

# ALL LAW IS PLURAL. LEGAL PLURALISM AND THE DISTINCTIVENESS OF LAW<sup>1</sup>

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## Introduction

The present article pursues two basic aims. Firstly, I shall canvass the idea that there is no normative difference between state law and other kinds of law, such as customary law or religious law, and that eventually there is not a clear dividing line between the various normative fields of social reality (from interactions of everyday life to legal activities). More precisely, I shall explain why some scholars (and above all some of those who belong to what today is known as ‘legal pluralism’) deem the traditional distinction between legal rules and other social rules either as an abstractive construal of monist state-centred theories, or else as a factual consequence of contingent socio-political arrangements. Such scholars forcefully argue that, at present, an increasing plurality of normative orders makes the distinction between the legal and the extra-legal outdated and urge legal theorists to dispose once and for all of the fictitious idea that law is something special. In reality, they conclude, the legal and the broader social are so intertwined that no distinctive line among good manners, religious precepts, and positive legal rules can be drawn. Subsequently, I shall argue that, while such a ‘panlegalistic’ approach represents a first decisive step towards a sound and open-minded understanding of legal phenomena, it is still possible to detect the traits that make law a special normative ordering. Indeed, in order to find a remedy to

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<sup>1</sup> I am extremely grateful to Gordon Woodman for his meticulous and thoughtful reading of my article. His comments and suggestions have remarkably improved the original version of this writing.

the panlegalistic quagmire mentioned above, I shall contend that the distinguishing marks of law do not relate to its formal structure (in terms of rules and bodies of persons working therein), but to the role legal orderings perform in social reality.

To put it otherwise, this article has two sides that, I believe, belong to the same coin: in order to show that law is truly something special, we first need to follow the panlegalist (deconstructive) hypothesis that what separates legal from non-legal orderings does not concern their internal normative structure. Therefore, even though I believe that, as I shall argue in the last part of this article, the idea of a basic distinction between legal and non-legal practices can be successfully advocated, I shall previously show that those who support a panlegalistic approach convincingly prove that the investigation into the nature of law requires a novel theoretical approach and more adequate tools of analysis than those provided by monistic and state-centred paradigms. In arguing this, I shall demonstrate that this type of analysis finds support not only among legal pluralists. Indeed, I shall cast some light on the panlegalistic view by integrating the analysis of the nature of customary law offered by Gordon R. Woodman, a renowned legal pluralist, with a Wittgensteinian reading of the ‘practice theory’ of rules by Herbert L.A. Hart, one of the most respected exponents of legal positivism. Based on this analysis I shall highlight an impasse which the panlegalist hypothesis incurs: it is unable to clarify what it is that allows us to regard some orderings as legal and some others as simply social. At the end of this article I shall try to unravel this puzzle. If it is true that the investigation of the normative structure of law leads to the conclusion that there is no significant difference between law (whether it is state or non-state) and many social orderings of everyday life, I shall argue that the hallmark of law can be found elsewhere and that therefore the panlegalist hypothesis must be tempered. While doing this, I shall divert my attention from the formal structure of law to other relevant aspects of the legal practice and its typical way of functioning.

## Preliminary considerations

### *1. The nature of Law*

In an article devoted to analysing the risks and potentials inherent in the recognition of customary laws by state governments and their legal systems, Gordon R. Woodman provides some subtle conceptual indications that may slip the attention of a superficial reader. Though the title of the essay refers only to customary laws and rights, with a subtle argument the author comes to argue that

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every law is customary: “[A]ll law, including state law, is in the last resort customary law” (Woodman 2009a: 98). This conclusion will be reinforced by the results of my philosophical analysis; hence, I shall now assume it as unproblematic, and thus look at Woodman’s considerations on customary law as referring to law in general.

Firstly, the author puts at the heart of law the controversial concept of ‘acceptance’, defined as a “relatively widespread observance of the norms of customary law in a particular group of humans” (Woodman 2009a: 92). Furthermore, here ‘acceptance’ figures as synonymous with ‘observance’. This assumption has serious consequences for a vexed notion in the field of legal studies, namely the validity of legal norms. As I have suggested elsewhere (Croce 2009: 131-132; Croce 2012: Chap. 2), we may single out three basic kinds of legal validity, that some authors consider to be hierarchically ordered while some others consider them to be incompatible. These are: *practical validity*, i.e. the validity of a legal rule depends on adherence to some pre-legal natural or moral standard, such as natural human equality or some principle of justice (as many believers in natural law argue); *legal validity*, i.e. the validity of a legal rule depends on its belonging to a broader legal system (as many positivists argue); *effectual validity*, i.e. a legal rule is not valid unless it is felt as compulsory and then actually practised by those who actually practice the rule and in particular by officials (as many realists argue). It may seem that the ‘acceptance as observance’ perspective supports the third kind of validity, in that it maintains that a rule is valid insofar as it is effective. An important part of my analysis will be dedicated to showing that such an interpretation not only misinterprets Woodman’s perspective, but would weaken it.

Secondly, in addressing the nature of law, Woodman mentions some well-known theoretical endeavours to capture the distinctive feature of legal rules and stresses that they all are to some extent reductive or misleading. Recalling the distinction advanced by Herbert L.A. Hart between ‘primary’ and ‘secondary’ rules, Woodman criticises those legal scholars who claim the law to be an ensemble of prescriptive norms. He shows that the law is composed of a full range of rules which have legal effects without all being commands or imperatives. As for instance Neil MacCormick (1998) puts it, such rules are *institutive* (that bring something into existence), *consequential* (that indicate what consequences the existence of that thing produces in the broader social context), and *terminative* (that determine when such a thing comes to an end). Not only, Woodman underscores, does the form of rules vary, but also the form of their observance does. In fact, most of these rules do not guide conduct by means of threats – as

command-based positivist theories assert –, but require for the achievement of certain results specific types of behaviour (such as those needed for creating a company) or the performance of ritual acts (such as those needed for a marriage), often motivated by the requirements of the addressees themselves.

Thirdly, Woodman underscores a basic feature of legal rules, which has been largely discussed in the famed Hart-Dworkin debate. In arguing that the “major types of customary laws may be classified in terms of the types of populations by which they are observed” (Woodman 2009a: 94), he categorises religious law as a kind of customary law. But at the same time he invites us to bear in mind the basic distinction (“as far as it is possible to do so in practice”) between religious injunctions that believers follow on the basis of their personal convictions and rules that they follow with regard to whether others follow them. As a consequence – and this is an important aspect of law – a legal rule serves as a *standard* for conduct within a population.

In sum, the conceptual background of Woodman’s article is the following: the law is an ensemble of rules

- (a) that are accepted and observed by the majority of a population;
- (b) that have different forms requiring different types of observance;
- (c) that are valid inasmuch as the members of a population consider them to be public standards.

Woodman’s arguments are particularly instrumental in demystifying the monist state ideology that claimed that only state law was truly law while the other laws could only be defined as law-like. The author demonstrates that, inasmuch as every law is customary, the relation between state law and customary law is not to be seen as a relation between laws of different degree, value, or nature.

## *2. The risk of objectifying and its opposite*

In a recent essay Woodman challenges the idea that law can be mapped (Bavinck and Woodman 2009). His negative conclusion is shared by many scholars in the ambit of legal pluralism, post-colonial studies and governmentality studies. Taken as the “anti-sovereign practice” *par excellence*, another scholar suggests that the “practice of travel” is able to unmask the “cartographic reason” of colonialism, which for a long time has enabled colonisers to impose their legal and political mentalities just by drawing a few lines on a piece of paper (Spanò 2009). The practice of travel discloses the imaginary and artificial nature of any material and

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symbolic border, which more often than not was a product of colonial exportation and served as an invasive means of violence and exclusion. This is why today – such theoreticians point out – western scholars are called upon to dispose of their instinctive inclination to map, so as to prevent themselves from exercising an objectifying symbolic violence that could be seen as an unintentional heir to the violence (both material and symbolic) of western colonisers.

These argumentations evoke the misgiving of Pierre Bourdieu over the fascination for logical models that according to many scholars (especially structuralists) allow the ethnologist to explain observed reality as no participant could. In *The Logic of Practice*, the French sociologist criticises the tendency to objectify shared by many philosophical and sociological schools. He expresses serious doubts about theories that look at social practices as if they were the application of some supra-subjective structures or schemes, of which the observed agents are supposedly unaware and which only an observer may come to outline. Bourdieu claims that when the observer superimposes a “logic” on the observed practices – that is, a “generative formula” as a set of independent and coherent axioms which the observer constructs in order to explain practices – she turns out to objectify and thus misread the practices, to such an extent that her observation is likely to reveal more about her (projective) relation to what she observes than about the nature of the latter. An objectifying approach to practices – which looks at their logical relations always in light of the model imagined by the observer – can hardly explain their true nature. To portray such a myopic tendency, Bourdieu uses the metaphor of the map:

The logical relations he [the observer] constructs are to ‘practical’ relations – practical because continuously practised, kept up and cultivated – as the geometrical space of a map, a representation of all possible routes for all possible subjects, is to the network of pathways that are really maintained and used, ‘beaten tracks’ that are really practicable for a particular agent (Bourdieu 1990: 35).

Such “beaten tracks” are precisely what Woodman seems to have in mind when he focuses on the nature of norms and the possibility of mapping law: “[N]orms are considered to ‘exist’ only if they are socially observed, not merely if they are, according to doctrinal reasoning from an initial presupposition, ‘valid’” (Bavinck and Woodman 2009: 199). However, a (justified) resistance to objectification should not induce us to take the opposite (wrong) direction, namely, to act on the assumption that there is nothing a scholar can take into account but factual

behaviour. On this view, rules are just what people regard as rules and an observer may know about them just by looking at the concrete behaviours of rule-bearers. That is to say, rules are valid only when effective. By identifying the whole spectrum of validity with mere effectiveness one ends by reducing all kinds of rules to sheer facts and thus depriving them of their normative value. What such a conclusion leaves unexplained is why rules (whether legal or generally social) claim to govern the conduct of individuals and how they succeed in doing it. In fact, by interpreting validity in terms of effectiveness, rules are depicted as mere regularities of behaviour, which set standards by virtue of their being reiterated by the majority of a population and eventually turn out to be nothing but an articulation of a broader *ethos*. I shall take up this issue in more detail below.

But, as I understand him, Woodman does not take a stand for effectual validity. Customary law is not a simple reiterated custom. It is a normative device that governs and structures the interactions of rule-bearers and provides an orderly frame for their social life. Woodman seems to confirm my interpretation when, for instance, he says that the student of customary law should not attach “importance to the longevity of a social practice” (Woodman 2009a: 94-95). As Woodman describes it, customary law is a reflectively mediated instrument that human beings adopt so as to organise their social interactions and their common relation to the surrounding environment. An instrument which varies over time and is affected continuously by the continuous transformations of social reality: “A great deal of information attests to the increasing rate of change in customary laws as they adapt to modernisation in the societies in which they are observed” (Woodman 2009a: 95). But the soundest theoretical evidence for my interpretation is the distinction, underlined above, between rules followed by way of personal convictions (such as, for instance, “you must run thirty minutes a day in order to lose weight”) and rules followed because of their public interactional value (such as, for instance, “you must stop when the traffic signal is red”). To corroborate my interpretation, I shall dwell on points (a) and (c) mentioned in the first section of the present article. I shall first concentrate on point (c), trying to elaborate on what Woodman may mean when he speaks of rules followed with “regard to whether others follow them,” and then I shall turn to the point (a), analysing the notion of ‘acceptance as observance’.

### Back To Basics: Actions, Rules, Understanding

Legal rules cannot be said to guide conduct if they are followed without regard to whether others follow them. This assumption, that Woodman stresses *en passant*,

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is at the heart of the so-called “practice theory” of rules advanced by Hart in *The Concept of Law* (Hart 1994, first published 1961). The English scholar challenges many reductionist perspectives (such as positivism and realism) that claim to locate the core essence of rules in their being commands of a sovereign (J. Austin), or indications for officials (H. Kelsen), or means for predicting the future behaviour of officials (K. Llewellyn), or obligations psychologically interiorised by officials (A. Ross). In the *pars destruens* of his book, Hart shows why all such perspectives fail to account for the salient aspects of law, and in particular for the way law functions in social life. Hart is dissatisfied with these understandings of rules and law as they are more or less counter-intuitive. Not only do these accounts fall short of being convincing as to the way law really works in social life, but, according to Hart, they obscure how *ordinary people use rules*. I believe that the clarification of this Hartian point may help us understand both what Woodman means when he connects the law to observance within a population and why every type of normative order can be said to be inherently plural.

One of the renowned merits of Hart’s practice theory is to show that it is not possible to give an adequate account of law from an “external point of view.” An external observer – who merely focuses on the behaviour of observed individuals – would not be able to understand the way ordinary people use legal rules in social life and thus the relation between their conduct and the law. What is more, the programmatic twofold approach adopted by Hart<sup>2</sup> suggests that legal analysis alone can hardly explain any sort of normativity. Jurisprudence is not, *pace* Kelsen, an autonomous science, precisely because law is nothing but an articulation of social reality and legal rules are nothing but a special kind of social rules. Hence, the proper field in which we should carry out a dependable analysis on how legal rules work in social life is not the ambit of jurisprudence, but the general context of social interactions, so that “we must, for the moment, turn aside from the special case of legal rules” (Hart 1994: 55) and focus on the broader case of social rules.<sup>3</sup>

Whoever claims that an observer can account for rules by monitoring sheer behaviours turns out (whether consciously or not) to uphold the paradoxical

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<sup>2</sup> In the preface to *The Concept of Law* Hart declares that his book can be regarded both as a work “designed for the student of jurisprudence” and “as an essay in descriptive sociology” (Hart 1994: vi).

<sup>3</sup> As Woodman shows in a recent review of a book on the nature of customary law, this is a process that must still be accomplished, as the attention of ‘pure theorists’ to empirical situations is scarce (Woodman 2009a).

conclusion that “the traffic signal in a busy street” is nothing but a “natural *sign that* people behave in certain ways, as clouds are a *sign that* rain will come” (Hart 1994: 90). Hart points out the difference between a *sign* which permits us to predict that something is likely to happen and a normative *signal* that an interactional practice establishes in a relevant context. This difference is rooted in the fact that, while certain phenomena happen independently of how people interpret them, a normative signal is intrinsically dependent upon the *meaning* that users give it. (Notice that this is not the same as the questionable distinction between ‘brute’ and ‘institutional’ facts, although this topic would merit further discussion). For instance, an external observer may not understand whether by shaking hands two persons are only greeting or are concluding an agreement; nor may the observer understand whether a person is nodding so as to indicate her assent or whether she is simply stretching her neck. The observer needs to *understand* (see Winch 1990; von Wright 1971) the shared meaning the agents give their actions. Rules are just like the actions in these examples: an observer must grasp their given meaning *in action*. But to convey the meaning of rules let me provide the further example (also used by Hart, Ross, Wittgenstein, and many others) of chess. An observer who intends to capture the rules of chess by recording the regularities in the behaviour of players may get into serious difficulty when she observes, say, every time the players move a piece they do so with their left hand, and every time they move the knight they do so in the typical ‘L’ move. By recording regularities the observer will hardly understand whether both of these actions are required by the rules or not. She will be helped by the fact that when a player happens to move a piece with her right hand her opponent gives no reaction, contrary to what happens when the player moves the knight as if it were a pawn.

By capitalising on reflections like these, Hart highlights the distinction between habits and rules. It may well happen that social agents feel habits to be essential, compulsory, or even oppressive, but, from a theoretical perspective, habits lack certain specific characteristics that rules have. Hart singles these out as follows:

1. As to habits, it is sufficient that behaviours converge, and “deviation from the regular course need not be a matter for any form of criticism.” As to rules, on the contrary, “deviations are generally regarded as lapses or faults open to criticism” (Hart 1994: 55). In a word, rules are a basis for mutual *criticisms* between agents.
2. As to habits, no agent would feel it legitimate to criticise

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someone who deviates from them.<sup>4</sup> As to rules, on the contrary, criticisms of deviations are regarded as legitimate or justified. In a word, rules are widespread standards whose infringement is considered as *a justified reason* for criticism.

3. As to habits, people behave in such a way that their behaviours converge unreflectively, i.e. without regard to whether each behaves as the others do: “[N]o members of the group need in any way think of the general behaviour, or even know that the behaviour in question is general.” As to rules, on the contrary, it is vital that the agents follow them by considering whether the others do the same: “[I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole” (Hart 1994: 56). In a word, rules must have an “*internal aspect*” in the light of which people act reflectively, i.e. with regard to whether the rule really plays its role of a general standard.

Unfortunately, in the first edition of *The Concept of Law* Hart provides no solid justification for his analysis of social norms. On the one hand, his analysis simply amounts to quasi-sociological observations of certain crucial aspects of social reality that, on the contrary, require a robust philosophical investigation. On the other hand, Hart exempts himself from such a philosophical investigation by referring here and there to some authoritative thinkers such as J.L. Austin, L. Wittgenstein, and P. Winch. But this argumentative strategy turned out to be inadequate to counter copious criticisms. One of the sharpest is expressed by Joseph Raz in *Practical Reason and Norms* (1990). Here the author questions the idea that habits may be distinguished from rules by virtue of the fact that it is only the infringement of a rule that provokes criticism. One of the three “fatal defects” that Raz believes he has detected in the practice theory (Raz 1990: 53-58) is

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<sup>4</sup> It may seem that a glaring contradiction arises between what I have just said and what I wrote some lines above, or rather, that “[i]t may well happen that social agents feel habits to be essential, compulsory, or even oppressive”. In effect, as I shall say shortly, this contradiction seems to be also present in Hart’s analysis, as some critics have pointed out. However I shall later say that, at the end of the day, Hart’s second point is tenable and that there is an important difference between deviating from a habit and deviating from a rule and that it mainly relates to the reason for criticisms and their justification.

related to the fact that habits can well be regarded as bases for justified criticisms, and therefore this cannot be considered to be a distinguishing feature of rules. Raz claims that there can be a community “in which almost everybody believes that babies should be breast-fed or that children should be encouraged to learn to read when they are three years of age. This is generally done and people tend to reproach mothers who do not breast-feed or parents who do not teach their three-year-old children to read. Yet people in the community do not regard these as rules. They merely think that they are good things to do” (Raz 1990: 55). Under the pressure of this and other criticisms, this aspect of the practice theory has progressively changed over time. Eventually, many of Hart’s epigones and to a degree Hart himself resorted to adopting a conventionalist approach, then interpreting the original version of the practice theory as a brilliant though approximate defence of legal conventionalism. In this way, Hart eventually dismisses the ‘spiritual assistance’ of the philosophers mentioned above for vindicating a tradition that among its leading figures lists David Lewis and Michael Bratman.

In my view, however, this solution brings out even more intensely the coherent *pluralist* outcome of Hart’s practices theory. In his famous ‘Postscript’ (Hart 1994: 238-279), in which Hart tackles some of the various criticisms made by Ronald Dworkin, he declares that his initial programme was more ambitious than it later became, since when he wrote the first edition of *The Concept of Law* he believed that his analysis of social rules was a good interpretation of normativity in general, from morality to law. In the ‘Postscript’ Hart downgrades his powerful analysis of social normativity to a mere investigation of the convention lying behind the activities of legal officials: “I do not now regard it [the practice theory] as a sound explanation of morality, either individual or social” (Hart 1994: 256). Now Hart simply aims to show that the practice of law is based on the rule of recognition<sup>5</sup> as a *social* rule that sets a standard for officials and that must be accepted as a standard only by them. It is evident that this later perspective reinforces the conclusion at which Woodman hints when writing that “state laws are in reality further instances of customary laws, the populations which observe them being the officials and others who operate the various institutions of the state” (Woodman 2009a: 97). I believe that this conclusion can be even reinforced by an analysis of the original programme of the practice theory of rules. So, I first need to devote my attention to Hart’s original portrayal of social normativity.

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<sup>5</sup> That is to say, a standard specifying the features whose possession must be taken as a conclusive indication that it is a rule of the legal order. See Hart 1994: 114-117.

## Social Practices as the Source of Normativity: the Criterion-Rules

As I stressed above, the assumptions that practices are the cradle of social rules and that they provide the foundation for every kind of normativity, whether moral or legal, are to be proven by means of solid philosophical arguments. In particular, we need to show how social practices produce binding criteria<sup>6</sup> that are inherently public and why therefore the adoption of their rules must be conditional on whether others adopt them. I shall now describe the way social practices yield such criteria and argue that they are indispensable if agents are to share common meanings and hence engage in functioning interactions.

We may describe social practices as *interactional contexts in which the conduct of the agents is governed by rules (or criterion-rules)*. There are three kinds of rule-governance: *intuitive*, *epistemic*, and *motivational*. The conduct of an agent is governed *intuitively* when she performs what the rule prescribes without them being aware of that and without them taking into account the advantages or disadvantages associated to rules (for instance, more often than not, one refrains from killing not because there is a rule forbidding murder, or one pays the bill not because there is an obligation not to breach contracts). The conduct is governed *epistemically* when the agent adopts the conduct *indicated* by the rule: the rule successfully governs the conduct of an agent, who complies with what the rule prescribes but is moved to action by other motives than the bare existence of the rule in question (for instance, one may act in accordance with the rule in order to achieve an aim that the rule makes achievable, or in order to do what they believe to be a good action). The conduct is governed *motivationally* when the agent is *motivated* by the fact that there is a rule claiming to govern their conduct: they follow the rule *because it is a rule*, i.e. because it is a standard that claims to guide conduct

As I said, rules are generally followed intuitively. But they are criteria that the agents are supposed to be capable – at least in principle – of bringing into a reflective, stable form. To put it differently, individuals must be capable of verbalising the criteria that provide a taken-for-granted basis for their interactions. I think it is crucial to prove this philosophically so as to show once and for all that every rule, *pace* Dworkin, is rooted in a social practice and thus that they are

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<sup>6</sup> As I shall demonstrate later, the Hartian ‘standards’ owe much to the Wittgensteinian ‘criteria’. This is why, for the reasons set out by Stanley Cavell (1979, chaps. I, II), I shall use the term ‘criteria’.

really rules only if followed with regard to whether others follow them.<sup>7</sup>

A rule may be defined as a model of conduct meant to ensure the occurrence of the same behaviour on every occurrence of the relevant circumstances. To demonstrate that such a rule cannot be in any way a private affair, we have to show that – although a model may be produced by a subject in isolation – “the being a model” character of the model cannot stem from the activity of the very same subject who takes the model as binding.<sup>8</sup> I think that on this issue Wittgenstein provides some conclusive arguments. In many passages of *Philosophical Investigations*, he portrays rules as reiterated models of action from which ensues a *paradigmatic application*. Such a paradigmatic application institutes the criteria of correctness and incorrectness (of the action reiterated on the basis of the criteria) while the reiteration of the action (in the light of the paradigmatic application) confers on such criteria a general and public stability. The public dimension of the criteria secures their identity and constancy both in the different circumstances of private experience of single individuals and in the different experiences of the various individuals: the criteria, which embody their own paradigmatic application, represent for each and every subject stable guidelines for performing their own actions and understanding those of the others. On this reading, the paradigmatic application becomes the criterion of correctness for future applications. Any practice (that I may now describe as the *reiteration of an action under the guidance of the paradigmatic application*) establishes its own

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<sup>7</sup> Famously, in order to controvert the idea that obligations come from social practices, Ronald Dworkin brings attention to the case of a vegetarian who says “that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any circumstance. Obviously no social rule exists to that effect” (Dworkin 1978: 52). As I shall show below, Dworkin misunderstands the essence of rules (or better, what I name “*the being rule*” of a rule), since the vegetarian, for example, needs a stable criterion to secure that in all circumstances in which she finds herself eating something, what she eats is not meat, and then may be corrected by others (whether vegetarians or non-vegetarians) when she erroneously bites into a pie containing meat. This aspect of rules will appear clearer after the introduction of the Wittgensteinian distinction between a necessarily and a contingently private language.

<sup>8</sup> In this regard I disagree with Jules L. Coleman who, in analysing the case of personal rules, maintains that the Hartian ‘internal point of view’ is the human *psychological* ability to transform a proposition into a rule (see Coleman 2001: 88).

paradigm of correctness and renders it into a normative criterion for assessing the actions that are performed in the light of the paradigm. In other words, the practice defines its own criteria for recognising the relevant circumstances (i.e. when the rule needs to be applied) and indicates the correct pathways for applying the rule. In such a framework, the *private* application of a rule is simply inconceivable. Let me explore this issue more in depth.

Wittgenstein argues that it is only if the rule is followed publicly – so that the criterion defined within the practice may be used by a *plurality* of agents – that we may assess whether a subject is following a rule *correctly*. To put it differently, the criterion we adopt for assessing the possible application of a rule is the *intersubjective interaction*, one of the primary and evident manifestations being the reaction of others to the infringement of the rule. Without this kind of intersubjectivity there would be no criterion of assessment: not only would the subject be unable to establish, in the restricted sphere of her individual experience, whether she is following the rule correctly (in fact, I shall indicate below, she may only *think* she is following it correctly), but in addition there would not be any rule at all. That is, there would not be any need for a stable and public criterion for assessing whether an application is correct or not, and conversely there would not be any application which might be taken as paradigmatic. This is evidence that the possibility of assessing the correctness of a single application represents the *condition of existence* of rules – that is, practices are conditions of existence of rules.

To prove this proposition, Wittgenstein needs to rule out the conceptual possibility of a private language, or rather, of a set of rules that a subject in isolation could follow by self-obligation. In doing so, he shows that the *publicity* of a rule is a distinctive feature of every rule.<sup>9</sup> A private language should be based on private rules, that the speaker may follow privately. To deny such a possibility, Wittgenstein vindicates the crucial distinction between *following* a rule and *thinking to follow* a rule: “That’s why ‘following a rule’ is a practice. And to *think* one is following a rule is not to follow a rule. And that’s why it’s not possible to follow a rule ‘privately’; otherwise, thinking one was following a rule would be the same thing as following it” (Wittgenstein 2009: §202). To substantiate his

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<sup>9</sup> I would like to remark that these considerations do not apply only to the rules of language, as some legal philosophers assert (see Schiavello 2009: 56-60), since the so-called ‘private language argument’ refers to the human ability to institute, recognise, and follow rules in general and in particular social rules.

assertions, Wittgenstein – who is generally inclined to highlight the inconceivability of some possible counter-argumentations rather than to provide structured justifications – envisages a subject who gives a name to her sensations. Not only does the very same activity of naming presuppose that “much must be prepared in the language” (Wittgenstein 2009: §257). In addition, Wittgenstein claims, if the subject allots the letter ‘S’ to her sensation and keeps a diary about its recurrence so as to identify S precisely when it occurs, she is doing nothing but adopting a procedure that may help her to *remember* correctly the connection between her definition and the recurrence of S. It is as if she tried to express her sensation as a mental image so as to recognise it correctly when it occurs again. But the subject, Wittgenstein argues, just lacks a criterion of correctness that permits her to test whether S<sub>1</sub> is the same as S or whether she is associating them erroneously. In Wittgenstein’s words: “Let us imagine a table, something like a dictionary, that exists only in our imagination. A dictionary can be used to justify the translation of a word X by a word Y. But are we also to call it a justification if such a table is to be looked up only in the imagination? – ‘Well, yes; then it is a subjective justification’. – But justification consists in appealing to an independent authority – “But surely I can appeal from one memory to another. For example, I don’t know if I have remembered the time of departure of a train correctly, and to check it I call to mind how a page of the timetable looked. Isn’t this the same sort of case?” No; for this procedure must now actually call forth the *correct* memory. If the mental image of the timetable could not itself be *tested* for correctness, how could it confirm the correctness of the first memory? (As if someone were to buy several copies of today’s morning paper to assure himself that what it said was true.) Looking up a table in the imagination is no more looking up a table than the image of the result of an imagined experiment is the result of an experiment.” (Wittgenstein 2009: §265). In a word, if justification consists in appealing to something independent, the criteria must be public and must be managed publicly.

Let me conclude this Wittgensteinian detour by underlining that the private language argument does not concern the *pragmatic* difficulty that a subject may encounter in trying to remember correctly her sensations. Wittgenstein does not deny the pragmatic possibility that a single individual may establish certain procedures and follow them in isolation. Actually we may well imagine a particularly gifted subject capable of successfully recognising each of her sensations. The problem is primarily *conceptual* and concerns the normative structure of rules and their functions. The activity of the isolated subject who establishes and follows certain procedures is parasitic on public rule-following, in that the method she adopts in following the rule privately amounts to an attempt to institute a criterion for assessing her own actions in the relevant circumstances.

She determines and establishes some criteria that may help her recognise the recurrence of an identical situation and therein adopt identical conduct. This is arguably a clarification of the distinction between a *necessarily* and a *contingently* private language. Wittgenstein distinguishes between a private idiolect that in principle none can understand but its inventor, and a language that is private by accident, being based on rules that in principle others may understand (Wittgenstein 2009: § 243). He wishes to rule out the conceptual possibility only of the former, since the latter is a case where rules play the same role as they play in public contexts. C. Peacocke explains this clearly: “Wittgenstein thought that if only the rule-follower and not anyone else could know whether he is following a rule, we would not in such a case be able to say what is the difference between there really being a rule the agent is following and his being under the false impression that there is. This, Wittgenstein continues, is an unacceptable conclusion if following a rule is to place any restrictions on what the rule-follower does. Hence it is not possible that the subject alone can know whether he is following a rule: the conclusion is that there must be public criteria for whether someone is following a rule” (Peacocke 1981: 75).

In sum, by showing that the “*being a rule*” of a rule does not relate at all to any private experience of the rule-followers (a feature of rules that Hart often remarks against Scandinavian realists, but with no further philosophical justification), Wittgenstein shows *ipso facto* that the existence of a rule requires the presence of (at least) two individuals. That is, the correctness of rule-following can never be proven by private evidence, but it is (implicitly and most often tacitly) confirmed by reference to a coordinated interaction among agents. This understanding of rule-following clarifies the original Hartian account of social rules as public standards for justified criticism. On this reading, what Wittgenstein names ‘criteria’ in rule-following coincide with Hart’s ‘standards’ in social rules, which I hereafter will name ‘criterion-rules’.

Now that I have shown why criterion-rules must always be presupposed if subjects are to assess the application of a rule as correct or incorrect, I can turn to focus on practices. These are contexts where agents are expected to be able to *assess the correctness* of their actions and those of others in the light of the gap between them and the criterion-rules and thus to *criticise* actions that depart from criterion-rules. As Hart correctly emphasises, this is the key difference between habits and rules.<sup>10</sup>

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<sup>10</sup> On this issue Hart is more convincing than Wittgenstein, as the latter is inclined to liken rules to institutions, customs, and usages (see Wittgenstein 2009: §199), and therefore to obscure the significant differences amongst these four elements of

It is essential to point out that rules, in this broad and basic sense, are neither commands nor external constraints for actions. The criterion-rule is an *epistemic indication* about what the agents do. Criterion-rules are primarily *epistemic devices*. In a previous article A. Salvatore and I characterised this feature of rules by saying that they

are deemed to constitute a specific language which confers on social reality a complex of meanings: only by enjoying this language may we understand what happens around us (in terms of social actions) and distinguish, for example, the movement of the autumn leaves in the wind from that of two dancers (Croce and Salvatore 2007: 17).

Only by capturing this essential feature of rules may we understand why they are, as Hart partly explains, *reasons for action*. In the vast literature on this subject-matter we can often notice an underlying and somehow neglected confusion between *motives* and *reasons*. For instance, in discussing the way the rule of recognition can guide the conduct of officials, many conventionalist advocates struggle to demonstrate that such a rule *figures as a motive* in the practical reasoning of officials. Such a confusion is severely condemned by P. Winch, one of the acknowledged inspirers of Hart. In his *The Idea of a Social Science* (first published in 1958), Winch stresses that “the terms ‘reason’ and ‘motive’ are not synonymous” (Winch 1990: 82). If we are to look for the motives of behaviour we should carry out an analysis aimed at explaining the *causes* that brought about that behaviour. Reasons on the contrary are those *considerations appropriate* to the context that *makes the behaviour intelligible*. Thus reasons are *meanings* indicating what kind of things are the things people are doing. Hence, as far as I understand it here, let me clarify with an example what it means to say that *a rule is a reason for action*. If Tom is used to having breakfast in the same café every morning and every morning he meets Kate there, and then one morning Kate does not come, Tom will have no justified reason for criticising Kate. But if Tom and Kate have an appointment and Kate breaks it, Tom does have a justified reason for criticism. In the former case, it is a habit, a routine, in that the agents reiterate their behaviour – moved by the sheer motive of having breakfast – with no consequence that may provide grounds for criticism. In the latter case, on the contrary, beyond the sheer motive of having breakfast, Tom and Kate are involved in an activity which is an *autonomous source of obligations*: both are called upon to plan their

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social life. See also Croce 2012: Chap. 3.5.

action so as to meet each other in the café. In this case their motives may be different (Kate may just desire to hold a pleasant conversation while having breakfast whilst Tom may hope to make Kate fall in love with him), but their common reason for action is the appointment. In other words, while the criterion-rule is the pivot of the practice (or, we may say, ‘the appointment practice is based on a mutual agreement that gives rise to a mutual obligation to be at a specific time in a specific place’), the reason lies in the fact that such a criterion-rule represents what every agent knowingly and consciously takes into consideration for planning their actions (so that, say, if Tom knows that Kate generally considers appointments as approximate arrangements that do not give rise to any obligation, Tom will be less inclined to be absolutely punctual). This is also why it would not affect the inner nature of the general practice of fixing appointments if the real motive beneath this particular appointment was the intention of Tom to entice Kate in order to rob her. In fact, both of them regard the appointment as a reason for action apart from their personal motives for action. This reason is public, common, independent of what the agents actually do, and is used by the agents both in planning their actions and in criticizing the actions of the others if they disregard it.<sup>11</sup> In short, such a rule governs (at least intuitively) the conduct of Tom and Kate while planning their actions on the basis of the appointment.<sup>12</sup>

In sum, practices are contexts in which conduct is governed by rules that serve as public and intersubjective criteria for the mutual assessment and criticism of actions. Such criterion-rules are among the considerations that are at the basis of the actions of the subjects involved in the practice, i.e. in principle they can be pointed to as reasons for action (that is, they may be shown to govern or guide

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<sup>11</sup> It is worth mentioning what D. Bloor writes as regards the practice of marriage:

Suppose someone were to go through the ceremony with deliberate, inner [...] intention to deceive. Could such a person argue [...] that they were not really married because, as they were getting married, they were thinking of themselves as engaged in a deceit, rather than a real marriage? Would that invalidate the marriage? Certainly not. [...] The reason is that the oversubtle deceiver *was well aware that it was a marriage he was going through. His being aware of what he was doing was part of what made up the deception.* (Bloor 2001: 106, italics added.)

<sup>12</sup> In case Kate, forgetful of the appointment, went by chance to the café at the agreed time, her conduct may be said only to conform to the rule.

actions) regardless of whether they figure as motives for these actions.

By capitalising on the analyses of Wittgenstein and Hart, I may pinpoint more clearly the two essential features of criterion-rules that have been discussed in the previous pages.<sup>13</sup> The first is their *ideal-normative force*: notwithstanding their pragmatic derivation, criterion-rules must never be identified with practices. The second (converse) feature is their *pragmatic nature*: the existence of criterion-rules always depends upon there being concrete practices in which they serve as criteria. To put it differently, on the one hand, criterion-rules are *conditions of thinkability* for practices, in that practices are intelligible and describable only in light of the criterion-rules that regulate them. (This is what Coleman labels the “explanatory power” of criteria.) On the other hand, conversely, practices are *conditions of existence* for criterion-rules, in that the latter always emerge out of the former. In sum, criterion-rules could not exist without practices and also practices could not be thought without criterion-rules. Owing to their implicit and unreflective nature, criterion-rules are “the result of ongoing negotiations,” and thus “there may well be disagreement about their content” (Coleman 2001: 99). To make criterion-rules explicit agents need often to engage in negotiations, i.e. reflective processes whose propositional results are always fallible and revisable. Suffice it to mention the general difficulty of formulating the fundamental rules or the recommended conduct of some widespread practices, such as friendship or love relationships, the implicit character of which is brought into question only when some conflict occurs.

This philosophical perspective may cast light on point (c) of Woodman’s analysis, i.e. on the fact that rules can be distinguished from non-rules as the former are to be followed by a person with regard whether others do the same. Actually, criterion-rules are epistemic devices which enable people to interact, to understand each other’s actions, and to criticise others when they contravene rules. Thus rules are common and shared insofar as they are indispensable criteria for understanding and assessing the behaviour of others and for planning our own actions, and thus engaging in those common activities that are at the basis of our social life. (Imagine what might happen if we were to follow the rules of a grammar, to fix appointments, to enter into marriages, to stop at red signals, with no regard to whether others give these activities the same meaning we give them).

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<sup>13</sup> Here I follow Coleman (2001: Lect. VII), even though, as I have already remarked, his conventional approach ends up narrowing the original scope of Hart’s practice theory.

## A Conceptual Impasse: the Priority of Legal Standards

Based on what I have thus far argued I can say that Woodman and Hart come to the same conclusion as to what law is: law is a *social* practice in which some rules are accepted as public standards that are meant to guide (at least epistemically) the conduct of a specific population. Within this practice – whose existence and validity depend on the reflective attitude of its members – agents adopt a set of rules as reasons for action and standards for criticism. Hart then was right when placing emphasis on the broader case of *social* rules to explain what the *legal* rule of recognition is. This special rule is what makes the practice of law intelligible to those who are engaged in it. The rule of recognition (which should be better described as a multiple set of ‘practices of recognition’<sup>14</sup>) guides – at least epistemically – those who regard themselves as members of a population which is actually determined by the existence of a common set of rules. As a consequence, Hart and Woodman can be said to agree on the fact that state law, like many other rule-governed contexts, is a set of rules which has its own relevant population (officials and more generally all those who belong to the state organisational machinery) while the members of this population regard legal rules – and in particular those which instruct them on how to recognise, amend and enforce the rules addressed to lay people – as standards to be followed because they provide some sort of guidance. Yet, if this conceptual definition of law is sound, law turns out to be a practice among many other practices, from more fluid (such as appointment-fixing) to more solid ones (such as football).

But Hart and Woodman endorse highly different positions as to this latter conclusion. Indeed, it is well known that Hart continues to advocate a positivist (although inclusive) and finally monist view, according to which the legal practice is a special one, which has a neat pre-eminence over the others. On the face of it, he has to tackle a tricky question: if, from a conceptual vantage point, law is a practice like many other social ones with their standards and their populations, why should it be so special? What entitles the practice of law to override the rules of other practices? It seems to me that Hart is able offer no conceptual solution to this issue. As a matter of fact, his theory provides the grounds for holding that, at least conceptually, law has no special pre-eminence over other similar practices. In

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<sup>14</sup> As Frederick Schauer points out, this term comes “closer to capturing the amorphous and shifting nature of what is an acceptable legal source as well as the way in which much of the development over time takes place from the bottom up rather than from the top down” (Schauer 2004: 1934).

effect, as already pointed out by Ralf Sartorius some decades ago, the analysis of law as a social practice proves to be applicable to a broad series of rule-governed social practices. Sartorius (1971) notices that Hart's formal definition of law perfectly fits many other social organisations, in which both primary and secondary rules and different groups of law-appliers and law-abiders are clearly distinguishable. This is the case with political parties, trade unions, corporations, educational institutes, sporting clubs, and criminal organisations: in all of these contexts there are closely defined meta-rules that entitle specific groups to administer rules of conduct. If this is so, the only viable conclusion is that, as Schauer tellingly remarks, "once we see that this analysis applies as straightforwardly to football and religious duties as to legal duties, we have not made much progress in trying to understand the institution of law, other than it being just one more system of rules" (Schauer 2010: 16). In other words, this entails that – at least from the point of view of a conceptual analysis of the normative structure of law – nothing can really account for the pre-eminence of the legal practice over the others. On his part, Hart seems to be aware of this, and indeed in the 'Postscript' he admits that it is

quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct. This will not of course serve to distinguish law from other rules or principles with the same general aims; the distinctive features of law are the provision it makes by secondary rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards. (Hart 1994: 249.)

In sum, Hart fails to explain what justifies the "priority" over standards to which he refers when talking about law. If this is true, then Woodman's conclusion seems far more coherent with the Wittgensteinian interpretation I have provided in the previous section. He frankly argues that legal scholars need to recognise "that there is not a clear dividing line on the spectrum which runs from the state legal norms forbidding murder to the norms of etiquette and good manners" (Woodman 2009a: 100). This conclusion is conceptually sounder since the reference to the inborn sociality of the rule of recognition proves that state law in reality is nothing but a further instance of social practices governed by rules, whose population is "the officials and others who operate the various institutions of the state" (Woodman 2009a: 97).

However, this conceptual conclusion raises a recurring problem, which has dogged

the entire debate over legal pluralism: Should we really accept, as Woodman explicitly suggests, that “all social norms must be included within the category of ‘law’” and that therefore scholars should give up hope of finding a clear dividing line between the social and the legal? (Woodman 2009: 100.) Should we acknowledge that the distinctive line between the legal and the non-legal – when it is present – is nothing but a *historical* product that was able to transform a normative system in *the* legal order? Is law’s being considered as a supreme ordering merely due to transient contingencies or even power differentials, on whose basis a societal party was able to transform into “law” its inner normative order? I think it is possible to provide a solution which is not necessarily at odds with the analysis provided thus far: state law (and every other kind of law) is not different from other normative orderings because of any inner properties of its rules or other aspects belonging to its formal structure. Rather, a rule-governed context’s being a law entails a particular way of functioning of its rules and its inner knowledge. I shall briefly try to vindicate this solution in the following pages.<sup>15</sup>

### Looking for the Distinctiveness of Law: a Semiotic Hypothesis

If so far I have been proceeding *with* Woodman, in the rest of the present article I shall go *beyond* Woodman (but, at least I think, not *against* Woodman). The hypothesis I shall put forward is that, although legal rule-governed contexts are structurally similar or even identical to many other non-legal rule-governed contexts, law is something special. In particular, even though there can well be many more types of law than state law, all those types share some basic traits that allow defining them as ‘legal’. These traits do not inhere in the formal structure of legal orderings, but in the type of knowledge and categories that are at work within them: an ordering is legal if it is able to serve as “a symbolic grammar in terms of which reality is continually constructed and managed in the course of everyday interaction and confrontation” (Comaroff and Roberts 1981, 247). This way of conceiving law helps solve the conceptual impasse which the panlegalist approach incurs: the speciality of legal rules is not due to the role of standards they play within their relevant population, but to the special role they play as semiotic

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<sup>15</sup> I would like to clarify that this kind of analysis would require much more space and a sounder justification than the rough and concise sketch I shall provide. Anyway, what I shall say will simply endeavour to synthesise what I argue in Croce 2012 and in particular in Part III.

tools for rephrasing social reality. To prove this hypothesis, I must temporarily withdraw from the field of legal theory to adopt a socio-anthropological approach that may bring out those elements which enable genuinely *legal* orderings to serve as venues of negotiation and management of social reality.

With an analysis which fits not only the modern juridico-political scenario (dominated by the pre-eminence of state law) but rather captures a relevant feature of the legal practice, Pierre Bourdieu proves that law always *tends to present itself as an autonomous field*, based on an *autonomous body of knowledge and rules*. He portrays law as an arena whose boundaries are safeguarded by a limited range of social agents who possess a “technical competence”, or rather, the “socially recognized capacity to *interpret* a corpus of texts sanctifying a correct or legitimized vision of the social world” (Bourdieu 1987: 817).<sup>16</sup> In other words, among the basic constituents of law there seem to be not only rules and their serving as standards for the population who follow them, but also its *special stock of knowledge* and the *role of those who master such knowledge* by virtue of their exclusive technical competence. In this reading, law would be characterised by elements which go well beyond its formal structure, that is, the *way legal knowledge operates in social life*, its *claim to self-sufficiency* and its *separateness from everyday knowledge*. I shall now clarify these relevant characteristics and also spell out some of the ambiguities that may affect them.

Bourdieu appears to suggest that the mentioned characteristics are circularly connected to one another. Legal rules can successfully claim to override the rules of the other practices because the stock of legal knowledge is independent of both the knowledge of everyday life and the sectorial knowledge of other social fields. In short, law’s normative claim of pre-eminence is legitimised with a circular recourse to its own self-sufficiency. At the same time, in order for law’s knowledge to preserve its special position, it must be kept and managed by a limited circle of reliable people, who act as custodians of the legal borders. In this sense, law ends up being *independent because separate* and *separate because*

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<sup>16</sup> Needless to say, he explicitly refers to contemporary Western legal systems, well institutionalised and highly proceduralised. Nonetheless, as I shall argue, I think that Bourdieu’s analysis is applicable also to contexts in which such a technical competence is poorly institutionalised and left to flexible procedures. To prove this, in Croce 2012 I take into exam both a non-modern and a non-Western case: Roman law and the *mekgwa le melao* of Tswana people. In the following paragraphs I shall briefly mention the latter case.

*independent.*

Bourdieu's analysis shows how the different distribution of legal knowledge and its custody by a restricted range of experts make law appear as less and less dependent on extra-legal factors. Legal rules are seen as the pure outcome of an independent, autonomous and self-sufficient activity. Those who occupy an official role in the legal field are regarded as the 'authorised interpreters' of legal knowledge and as privileged players. Nevertheless, even if the role of experts turns out to be crucial, it does not represent a distinctive trait *in se* and *per se*. Rather the distinction between experts and lay people is primarily *instrumental in preserving the autonomy of the legal field and the self-sufficiency of its knowledge*. Indeed, legal knowledge grounds itself on an alleged self-sufficiency even when experts are not present or when they are not formally recognised as a well-established group (in fact, members of this group can be elders, savants, chiefs or priests who operate as 'legal' experts only in temporary and circumstantial conditions). Also in these latter cases, law acts as *a stock of knowledge* – distinct from, and independent of, every other kind of knowledge that is present in society<sup>17</sup> – whose decisions and settlements are seen as valid because they are founded on a common *trans-sectional* basis, which transcends the opposite interests that are at the origin of the conflict (be this basis a primeval tradition, an ancestral past, the wisdom of ancestors, the revelation of God or a democratic constitution). In other words, 'legal' decisions are based on what John Peristiany calls "a common *religio*" (Peristiany 1954: 48), as the law fulfils the need "to discover how sectional interests may be transcended" (Peristiany 1954: 39-40).

In my view, this is also what emerges out of John L. Comaroff and Simon Roberts's cutting-edge analysis of the *mekgwa le melao ya Setswana* in *Rules and Processes*. As far as I understand them, the two anthropologists prove that, even in circumstances that are far from our specialised legal systems, there is a special stock of knowledge that is used to produce particular effects on social reality. They claim that Tswana do not possess "a separate class of *legal* norms, functionally and conceptually distinguished from other types of precept" (Comaroff and Roberts 1981: 9). In fact, the stated rules found in Tswana communities is a vast and undifferentiated repertoire that extends from rules of etiquette to rules dealing

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<sup>17</sup> I am by no means saying that legal knowledge is completely separate from the problems of daily life. I am rather saying that law sieves and parses everyday reality through its language and its categories without merging with everyday language and categories.

with major crimes. When Tswana find themselves speaking of *mekgwa le melao*, they mobilise a vast set of concepts, such as manners, etiquette, polite behaviour, custom, usage, habitual practice, taboo, duty, obligation (Comaroff and Roberts 1981: 71). This suggests that we can hardly consider it to be an ordered and differentiated set of legal rules. Yet, what counts here is the role that this repertoire plays in social life: the hybridity and flexibility of *mekgwa le melao* is instrumental in *legitimising competing constructions of reality and imposing an order on everyday events* (Comaroff and Roberts 1981: 78). Comaroff and Roberts depict *mekgwa le melao* as a *semiotic code*, based on a shared but separate stock of knowledge, which in given circumstances is employed so as to yield, renegotiate, and revise the Tswana view of social reality. They point out that, when discussing in reference to this repertoire, speakers adopt a *formal code*, marked by *stylistic formality, reliance on metaphors and impersonal and authoritative quality*. These marks make it clear that the speakers are appealing to “the transcendent legitimacy of shared values” (Comaroff and Roberts 1981: 86). In doing so, the authors emphasise that the parties treat the set of Tswana rules in a very particular manner: when Tswana enter the dispute and refer to *mekgwa le melao*, they come to adopt the *special language* that pertains to the legal field. More precisely, Comaroff and Roberts speak of an ‘insulation’, which is meant to separate the language typical of *mekgwa le melao* from the language of everyday life. In the legal field, there cannot be any reconstruction of facts and events that does not employ this insulated formulaic language.

The two anthropologists support this idea by discussing some concrete cases in which it is shown how Tswana processes favour a constant interplay between rules and facts. They explain how the rules of *mekgwa le melao* enable to describe facts in a certain manner, while in turn facts, described in a certain manner, enable potential conflicts between rules to be overcome. In other words, what is at stake in the cases that the authors consider is both *the way in which rules are used to elucidate facts* and *the way in which these facts*, elucidated in such and such a way, *retroact on the normative repertoire*.

This in my view helps solve the conceptual impasse of panlegalism: even though legal and non-legal orderings may exhibit the same formal structure, legal orderings claim they possess a stock of knowledge which allows a collectivity (or better, the vast arrays of practices, institutions, and organisations that comprise a given collectivity) to discuss and resolve their conflicts within an *extra-ordinary domain*, in which special categories are at work. Based on this, I would like to make the claim that we can call legal only those rule-governed practices that, in spite of the formal characteristic they share with many other practices, claim to be

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*trans-sectional and insulated venues, separate from everyday life, in which everyday reality can be renegotiated and rephrased by means of a special knowledge (usually mastered by a circle of experts) and a rigid set of conceptual categories.* Needless to say, this does not exclude the possibility that many *social* rule-governed practices regulate the everyday life of their members more closely and more effectively than *legal* practices;<sup>18</sup> nor does it exclude the possibility that, in addition to state law, many types of practices can be subsumed under the description of the legal practice provided above. Nonetheless, it is my contention that, on the basis of what I have argued, the number of rule-governed practices or contexts (whether institutionalised or not) which can be regarded as genuinely legal is significantly smaller than the overall number of rule-governed practices or contexts.<sup>19</sup>

The traits of law discussed so far – that is, the separateness of legal knowledge, the insulation of law’s categories, the rigidity of legal language – are variable factors that, to a greater or lesser extent, pursue the same goal. They all aim to prevent the law, its stock of knowledge, and its categories from merging either with the unspecialised knowledge of everyday life or with the specialised knowledge of other rule-governed practices. These factors create a *protective*

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<sup>18</sup> It is worth adding that legal orderings can share many of the rules of other non-legal rule-governed contexts residing in their jurisdiction. In this regard, in Croce 2012: Chaps. 7, 9 and 10, I argue that the legal practice is above all a jurisdictional device, which does not (at least primarily) create new rules, but selects rules and models that are already at work in the social realm and translate them into its special and formulaic language. Social rules and models are thus typified and transformed, but never (or seldom) created *ex novo* by legal experts.

<sup>19</sup> It is also important to stress another remarkable difference connected to what I have thus far said: while rule-governed contexts in general are frameworks of meanings and rules, which are designed to mediate between those who operate within their borders and the external environment, the law *mediates among rule-governed practices and contexts*. This may help us solve the puzzle related to the role of those (lay people) who do not belong to the relevant population of the legal practice. Indeed the legal field primarily serves as a stable frame in which lay people can interact by following firm procedures, using a special language and adopting rigid categories. This suggests that *lay people are constantly involved in the production of legal outcomes*. What is produced in the legal field impacts on everyday life only as long as these productions can be effectively and intelligently employed in the various rule-governed contexts to which lay people belong.

*membrane* that surrounds law so as to subtract it from the sticky fluidity of social interaction. Only if it actually achieves this separateness can law play the role of conflict-neutraliser and provide a platform where social subjects can semiotically deconstruct and reframe their own conflicting views. Only in a condition of separateness and insulation can the parties interact in the legal domain in such a way for them to renegotiate social reality with recourse to a special set of categories. In most geo-historical contexts, a specialised body of experts, who are considered as independent from the parties in conflict, are called upon to organise *the public representation* of dispute in compliance with the formality of the legal language and with the firmness of its categories. Legal settlements are recognised as impartial precisely because they are made by a third party who has recurred to a trans-sectional body of knowledge and rules, which was previously agreed upon by the conflicting parties and which enables them to rephrase facts and events.<sup>20</sup>

### The Space for Legal Pluralism

So far I have reached two conclusions. In the first sections I have argued that, under a structural-formal viewpoint, the official law of a given geo-historical context appears as a social practice among others. This analysis invites us to put into question the taken-for-granted pre-eminence accorded to state law, whose formal structure proves to be identical to many other social practices. Afterwards I

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<sup>20</sup> It can be rightly argued that there are contexts in which there is no third party who acts as a judge. *Contra* this latter observation I would briefly mention these words by Adamson Hoebel:

On an even more primitive level, if an aggrieved party or his kinsmen must institute and carry through the prosecution *without the intervention of a third party*, there will still be a ‘court’ *if the proceedings follow the lines of recognized and established order* – there will be then at least *the compulsion of recognized ‘legal’ procedure*, though the ultimate court may be no more than the ‘*bar of public opinion*’. When vigorous public opinion recognizes and accepts the procedure of the plaintiff as correct and the settlement or punishment meted out as sound, and the wrongdoer in consequence accedes to the settlement because he feels he must yield, then the plaintiff and his supporting public opinion constitute a *rudimentary sort of ‘court’*, and *the procedure is inescapably ‘legal’* (Hoebel 1954: 25, emphasis added).

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have argued that the label ‘law’ cannot be stretched to cover all those entities that are governed by rules and in which a set of people look at rules as standards. To unravel such a panlegalistic impasse, I have shown that, in order for a practice to be defined as legal, it must possess certain specific qualities that distinguish it from other rule-governed practices. This analysis provides us with sounder criteria to establish whether a given ordering can be really called ‘legal’ and if it is able to serve as a venue for the renegotiation of social reality.

However, to conclude, I would like to underline that this view by no means reverts to legal monism. Not only because there can well be a geo-historical situation in which more than one practice claims to serve as a trans-sectional and special venue (as the European Middle Ages vividly shows), but also because it is important to cast due light on the perennial symbolic struggles around the legal practice and its boundaries. If the legal practice is what allows a collectivity to renegotiate and reframe social reality, the control over legal knowledge, the technical competence it involves and the categories it deploys grant the possibility of significantly impacting upon social signification and producing durable effects on social reality. To quote Berger and Luckmann: “He who has the bigger stick has the better chance of imposing his definitions of reality” (Berger and Luckmann 1966: 127). This is why all social entities that comprise a given geo-historical context are engaged in a struggle over the *stock of symbolic and material power* which is always related to the *custody of legal rule and knowledge*. Different normative rule-governed orderings (such as religious and ethnic groups, associations, businesses, civic organisations) compete with each other to affect both the special venue in which they enter when they need to solve disputes and the instruments they use to negotiate reality. This is a blatant situation of *legal pluralism*, in which a plethora of normative actors wage a symbolic war to affect the *definition of social meanings as filtered by law*. If this is so, then legal pluralism can be regarded as a permanent condition of social reality: a perennial struggle for determining the contours of lawfulness.

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