what it is reasonable to apply" is common law (or to be more precise the elaboration of what it is reasonable to apply is common law). This is B, distinguished from A "apply what is reasonable" in which (latter) reasonableness qualifies the thing applied (legislation) not the act of application (common law). Legislation was the fourth of our law-determining processes. The other three processes (adjudication, advice and interpretation) have creative elements as well; so some care is needed in identifying the sense in which they are common. A special response to a legal problem, an advice or a clarification, is not *itself* common, but the reason of the common law being intrinsic to these processes (in the way stated in part I) they are quickly submerged in the commonality ("The assizes of Henry II had worked themselves into the mass of unenacted law, and their text seems already to be forgotten:" Pollock & Maitland).[63] Adjudications, too, are made and therefore special. No one has ever pretended that adjudications were simply found (as though judges consulting their books were consulting a speaking oracle); but the common law, that which governed the adjudication, was found not made. It had to be: if it were made it would be special not common. It would be the law of judges not the law of commons (a term we might now translate as people). The common law is quite clear here. It is the modern jurisprudence with its ideas of prospective overruling and judicial law-making which are confused.[64] To say in this way that law is found not made is no licence for conservatism in the common law. Quite the opposite, really. Judges tend to be conservative in temperament. If they make the law they will therefore tend to make it conservatively. If, on the other hand, they find the law in the people, and the people change, the law changes.[65]

. . .

A common law judge finds the law in the people. Our judge faced, like Davoût, with the object particularity void found in the consent of the object citizen an authority to cross that void. But why judge-subject and citizen-object? It is as though we are thinking of law as something that exists for judges as subjects (the extreme of the judge-centredness in jurisprudence that Raz rejected). Law (and judges) exist for citizens, not vice-versa. Thus the citizen-object void is more truly the citizen-subject void. And the fullness of law as practical

[63] *Ibid.*, p. 176.
[64] *Op. cit.*, note 3 at pp. 201–204.
[65] A way in which this might translate into a programme of judicial reform in administrative law I have offered in *op. cit.* note 7.

reason is achieved when the law that judges apply is law that has crossed the citizen subject void; when law is in a true sense the citizen's law; when law is common law.

What is it, then, for law to be citizen's law? One answer is to state the conditions under which law is taken into citizens' ends.[66] Another is to ask whether there is law other than as citizen's law? Hart distinguished internal attitudes to law from external,[67] and this provided the central element in his concept of law; but there was a curious ambivalence here. What was internal to what? Was citizen internal to rule; or rule internal to citizen? Most of what Hart says suggests the former. For example:

> It is important to distinguish the external statement of fact asserting that members of society accept a given rule from the internal statements of the rule made by one who himself accepts it.[68]

It is as though the rule is constituted by those internal to it. But for our present purposes the more interesting idea of internality is not that when citizen is internal to law, but that when the rule or the law is something that the citizen has taken as his own end, as Socrates did the law of Athens. Then the law is internal to the citizen. It is this second idea of internality which is needed to complete our account of the practicality of law.

Let us compare a citizen who has law internal to him with one who treats law externally. Suppose a judge applies law to an external person (let us say he committed a criminal offence the penalty for which was gaol). The first thing to notice is that since the criminal is external he cannot be punished. But as I don't want here to get into the intricacies of the theory of punishment, I had better say the second thing. The judge is given no authority to cross the object particularity void. The law is not the external person's end (it has not crossed his subject void); so if he is to be treated as a particular end in self the law cannot be applied to him. To treat him as end in self is to treat him as subject. Treating him as subject, this law to be applied to him is no common law because it is not his law. The judge's practical reason is incomplete. If he thinks about it he is brought to a halt as Davoût was. He might cross the particularity void by force (or habit, or uncaring brutishness) but not by law. In one sense by law. The judge may think himself bound by law (as Davoût was by French law before he saw Pierre as particular). But that is a special law, a law for the judge. It is not common law. On

[66] *Op. cit.* note 7, which is concerned to state those conditions. See particularly chapter 7.
[67] *Op. cit.* note 42.
[68] *Ibid.* at p. 244.

the other hand, for the judge to apply law to an internal citizen (one for whom the law is an end) the matter is quite different. There is then (as we suggested in part II) authority to cross the particularity void. As we have seen, the fact that a citizen has broken the law does not mean law is not his end (internal to him). Some criminals do abandon the law and their community entirely (or they have never had it in them). Others do not, recognising that the law and their community is deeply theirs, and therefore something wronged by their crime (the sense here is of their having wronged themselves by breaking *their* law). Only these may be punished, because only those who have wronged themselves may be punished (though hardly by the bestial institutions which we run today in the name of punishment).

The difference between internal and external citizens in practical theorising about law has been noticed by John Finnis, who asks of Hart's conception of the internal attitude:

> But is there any reason not to apply to the philosophical concept of the "internal viewpoint" those philosophical techniques applied by Hart in his philosophical analysis of "law"—viz the identification of a central or standard instance among other recognizable but secondary instances?[69]

And answers:

> we are led to adopt the position Hart was concerned to reject when he advanced his list of possible sufficient motivations for allegiance to law: the position that law can only be fully understood as it is understood by those who accept it in the way that gives it its most specific mode of operation as a type of reason for acting, viz those who accept it as a specific type of moral reason for acting. Once one abandons, with Hart, the bad man's concerns as the criterion of relevance in legal philosophy, there proves to be little reason for stopping short of accepting the morally concerned man's concerns as that criterion . . . Analytical jurisprudence rejoins the programme of philosophizing about human affairs, the programme whose conditions have been identified by Aristotle: We hold that in all such cases the thing really is what it appears to be to the mature man [the *spoudaios*].[70]

The internal citizen's concerns are the criterion of relevance in legal philosophy, but we must be careful here to see that "internal" does not mean the simple opposite of bad (it is the bad man's concerns that are rejected). To the extent that we respect humans as ends in selves the question is not one of their having or not having a good in the sense of ideally true human attitude: it is true particular choice

[69] "Revolutions and Continuity of Law" in *Oxford Essays in Jurisprudence (2nd series)* ed. Simpson (Oxford 1973) p. 74.
[70] *Ibid.*, at 74–75.

not ideal truth which is fundamental in that sort of respect. Of any particular human the question of his internal attitude to law is: is the law in fact deeply his (an end chosen by someone who is true to himself, rather than a fickle day-to-day convenience)? *Spoudaios*, Aristotle's word, has an ambivalence here, which it is essential to clarify. The normal translation of the passage in Aristotle[71] is that things are what they seem to the *good* man.[72] This thoroughly subverts Aristotle's purpose; and is anyway highly implausible, for a couple of lines further on Aristotle resumes with the more conventional words for good, *arete* and *agathos*. He is able to resume with these words because he has avoided (at least sought to avoid) the obviously question-begging form—good is what appears so to the good man—by saying good is what appears to the *spoudaios*. Good is one meaning of *spoudaios*, but its basic meaning is serious, as contrasted with childish or fickle; hence Finnis's "mature". What Aristotle is seeking to do with this word is apparent from his argument a few lines earlier: "the same things do not seem sweet to a man in the grip of fever." Thus sweet is what appears so to the healthy man, rather than the question-begging, sweet is what appears so to the sweet-perceiver. And maturity, seriousness of purpose, provides independent criteria for the perception of good just as general health does for the perception of sweetness. But only in practical, particular, perception. If the mature man was an ideal of goodness, the circularity that Aristotle sought to avoid would reassert itself, though it would be obscured. Suppose good is A. How do we know? Because the mature man tells us so. Who is the (ideal) mature man? The one mature enough to perceive A! And the same for B, C, etc. But the mature man is not an ideal. Aristotle's argument is not of the form: truth is what appears to the truth-perceiver. In the matter of law the mature man is every particular citizen who takes law as a deep and particular end of his. Such a person is mature (serious) by virtue of his taking some long-term thing as an end. He is mature in law by virtue of his taking law as a long-term end. Law for such a person is common law in the fullest sense. The immature (childish) person takes no long-term thing as an end. The immature (childish) person in law takes no law as a long-term end. There is no question here of our saying that a mature person *ought* to take law as an end (imposing an ideal on him). A long-term end of one sort of mature person might be the accumulation of pleasure. He might treat law as a day-to-day means to that end (use it when it aids the accumulation; avoid it when it doesn't). He would be external in law, but mature in another way

[71] *Nic. Eth.* 1176a 17.
[72] JAK Thomson, Penguin, p. 298; John Warrington, Everyman, p. 224.

(immature in law, but mature in hedonism). And the long-term end of another might be revolution. The point is to say that the fullness of practical reason *in law*, and its central case, is achieved only in so far as a legal system has (and recognises that it has) serious citizens (those mature in the matter of law; those who have law as common law). And that a legal system disposed to take the judicial maxim as:

A. Apply to citizens what is reasonable,

rather than one disposed so to respect the particularity void that it regards its citizens as subjects within the judicial maxim:

B. Apply to citizens what it is reasonable to apply to them as ends in self,

is a legal system of crippled practicality; of peripheral theoretical concern; and not one of common law.