Utrecht Law Review
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The End of Doctrine?
On the Symbolic Function of Doctrine in Substantive Criminal Law

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1. Introduction

1.1. Locating the problem

Substantive criminal law includes the conditions for subjective acts to be qualified as criminal offences and for authorities to have the power to impose a criminal sanction. The drastic nature of this power entails that its use should be predictable. For this reason, the legality principle requires that criminal judgments be sufficiently based on the *law* and that the law's scope of application is safeguarded systematically. This can be referred to as the 'system-immanent' function of the legality principle. One of the main overarching purposes that this principle is taken to serve is to guarantee society's *confidence* in criminal proceedings.[1] The principle of legality therefore also refers to a notion that, at least according to the different so-called 'positivist' accounts of the nature of law, is located outside of the criminal-law system: the notion of legitimacy. In this regard, the concept of legitimacy can be referred to as a 'system-transcendent' value.

Currently, this system-transcendent notion of legitimacy in criminal proceedings is subject to a wide debate in the Netherlands, as elsewhere, with multifocal aspects. The legitimacy of criminal law is studied in political philosophy and the philosophy of law, in (legal) sociology and in criminal jurisprudence itself. Although the angles may differ widely, the legitimacy crisis is generally defined metaphorically in terms of a 'gap' between criminal courts and society.

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1 F. Allen, *The Habits of Legality. Criminal Justice and the Rule of Law*, 1996, p. 17; F. de Jong, *Daad-Schuld. Bijdrage aan een Strafrechtelijke Handelingsleer met bijzondere aandacht voor de Normativering van het Delictsbestanddeel Opzet* (Act-Inferred Culpability. A contribution to a Legal Theory of Action with special reference to the Normativisation of the Mental Element of Intent in Criminal Law), 2009, pp. 167-250; A. Mooij, *Intentionality, Desire, Responsibility. A study in Phenomenology, Psychoanalysis and Law*, 2010, p. 234.

 URN:NBN:NL:UI:10-1-101291
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Accordingly, solutions for the crisis usually focus, albeit in different ways, on strategies for courts to bridge the gap and reinstate the link with society.[2] Some believe that the legitimacy crisis is mainly of an institutional nature and that it is generally caused by communicative problems between courts and society and between courts and experts. Others state that the issue is more deeply-rooted than this, and that solutions are to be sought in improvements of the academic education of lawyers. And yet another group takes the view that the crisis is mainly caused by a lack of democracy, and that involving laymen in criminal proceedings could improve things somewhat.

All in all, the academic debate on the legitimacy of criminal proceedings does not seem to show much progress or much coordination. This seems to result in part from the current lack of a generally accepted conceptualization of the notion of legitimacy itself, which should be general enough to explain the current authoritative crisis, on the one hand, and specific enough to test the various solutions that are suggested, on the other. In the academic debate, legitimacy is conceptualized primarily as something that pertains to the ways in which the judge *explains* the judgment he has already reached to the involved parties. In this general fixation on 'responsiveness', the academic debate seems to ignore the question whether the legitimacy crisis may relate, to a considerable extent, to the fact that also the adjudicating judge himself is in constant need of having the contents of the criminal law explained *to him* in a sufficiently profound way.

The debate thus ignores a number of systematic developments within the constellation of the criminal law's *norms* that are addressed to society, laid down in the law, interpreted and applied by the courts, and theoretically refined in criminal-law doctrine. As criminal law communicates imperative rules of conduct to society, the legitimacy and authority of criminal judgments can be said to depend upon two interconnected relations. Firstly, on the manner in which the court 'prospectively' relates the applicable norms to the concrete *facts* of the case at hand; secondly, on the theoretical and doctrinal *tradition* in which it should be possible for the court to insert its judgments 'retrospectively'. The law that is applicable to a case is or can be explained by the court to the addressees of its judgment, but the court in turn depends on how the law is explained to the court. This latter kind of 'explanation' is provided by doctrine. The aim of this article is to shed some light on the function of substantive criminal-law doctrine, in the hope that this may further our debate on the legitimacy of criminal law and the authority of criminal-law judgments.

1.2. Hypotheses and research question

The application of norms to facts is guided by *doctrine* (or 'dogmatics'). As a working definition, I will use the term doctrine to refer to the framework of theoretical concepts that clarify the content of valid legal norms and reformulate them as a systematic unity.[3] Legal doctrine is distinct from both judicial decision-making and jurisprudence or legal philosophy. Doctrine is different from judicial decision-making in that it is more abstract, more oriented towards general theses and arguments; and it differs from jurisprudence in that jurisprudence is a metadiscipline which focuses on abstract questions such as 'What is (the nature of) law?' and 'What do we understand by the concept of a legal norm?', and which takes legal doctrine as one of its objects

2 See e.g. G. van den Brink, 'Justice and Credibility. About Bridges built by Judges', 2009 *International Journal for Court Administration* 2, no. 1, pp. 2-17; Ph. Nonet & Ph. Selznick, *Law and Society in Transition. Towards Responsive Law*, 2001.

3 A. Aarnio, *Reason and Authority. A treatise on the Dynamic Paradigm of Legal Dogmatics*, 1997, p. 75. He adds: 'Referring to these tasks, it is an established practice to speak about the double function of legal dogmatics: it *interprets* and *systematizes* the law. Legal dogmatics concentrating on interpretation can also be called practical, and that reformulating the system theoretical legal dogmatics.'

of inquiry.[4] I will assume legal doctrine to be located *between* judicial decision-making and legal theory proper, in that I take doctrine to comprise the theoretically refined criteria that are actually *employed* by courts when they apply certain legal concepts and rules to concrete cases. However, I take the 'province' of legal doctrine to have no definite boundaries. Theoretical, doctrinal concepts that clarify and systematize differing legal rules may have evolved mainly in scholarly work, in case law, or even in statutory law, or they may be rooted in a combination of these sources.[5] The point is not that some legal norms or concepts can be defined by a certain statute so clearly and in such detail that there is no or little need for additional doctrinal commentaries or elaborations; the point – or rather, my hypothesis – instead, is that doctrine, in some as yet unidentified way, helps the court in interpreting and applying valid legal norms, and that the court *needs* this doctrinal support, no matter how detailed and theoretically refined the norms' formulations may happen to be in a particular statute or in some other legal source.[6]

In substantive criminal law, then, the term doctrine refers to the framework of unified and systematized theoretical concepts that define the preconditions for the imputation of criminal liability, and that endow the criminal law with a considerable measure of continuity.[7] What is here referred to as criminal legal doctrine is something that, in the Netherlands, is traditionally first and foremost rooted in a number of important judgments of the Dutch Supreme Court (which in turn may or may not to some degree build on certain doctrinal viewpoints which may have been expressed by the legislator). Recently, there have been various developments within the Dutch substantive criminal law that in some important ways suggest a shift towards a more Anglo-American, 'common-law' conception of judicial interpretation in different topics central to the substantive criminal law, e.g. legality, intent, negligence, action and attempt.[8]

Firstly, it seems that case law and the theory based thereon more and more explicitly emphasize the importance of *casuistry* when it comes to the application of criminal legal norms and concepts. Surprisingly often, the application of central substantive doctrines are said to first and foremost depend on the 'facts and circumstances of the case'.[9] The process of judicial interpretation or construction is further influenced by the fact that an increasing number of doctrinal concepts are filled in with rather vague and open-ended criteria, the most notorious of which is constituted by the criterion of 'reasonable ascription'. For example: the concepts of

4 A. Peczenik, *On Law and Reason. Second Editon*, 2008, pp. 13-14. Cf. G. Fletcher, *The Grammar of Criminal Law. Volume I: Foundations*, 2007, pp. 91-97, who distinguishes between scholarly work that delivers commentaries and scholarly work that seeks to formulate theoretical generalizations.

5 For example: the *Model Penal Code* in the United States – promulgated by the American Law Institute (a non-governmental organization of lawyers, judges and scholars) in 1962, and revised on a number of occasions – contains provisions on most or all central substantive criminal law concepts, such as action, omission, intent and negligence, that are spelled out in such detail that the book reads almost like a textbook designed for educational purposes. The *Model Penal Code*, which has stimulated criminal law reform and has had a big influence on the enactment of new criminal codes in a large number of states, thus contains many 'doctrinal' passages, which one would not find in, e.g., the Dutch Criminal Code or the German Criminal Code. See e.g. Articles 2.01 and 2.02 in: *Model Penal Code. Official Draft and Explanatory Notes. Complete Text of the Model Penal Code as Adopted at the 1962 Meeting of The American Law Institute at Washington, D.C., May 24, 1962*, 1985, pp. 19-23.

6 Cf. Fletcher, supra note 4, p. 94: 'In the final analysis, however, it is hard to imagine how any legal system could develop and flourish without the guidance of scholars, who systematize legislation and cases in a form that is readily studied and mastered. No one has learnt to be a lawyer simply by reading codes and cases, neither in the common law nor in the civil law systems.'

7 J. Raz, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, 2009, p. 233: 'Legal doctrine provides a glue which binds different legal regulations together. It smoothes and polishes the law, regularizes what would otherwise be deviant, irregular aspects of legislation or precedents.'

8 With regard to the principle of legality in substantive criminal law, this shift was already signalled by Dirk Herman de Jong in 1999; see D.H. de Jong, 'Naar een Common Law-Conceptie van Legaliteit?' (Towards a Common Law Conception of the Rule of Law?), 1999 *Delikt en Delinkwent* 29, no.8, pp. 687-690.

9 A. Franken, 'Casuïstiek en Legaliteit in het Materieel Strafrecht' (Casuistry and Legality in Substantive Criminal Law), 2006 *Delikt en Delinkwent* 36, no. 9, pp. 949-958; N. Rozemond, 'De Casuïstische Grenzen van het Materiële Strafrecht' (The Casuistic Boundaries of Substantive Criminal Law), 2007 *Delikt en Delinkwent* 37, no. 5, pp. 465-495.

functional or corporate action, of causality, and of *mens rea* in relation to corporate entities all require for it to be established that these concepts can 'reasonably' be ascribed to the defendant.[10]

Secondly, case law is showing *formalization*, or orientation on 'form'.[11] The 'nature of the act committed' and the 'exterior appearance of the act committed', and different kinds of 'rules of general experience' that are said to obtain in the concrete circumstances of the case are criteria that in the courts' application of concepts such as intent, guilt and attempt are now being widely used. These 'outlining' criteria are based primarily on the exterior appearance of the facts and circumstances of the case, and depart, to that extent, from substantive issues. That is to say: the primary focus of an increasing number of doctrinal concepts is no longer placed on the 'theoretical task' of delivering substantive clarifications or definitions, but on the 'practical task' of listing criteria on the basis of which one can furnish the proof of a particular doctrinal concept.

Thirdly, and related to the foregoing, case law is showing a certain kind of *proceduralization*. An increasing number of doctrines are taking the form of 'checklists', that consist of a set of criteria according to which the judge can – but not necessarily *must* – determine whether or not a certain legal concept obtains in the facts of the case. Sometimes, doctrinally catalogued criteria are combined with what may be termed a 'protesting mechanism': if the accused does not present certain views, or if he does not protest against a certain interpretation presented by the prosecution and/or the court hearing the case, then the accused will be bound by that interpretation. The defence has increasing responsibility for the correct presentation and substantiation of views to complete, balance or diffuse the 'narrative' previously construed.[12]

The developments referred to above suggest that criminal law doctrine is becoming sketchier and is losing some theoretical profundity. I would like to stress already at the outset that these developments may in themselves be or may not be desirable developments; I will not be occupied by that question in this article. The question evoked by the succinctly discussed developments that I am interested in here is the question of what independent purpose substantive criminal legal doctrine can be said to serve with regard to the legitimacy of criminal judgments.[13] Accordingly, the question formulated elliptically by the head title of this article – 'The end of doctrine?' – is to be read in its double meaning: the first referring to the admittedly somewhat exaggerated contention that doctrine is fading away in Dutch substantive criminal law; the second referring to the aim or purpose of doctrine in substantive criminal law. This article will only address one component of this rather large question: in what way does doctrine in substantive criminal law 'help' the court in applying the statutory and non-statutory criminal legal norms?

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10 In this connection it is sometimes argued that the Dutch substantive criminal law is subject to unifying tendencies. See e.g. S. Janssen, 'Unificatie in het Materiële Strafrecht?' (Unifying Tendencies in Substantive Criminal Law?), 2007 *Delikt en Delinkwent* 37, no. 4, pp. 370-385.

11 A. Machielse, 'De Opmars van de Uiterlijke Verschijningsvorm' (The Increasing Importance of the Criterion of External Appearance), in A. Franken et al. (eds.), *Constante Waarden*, 2008, pp. 233-242. See e.g. with regard to the doctrine of conditional intent (*dolus eventualis*) the Dutch Supreme Court (HR) case of 25 March 2003, *Nederlandse Jurisprudentie* 2003, no. 552; with regard to the doctrine of negligence HR 1 June 2004, *Nederlandse Jurisprudentie* 2005, no. 252; and with regard to the doctrine of criminal participation HR 18 March 2008, *Nederlandse Jurisprudentie* 2008, no. 209.

12 F. Kristen, 'Aandacht Vragen, Aandacht Krijgen en Aandacht Verdienen' (Demanding Attention, Receiving Attention and Deserving Attention), in A. Franken et al. (eds.), *Constante Waarden*, 2008, pp. 313-322; H. Kaptijn, 'Hermetische of Historische Waarheid (en Recht). Remedies tegen opsluiting van Feiten in Processualisering en Partijautonomie' (Hermetic or Historic Truth (and Law). Remedies against the Confinement of Facts to Proceduralization and Party Autonomy), in E. Feteris et al. (eds.), *Alles Afwegende… Bijdragen aan het vijfde Symposium Juridische Argumentatie, 22 juni 2007 te Rotterdam*, 2007, pp. 375-383. See e.g., in relation tot the doctrinal concept of negligence, HR 1 June 2004, *Nederlandse Jurisprudentie* 2005, no. 252.

13 Similar questions seem to have arisen with regard to German criminal legal doctrine; see U. Kindhäuser, 'Die deutsche Strafrechtsdogmatik zwischen Anpassung und Selbstbehauptung. Grenzkontrolle der Kriminalpolitik durch die Dogmatik?', 2009 *Zeitschrift für die gesamte Strafrechtswissenschaft* 121, no. 4, pp. 954-964; and H. Landau, 'Die deutsche Strafrechtsdogmatik zwischen Anpassung und Selbstbehauptung. Grenzkontrolle der Kriminalpolitik durch die Dogmatik?', 2009 *Zeitschrift für die gesamte Strafrechtswissenschaft* 121, no. 4, pp. 965-976.

By answering this question, this article aims to pave the way for advancing our understanding of the relationship between the 'system-immanent' principle of legality and the 'system-transcendent' concept of legitimacy.

1.3. Methodology and survey

It is worth noting here that the present article contains work in progress. The answer that it delivers to the question posed in the previous subsection will therefore be only very tentative in nature. I will try to answer the question by using a legal-theory model, in which the developments referred to above can be integrated. The legal theory envisaged in this article is based on the insight that law in a radical sense depends on a form of *proceduralization*: the law contains provisions that establish who can legally take the floor, subject to what conditions, etcetera. In this process, incidents in the empirical life-world are placed in a legal *perspective* that is constitutive of a specifically legal 'space'. In this space, substantive criminal-law doctrine has a particular function.

This article aims to contribute to the description of this function by testing the hypothesis that the function of the doctrinally processed, substantive criminal-law norm is closely connected to its *symbolic form*. This symbolic form implies that a norm can only be applied in practice on condition that it has been 'read' or understood from a specific viewpoint or *perspective*. This perspective relegates the norm's addressees (both the court and the citizen) to their respective legal 'positions' within legal space, in such a way as to enable them to establish the meaning of a norm in concrete situations. Understanding the meaning of a norm for a particular case is to see how this norm is to be applied to that case.

The judge needs to be in a position – or be brought into a position – wherefrom he can see (and feel) how to *go on from there*.[14] The norm thus *objectivises* the subjective positions of the court and the citizen. For this process to have the required effect, a sound basis at both the 'back side' and the 'front side' of juridical assessment is needed: in the court's justification posterior to its judgments, and also in pre-given, doctrinally processed legal *norms*. In this article I want to describe and use this theoretical legal model in order to establish in what way criminal-law doctrine may serve as a means to coach the court's positioning in relation to the norms of the criminal law.

Section 2 discusses the concept of symbolic formation. It will be argued that the law is a symbolic form and that it is to some extent disassociated from the social life-world. Section 3 tries to explain how law's symbolic space is developed. It will be argued that law's space is construed by way of sophisticated, shared forms of social planning which are governed by a specific 'legal point of view'. Section 4 deals with what is involved in following rules or applying plans. It will be argued that applying rules is essentially dependent on the notions of perspective and practice. In Section 5 it will be argued that criminal legal doctrine fulfils an important function in 'prompting' or 'compelling' the judge to apply a criminal legal norm in a certain way. Section 6, finally, rounds up the discussion by returning to the developments in Dutch substantive criminal law that were very succinctly indicated in the previous subsection.

14 This article is predominantly written from the perspective of a civil law tradition, where the court, i.e. the judge, is actively involved in the process of truth-finding, in the process of the interpretation of criminal legal rules and concepts, and in their application to particular cases. Therefore, ample reference will be made to the person of the deciding judge. Any possible involvement in these processes of juries, for example, will be left aside.

2. Symbolic form

2.1. Language and life-world

The notions of modernity and subjectivity are strongly intertwined. Since the beginning of the so-called Modern Era, man has become accustomed to thinking that subjective consciousness, in some way, is constitutive of whatever may count as a candidate for being termed 'reality'. To be sure, the chronicles of modern philosophy have recorded many different views of this relation between subjectivity and reality, roughly ranging from highly idealistic views – maintaining that objects are only thought into existence by our subjective minds, so that no object may legitimately be supposed to exist outside of human consciousness – to highly naturalistic views – maintaining that although man may *believe* himself to be an uncaused cause, consciously initiating events and chains of events in the world, human consciousness cannot actually be supposed to exert any truly independent influence of this sort on the world, precisely because consciousness itself is a piece of nature, subject to all the same natural laws as are other objects in the world. In this section I map out – in very general terms – the way in which subjectivity and human consciousness can be supposed to be involved in the process of constructing certain aspects of reality. I will do so by discussing a number of essential notions from Ernst Cassirer's philosophy of symbolic forms.

Now it may seem rather far-fetched to interpolate a discussion of such a philosophical-anthropological theory into an investigation devoted to the function of doctrine in substantive criminal law. Explaining the nature of doctrine by reference to a mysterious notion like symbolic formation can easily invite the allegation of indulging in a form of *obscurum per obscurius*. A few preliminary remarks that aim to justify this strategy are therefore befitting. By means of a number of insights borrowed from Cassirer's philosophy of symbolic forms, it will be possible, first of all, to shed some light upon the relation between a legal order and the extra-juridical life-world. These insights will, furthermore, pave the way for what I view to be a correct understanding of the nature of a rule, the nature of a legal rule, and the rule-character of legal doctrine. Needless to say, the discussion will focus primarily on the notions that are relevant for my purposes, and will fail to be much more than a rather sketchy account which, I do not doubt, will not be completely free of any conceptual imprecisions and perhaps even misunderstandings.

According to Cassirer, what distinguishes man from the other animals is his capability of symbolization. Man is an *animal symbolicum*.[15] In and through the exercise of this capability of symbolization man has access to reality in a specifically human fashion, and has a specifically human relation to reality as well. The human subject's access to the world that surrounds him is mediated by what Cassirer denotes as: symbolic forms. All forms through which the cultural life of humans manifests itself – such as language, art, science, religion, law – are symbolic forms. A symbolic form consists of a system of images and signs by means of which parts of reality are denoted and fixated in certain meanings. The connection between, on the one hand, the objects perceived by the human subject, and, on the other, the meanings in which these objects are apprehended or grasped by the human subject, is brought about and organized by the symbol. The symbol represents the *relation* between meaning and sign, between the universal and the singular.[16] The symbol *mediates* between subjective perceptions and their objective meanings.

How are we to picture this to ourselves? The essential point here is that the symbol is a human artefact that is placed between the human subject and reality. Within the differing

15 E. Cassirer, *An essay on Man. An Introduction to a Philosophy of Human Culture*, [1944] 2006, p. 31.

16 D. Coskun, *Law as Symbolic Form. Ernst Cassirer and the Anthropocentric View of Law*, 2007, p. 190.

domains in which cultural life finds expression, the human subject, on that account, has no direct, in the sense of unmediated, access to reality. Each and every way in which man relates to or engages himself with the world is mediated by the symbol.[17] In this connection, language, the most fundamental of all symbolic forms, enjoys paradigmatic importance. It is because of language that man lives in a world that is capable of being designated and experienced. Language prevents man from being surrendered to an absolute, brute and immediate reality that as such cannot be available for human experience. That language is a symbolic form means in this connection that the human subject, by means of the language he uses, actively shapes reality. This is solely possible on condition that the human subject is able to, somehow, distance himself from the world that surrounds him. That distanciation is realized by the symbol. The symbol places a sign, which announces itself to the human senses, under the governance of an inter-subjectively employed meaning.

In this way, language interposes a system of meanings between man and reality. This leads to a radical transformation of reality. Language grasps absolute reality in a comprehensive totality of meanings. Thus, it renders reality amenable to human apprehension and experience. The price that man has to pay for the distance to immediate reality that is put in place by language is that this immediate, absolute reality – at least for the most part – becomes inaccessible to him. The proceeds yielded by the separation between man and reality, however, are larger than the costs involved herein: the separation is constitutive of the human subject's ability to approach the symbolically organized world, to relate to this world intentionally, to understand his position amidst other subjects, and to evolve himself within the world in relative freedom.[18]

How does the lingual symbolic order produce this effect, which is so beneficial for human beings? Cassirer argues that a symbolic form comprises every 'energy of the spirit [*Geist*] through which a spiritual [*geistig*] content or meaning is connected with a concrete, sensory sign and is internally adapted to this sign.'[19] The internal connection between sign and meaning is laid in the symbol, in which both sign and meaning have their roots. This implies that every object or sign that announces itself to the human senses in order for it to be connected with a certain meaning, must itself already be the bearer of a meaning, which it represents, and in virtue of which the sign can be regarded or interpreted by a subject as a representative of a specific meaning. This principle is referred to by Cassirer as 'symbolic pregnance': language transforms reality into a world *filled* with meanings, precisely on account of the fact that language functions

17 This statement is a bit too strong: there are of course ways of experiencing the 'world' or reality, with regard to which it does not seem to make much sense to speak of symbolic mediation. If I were to be suddenly stabbed with a knife, there would hardly be anything symbolic about my experience of pain, and, to that extent, my engagement with or relatedness to reality. One could perhaps say the same about feeling and being very hungry or very thirsty. I am indebted to Professor Kent Greenawalt for suggesting this clarification. Moreover: when we are born we do not, of course, enter a 'world' that has already been equipped with meanings and labels by nature; but there is some neurological evidence that might indicate that humans have at least some congenital or innate dispositions that help them to instinctively sort and process their first experiences in the world; see J. den Boer, *Neurofilosofie. Hersenen, Bewustzijn, Vrije Wil* (Neurophilosophy. The Brain, Consciousness, Free Will), 2004, pp. 194-196, 202. The crucial point for my purposes is only that all *cultural* human life, including, as we will see in Subsection 2.2, the human subject's existence within the 'legal space', is mediated symbolically.

18 See Mooij 2010, supra note 1, pp. 7, 10-14, and 58-62. According to Antoine Mooij, it is due to the human subject's capability of distancing himself from the situations in which he finds himself, and to his ability to reflect on those situations, that the human subject is able to act freely and to bear responsibility for his actions. To a considerable extent, Mooij's argument builds on insights borrowed from Cassirer's philosophy of symbolic forms. For a comparable view, see P. Kahn, 'Freedom, Autonomy, and the Cultural Study of Law', in A. Sarat et al. (eds.), *Cultural Analysis, Cultural Studies, and the Law*, 2003, pp. 154-187, at p. 180.

19 Cited by D. Verene, 'Introduction: The Development of Cassirer's Philosophy', in T. Bayer, *Cassirer's Metaphysics of Symbolic Froms. A philosophical commentary*, 2001, pp. 1-37, at p. 15. See also Coskun, supra note 16, pp. 194-196.

as a system of terms that do not in the first instance refer directly to the world, but that first and foremost refer to one another, and only by that route to the world.[20]

Absolute, undifferentiated reality is infinite, but meanings are more or less finite.[21] Filling reality with meanings therefore presupposes that reality, in one way or another, is limited or condensed, made finite. This is exactly what language does: language *dimensions* reality to humanly manageable proportions, both spatially and temporally. Instead of an overwhelming and threatening infinity, a life-world is created, which is bestowed with the perspectival dimensions of a space in which notions such as 'in front of' and 'behind', 'above' and 'underneath' can be discerned from each other, and which is bestowed with the perspectival dimensions of a temporal world that has a past, a present, and a future. This symbolically organized space, on that account, is an intersubjective space as well: communicative agreement between people presupposes a shared 'background knowledge',[22] which can only be the result of the *interposing* of a 'ground' or 'necessity' in between man and immediate reality. In the absence of any such 'invented necessity', subjective perceptions would not lend themselves to being objectified, but would instead remain enclosed within a chaotic, unintelligible reality.[23]

2.2. Law and legal space

The previous subsection contains a far from complete sketch of the symbolic form of language, but this sketch suffices for our purposes. It provides a sufficient basis for a description of the sense in which also the law may be regarded as a symbolic form. It should be noted that language, according to Cassirer, lies at the basis of the specifically human way of existing and, thus, of all cultural life. Other forms in which cultural life finds expression, such as art or science or law, are language-dependent cultural systems and answer *in ultimo* the lingually shaped order that underlies cultural life.[24] The symbolic order of law, however, organizes and shapes intersubjective life in a unique manner, that is, in a way in which language would never be able to shape social life.[25] Just as language puts absolute and immediate reality at a distance, in order that a symbolically construed intersubjective life-world is created and made accessible, so too the law, in its turn, puts that intersubjective life-world at a distance, in order that an again symbolically organized, but this time specifically *juridical* world emerges.

The law is a symbolic system made up of concepts in terms of which the social life-world is denoted juridically and is fixed in juridical meanings. Law, in this sense, mediates between subjective perceptions and the objective-legal meanings thereof. Law, evidently, makes use of the instrument of language. Language is even a *conditio sine qua non* to law, insofar as law is faced with the requirement of being written down, codified, and 'posited', in order to become

20 A. Mooij, *Prudentie en Evidentie* (Prudence and Evidence), 2009, p. 15; Cassirer [1944] 2006, supra note 15, pp. 128-139; E. Cassirer, *The Philosophy of Symbolic Forms. Volume III: The Phenomenology of Knowledge* (tr. R. Manheim) [1929] 1957, p. 202; Verene, supra note 19, p. 16.

21 More or less: in stating that meanings are finite I do not mean to imply that terms can always be (or could ever be) lent definite meanings, which are immune to any adaptation or interpretative controversy. Meanings are finite in the sense that they – together, as a systematic or functional unity – delimit and domesticate an otherwise unlimited, unmediated reality. Cassirer [1929] 1957, supra note 20, p. 286: 'Nowhere (...) do we find anything isolated or detached.' Meanings are related to one another as a system of ideal concepts in terms of which we denote and grasp reality. To this extent, these meanings or concepts constitute both the medium and the limit of our access to reality and to the world.

22 J. Habermas, *Between Naturalism and Religion. Philosophical essays*, 2008, pp. 151-180.

23 H. Lindahl, 'Democracy and the Symbolic Constitution of Society', 1998 *Ratio Juris* 11, no. 1, pp. 12-37, at pp. 20-22.

24 Mooij 2009, supra note 20, p. 15; Coskun, supra note 16, pp. 205-208.

25 In Subsection 3.2 I argue, following Scott J. Shapiro, that only the sophisticated forms of social planning that legal institutions can provide can be expected to address the moral problems which alternative forms of organizing intersubjective behaviour are unable to rectify. Cf. Kahn, supra note 18, pp. 163, 171-172.

accessible to a general public.[26] In this way, posited law is enabled to place a plurality of individual interests under the governance of a shared normative order, so that intersubjectively supported patterns of expectations and claims regarding one's own and fellow subjects' actions can develop. Law engenders an objectification of cultural life: it elevates the human subject above the socially dimensioned world and places him within a new objective dimension in which to shape and direct his future actions.

It is important here to take note of the fact that law does not respond to social configurations of circumstances and actions in a *direct* way. The law first grasps these social facts in its own concepts, before these facts are available for juridical processing.[27] The law, therefore, does not so much represent states of affairs within the extra-legal life-world, but *mediates* between social facts and juridical meanings. Between the world of social facts and the world of juridical meanings, a comprehensive system of symbols is in place which produces internal connections between both worlds.[28] From this it follows that social facts must themselves already be considered to be the bearers of juridical meanings, in order that these facts can be fixed to these meanings within the symbolic form of law. The social world, in other words, must be characterized by a juridical 'symbolic pregnance': every social fact can in principle be perceived through a juridical lens. The law thus reshapes the intersubjective life-world into a world which is *filled* with juridical meanings.

Law cannot do this, however, by simply filling up the total social world with its own meanings. In order to regulate society, law must delimit and condense the social life-world, just as language delimits and 'domesticates' the initially unlimited, chaotic reality. This delimitation is brought about by the development of a system of juridical concepts, which in the first instance refer exclusively to one another, and only by that route to the world of social facts. In this way, law constitutes a 'functional unity': juridical concepts do not point to ontic facts that stem from the social world directly, but they point primarily to ideal meanings. And the singular facts that are given in subjective perception are mapped onto these meanings only subsequently.[29] The law's concepts engender a reduction of reality, thus enabling us to consider various distinct facts from the perspective of a certain legal rule as legally *equal* facts, i.e. as different representations of the same legal meaning.[30]

Legal concepts not only bring about a reduction of the social life-world, they also effect a transformation of the social life-world. The law transforms the lingually constituted public space into a symbolically dimensioned legal space that is governed by the perspective of rules.

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26 Coskun, supra note 16, pp. 259-260.

27 See K. Raes, 'Legality and the Mirror of Language. Some remarks on Law's Textuality', in R. de Lange et al. (eds.), *Plural Legalities. Critical Legal Studies in Europe*, 1991, pp. 209-225. The implications of this statement should not be overrated. Naturally, the law makes use of many concepts that are firmly rooted in colloquial language usage. The criminal law's concept of causation is an example of this. However, the fact that *the law* regards a certain relation between a particular action (or omission) and a particular result or outcome as an instance of the criminal concept of causality, is and remains a function of the meaning that the law attaches to its concept of causality, even though it may in certain or even in many cases be so obvious that a causal relationship applies that the adjudicating court feels no need – and does not need – to make any (explicit) reference to the doctrinal concept of causality.

28 R. Foqué & A. 't Hart, *Instrumentaliteit en Rechtsbescherming. Grondslagen van een Strafrechtelijke Waardendiscussie* (Instrumentality and Legal Protection. Foundations of a Discussion of Values in Criminal Law), 1990, pp. 138-140, emphasize in this connection the counterfactual nature of juridical concepts. They are not to be conceived of as the mirroring images of states of affairs that occur within reality; their meaning is to be found primarily in the fact that they *mediate* the relations between empirical facts, on the one hand, and the doctrinal theory of law, on the other. See also R. Foqué, 'Legal Subjectivity and Legal Relation. Language and Conceptualization in the Law', in F. Fleerackers et al. (eds.), *Law, Life and the Images of Man. Modes of Thought in Modern Legal Theory*, 1996, pp. 325-342, at pp. 338-341.

29 Lindahl, supra note 23, pp. 26-27; Coskun, supra note 16, pp. 262-263.

30 In Section 5 it will be argued that the function of doctrine in criminal law is not to be sought primarily in the way doctrine 'fills in' the different (statutory) norms of the criminal law with additional sub-rules, but that its function lies primarily in the formation of a functional unity of legal concepts within the criminal law's symbolic space.

On account of the fact that the legal space is invested with a perspectival dimension, it is possible to determine whether a certain social fact either is 'in line' with a particular legal rule, or deviates therefrom. Any objective agreement regarding the legal meaning of social facts, in other words, is conditional upon those social facts having been filtered through the symbolic screen of the juridical concepts already in advance.[31] The fact that people generally agree in their answer to the question whether a social fact is in accordance or conflicts with a given legal rule can again solely be the result of the *interposing* of a ground or necessity between man and the intractable human life-world.

By virtue of the efficacy of the concepts of law, social conflicts can be cast in the mould of a legal case with a marked beginning and a marked end, within the confines of an encompassing legal space.[32] Within that space it is made possible to quarrel about conflicts in a juridically regulated manner. The manner in which this is done is subject to a first and foremost procedural technique: the law's different concepts contain a kind of formal topology, in that they, in the first instance, distribute positions within legal space. The law's concepts determine who is eligible to speak and make himself heard within the legal arena, when and subject to what conditions this is in fact possible, and what kinds of arguments stand a chance of being legally recognized and acknowledged. In this way, law condenses the social world until a coherent framework of references emerges by means of which the law delimits the possibilities that we enjoy outside the legal space to entertain widely different ways of thinking about and conceiving the world.[33]

2.3. Representationalism and legalism

Language and law are examples of symbolic forms, i.e. symbolic systems that enable us to have a particular relation to and engagement with reality. In the previous subsections it has appeared that a symbolic form instantiates an order within which a pre-symbolic reality is represented only secondarily. The relation with the world outside of the symbolic form is mediated and is therefore not depicted immediately by the symbolic form. This means that objects are not given to human perception in any direct way. They only present themselves to human consciousness indirectly, that is to say: through a medium. By means of symbolization, man puts an interval in place between himself and reality. By virtue of this interval figures can stand out against a background, and subsequently be apprehended as distinct objects by subjective consciousness and grasped in a specific meaning.[34]

From the foregoing it follows that we will have to reject the view according to which meanings generally stand in for, or are the substitutes of, immediately given ontic facts. This view is itself a manifestation of epistemological *representationalism*: our thinking is portrayed as a process that immediately pictures reality, in the sense that the concepts in which we think are taken to refer to objects of which these concepts are the substitutes.[35] Meaning, however, is an ideal category and cannot be derived from an ontic fact. Objects have no inherent meanings

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31 Coskun, supra note 16, p. 264; B. van Roermund, *Het Verdwijnpunt van de Wet. Een opstel over de Symboolwerking van Wetgeving* (The Vanishing Point of Statutory Law. An essay on the Symbolic Structure of Legislation), 1997, p. 71.

32 Van Roermund, supra note 31, p. 72.

33 R. Foqué, *De Ruimte van het Recht* (Law's Space), 1992, pp. 10-12, 34; Foqué, supra note 28; Van Roermund, supra note 31, pp. 69-71; M. Davies, *Delimiting the Law. 'Postmodernism' and the Politics of Law*, 1996, pp. 13-14: 'Thus, a limit is an end to thought – something is there preventing us from thinking *that*. And, very often, there is something (…) preventing us from even seeing that we are prevented from thinking *that*. We are blind to the limitations of thought. (…) A limit is (on another hand) the beginning of thought, the beginning of action and the beginning of ourselves. Without the taxonomy which says that *that* is impossible to think, we would not be able to think *this*. The limit gives us a place to begin, a place to put our thoughts, a place to proceed and a place to make conclusions.'

34 Mooij 2009, supra note 20, p. 15. This philosophical insight seems to find support in certain theories on the so-called 'embodied mind'; see Den Boer, supra note 17, pp. 200-206.

35 See Lindahl, supra note 23, p. 25.

that precede, and that are independent of, the symbolic system of meanings within which objects are cognized and experienced. The symbolic form interposes a 'ground' between man and the world and thereby it definitively obstructs all access to an ungrounded, i.e. pre-symbolic, reality. The interposed ground, admittedly, irretrievably furnishes the symbolic form with a certain measure of contingency, but this is a founding, and therefore a necessary, contingency.[36]

When confronted with representationalist theoretical reflections on the law we may speak of *legalism*. In legalistic portrayals of law, it is presupposed that juridical concepts represent and mirror ontic states of affairs.[37] The legal order is taken to comprise a reproduction of a social order, the existence of which is supposed to precede, and to enjoy independence from, any juridical conceptualization. Law's concepts, however, can hardly be thought of as direct depictions of states of affairs in a virginal reality, that is to say: a reality still untouched by the categories of the symbolic order of law. Neither could they ever be such depictions, because the only type of reality to which legal concepts are able to refer directly is a symbolically delimited and processed juridical reality.[38] This juridical reality is the effect of a human intervention: agreement of subjective opinions on the meaning of concepts and rules is only possible within a juridically *construed*, objective order.

The forceful objections that representationalism and legalism have met with, should therefore not entice us to adopt a relativistic or nihilistic view.[39] Objectivity is not denied. On the contrary: objectivity appears to thank its very existence to symbolic formation. Without symbolization, man would be surrendered to an immediate, ungrounded reality of 'brute facts' with which no meaningful contact can be established. The radicalness of the anti-representationalist way of thinking, thus, does not consist in any denial of the possibility of true propositions regarding the meaning of a given rule of law. It consists in the implication that the objective meaning of a legal concept or of a legal rule is ultimately a function of the way in which those participating in a legal order are 'trained' to read the different signs that together make up the symbolic form of law.[40]

The process of training should not be thought of in too activist terms. Of course, at law schools students are actively trained in the ways they are to understand and use legal concepts and rules, by letting them analyse and work with cases, which are sometimes imagined cases, and sometimes actual or real-world cases derived from practice (!). However, to the degree that this didactic strategy is successful, the training culminates in an appropriation or internalization of the learnt way of handling legal concepts and rules, to the effect that it becomes almost second nature and in most cases does not require any substantial mental, interpretative work. In response to the somewhat trivial objection that the meaning of by far most legal concepts and rules is

36 Van Roermund, supra note 31, pp. 27, 29-31. See also note 88, infra.

37 See B. van Roermund, *Law, Narrative and Reality. An essay in Intercepting Politics*, 1997, pp. 125-128. Van Roermund presents the following definition of the term representationalism (p. 126): '[I]t is the rule which governs the interpretation (or, for that matter, the action), not vice versa, and (...) it does so by virtue of the *fact that it is epistemologically possible* (though cognitively difficult) *to formulate a set of truth conditions or assertion conditions* on "fitting". The idea is, that the judgment whether a particular interpretation or action is in accordance with the rule or not, whether it "continues" the rule or not, whether it is a step already foreseen by the rule or not, has its epistemological basis in such a set of truth conditions or assertion conditions.' Cf. C. Rovane, 'Anti-Representationalism and Relativism', 2006 *Protosociology* 23, pp. 145-158, at p. 145: 'a certain metaphysical realist picture of the mind-world relation, according to which true sentences correspond to mind-independent facts.' I will come back to this in Subsection 4.2, infra.

38 See also note 27, supra.

39 Cf. Rovane, supra note 37.

40 The use of the term objective perhaps requires a clarification. Throughout this article, the term objective is used in roughly two 'ontological' senses, discerned by Matthew H. Kramer. The term is taken to express a certain measure of 'mind-independence', insofar as reference is made to the objective nature of the legal order; and the term denotes 'determinate correctness', insofar as reference is made to the objective correctness of judicial judgments or answers to legal questions. See M. Kramer, *Objectivity and the Rule of Law*, 2007, pp. 3-38; cf. K. Greenawalt, *Law and Objectivity*, 1992, pp. 3-4, 93.

'clear', it can be maintained that the informative value of a concept or a rule is conditional upon this concept or this rule being embedded within a whole of, in the last instance, contingent, pre-reflexive assumptions. I will elaborate this in more detail in Sections 4 and 5. In the next section, attention will first be paid to the concept of a rule, and to how rules lie embedded in legal space.

3. Law as social planning

3.1. Rules and plans

In the foregoing section the term rule was already used on a number of occasions. The fact that law operates through rules is of course rather self-evident. And also the fact *that* the manner in which the law does so is made conditional upon the law's own framework of juridical concepts to which the law binds itself, need not, after what has been discussed in the previous section, to be accounted for any further. What has not been discussed so far, however, is *how* the law designs or construes its own symbolic space, and how the law 'operates' with rules within this space. In this section I discuss a theory that holds that rules are essentially 'plans' and that legal rules are the results of a specific process of social planning. Paying attention to this theory will prove to be useful for several reasons. A comparison between rules and plans will serve to establish that rules are in essence elliptic representations of *action lines*. Given a certain perspective or point of view, these lines can be extrapolated or continued in a certain manner. I will elaborate on this view in Section 4, where I will attempt to present an account of what it means to 'follow' a rule, without ending up in representationalism's pitfall. Furthermore, a discussion of the planning theory of law may serve to make clear in what way law's symbolically organized space shows both continuity and discontinuity with the life-world that is symbolically organized by colloquial language.

In his recent book *Legality*,[41] Scott J. Shapiro argues for the proposition that law – that is to say: a given legal system and the totality of legal rules that apply within this system – in at least two ways is intrinsically connected with sophisticated forms of what he terms 'social planning'. Not only does law constitute the never definitive result *of* an ever ongoing process of social planning, law also results *in* a form of social planning and forms the continuous embodiment thereof.[42] In order to bring the meaning of this proposition within sight, it will first need to be ascertained in a very general sense what plans are and in what way the concepts of plans and rules coincide. According to the definition offered by Shapiro, plans are 'abstract propositional entities that require, permit, or authorize agents to act, or not act, in certain ways under certain conditions.'[43] Plans are thus the embodiment of a specific kind of rules, viz. rules characterized by a specific structure, by a specific process through which they are created, and by a specific inherent normative teleology.

The *structure* of plans is partial, composite and nested. A person who designs a plan usually starts out with the determination of an overall goal which he wishes to achieve. For example, I may adopt the plan to watch a film tonight. In order to effectuate this general, rudimentary plan, it is often necessary that further choices are made with regard to the way in which, and the means by which, this goal is best furthered. I may decide to go to the cinema,

41 S. Shapiro, *Legality*, 2011. The proposition on the nature of law is strongly inspired by a number of insights taken from the work of Michael E. Bratman ('human beings are planning agents in a social world'; see M. Bratman, *Faces of Intention. Selected essays on Intention and Agency*, 1999, pp. 1-12).

42 Shapiro, supra note 41, p. 176.

43 Shapiro, supra note 41, p. 127.

instead of renting a film from the local video store. The putting into effect of this already somewhat more detailed plan to go to the cinema again requires some further decisions to be taken. I will have to check what films are currently being screened in the cinemas, decide which film I would be most interested in seeing, check what cinema I will then have to go to, and reach a decision as to whether I will use public transport or my bicycle to get to that location, et cetera. In this way, the general plan is filled and mapped out with sub-plans. These sub-plans are nested within a larger framework, and it is from this framework that they derive their meaning. As a plan assumes increasing proportions, and increasing complexity, and as the plan adopter is less familiar with what is involved in the execution of the plan, it will be necessary to flesh out the general plan with more detailed sub-plans. Nonetheless, it will hardly ever be necessary to specify in full detail every single step that needs to be taken in order to achieve a certain goal.

That plans normally need not be exhaustively specified is a result of the fact that we, during the process of planning, take our past deliberations about means and ends, i.e. our previously attained experiences in forming and executing plans and sub-plans, as a given.[44] Plans, therefore, are typically *partial*. The *process* whereby these partial plans are created is incremental, dispositive and purposive in nature. On account of the fact that plans constantly leave blank a number of steps that need to be taken in order to achieve the overall aim – that is to say: on account of the fact that plans are typically partial and somewhat sketchy entities – plans possess a measure of flexibility that enables us to flesh out such plans over time. In addition to this, the adoption of a plan by a subject is attended with the creation of a certain subjective *disposition*: the plan disposes the subject to also actually – unless certain unforeseen events happen to occur – put the plan into effect. This implies that plans are purposive entities: they are not only created, but are created *to be norms*. The moment I adopt a plan for myself, this plan is supposed to, as it were, take over my thinking, to do the thinking for me: the plan is supposed to pre-empt deliberations about its merits, and also purports to provide a reason to pre-empt deliberations about its merits.[45] The normative *aim* of plans, therefore, is to settle what is to be done.

We are now able to see that plans are related to norms in a specific way: a subject who adopts a plan for himself places himself under the governance of a norm. And not just any kind of norm, but a norm that has a partial, composite and nested structure, that is created by an incremental, dispositive and purposive process, and that is supposed to settle questions about what ought to be done. This specific connection between plans and norms is characteristic not only of individual planning, but also of *shared* forms of planning.[46] Plans can also be adopted for other subjects, and for groups of subjects. Shared forms of activity are accompanied by coordination problems. The actions of the participants in a shared activity can be coordinated with one another in completely improvised ways, which provide no guidance beforehand to any participant. However, when certain conditions apply, these completely improvised ways of assessing options open to the different participants in a shared activity become too unstable, too unpredictable, and too unreliable. Planning is needed in the context of shared activity when alternative forms of coordination fail to channel the behaviour of the different participants so as to render that behaviour reasonably predictable for the others.

According to Shapiro, the adoption of a shared plan is desirable whenever one or more of the following factual conditions apply. The shared activity involves *complex* actions, the

44 Shapiro, supra note 41, pp. 121-122; Bratman, supra note 41, pp. 15-17.

45 Shapiro, supra note 41, pp. 128-129; cf. J. Raz, *The Morality of Freedom*, 1986, pp. 42-53; J. Raz, *The Authority of Law. Essays on Law and Morality. Second Edition*, 2009, pp. 16-19. Cf. note 54, infra.

46 On this, see Bratman, supra note 41, pp. 93-163.

performance of which demands significant knowledge and skill. By simplifying decision-making procedures, planning aims to compensate for the lack of trust that participants have in their own and in their fellow participants' judgments in improvised attempts at coordination.[47] The same obtains when a group of subjects is involved in *contentious* activities. When different participants adhere to different preferences or values, planning helps to settle possible disputes correctly. Finally, planning is desirable when the execution of shared activities confronts the participants with problems that have *arbitrary* solutions, which render the decisions of the participants unpredictable unless a shared plan is adopted that pre-selects one solution out of a multiplicity of available options.[48]

In these cases planning can compensate for the deficiencies of alternative, improvised attempts at coordinating shared activities. Shared plans relieve the agents of the burden of continuously having to deliberate about the proper ways to act in different circumstances. In this sense, the shared plan does the thinking for the agents involved in a shared activity. But in order for a plan to be a *shared* plan, these agents must in some way accept that plan. Acceptance of the plan by every participant in the shared activity does not mean that certain participants cannot to some degree be alienated from the planned activity, which is to say: it does not mean that every participant actually needs to intend or desire for the plan to achieve its end. Acceptance implies nothing more nor less than that every participant is committed to act in a manner consistent with the plan. The deliberation, negotiation and bargaining that are needed to render the plan generally accepted make the shared plan a costly thing to produce. These costs, however, can be reduced in a number of ways.

The most effective way of reducing the costs that accompany the creation of a shared plan involves the introduction of a *hierarchical structure* in the group of participating subjects.[49]A group of agents can select amongst themselves one leader who is invested with the authority to adopt plans for the other members of the group. The introduction of a hierarchy into the group results in a vertical division of labour: instead of lengthy group deliberations, one person is entrusted with the responsibility to set up a communal plan for all. The members of the group surrender their power to plan to a leader; in so doing, they outsource various stages of planning to the leader and defer to this leader's planning for them. However, in massively shared activities, a mere vertical division of labour may not suffice. When large collections of individuals are involved in a shared enterprise, the shared activities are bound to become more complex, contentious and arbitrary. Moreover, as the number of individuals involved in the shared activities increases, the chances are that also a larger number of them will be to some degree alienated from the overall goal pursued by the shared activities.

The mere introduction of a vertical, hierarchical decision-making structure will then not suffice to manage forms of massively shared agency. When a very large number of people participate in a shared practice, it may be imperative to *decentralize* the process of group planning. By dividing the activities involved in group planning horizontally, one can compensate for a certain lack of trust among the members of the community to follow the overarching plan

47 Shapiro, supra note 41, p. 133. I do not mean to imply that law can be best understood in terms of providing a normative solution to recurrent coordination problems. In fact, the question whether legal rules can be understood as the normative responses to coordination problems is a rather controversial one; see A. Marmor, *Social Conventions. From Language to Law*, 2009, pp. 156, 165-166; and Shapiro, supra note 41, pp. 105-110.

48 Shapiro, supra note 41, p. 134. Cf. Van Roermund, supra note 31, pp. 47-48.

49 Other cost-reducing means mentioned by Shapiro are the development of 'policies', that is, general plans, and the development of 'customs', that is, gradually and spontaneously emerging patterns of behaviour that were not created for the purpose of being norms (and that are therefore not 'real' plans, but 'plan-like' norms), but that are accepted by the members of a group as standards, used to guide and evaluate behaviour. See Shapiro, supra note 41, pp. 138-140.

of the community, and the different sub-plans contained therein, as they are supposed to. This horizontal division can be brought about by appointing supervisors who are authorized to *apply* the communal plans to the subordinate members of the community. That is to say: supervisors are authorized to monitor the behaviour of the other members of the community, and to see to it that these members carry out the communal plans correctly. The subordinate members of the community can only be expected to capitalize their trust in their supervisors on condition that the supervisors are bound by publicly accessible instructions as to how to apply the community's plans, or as to how to exercise their powers in a valid manner. In short, the vertically and horizontally structured procedures for group planning constitute a self-regulating planning *mechanism*.[50]

3.2. The identity of a legal order

The regulation and coordination of instances of massively shared agency impel the creation of rather sophisticated, self-regulating mechanisms of group planning. Law can be regarded as the most important form of social planning in a given society. Law not only results *from*, but it also results *in* a highly sophisticated form of social planning. The set of features of this form of social planning that, according to Shapiro, defines the identity or nature of law, that is, the necessary and sufficient conditions for something to be called 'law' and not something other than 'law', can be summarized in the following formula: 'a group of individuals is engaged in legal activity whenever their activity of social planning is shared, official, institutional, compulsory, self-certifying, and has a moral aim.'[51] In this subsection, attention is paid to the different components of this definition.

First, for some activity to constitute a legal activity, it is necessary that this activity is an activity of *social planning*. Shapiro calls this the Planning Thesis.[52] Like all other forms of planning, legal planning aims to guide, organize and monitor the behaviour of people. Legal planning is *social* in nature in the sense that it creates and applies norms that represent communal and, mostly, publicly accessible standards of behaviour. Legal planning is like other forms of planning in that it creates *positive* norms: certain norms are designated as authoritative so as to ensure that the individuals involved in this process of planning can simply rely on the thus designated norms without the need for further deliberation, negotiation or bargaining about the proper ways to act in different circumstances. This means that the process by which legal norms are created has an incremental, dispositive and purposive structure.

Legal planning is an *incremental* process, because whatever passes for the law in force in a certain community at a certain time always constitutes the provisional result of an ever ongoing, developmental process of adding new sub-plans – or sometimes of removing sub-plans previously in place! – that fill in and refine the more general legal plans and, ultimately, the legal order's 'master plan'.[53] Legal planning is *dispositive* in nature, in the sense that the individuals who are subjected to the legal rules normally obey these rules. Legal planning is *purposive* in nature in that its very point is to create norms that are (generally) supposed to pre-empt delibera-

50 Shapiro, supra note 41, p. 148.

51 Shapiro, supra note 41, p. 225.

52 Shapiro, supra note 41, pp. 195-204.

53 It should be noted that this incremental process is not only characteristic of the common law tradition's 'judge made' law. Also legislatively enacted *codes* consist of collections of rules that largely codify existing, previously developed law. See Shapiro, supra note 41, pp. 198-200. On the notion of temporality in connection with law, see J. Gaakeer, *Tijdelijk Recht. De Verhouding tussen Recht, Taal en Literatuur* (Provisional Law. The Relation between Law, Language and Literature), 2005. See also the brief remarks on the *Model Penal Code*, supra note 5; and Fletcher, supra note 4, pp. 80-91.

tions about their merits, and that (generally) purport to provide a reason to pre-empt deliberations about their merits.[54] These norms are supposed to settle normative questions about what actions to perform in favour of those actions that the law prescribes.

Second, for some activity to count as a legal activity, this activity must also be a *shared* one. This is what Shapiro refers to as the Shared Agency Thesis.[55] Legal activity is shared in that various legal agents are involved in the *same* activity of social planning, that is to say: the agents play a certain role in one or more of the different stages of one unified process of legal planning. These various stages are regulated by sub-plans that all fall under the scope of the law's unifying 'master plan' whose design is a function of the substantive goals pursued by the designers of the master plan. The process of legal planning is necessarily characterized by both a vertical and a horizontal distribution of planning activities. The introduction of hierarchy results in a shared plan for a number of selected individuals who are authorized to either formulate, adopt, repudiate, apply or enforce plans on behalf of the community at large.[56] The members of this community outsource various stages of social planning to these individuals, some of whom are invested with the authority to adopt norms for the community, and some of whom are invested with the authority to apply these norms whenever a dispute arises as to whether or not an individual has acted in a manner which is consistent with the norms of the law.

The individuals who are legally authorized to adopt or apply plans for the whole of the social community are the occupants of durable *offices*. Their being so authorized is not a function of the individuals' personal identities or names, but is made dependent on a set of appropriate qualifications that these individuals will have to meet in order to be eligible to occupy these offices. In this way, the hierarchical process of legal planning is impersonalized. The organisation of legal planning is further impersonalized as a result of the fact that the planners who are authorized to inhabit a certain office are bound by certain instructions that specify the formal procedures according to which the authorized powers are to be exercised. In this way, legal planning activities become *institutionalized*. Furthermore, legal activity is not only a shared, official and institutionalized form of social planning, it also constitutes a *compulsory* form of authority, in that consent is not a necessary condition for the validity and applicability of the law's demands.[57]

Third, in order for an activity to count as a legal activity, the activity must be performed by an agent who or an institution which is generally presumed to be authorized to do so. Law is a *self-certifying* planning organization. This means that a legal system is presumed to enjoy legal validity. Unlike other planning organizations, a legal system is not required or expected to demonstrate to a superior organization (if it exists) that its rules are valid, before it can legitimately exercise its authority.[58]

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54 Shapiro, supra note 41, pp. 128-129; cf. J. Raz, *Practical Reason and Norms*, 1999, pp. 40-45, 73-76. I added the bracketed word 'generally' in order to express a slight hesitation with regard to the endorsement of the mentioned 'pre-emption thesis'. While it is certainly true that many legal rules are 'exclusionary' rules in the sense that they purport to supplant and preclude the subordinate's own judgment or ethical choice, this might not hold true for all legal norms. It may be that those who adopt legal norms do not always and necessarily aim to pre-empt all deliberation about the norms' merits. The latter view is propagated by K. Greenawalt, *Conflicts in Law and Morality*, 1989, pp. 29 and 42; K. Greenawalt, *Legal Interpretation. Perspectives from Other Disciplines and Private Texts*, 2010, pp. 163, 177 and 197-198. The answer to the question whether or not legal rules *always* aim to pre-empt all subsequent deliberation is not relevant for my purposes in this article; it is enough for my purposes that legal norms – especially criminal norms – normally pursue this pre-emptive or exclusionary aim.

55 Shapiro, supra note 41, pp. 204-209.

56 Shapiro, supra note 41, p. 176; cf. Marmor, supra note 47, pp. 46-52.

57 For more on the indispensable functions of official activity, institutional activity and compulsory governance in law, see Shapiro, supra note 41, pp. 166-168, 209-212.

58 Shapiro, supra note 41, pp. 220-221.

Fourth and last, for some activity to constitute a legal activity, it must be supposed to have a specific *moral aim*. According to what Shapiro refers to as the Moral Aim Thesis, legal activity aims at remedying the moral deficiencies of alternative forms of planning.[59] These deficiencies of non-legal forms of planning obtain in what Shapiro terms the 'circumstances of legality'. The circumstances of legality are the social conditions that render sophisticated, specifically legal forms of planning desirable. The need for law comes in when a society is faced with complex moral problems, the solutions to which are either too arbitrary or too contentious for non-legal forms of planning to produce. In the face of these problems, consensus becomes too costly to achieve and fails to produce stable and durable answers to emerging moral questions.[60] Moreover, also less sophisticated forms of social planning than the ones that only legal institutions can provide, cannot remedy the failure of consensus. The costs and risks associated with non-legal forms of planning can be so high as to compel a community to reduce these costs and risks by means of legal planning.[61]

According to the moral aim thesis, it is part of the identity of a legal order that it pursues a moral end. Only a legal order is supposed to deal with those problems that alternative forms of social planning are unable to rectify.[62] This is what sets apart a legal order from many other planning organizations. The fact that law entertains a moral aim does not mean that law also necessarily succeeds in achieving this aim. Nor does it mean that law necessarily has to pursue some specific substantive goal; a legal system may pursue a goal that many people would deem downright evil, and may then still count as a legal system. This legal system must still be supposed to have a moral aim in the somewhat formal sense that it aims to affect the normative situations of the subordinate members of the legal community, i.e. their rights and obligations. The moral aim thesis is thus agnostic as to which moral problems the law ought to address and as to how these problems should be dealt with.[63] The moral aim thesis does, however, account for the fact that, and the reasons why, law is considered to be an invaluable and indispensable institution in modern societies. It also explains why legal orders that do not satisfy their moral aims are criticizable.[64]

3.3. The legal point of view

At the beginning of this section I promised that dwelling upon the planning theory of law would teach us something about the nature of rules, more specifically, that rules are in essence elliptic representations of *action lines* that, given a certain perspective or point of view, can be extrapolated in a certain way. It was also promised that by means of the planning theory it would be made clear in what way law's symbolically organized space shows both continuity and discontinuity with the life-world that is symbolically organized by colloquial language. These promises I hope to redeem in this subsection.

Previous subsections showed that legal norms are plans and that plans in their turn are a certain type of norms. We use the word norm to indicate standards which are both prospectively

59 Shapiro, supra note 41, pp. 213-217.

60 See Shapiro, supra note 41, pp. 161-164. According to Marmor (supra note 47, pp. 73, 171-174) the social conditions and complex moral problems that engender the need for law or legal planning are primarily addressed by what he calls the 'deep conventions' of law.

61 Shapiro, supra note 41, p. 170, and at p. 173: 'A community needs law whenever its moral problems – whatever they happen to be – are so numerous and serious, and their solutions so complex, contentious, or arbitrary, that nonlegal forms of ordering behavior are inferior ways of guiding, coordinating, and monitoring conduct.'

62 In this sense, the symbolic form of law shapes social life in a unique way, that is to say: in a way that other symbolic forms, including that of language, are unable to shape social life. Cf. Subsection 2.2, supra.

63 Shapiro, supra note 41, p. 213.

64 Shapiro, supra note 41, p. 172 and p. 214.

normative as regards the answer to the question as to how to act in a certain situation, i.e. what action is prescribed in the situation at hand, and retrospectively normative as regards the answer to the question whether an action conforms to the provisions of an applicable norm. A norm thus has a prescriptive or indicative function, in the sense that it functions as a standard for the correct or valid way of continuing the action line that it represents. Earlier we saw that a legal norm can be regarded as a plan, i.e. as a normative entity that is characterized by its partial structure, by its being embedded in a complex of mutually related plans and sub-plans that together are subject to the authority of a master plan, by the fact that it forms the result of an incremental, purposive and dispositive process, and by the moral objective it pursues.

Plans – norms – are partial or elliptic phenomena, as the action lines that they indicate never offer a completely exhaustive description of the various steps to be taken in order to realize the objectives of such plans. Plans thus constitute condensed notations of such fully detailed step-by-step descriptions. To the degree that a plan condenses this detailed overall picture, it is based on something outside itself: plans are built on our previously gained experiences and on our previously acquired insights, and in order to be reasonable to entertain, plans need to be consistent not only with our other plans, but also with these previously attained beliefs.[65] This applies to plans in general and to legal plans or legal norms in particular. A single legal norm always also derives its meaning from the comprehensive whole in which it lies embedded. This comprehensive whole is constituted by the symbolically organized legal space and is dominated by a certain perspective: the legal point of view.

The legal point of view is the perspective wherefrom legal norms are valid, and thus binding on the various legal subjects within a given legal order. One of the essential characteristics of a legal order is, as we saw earlier, its compulsory form of social planning (the characteristic of compulsory governance): from the perspective of the legal order, subjects are under a moral obligation to obey the legal norms.[66] The subjective approval of the contents of these norms is thus not a condition for the legal validity thereof. As the exercise of legal power or authority effects changes in the normative situations in which subjects find themselves, and as those normative situations are controlled by moral concepts, such as rights and obligations, legal authority is to be regarded as a form of *moral* authority.[67] This, however, does not imply that legal authority is by definition a morally justifiable form of authority, or, the other way round, that a morally unjustified order could not bear the label of a legal order.

Within the term 'legal point of view' the designation 'legal' fulfils a specific function: the designation expresses that the legal validity of a norm in the end is another form of validity than, and cannot directly be reduced to, the moral validity of a norm.[68] The law exists solely by the grace of social facts: the existence of a legal order in the end can only be explained by reference to the circumstances of legality, i.e. the circumstances, in which only legal forms of social planning can provide solutions for coordination problems within large communities. The existence of a legal order is the result of the simultaneous occurrence of the four social conditions discussed in the previous subsection. This implies that a legal norm is not dependent on its moral legitimacy in order for it to exist as a *legally valid* norm. The function of plans – also of legal plans – is that they in a way take over our own thinking: exactly because plans are drawn up in

65 See Shapiro, supra note 41, p. 124.

66 According to Shapiro, coercion and the provision of sanctions are not necessary features of law. See Shapiro, supra note 41, pp. 169-170. Whether or not this is correct does not matter for our purposes. Cf. R. Alexy, *The Argument from Injustice. A reply to Legal Positivism*, 2002, pp. 15, 85-86, 128.

67 See Shapiro, supra note 41, pp. 101-102, 110-111, 182.

68 See Raz, supra note 54, pp. 170-177.

order to answer certain moral questions beforehand, they relieve subjects of the necessity to conduct potentially endless deliberations and negotiations each time a similar question poses itself.

This then means that the existence and the contents of a given plan or norm are in principle to be determinable by means of a method that does not comprise a search for the morally correct answer to the normative question that the norm is supposed to have already answered.[69] This legal-positivist claim holds an important insight regarding the nature of the relation between the symbolic order of the law and the symbolically organized social world. By means of legal planning an artificial space is being created, that is at a distance from the moral demands governing a society. Shapiro in this respect mentions the distancing function of legality: this function 'enables us to talk about the moral conception of a particular legal system without necessarily endorsing that conception.'[70] Only from the legal point of view can it be stated by force of necessity that subjects are 'morally' bound by the demands of law. The law claims legitimate authority, but this does not mean that everyone has to agree on the underlying moral theory according to which the law is in fact morally legitimate.[71]

The legal point of view, in other words, consists of an interposed ground between the legal subject and the social world. It is a kind of 'firewall' between the demands of morality and the demands of the law,[72] a legal space carved out by morality itself, within which one can act, if necessary, as if the legal norms also have moral validity. The legal point of view is thus an interposed objectivity, a legal necessity, which is constitutive of a symbolically organized legal space that is at a distance from the pre-legal space of the life-world. This, however, is a far from complete description of the meaning of the legal point of view. Not only does this perspective comprise an instrument for the explanation of the relation between law and morality; it also comprises the key to an explanation of the process of 'following' and applying legal rules. The conclusion that – from the legal point of view – one is morally obliged to observe a legal norm in itself does not provide any clarity as regards *how* one has to do this.

In the next section we will see that a norm *as such* ultimately does not say or cannot say what one has to do in a certain case, i.e. how to extrapolate the action line indicated in the norm in a concrete case, but only *that* one has to do what the norm prescribes. The person who wishes to know whether his behaviour or that of another person is 'in line' with a legal norm should assume the point of view of the law; only from that perspective can it become clear what the norm prescribes, how the action line is to be extrapolated. The observance of a rule in this light presupposes a certain degree of reflexivity, of engaging with the incremental, purposive and dispositive process, in which and through which legal rules are established. These considerations will be elaborated in more detail in the following sections.

4. Applying rules

4.1. Rules, norms, plans, and the definitions of crimes

In the foregoing the terms rule, norm and plan were used interchangeably in a seemingly rather haphazard way. It is now time to make some conceptual distinctions between them. The distinc-

69 Shapiro, supra note 41, pp. 177-178.

70 Shapiro, supra note 41, p. 186.

71 See Raz 2009, supra note 45, pp. 3-33.

72 I have borrowed this metaphor from a lecture by Jules L. Coleman with the title 'The Architecture of Jurisprudence: Part I', which was delivered during the conference *Neutrality and Theory of Law* that took place from May 20-22 2010 in Gerona, Spain.

tions that I will introduce in this section *grosso modo* come down to the following: a plan is a certain type of norm and a norm is a certain type of rule. The concept of a rule functions as a basic concept, on the understanding that norms and plans are always rules, whereas not all rules are also norms or plans.[73]A norm is a rule with the aim of guiding behaviour and of serving as a standard for the evaluation and criticism of past actions.[74] The intensity of this conduct-guiding aim or normative force may vary widely, depending on the type of norm in question, e.g. rules of thumb, or highly individualized and specified orders.[75]

Plans are those norms that are characterized by their partial structure, by their embeddedness in a master plan and in a complex of sub-plans, by their incremental, purposive and dispositive process and by their moral aim. A legal norm then again constitutes a certain type of plan: legal norms are the result of a form of social planning that is shared, official, institutional, compulsory, self-certifying, and has a moral aim. The most basic form of a legal norm is a directive.[76] A directive places a subject or a collection of subjects under an obligation to carry out, or not to carry out, some action. A directive thus comprises either a requirement or a prohibition and in essence consists of an action line that is to be 'continued' by the addressee of the norm. Another form that a legal norm may take is that of a permission which allows a subject to take, or not to take, certain action.

Definitions of criminal offences are usually not formulated as behavioural directives; as a rule, they have the form of a composite plan.[77] Definitions of offences are often formulated as norms addressing an authority appointed by the master plan of the law. This authority is responsible for the application of the behavioural directive that is implicitly present in the definition of the offence and that addresses the citizen subordinate to the law. A criminal provision thus consists of both a prohibition or requirement, addressing the citizen subordinate to the law, and a permissive norm, addressing the court or adjudicating judge. In the previous section we saw that competence for the application of legal norms to facts and circumstances is placed in the hands of persons or institutions specifically authorized for this purpose. In addition, the way this competence is being exercised is often made dependent on various instructions.[78]

By virtue of the master plan of the law, the judge is authorized to apply criminal norms to concrete cases presented to him. This application process among other things implies that the court, in conformity with the instructions of the criminal law of evidence, determines whether a defendant has in fact – as the prosecution alleges – violated an action directive that is implied in the definition of an offence. In other words, the court is called upon to determine whether, from the legal point of view, the defendant's action is to be considered as an incorrect (and thus unlawful) continuation of the action line pre-drawn in the definition of an offence. The question that now begs an answer is: on what basis does the court know whether the defendant acted against the action directive? In order to answer this question, various steps will be taken.

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73 Cf. Van Roermund, supra note 31, p. 6; Shapiro, supra note 41, pp. 40-42.

74 Raz 1999, supra note 54, pp. 117, 208; Shapiro, supra note 41, p. 41.

75 Cf. Raz 1999, supra note 54, pp. 59-62.

76 Shapiro, supra note 41, p. 226.

77 Shapiro, supra note 41, pp. 227-228. Shapiro uses the description of the offence of murder as an example (p. 227): 'A person is guilty of the offence of murder in the first degree when the person purposely and with premeditation causes the death of a human being.' The definition of the criminal offence of murder in Article 289 of the Dutch Criminal Code has approximately similar components (and furthermore contains the penalty provision: life imprisonment or a term of imprisonment with a maximum duration of thirty years or a fine of the 'fifth category'). The action directive addressed to the citizen – 'you shall not intentionally and with premeditation take another person's life' – is implicit in the norm that is addressed to the judge and explicitly authorizes him to apply this action directive to the appropriate cases.

78 Shapiro, supra note 41, pp. 228-230.

The present section still deals with rules and action directives in a general, i.e. not necessarily in a criminal sense. The basic idea is that they – *as* rules – always prescribe or pre-arrange or pre-draw something. In this context the next subsection pays attention to a view of *following* action directives, which attempts to escape from representationalism's or legalism's grip. In Subsection 4.3 it is subsequently argued that following a rule necessarily presupposes that the follower of the rule is *prompted* or *compelled* to continue an action line in a certain way. In Section 5 the focus shifts to the criminal domain and the last step is taken. It is argued there that doctrine first of all possesses a *procedural* function, in the sense that doctrine fills the legal space with perspective and depth, as a result of which the judge is directed into a certain position, wherefrom he is prompted or compelled to apply a rule in a certain way.

4.2. To follow a rule

For a start it needs to be called to mind here that plans – and thus legal norms – are characterized by an intentional orientation: plans normally aim to provide subjects with a reason to pre-empt deliberations on the best or most appropriate way of realizing a certain aim. A subject who binds himself to a certain plan places himself under the governance of a norm that prescribes which actions are to be performed. This does not mean that plans are fixed entities, the content of which is not open to any adaptation. On the contrary: we have seen that plans are characterized by an elliptic structure and by an incremental process. Plans almost never contain a full specification of each step to be taken in order to realize a certain aim. In and during their application they need to be fleshed out according to the circumstances. However, to the extent that a plan fixates an action line to be followed, it forbids, under penalty of the allegation of irrationality, any reconsideration of the reasons for taking the steps that are incorporated in the plan.

A plan or a norm thus represents a reason to act in a certain way. This reason is immunized by the norm against reconsideration, without the norm being capable of legitimizing the reason completely.[79] With this consideration we closely approach the criticism of representationalism and legalism voiced in Subsection 2.3. I argued there that a rule – or, we may now add, a plan – does not contain a direct representation or *picture* of a state of affairs in the social world. The meaning of a rule, or the normative contents thereof, indicating what a subject is to do, depends upon the embeddedness of that rule within an ultimately contingent whole of pre-reflexive assumptions. I also argued that this proposition should not be misunderstood as an invitation to nihilism or relativism. It is not denied that rules or plans can inform us in unmistakable terms on the demands they make upon us. It is thus not denied that rules have an objective meaning; it is solely denied that their objective meaning or their informative power is to be found in a direct, unmediated representational relation between rules, on the one hand, and the actions prescribed by them to their addressees, on the other.

In order to gain a clearer understanding of the proposition that the objective meaning of an action directive is a function of the mediating efficacy of a symbolic form we may focus our attention on some philosophical insights taken from the late work of Ludwig Wittgenstein.[80] Action directives, as mentioned before, constitute action lines that are to be independently continued in a certain way by the persons addressed by the directives. A rule or a directive is thus a kind of condensed notation of the way to proceed in certain cases, of how in certain cases to

79 Cf. note 54, supra.

80 Or rather: we may focus our attention to specific *interpretations* of insights that are attributed to Wittgenstein. In my discussion – which is largely based on interpretations of the work of Wittgenstein that have been presented by others – I make no pretention to do complete justice to Wittgenstein's intentions.

take a 'next step' that is in line with the action line presented by the rule.[81] Wittgenstein in this respect compares rules to rails: 'Whence comes the idea that the beginning of a series is a visible section of rails invisibly laid to infinity? Well, we might imagine rails instead of a rule. And infinitely long rails correspond to the unlimited application of a rule.'[82] This metaphor expresses that following a rule – and thus understanding the meaning of a rule in a given situation – comes down to mentally hitching oneself to this infinite rail and letting oneself be pulled down the track.[83]

What does this mean? It certainly does *not* mean that a rule can simply be regarded as a sort of interpretative formula that could be fully implemented by a subject according to his own insight or at his own discretion. Wittgenstein's famous example of series of numbers makes this clear. Anyone who is requested to continue the following series of numbers *1 3 5*, will automatically write down *7 9 11* et cetera. However, this is not necessarily the correct completion or continuation: any way of continuing this series may in principle – in any case as long as we are prepared to invest our interpretation of the rule that dominates the series with a complexity which is sufficient for a certain continuation – be brought under the scope of a certain formula, by virtue of which that continuation may be regarded as a valid continuation of the series.[84]

Seen in this light, a rule confronts us with the paradox that it has nothing to say on the new cases to which the rule is to be applied: 'This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.'[85] Wittgenstein however hastens to add that there must be a misunderstanding here. The misunderstanding being that the aforementioned description blocks our view of the fact that the continuation of a series, or the extrapolation of an action line, is ultimately not a matter of interpretation,[86] but is instead precisely a matter of a self-evident realization that the rule has to be applied *like this*, and not otherwise: 'The rule can only seem to me to produce all its consequences in advance if I draw them *as a matter of course*. As much as it is a matter of course for me to call this colour "blue".'[87]

The problem with the interpretative view of rule following is that it eventually becomes bogged down in an infinite regress. A condensed notation of an action line in a rule *alone* cannot tell us anything as regards the way in which the action line is to be continued in a new concrete case.[88] In other words, a rule cannot mark out its own application or claim its own instances. This means that there is a sort of gap between a rule and the cases to which the rule applies. We would not get any further, however, if we were to close this gap by interposing a process of interpretation between the rule and the case at hand. This does not mean that interpretation is never

81 Van Roermund, supra note 31, p. 25.

82 L. Wittgenstein, *Philosophical Investigations* (tr. E. Anscombe et al.) [1953] 2007, § 218.

83 M. Stone, 'Focusing the Law: What Legal Interpretation is Not', in A. Marmor (ed.), *Law and Interpretation*, 1995, pp. 31-96, at pp. 44-45.

84 P. Winch, *The Idea of a Social Science and its Relation to Philosophy*, 1958, p. 29.

85 Wittgenstein, supra note 82, § 201.

86 The term interpretation is not in itself very clear; it can be given broader and narrower meanings. For the purposes of this article I use the term interpretation in the following sense: with the term interpretation I refer to all mental efforts to discern the meaning of, or to confer meaning unto, initially incomprehensible, or puzzling, or at least not completely 'plain' or 'self-evident' texts, objects, events or utterances. See Greenawalt 2010, supra note 54, pp. 12-13.

87 Wittgenstein, supra note 82, § 238.

88 See Van Roermund, supra note 31, p. 22. In a sense, every new concrete case is in fact a 'new' case. As was noted in Subsections 2.2 and 2.3, supra, the fact that singular cases can be recognized as the 'same' indicates that these cases represent a certain 'meaning'. A meaning is not part of the series of cases or elements that it unifies, but it is the very condition or ground on the basis of which singular cases can be recognized as the same, as equal cases. Sameness is thus a quality that depends on a normative principle. See Lindahl, supra note 23, pp. 26-27; Cassirer [1929] 1957, supra note 20, p. 314; Winch, supra note 84, pp. 24-29; Wittgenstein, supra note 82, § 225: 'The use of the word "same" and the use of the word "rule" are interwoven. (As are the use of "proposition" and the use of "true".)'

necessary in order to apply a rule to a given case; in many cases interpretation is undeniably necessary. But the essential point is that, in the actual application of a rule, an interpretation can never have the last say, can never lay an ultimate foundation under the result reached by the application of the rule.

Interpretations only substitute new or more detailed rules for a given rule. Each more detailed rule in turn begs an explanation in the form of again more detailed sub-rules, *ad infinitum*. Wittgenstein remarks in this context that 'any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.'[89] Whoever argues that rules are by definition indeterminate and can only derive their meaning from interpretation is guilty of a form of begging the question. The misunderstanding caused by the metaphorical description of rules as infinite rails is thus not remedied, but rather exemplified by the notion that the meaning of a rule can only be determined by an interpretation of that rule.[90]

The indeterminacy of an action directive cannot thus be remedied by referring to the necessity of interpretation. Reliance on such a necessity is a makeshift solution that does not solve the problem, but only postpones it. This also applies the other way round. We have already seen that, depending on the way in which a given rule is rewritten, a certain way of acting can always be justified in terms of this rule, and that therefore this action, on another note, can really never be completely legitimized. One cannot endlessly adduce reasons for one's actions and omissions. This thought is expressed by Wittgenstein, where he remarks that when 'I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."'[91] It is now clear that the threat of infinite regress that accompanies the supposed requirement of interpretation, on the one hand, and the explanatory emptiness indicated by the image of rules as rails, on the other, are the two horns of a single representationalist dilemma.[92]

This dilemma is caused by a misconception of the image of the rails. For this image easily raises the misleading suggestion that, within the ideal, normative sphere, rules form direct representations of the chains of empirical actions that they aim to standardize. That such a representationalist reading is based on a misconception becomes clear from Wittgenstein's remark directly following his introduction of the contested metaphor: '"All the steps are really already taken" means: I no longer have any choice. The rule, once stamped with a particular meaning, traces the lines along which it is to be followed through the whole of space. – But if something of this sort really were the case, how would it help? No; my description only made sense if it was to be understood symbolically. – I should have said: *This is how it strikes me*. When I obey the rule, I do not choose. I obey the rule *blindly*.'[93]

The image of rules as rails is apparently to be understood symbolically, and the following of rules takes place blindly. Or, the continuation of a series is not a matter of interpretation, but ultimately of the realization that, as a matter of course, it has to be done in *this* and not in any

89 Wittgenstein, supra note 82, § 198. And in § 201: '[W]e ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.' The next section will therefore show that the function of doctrine cannot be completely captured by the statement that it consists of a totality of 'sub-plans' that elaborate further on the plans – or norms – that make up the criminal law.

90 Stone, supra note 83, p. 45. Also Ph. Bobbitt, 'What it Means to Follow a Rule of Law', in L. Meyer (ed.), *Rules and Reasoning*, 1999, pp. 55-60, at p. 58.

91 Wittgenstein, supra note 82, § 217.

92 Cf. Stone, supra note 83, p. 54; Van Roermund, supra note 31, p. 22; D. Patterson, 'Wittgenstein on Understanding and Interpretation. Comments on the work of Thomas Morawetz', 2006 *Philosophical Investigations* 29, no. 2, pp. 129-139.

93 Wittgenstein, supra note 82, § 219. In this context, reference may be had to the considerations of Elizabeth Anscombe (E. Anscombe, *Intention*, [1957] 2000, §§ 8 and 28) regarding 'practical knowledge' and 'knowledge without observation'.

other way.[94] What does this mean? It means, first and foremost, that following a rule is ultimately not dependent upon adducing ever more detailed reasons; instead, following a rule in the end amounts to a form of 'going along' with the movement already indicated by the rule itself. The subject continuing an action line projects himself in the rule. And, in doing so, he steps into a rule-framework, symbolized by that rule. The rule as a symbol is like a signpost that, from the position taken by the subject, offers a view of an action line within a symbolically construed space, and that prompts or compels the subject to follow the rule in a way that is in line with that action line.

4.3. Being compelled

In this subsection we will see that the symbolic function of a rule can only be understood if we do not consider the rule in the abstract, but in the practical context of its application. We speak of the application of a plan, either when envisaging the prospective determination of the actions that the plan requires, permits or authorizes in certain circumstances, or when envisaging the retrospective determination of the degree to which a past action meets or deviates from a plan. According to Shapiro this process of the application of plans consists of three steps: 'The plan applier must determine (1) the content of the plan, (2) the context of its application, and (3) how to conform the plan to that context.'[95] Seeing *how* plans are to be applied to concrete circumstances is, as was argued before, a function of a symbolic understanding of plans that can account for the way plans prompt the subject to continue the action line implied in the plans in a certain way. In this subsection an attempt is made to shed some light on this symbolic function of plans.

Wittgenstein notes: 'Every sign *by itself* seems dead. *What* gives it life? – In use it *lives*. Is it there that it has living breath within it? – Or is the *use* its breath?'[96] A rule or a plan is like a dead letter when we regard the rule or the plan *in the abstract*, i.e. dissociated from the practical context within which the rule or the plan is used. Once it is taken out of its practical context, the rule becomes infected with the virus of the rule paradox, discussed in the previous subsection: a rule *on its own* cannot define its own normative scope of application, and is thus characterized to that extent by an explanatory emptiness that seems to demand being filled up by means of an interpretation. However, interpretative additions are like explanatory sub-plans that suffer from the same form of explanatory emptiness, and that thus continue to beg for more detailed interpretative additions. By this picture we are led down the blind alley of an infinite regress.[97]

If, on the other hand, we place rules or plans back in their natural surroundings, it appears that they are alive.[98] That is to say: within the practical affairs of human beings we can *see* what the rule as a signpost demands from us, without us (always or necessarily)[99] having to resort to

94 Shortly prior to this, Wittgenstein already notes (supra note 82, § 201): '[T]here is a way of grasping a rule that is *not* an *interpretation* which is exhibited in what we call "obeying a rule" and "going against it" in actual cases.'

95 Shapiro, supra note 41, p. 126.

96 Wittgenstein, supra note 82, § 432. This consideration forms a reply to the suggestion expressed in § 431: '"There is a gap between an order and its execution. It has to be closed by the process of understanding." – "Only in the process of understanding does the order mean that we are to do THIS. The *order* – why, that is nothing but sounds, ink-marks. – "'

97 Stone, supra note 83, pp. 49-50; Aarnio, supra note 3, p. 118.

98 That a rule by itself, i.e. outside the context of its use, indeed cannot provide us with any information about the manner in which this rule must be followed, is shown clearly once more in the following consideration by Wittgenstein (supra note 82, § 85): 'A rule stands there like a signpost. – Does the signpost leave no doubt about the way I have to go? Does it show which direction I am to take when I have passed it, whether along the road or the footpath or cross-country? But where does it say which way I am to follow it; whether in the direction of its finger or (for example) in the opposite one? – And if there were not a single signpost, but a sequence of signposts or chalk marks on the ground – is there only *one* way of interpreting them? (…).'

99 Needless to say: the point is not that interpretations would never be required to discover the meaning of a rule, but that the application of rules in the final instance – i.e. when we have exhausted our supply of reasons adduced that were discovered by means of interpretation – is dependent on a form of 'leap' from the realization that the rule must be applied in one way and not in another.

interpretation. Within the context of our 'life-form'– filled as this is with notions such as direction, indication, location, position, distance – the rule provides us with an unambiguous instruction.[100] As we saw, Wittgenstein writes that the 'rule, *once stamped with a particular meaning*, traces the lines along which it is to be followed through the whole of space.'[101] This consideration expresses the idea that rules *themselves* can indeed indicate the manner in which they are to be followed, but also that the capacity of rules to perform this tour de force is conditional upon their being 'stamped' with a certain meaning.

For an answer to the question as to how rules are stamped with a particular meaning, we need to redirect the focus of our attention: 'What we need from philosophy is not the construction of a groundwork that would secure the notion of a rule's normative reach, but help in acknowledging the ground that lies *before* us.'[102] In other words, instead of searching for a foundation underneath a rule, we had better focus our attention on that which lies before us, when we are on the verge of applying a rule. If we consider rules apart from their practical environment and subsequently start searching for something under the rules to found the application thereof, we look for rules in the wrong place.[103] Wittgenstein suggests that the right place to look for rules is formed by the notion of a practice, i.e. of a practical framework of activities, within which a rule is used and applied: 'And hence also "obeying a rule" is a practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule "privately": otherwise thinking one was obeying a rule would be the same thing as obeying it.'[104]

The notion of a practice refers to the situation that a subject is in when he 'stands before a decision'.[105] The correct application of a rule in such a situation presupposes that the rule-applier or the decision-taker is *familiar* with and attuned to the symbolic meaning of the relevant rule to a sufficient degree. Thus grasping what the rule demands from us is not in principle based on any form of interpretation of that rule, but on our adeptness to the rule: in order to see how an action line is to be extrapolated, we need to have become adept in the practice of applying the rule.[106] How is this adeptness being accomplished? The adeptness is mainly the result of what may be called a process of training or socialization.[107] In this reflexive process rules are set by *showing* others how they are to act in certain situations and these rules are followed in that these others *imitate* the ways of acting shown to them.[108] By virtue of this form of training a rule may acquire a symbolic meaning. By the same token, a subject is able to recognize this symbolic meaning, to see the rule 'as a matter of course' as a condensed notation of an action line to be followed independently by the subject.

In this way human subjects are being initiated into a certain practice. This practice is a symbolic framework in the meaning that we attributed hereto in Section 2: the framework forms

100 Stone, supra note 83, p. 53. See also Greenawalt 1992, supra note 40, pp. 71-73.

101 Wittgenstein, supra note 82, § 219 (emphasis added).

102 Stone, supra note 83, p. 54 (emphasis added).

103 C. Diamond, 'Rules: Looking in the Right Place', in D. Phillips et al. (eds.), *Wittgenstein: Attention to Particulars*, 1989, pp. 12-34; Stone, supra note 83, pp. 56-57.

104 Wittgenstein, supra note 82, § 202.

105 Van Roermund, supra note 31, pp. 43-54.

106 Stone, supra note 83, p. 55. Again (cf. notes 17 and 34, supra), this philosophical insight seems to find support in a number of neuro-philosophical conclusions drawn from research on what is called the 'embodied mind' or 'embodied cognition'; see Den Boer, supra note 17, pp. 155-156, 200-206, 270-271.

107 Wittgenstein, supra note 82, § 198: '(...) "So is everything I do compatible with the rule?" – Let me ask this: what has the expression of a rule – say a signpost – got to do with my actions? What sort of connection obtains here? – Well, this one, for example: I have been trained to react in a particular way to this sign, and now I do so react to it. (...)' See also Van Roermund, supra note 31, pp. 25-27.

108 The consideration in Wittgenstein, supra note 82, § 208, in which it is clarified that this type of education is accompanied or may be accompanied by various forms of feedback, such as signs of agreement or rejection, encouragement, pointing and other gestures, et cetera, is instructive with respect to this.

the result of a symbolic mediation of reality, which results in a necessary delimitation of that reality. This delimitation is indeed a necessity, because a human subject cannot relate to an unmediated shape of reality in any way that would enable the subject to achieve a certain cultural aim. The most basic form of a practice is what Wittgenstein calls our 'life-form'. At the risk of presenting a somewhat anachronistic and philosophically not completely accurate impression of things, it can be argued that this notion of a life-form largely conforms to Cassirer's notion of a human life-world as it is dimensioned symbolically by the symbolic form of language.[109] In this connection the rule may be conceived of as a symbol, offering a view of a place within the practical framework in which the rule is used.

Our life-form naturally comprises various other, more regional practices or symbolically construed frameworks within which rules are set and followed. An important example thereof is the symbolic form of law. A legal rule, e.g. a criminal behavioural directive, in this light can be viewed as a symbol, offering a view of a place within the symbolic legal space. How the legal subject or citizen is to act is pre-drawn in the criminal norm. The legal subject is thus expected to copy or imitate the action that has already been shown elliptically by the norm. And the court, called upon to apply the behavioural directive to a case presented to it, is expected to do the same: it has to follow and continue the action line imposed by criminal law in order to establish whether the action of which the defendant is accused is in line herewith or not.

As said before, this judgment can only lead to an objectively correct result by virtue of a specific form of training and, thus, of the interposing of an objective ground or necessity. The fact that this ground is interposed – that it to that extent is a contingent artefact – ought to prevent us from hypostasizing practices and habits prevalent herein into foundations underneath rule following and rule applying.[110] Such a point of view would again direct us into the trap of representationalism and legalism. Practices and frameworks are necessary because they are constitutive of our capability to follow and apply rules 'blindly'. They form, however, the contingent results of symbolic mediation.[111] A certain training is thus not a last or ultimate ground to be invoked in order to legitimize the decision to apply a rule in a certain way.

The training is a reflexive process that is to be completed in order to gain access to a certain framework of rules. Once introduced to this framework, rules have a self-evident meaning that *prompts* the subject to a correct application of the rules. From the position that the subject occupies – or has learnt to occupy – vis-à-vis the applicable rule, the subject projects himself in the rule in order to then pursue independently 'in line' with the rule. The action line to be followed is represented symbolically by the rule. The subject will therefore have to 'translate' the abstract action line pre-drawn in the rule into a concrete, own action that the subject may

109 Another link that – at least in general and for our limited purposes – is tantamount to the same, is that between a form of life and the hermeneutical notions of 'being-in-the-world' and of a 'horizon' and the 'supporting consensus'; see M. Heidegger, *Being and Time*, [1927] 2005, pp. 78-90; H.-G. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, [1960] 2010, pp. 247-250; and P. Ricoeur, *Hermeneutics and the Human Sciences. Essays on Language, Action and Interpretation* (ed. J. Thompson), 1989, p. 106.

110 Van Roermund, supra note 37, pp. 133-141; Stone, supra note 83, p. 56; Davies, supra note 33, p. 73.

111 Cf. Stone, supra note 83, p. 55: 'Wittgenstein, however, proposes that, for the sake of clarity, we restrict the word "interpretation" to the substitution of one linguistic expression for another: if we follow this proposal we can allow that it is sometimes helpful, but not always necessary to interpret a rule in order to follow it. What is at stake here is not merely a terminological point. In Wittgenstein's invitation to think of "a way of grasping a rule which is not an interpretation" the word "interpretation" admits the broad sense of any *mediation* between grasping a rule and following it in the particular case.' Stone, in my opinion, is too resolute when he rejects the necessity of all forms of mediation in rule following (or attributes this rejection to Wittgenstein). It is correct that following a rule does not have to be accompanied by the (need for) interpretation, but this does not mean that in following the rules there is no form of mediation. The symbolic function of the rule mediates the relation between grasping a rule and following it. And this mediation produces the desired effect by virtue of the training or disciplining of the subject who follows the rules.

regard as a valid continuation of the normative action line.[112] How a subject ends up in the correct position, and how he is prompted from that position to make a certain decision, will be the subject of the next section.

5. Doctrine and symbolic formation

5.1. Procedure and perspective

In this section the proposition is defended that the principal function of substantive criminal-law doctrine lies in the manner in which it directs the adjudicating judge, as the applier of the action lines that are contained in the definitions of criminal offences, to the correct position wherefrom he is compelled to extrapolate this action line in a certain manner. The defence of this proposition first of all requires that attention is paid to the nature of legal doctrine in a general sense. It will be argued that legal doctrine is first and foremost *procedural* in nature. This procedural character of doctrine invests the symbolically dimensioned space of the criminal law with a particular legal point of view as discussed in Subsection 3.3. The subsection at hand concentrates on this procedural nature of legal doctrine. In the next subsection the practical framework within which criminal judicial interpretation or construction is situated, as well as the notion of reflexivity that plays an important role herein, are examined. The third and last subsection contains a more substantive description of the symbolic function of doctrine in substantive criminal law.

In Section 4 it was argued that following or applying rules – or following or applying plans – is ultimately conditional upon a type of *taking a stand* that does not itself imply the need for any form of interpretation,[113] and it was argued that, when the occasion arises, a process of interpreting the rule may, but will not necessarily, precede the 'stand', which the applier of the rule in the end is prompted or compelled to take. When this concerns the interpretation of a legal rule by a court or a judge we refer to this interpretative process as judicial interpretation or judicial construction. Particularly in the so-called 'hard' cases, judicial interpretation is required both for arriving at the applicable rule and for the correct application thereof to the legal case. The essential point, nonetheless, is and remains that any form of application of a rule is ultimately based on taking a stand, on the taking of a position wherefrom the applier of the rule 'continues' the rule in a certain manner. Taking a stand therefore presupposes a position or situatedness. The question is now: how are the addressees of legal norms – the judge and the citizen – situated?

As was briefly touched upon in Subsection 2.2, the symbolic form of law consists of a legally dimensioned space that results from human intervention: the interposing of a ground between a legal subject and the social life-world. The legal space is governed by the doctrinal concepts of the law that impart the legal space with a formal topology or distribution of subjective positions. The doctrinal concepts designate who is authorized to act as a speaker within the legal arena, subject to what conditions and time-limits this is possible, and which arguments can be recognized in law.[114] In that sense, legal doctrine exists by the grace of a procedural interven-

112 Here we can think of Wittgenstein's considerations regarding the normative or logical rigidity of the machine as a symbol (the blueprint of a machine) and the causal rigidity of the real machines; see Wittgenstein, supra note 82, § 193; Stone, supra note 83, p. 46; Van Roermund, supra note 31, pp. 23-24.

113 I accounted for my use of the term interpretation in note 86, supra.

114 Van Roermund, supra note 31, p. 69. In this subsection I strongly rely on Chapter 6 of this work. See also note 33, supra. And see B. van Klink, *Rechtsvormen. Autonomie van Recht en Rechtswetenschap* (Forms of Law. The Autonomy of Law and of Legal Science), 2010, pp. 29-30, who discusses the same conceptual aspects in terms of 'legal forms', including aspects like temporality, spatiality, divisions of roles, discursive structures, and modalities of enforcement and monitoring.

tion. Beyond the boundaries of legal space one can in principle argue endlessly on the correct solution of a moral question. However, as we saw in Section 3, legal forms of planning are supposed to reduce the costs involved with extensive deliberations and negotiations regarding the correct solution of controversies, to acceptable proportions.

The law reduces these costs by means of a special technique. This technique in the first instance prevents those conflicts that are marked as legal questions from being bickered over endlessly. Given that the law cannot tolerate too lengthy discussions, the law constrains the different activities that can or must be performed as part of legal proceedings to fixed terms or time frames. The ensemble of terms is furthermore associated with a predetermined endpoint for every single legal procedure: there must be a fixed moment when the law has had its final say on a specific legal question and when the last legal judgment on the case becomes irrevocable, so as to truly become the *final* judgment on the matter (the principle of *litis finiri oportet*).

With such a constraint on timing alone, however, little is gained. If the time during which the law allows the parties to exchange thoughts on the proper outcome of a dispute is to be used in a sufficiently *effective* manner, the law will furthermore have to ensure that at least the most central legal concepts are semantically sufficiently outlined. This means, for instance, that criminal doctrine is to provide a formula that outlines the criminal meaning of a rather frequently occurring element of criminal offences like that of intent in such a manner so as to ensure that the furnishing of proof of intent is sufficiently immunized against claims based upon the all too divergent meanings that can be ascribed to the term intention in colloquial speech.[115] The law therefore binds itself to its own body of legal concepts, within which meanings are assigned to concepts that to some extent differ from the meanings that these or equivalent concepts can have outside the legal space.

The technique by means of which the law shapes its own space furthermore entails that every legal subject in principle is provided with access to a court.[116] This implies that in principle anyone who wishes to do so can cast a specific dispute into a juridical mould and present this to a court. As we saw in Subsection 2.3, the world is filled with legal 'symbolic pregnance': any social fact can in principle be viewed through a legal lens and can thus in principle be encoded in legal terms. The other side hereof is that every individual becomes a subordinate of the law and thus must bear in mind the possibility that his actions are poured into a legal mould and that he can be held legally accountable for his doings.[117] In this context, criminal law constitutes a relatively aggressive tailpiece of the symbolic legal order: every subordinate of the law has to realize that certain actions that affect the core of the legal system have criminal-legal consequences.[118]

Another aspect of the technique by means of which the legal space is imparted with a legal point of view, concerns the requirement imposed on the court to seal a case presented to it with its judgment within the applicable terms and in compliance with all applicable instructions.[119] This obligation to reach a decision – or the prohibition of the refusal to hear and to decide a

115 I expand on this elaborately in my doctoral dissertation, De Jong, supra note 1; see also F. de Jong, 'Theorizing Criminal Intent: a Methodological Account', 2011 *Utrecht Law Review* 7, no. 1, pp. 1-33.

116 Of course this is not a universal characteristic of legal systems (and it was therefore not discussed in Subsection 3.2, supra). I present it here as an important characteristic that is partly constitutive of the perspectivistic structure of in any case many legal systems. Cf. Van Klink, supra note 114, pp. 41-42.

117 Van Roermund, supra note 31, pp. 73-74.

118 Van Roermund, supra note 37, p. 178: 'Thus it is characteristic of punishment that it cannot do without symbolically staging the presence of such an order and refer to it. In this regard, punishment is part and parcel, indeed the paragon, of (...) the core of the political.'

119 Paul Ricoeur (P. Ricoeur, *The Just*, 2000, pp. 127-132) in this context speaks of the short-term finality of legal judgments which is connected to the long-term finality of legal judgments, aimed at achieving and maintaining social peace.

case – entails that the judge necessarily has to assume that the law contains a suitable answer to any legal question that is submitted to him, and that it must therefore also be possible to 'find' this answer. Judicial interpretation or construction, finally, by the procedural technique, is subject to the principle of equality, i.e., the instruction prescribing that the court is to treat equal cases in an equal manner. This instruction can only be complied with subject to the condition that the law reduces or condenses the social life-world by means of a system of legal-doctrinal concepts. Together, these concepts form what was termed a 'functional unity' in Subsection 2.2: due to the fact that these do not refer directly to ontic facts in the social world, but in the first instance only to one another, they allow for different distinct facts to be considered as equal facts for the law, thus as facts with the same legal-symbolic pregnance, from the point of view of a specific legal standard.[120]

On the basis of the foregoing brief description of the procedural technique by means of which the law construes its own legal space, it is clear that this technique consists of the interposing of a 'ground' between a human subject and the social world in which he finds himself. Through the combination of the obligation of a court to reach a decision, the prospect of an ultimately irrevocable judgment at the end of all legal proceedings, and the commitment of the law to its own functional unity of doctrinal concepts, the law lays a screen of formal objectivity over what originated as a social conflict.[121] We can now start to see and describe how legal doctrine fulfils its important *procedural* function: doctrine allows for facts from an endlessly diversified social environment to be reduced and reshaped into a legal case with a marked beginning and a marked end. It allows for the thus legally encoded facts to be extracted from the social world and to be placed within the space of the law.[122] Within this space the 'chain of reasons has an end', that is to say: the doctrinal delimitation of the legal space within which a case is subjected to legal processing prevents a too lengthy deliberation regarding the answer to a legal question that has been posed in relation to the case processed.

The law is thus housed within an encompassing legal space that is governed by a formal topology.[123] Legal doctrine lays down how proceedings are to be conducted, which individuals are recognized as parties who can legally take the floor, subject to what conditions this is permitted, and which arguments may be presented with any chance of success. Doctrine, in other words, defines the *positions* wherefrom the participants in legal practice direct and can direct legal proceedings. The direction is not dependent on the subjective *preferences* of the participants, but is ultimately determined by the legal point of view that governs the entire legal space. In Subsection 3.3 we saw in this regard that all legal concepts and norms are dominated by the legal point of view. This means that the manner in which legal concepts and norms are to be applied to cases – thus also the manner in which the action lines that are implicit in the norms are to be extrapolated – is directed by the encompassing *perspective* of the legal space.

The encompassing legal perspective is a construed perspective, an artefact, and as such the result of an intervention. But arriving at objectively correct legal judgments is only possible by virtue of this construed and interposed ground. After all, rules *as such* are indeterminate entities;

120 Lindahl, supra note 23, pp. 26-27; Coskun, supra note 16, pp. 262-263.

121 Van Roermund, supra note 31, p. 71.

122 To prevent a possible misunderstanding of my contention that doctrine fulfils a primarily procedural function, I should clarify that the term procedural is here meant to express the idea that (criminal) legal doctrine is rooted in a kind of technique that, in the last instance, is procedural in nature. I do not, in this connection, mean to refer primarily to the types of rules and regulations that, in the legal tradition, are commonly understood as parts of the law of 'criminal procedure', but to something both broader and deeper than that: doctrine consists in a kind of procedure by means of which *direction* is given to the process of judicial construction or judicial interpretation, including the interpretation of the different substantive criminal-law concepts.

123 Foqué, supra note 33, pp. 8-12, 34.

as we saw in Section 4 they cannot *simply* dictate the manner in which they are to be applied. The legal space, supported by the legal point of view, is thereby simultaneously both dependent on and independent of the subjective perspective of the participants in the legal practice. The space exists independently of the subject, to the extent that the subject at first is to be introduced and initiated into this practical and symbolic space, before the subject is able to form part thereof and to participate therein. The space is dependent on the subject to the extent that the rules or plans that comprise the legal space can only be applied from the respective *positions* assigned to the subjects within the space. It is from his subjective position that a subject is capable of drawing a line between the rule and the case to which this is to be applied. Legal doctrine can be taken to be constitutive of the indispensable perspective within the legal space that directs the participants in the legal practice to their correct positions vis-à-vis the rules of the law.[124]

5.2. Reflexivity and practice

In Section 3 it became apparent that within the legal master plan the judge is appointed as the applier of the plan. At the instigation of the prosecution, the judge is supposed to determine whether a defendant did perform an act that he is charged with and whether the act constitutes a violation of a behavioural directive that is contained in the definition of a criminal offence. From the position assigned to him within the legal space, the judge is to extrapolate the action line of the directive in a, from the legal perspective, correct manner, to the effect that he can determine to what extent the action of the defendant deviates from or is in accordance with this action line. In this context it is important to recall that rules or plans do not contain direct representations of the cases to which they are applicable. As such they cannot announce or claim their own instances. Neither, therefore, can they by themselves provide a sufficient justification for a certain way of application by the rule applier (see Subsection 4.3).

Plans and norms derive their directive power to indicate what ought to be done – and this is, as appears from what is discussed in Section 3, also exactly the *aim* with which plans or norms are called into being – from the context of the practical activities within which they are embedded. Within the practical context of the legal space, in which the judge has been initiated and with which he is acquainted, most norms exert an unequivocal informative power that compels the judge to apply them in a certain manner. The judge projects himself from his subjective position in the rule and sees 'as a matter of course' how to proceed. The rule or the plan, as we recall from Section 4, is a symbol: the rule is an elliptic notation of a line that can be extrapolated to infinity and that invites – or allows, or forbids, or obligates –the subject to pursue that line.

The application of a plan consists of taking the next step that is in line with the steps that are already mapped out in the plan. This implies that following rules, or the application of plans, is directed from two directions, namely the direction from which the judge is being moved and the direction from which the judge himself moves.[125] Rules or plans derive their symbolic nature precisely from the fact that they *mediate* movements from both directions. The mediating function of a rule, according to Bert van Roermund, consists of a threefold process: the subject, who, as it were, stands before the rule that he is supposed to apply, views the rule as a reference to a specific force that initiates the movement of a specific action line; the subject localizes the origin of the aforementioned force within the action line shown in the rule and the direction in which the line proceeds; finally, the subject identifies himself with the source of the force by

124 Van Roermund, supra note 37, pp. 196-201; Stone, supra note 83, pp. 55-57.
125 Van Roermund, supra note 37, p. 199.

projecting himself at this location on the action line shown, in order to extrapolate the action line from there.[126]

The symbolic mediation culminates in a feeling of 'being compelled' or 'prompted'. In this sense the rule acts as a mirror, 'and we are prompted to step "through the looking-glass": from a place *in front of* and *external* to the icon to a place *in the framework of* or *internal* to the icon.'[127] The rule offers a view towards the 'vanishing point' of the action line depicted by the rule. This vanishing point forms the counterpart of the subjective point of view wherefrom the judge regards the rule. The previous subsection showed that legal doctrine in essence provides the procedural technique by means of which the judge is directed to the correct subjective position. Doctrine has, in other words, the function to teach the court how to *view* or *see* the various rules of the law. This learning process can be considered as an intensified form of the process of training, which was discussed briefly in a very generic sense in Subsection 4.3.

The legal training process already takes place, amongst other places, in law schools or at law faculties, where students are actively trained in the ways of handling legal concepts and rules. This training is (partly) aimed at getting future lawyers to 'internalize' this way of handling so that it becomes almost second nature and in most cases does not require any or much substantial mental, interpretative work.[128] It is of importance to emphasize here that we may not succumb to the representationalist or legalist temptation to regard the practical contexts in which the judge has learnt to perceive and apply the legal norms in a certain way, as an ultimate and unchanging fundament that underlies and supports the application of legal norms – and that this context could in any manner serve as an absolute measure for the correct application of the norms. A practice does not constitute the basis or the ground underneath a rule and its application: '(…) "obeying a rule" *is* a practice' as Wittgenstein phrases it.[129]

To gain a correct understanding of the role that the notion of a practice plays within the application of rules – i.e. a form of understanding that does not lead into the cul-de-sac of the rule paradox – it is of importance to be aware of the decisive meaning of *reflexivity* within the practical context within which rules are followed or applied. A subjective perspective cannot form the basis for 'taking a stand' that leads to an objectively correct continuation of an action line without the implication of intersubjectivity.[130] When faced with the task of reaching a decision, one 'sees' the action line that is symbolically depicted by the rule, and onto which one can then 'project' oneself. If matters are less self-evident, and the need for interpretation comes into play, one will be asking oneself what a specific rule requires one to do, and one will search for the requisite action line that is symbolically depicted by the rule. We could refer to this as an

126 See Van Roermund, supra note 37, pp. 197-200. Van Roermund explains the symbolic efficacy of rules by means of an illustrative everyday example: the symbols present on the buttons of elevators that must be pressed to open the elevator doors (the symbol <| |>) and to close them (>| |<). A correct application of the rules that these symbols seek to represent assumes that the user of the elevator views the symbols as references to a specific force that mobilizes the doors in the direction of the arrows, that he localizes the source of this force on a specific location within the symbol (<|*|> and >|*|< respectively) and that he projects himself on those locations to see which button he must push to achieve the desired effect. Another contemporary example is provided by the so-called 'emoticons' that are commonly used in e-mails and text messages and similar communications. A comment that is intended humorously is often enriched with the symbol Ü or :). According to Wikipedia, also more advanced symbols are being widely used, that even illustrate in which direction the 'face' is laughing or looking: (^_^).

127 Van Roermund, supra note 37, p. 199.

128 This applies in part: we should not forget that every self-respecting academic law education also includes reflective components in the curriculum, which place question marks against and critical notes to the legal perspective from a specific meta-legal point of view.

129 Wittgenstein, supra note 82, § 202 (emphasis added).

130 Cf. Winch, supra note 84, p. 30: '[The concept of following a rule] suggests that one has to take account not only of the actions of the person whose behaviour is in question as a candidate for the category of rule-following, but also the *reactions of other people* to what he does. More specifically, it is only in a situation in which it makes sense to suppose that somebody else could in principle discover the rule which I am following that I can intelligibly be said to follow a rule at all.'

intentional movement: the judge aims, for example, to establish the meaning of a legal norm for a concrete case. This movement or directedness wherefrom the judge views the rule, or rather, wherefrom the judge looks *through* the symbol of the rule to the rule's 'vanishing point', is, however, directly coupled to an opposite movement or directedness: the directedness wherefrom the judge is moved by the rule. We can refer to this as a *reflexive* movement: in his intentional attempt to reach an understanding of the rule, the judge is simultaneously directed towards both himself and 'the other'.[131]

This requires an elucidation. We have seen that the rule as a symbol offers a view from a position in front of the rule to a point beyond within the symbolically mediated legal space. The intentional movement of the judge is aimed toward this point that is situated beyond himself and, strictly speaking, also beyond the rule: his aim is to discover a point in the 'world' that is unfolded by the symbolic rule and to which the rule refers. Reflexivity implies that there is likewise a movement in the opposite direction. The rule is not merely a 'window' through which the judge, as it were, can step, in order to extrapolate the action line that is mapped out in the rule; the rule is likewise a 'mirror' that reflects the judge's gaze and points out his own subjective location or position to him. Thus, in the application of a rule, the subjective position of the applier of the rule and the objective vanishing point of the rule are played off against one another. Therefore, in the application the judge is not only focused on the objectively correct meaning of a rule for a case, but also – or rather, he is, exactly in order to see or find the objectively correct meaning of a rule, – focused on the position that he as a subject assumes within the legal space.

This subjective position is not in the least a solitary position: his position depends on the position that fellow subjects, i.e. other participants in the legal practice, occupy. Within criminal proceedings the positions of the defendant and of the prosecution present important orientation points by which the judge reflects on his own position. Reflexivity entails that the judge is aware of – or, if need be, reflects on – the position allotted to him within the whole of legal planning. In the criminal master plan, for instance, his position is in part determined by the concept of legality, which means, among other things, that his judgments are to be sufficiently predictable for citizens. This implies, among other things, that his position is partly determined by the perspective of the citizen who is subordinate to the law.[132] Insofar as the judge evaluates and views a rule also or partly from the perspective of the citizen, the latter, in turn, can only ascertain the correct legal meaning of his actions by contrasting his own perspective with the perspective of a judge, and thus by also assuming or taking in, to this extent, the perspective of a judge who could, hypothetically, be called upon to evaluate the citizen's actions.[133]

5.3. The symbolic function of doctrine

In Subsection 1.2, I presented the following provisional definition of legal doctrine: the term doctrine refers to the framework of theoretical concepts that clarify the content of valid legal norms and that reformulate them as a systematic unity. In substantive criminal law, the term doctrine then refers to the systematic framework of theoretical concepts that define the preconditions for the imputation of criminal liability and that endow the criminal law with a considerable measure of continuity. We can now examine to what extent this description holds true in the light

131 See Ricoeur, supra note 109, pp. 165-181. According to Ricoeur the interpretation or the elucidation of a *metaphor* is accompanied by a dialectic between intentionality and reflexivity. Intentionality implies that a subject in his attempt to interpret is focused on the world that is unfolded by the metaphor. Reflexivity implies that a subject in his attempt to interpret is focused both on himself and on the other. The subject is the 'student' of the metaphor to the extent that he learns something about himself and his relation to the other via the metaphor.

132 See Van Roermund, supra note 31, pp. 63 en 76.

133 This principle is referred to as 'interception' by Van Roermund. See Van Roermund, supra note 37, pp. 199-200 and *passim*.

of what has been discussed in the preceding sections. We have seen that doctrine in the first instance does not primarily *inform* but that it rather *situates* the adjudicating judge. Doctrine marks the position from where the judge perceives a legal rule, and thereby indicates *how* the judge should perceive this rule. The function of doctrine therefore lies not primarily in supplementing existing legal rules and legal concepts with elucidating commentaries.

This does not change the fact that doctrine plays an important informative role. Doctrine consists of sub-rules or sub-plans, in the sense that doctrine further elaborates components of individual rules or plans, but simultaneously also in the sense that this further elaboration introduces general links between the individual rules or plans that constitute the law. As we saw in Subsection 4.1, a criminal provision contains a prohibition or a requirement addressed to the citizen subordinate to the law, and a norm that is addressed to the judge. The prohibition or requirement addressed to the citizen is a behavioural directive that is implicit in the definition of the offence. The behavioural directive can be termed as a plan, which consists of various sub-plans. Examples of sub-plans that give substance to the behavioural directive are the elements of the definition of a criminal offence, such as intent, negligence, etcetera, and the additional rules of the 'general part' of substantive criminal law, such as the rules regarding punishable attempt, participation, grounds for justification and excuse, etcetera.

All these sub-plans are, to a certain extent, further mapped out in sub-sub- plans. The concept of intent for instance (in the civil law tradition) is further refined in the doctrine of conditional intent (*dolus eventualis*). The conditions for the furnishing of proof of conditional intent in the Netherlands were developed in the case law and doctrinally elaborated and described in criminal law theory. According to the current doctrine in Dutch substantive criminal law the concept of conditional intent applies when it is established that an offender not only was aware of the considerable possibility that a certain consequence may result from his action, but also approved of, or reconciled himself to, the possible occurrence of that result. This formula can be considered as a sub-plan – and an elaboration – of the more general 'plan' of the criminal concept of intent. The components of the formula for conditional intent are in turn elaborated in more detail with further sub-plans. Thus, in Dutch case law additional sub-sub-plans have been developed – though these are still far from completely crystallized – that provide an elaboration of the term 'considerable possibility'.[134]

The function of doctrine, however, does not mainly lie in the creation or description of such complementary or elucidating sub-plans. For a conceptualization of the function of doctrine along these lines has a weakness: if doctrinal rules are identified with (sub-)plans that develop and provide an elaboration of other plans, doctrine would dissolve entirely in the concept of the rule itself: the elaboration of a rule is in turn again a rule, that thereupon can require a further elaboration, *ad infinitum.* If doctrine were *only* about pouring more specific rules into existing rules, doctrine would become trapped in an infinite regress. The ultimate function of doctrine, in other words, must lie in something other than the mere provision of content or the mere clarification of existing (statutory) legal rules or plans by means of the creation of sub-rules or

134 In this connection, it is interesting to note that the United States' *Model Penal Code* (see note 5, supra) proposes rather detailed statutory provisions regarding *mens rea*. In Section 2.02 the *Model Penal Code* distinguishes and defines the following kinds of culpability: acting purposely, knowingly, recklessly and negligently. These proposed provisions have heavily influenced the reform or the enactment of criminal legislation in several states, and form examples of cases where legal doctrine is codified in statutory legislation. However, as was noted in Subsection 1.2, supra, I have assumed throughout this article that courts, in their efforts to apply valid legal norms, need 'doctrinal support' (in the specific sense that I have tried to account for in Subsections 5.1 and 5.2), no matter how detailed and theoretically refined the norms' formulations in a particular statute may happen to be.

sub-plans. In short: if legal doctrine fills in legal plans with sub-plans, it does more than that, and it is precisely in this 'more' that we will have to look for doctrine's most prominent function.

The elaboration provided by doctrine can only be truly valuable if, by means of this elaboration, the judge is provided with a better *perspective* or a better *view* of the rules and plans that he is to apply. This perspective is always a perspective from a certain position. Perspective thus presupposes situatedness. As was noted earlier, legal doctrine is not a primarily content-related or substantive matter, but is rather a primarily procedural matter:[135] doctrine marks the positions that are and can be taken within law's space, it marks the moments in time in which it is legally possible to take in a certain position, within which time frame this is possible, on the basis of which arguments one can take in a certain position, etcetera. It follows from this that the principal function of legal doctrine lies in the elaboration of concepts and rules and plans of the law in such a manner so as to ensure that the judge is brought into a position whereby he has a correct view through the symbol of the rule on the rule's vanishing point.

What counts within substantive criminal law as a 'correct' positioning in this context? In my view, this comes down to a correct understanding of the role of *reflexivity* within criminal law. The elaboration or elucidation of the rules of criminal law that is provided by criminal doctrine ought not to be confined to the mere addition of increasingly detailed sub-plans to existing plans, but should be motivated by a reflection on the relation between the relevant rules and all other rules that are part of the criminal law's master plan, and should thus be motivated by a reflection on the entire criminal system. This system is not a static, but a dynamic system. It is, after all, a symbolically dimensioned space, in the sense that was discussed in Section 2. Moreover, the criminal system is an intentional system motivated by an inherent teleological orientation towards the imputation of criminal liability to persons.[136]

Criminal law symbolizes social reality by reducing and reshaping this reality. Criminal law calls into being a system of legal concepts, which in the first place primarily refer to one another, and only subsidiarily to the world of social facts. Criminal law in this manner constitutes a 'functional unity': the criminal law's doctrinal concepts do not directly refer to ontic facts in the social world, but to idealized meanings that are, in their turn, related to singular facts which can be observed. The concepts of the law effect a reduction of reality by enabling us to consider various distinct facts from the perspective of a certain legal rule as legally *equal* facts, thus as different representations of the same legal meaning.[137]

Doctrine thus has a localizing efficacy. Doctrinal concepts direct the judge to the position wherefrom he is to regard a specific rule, and wherefrom he is compelled or prompted to apply the rule to a case in a certain manner. Doctrine furnishes the symbolic space of the criminal-law practice with depth and perspective. Doctrine in this context can thus be considered as a form of 'training' that initiates those who undergo the training in the practice of criminal judicial interpretation or construction. In Subsection 5.2 we have seen the legal rules' and plans' mediating operativeness at work within the symbolic space of the law. The simultaneous occurrence of two movements, the first from an intentional directedness and the second from a reflexive directedness, clearly illustrates that the prompting or compelling efficacy of rules and plans does not replace or exhaust arguments or reasons for action.[138]

135 See note 122 and the accompanying text, supra.
136 See De Jong 2011, supra note 115.
137 See notes 30, 34 and 88 and the accompanying text, supra.
138 Van Roermund, supra note 37, p. 200.

The validity of the arguments on the basis of which a rule is applied in a certain manner – and not in an alternative manner – is thereby ultimately dependent on the manner in which the judge is compelled by the rule to relate this rule to a specific case. From this it follows that the validity or correctness of the application of the rule is a function of the position assumed by the judge, wherefrom he is compelled to extrapolate the action line laid down in the rule in a specific manner. If this holds true, that is, if indeed the validity of a specific manner of application is a function of the subjective position wherefrom the rule is viewed, it must be acknowledged that alternative views regarding the correct manner of applying a rule, arising from alternative positions wherefrom the rule is viewed, cannot a priori be denied all reasonableness or legitimacy. The judge's awareness of the fact that his judgment can indeed be said to enjoy *objective* justifiability only on the basis of the perspective that is being assumed will necessitate the exercise of *prudence* by the adjudicating judge.

The necessity of prudence thus follows from the reflexive nature of the practical context within which the rules of criminal law are being applied. The reflexive involvement of the judge – his directedness both towards the position that he himself occupies within the symbolically shaped legal space, and towards his relation to the positions of other agents involved in criminal proceedings, most notably the defence and the prosecution – impresses upon the judge the realization that his perspective is the consequence of a certain positioning, which in turn is the effect of a certain, ultimately contingent symbolic artefact interposed between the human subjects who make up a political community, on the one hand, and the social life-world, on the other. This realization compels the judge to exercise due hesitance or caution when passing his judgment. Awareness of the position that the judge occupies within the practical context within which he applies criminal rules and passes his judgments demands reflection on the place assigned to him within the whole of criminal 'legal planning', and also on the normative premises that explain why this position is assigned to him and that delimit his freedom to manoeuvre within this position. Ultimately, prudence is a consequence of doctrinal reflection on the *legal point of view* that dictates the position assumed by the judge.[139]

Doctrine provides the necessary tools for this reflexive contemplation. In this notion, legal doctrine derives its contours and contents from that which we can indicate as 'foundational legal theory', i.e. the kind of teleologically motivated legal theory that considers it its task to analyse and explain legal doctrinal concepts in a manner which is consistent with the basic normative premises that underlie the (criminal) law. Put somewhat more forcefully: it is part of the *function* of legal doctrine that it not merely clarifies existing (statutory) legal rules or plans by means of the creation of an ever increasing amount of sub-rules or sub-plans, but that it does so in a manner which seeks to ensure that the clarifications it delivers answer the normative 'telos' inherent in law. The elaboration that doctrine provides of substantive criminal rules or plans can therefore only be taken to be truly valuable when the elaboration of these rules and plans is fed from a contemplation of the normative teleology inherent in criminal law. The doctrinal meaning of the criminal law's concept of intent, for example, is dependent on the normative function that

139 Note that all of this does not imply that it is part of the task of the adjudicating *judge* to (constantly) reflect on the legal point of view and on his situatedness within legal space. Such a view would amount to a rather Dworkinian account of judicial interpretation, governed by regulative ideals that only judges with Herculean qualities might be able to live up to; and such a view would be subject to criticism of the sort voiced by Shapiro, supra note 41, pp. 307-330, and Van Klink, supra note 114, p. 66. It is the task of *doctrine* to provide this kind of inherent awareness, so as to *relieve* the judge of the burden of constantly having to deliberate on his relation to other occupants of legal space.

the concept of intent is taken to fulfil within the totality of conditions for the imputation of criminal responsibility to persons.[140]

6. Outlook

Doctrine polishes the law, it smoothes the irregularities in the law. It draws lines connecting the individual legal rules to one another, in order for these rules to become functional parts of a systematically organized unity. Doctrine consists of sub-rules or sub-plans, in the sense that doctrine elaborates components of different rules or plans, but also in the sense that this further elaboration draws general lines between the distinct components that constitute the law. Doctrinal rules, however, cannot be completely identified with the collective of (sub-)plans that elaborate other plans and that fill them in, as in this case doctrine would entirely dissolve into the concept of a rule or plan. It is therefore more fruitful to view doctrine not as primarily a matter of content, but rather as a matter of procedure. As we saw in the previous section, the function of substantive criminal-law doctrine is mainly linked to the notion of positioning.

If I am permitted to employ a musical metaphor: legal doctrine is related to the rules and concepts of a certain field of law in the way a conductor is related to the individual members of his orchestra. The conductor mediates between the musical master plan that is rooted in the composer's intentions – or that is appropriated by means of more recently developed interpretations of the compostion's meaning that may to some extent fail to coincide with the composer's original intentions – on the one hand, and the execution of the musical composition by the members of the orchestra, on the other, in a manner which bears some resemblance to the way in which legal doctrine mediates between the law's master plan and the application of legal rules and norms to singular cases by courts or other adjudicating institutions. The conductor sees to it that the different instruments and groups of instruments play their respective distinct parts within the musical piece, and operate together as a musical 'functional unity'. In order for this desired result to apply, a certain measure of reflexivity is required: it is part of the conductor's task to, as it were, 'direct' the individual members of his orchestra to, and to make them aware of, their respective positions within the composition's master plan.

In a similar fashion, legal doctrine positions the participants in a legal debate vis-à-vis the criminal norms by determining what types of arguments can be presented in a valid way, and thus also what types of arguments cannot be put forward with any chance of success. In that sense doctrine contributes to the lending of a certain focus or direction to legal discussions, and, derived from this, to the predictability of the judgments reached by the court. To this extent, doctrine has an important function to fulfil in relation to legal certainty and legality. In the above it was investigated in which sense doctrine can be deemed to exercise its procedural function, that is: in which sense doctrine can be deemed to position the agents involved in criminal proceedings, and in general all persons subordinate to the law, relative to the norms and plans contained within the law.

If the developments that were briefly touched upon in Subsection 1.2 justify the tentative conclusion that doctrine in Dutch substantive criminal law is fading and is becoming sketchier – because it is becoming less content-based, more casuistic, more procedurally geared, more modelled on external and social factors – then the question arises as to whether as a result thereof the function of doctrine with respect to both the legality of the judicial judgment and, eventually,

140 This I have tried to demonstrate in De Jong 2011, supra note 115, and, more elaborately, in De Jong 2009, supra note 1.

the legitimacy of the judicial judgment, may be subject to change. The developments seem to suggest, after all, that legal doctrine is less able than it has been hitherto to determine the positions of the participants in legal proceedings in a primarily normatively 'closed' and content-based manner, but that doctrine instead rather determines the participants' respective positions in a more open and formal manner.

Where substantive criminal-law doctrine previously consisted mainly of the construction of a systematic, relatively closed general part, filled in with more or less fixed and solid, content-based criteria, it currently consists to an increasing extent of a relatively loose collection of relatively open common places: the application of doctrines and of the rules encompassed within these is said to first and foremost depend on the circumstances of the case, whereas the further indexation of the relevant factors is relatively strongly oriented towards the external form of the circumstances and made dependent on a certain role responsibility of the participants in the debate.

The signalled developments seem to indicate that substantive criminal-law doctrine is becoming somewhat impotent. The directive power of doctrine appears to weaken. Not only are different substantive criminal-law doctrines to an increasing extent doctrinally filled in with uniform criteria or factors, these repeatedly used criteria and factors are furthermore characterized by their marked vagueness and indefiniteness: the concept of 'reasonable attribution', the 'nature' and 'external appearance of the act committed', the 'general rules of experience', etcetera. As things appear, doctrine has a diminished capability of providing us with instructions that not only fill in the various substantive criminal-law doctrines, but also thereby mark and explain the *differences* between the doctrines. As a result of this, the ability of doctrine to form a *functional unity* of legal concepts, i.e. a system of mutually related legal concepts that in their mutual references mark their distinct meanings and positions within the criminal legal space, is being reduced.

Instead of constituting a functional unity, substantive criminal-law doctrine appears to increasingly consist of a collection of largely uniform commentaries attached to what are fundamentally and traditionally *different* substantive criminal-law norms and concepts. These commentaries do not appear to tell us much more than to apply these norms and concepts in a 'reasonable' fashion. To this extent doctrine appears to narrow down to the legal point of view *as such*. Doctrine instructs the judge to do what he ought to do 'regardless'. It thus appears to simply postulate the 'vanishing points' of the doctrinal concepts, without truly directing the judge – or other legal subjects – to a position within the legal space wherefrom this vanishing point can compel the applier of the rule to adopt a certain way of application. To the extent that legal doctrine fails to direct or position the adjudicating judge, and to the extent that this failure is not compensated by other means (that were not explored in this article), legal rules are idle entities that will fail to provide the rule follower with any clear instructions.

The question at hand is not so much whether the developments within substantive criminal-law doctrine in themselves are desired or undesired. It is after all very well possible that the developments succinctly indicated in Subsection 1.2 comprise an appropriate means to ensure a good connection between the criminal law and a society which is in many ways fragmented, and in which it may therefore be increasingly difficult to introduce 'unity' than may have been the case in earlier times.[141] In the above, I have not intended to develop and present any opinion

141 In this context we can join Shapiro (supra note 41, pp. 124-126, 155, 198-200) in speaking of a development from a primarily 'top-down' form of legal planning in the direction of a more 'bottom-up' form of legal planning. With Mooij 2010 (supra note 1, pp. 39-45) we can speak of a development from a 'hermeneutics of the signification' to a 'hermeneutics of the situation'. And with Raz (J. Raz, *Ethics in the Public*

on the desirability of the trade-off of the different factors involved in the indicated developments. The question that triggered our inquiry is rather which repercussions the signalled developments have on our concepts of legality and legitimacy. Are we in the Netherlands heading for a common-law conception of the principle of legality in substantive criminal law? This article has only aimed to provide a foundation for an investigation that may lead to an answer to this question.

Domain. Essays in the Morality of Law and Politics, 1994, pp. 370-378) we can state that a 'bureaucratic model' of legality appears to be substituted by a somewhat looser, social model.