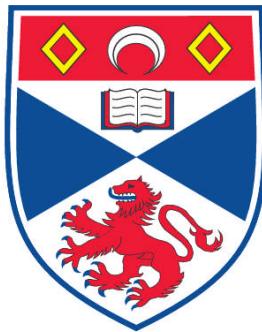


# **ACCOUNTABILITY FOR AMNESTY**

**Simon O'Connor**

**A Thesis Submitted for the Degree of MPhil  
at the  
University of St. Andrews**



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# **ACCOUNTABILITY FOR AMNESTY**

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**UNIVERSITY OF ST ANDREWS**

**5 NOVEMBER 2009**

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## **ABSTRACT**

**Amnesties are evidently contentious issues. The issue of immunity and impunity is significant in the peace versus justice debate. What this thesis attempts is to explain the grant of amnesty as a legally permissible exception from the norm that those who commits crimes are to be punished – the very premise of punitive law. The demand is ever more so in respect of those crimes most atrocious.**

**It approaches the topic from a legal rather than a moral perspective. Analysing the grant of amnesty through the perspective of legal obligation, the paper seeks to demonstrate that this is the first question to ask, by reference to the fact that, if logically inconsistent with the legal system prevailing, any amnesty will lack legal validity. And legal validity is the key both to the grant of amnesty and equally can inform on the same arguments its rescission.**

**In order to demonstrate thus amnesties legal validity, it is necessary the paper contends to first consider the question of obligation and to do so from the historical perspective of the Roman legal maxim that underlie existing legal regimes, domestic and international. It then turns, by reference to Kant to the notion of permissive laws and how such are properly considered contingent exceptions. The paper then turns to its core chapter on deontic logic, where it seeks to demonstrate the logical consistency of amnesty with legal norms and systems. And finally illustrates the manner in which amnesty acts as a derogation with only provisional effect on the validity of individual norms rather than negating the norm of punitive law *per se*.**

**In conclusion the paper argues that by virtue of utilising contemporary legal notions of purposive interpretation, we can properly limit the scope and application of amnesty by reference to and only to its legal validity.**

# **ACCOUNTABILITY FOR AMNESTY**

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# 1.

## INTRODUCTION

*“That a general amnesty should be included in a peace treaty is already implied in the concept of the latter” Kant (1999 (1798), 157)*

*“Here then is the foundation of the Sovereign’s right to punish crimes: The necessity of defending the depository of the public welfare against the usurpations of private individuals” Beccaria (1986 (1764), 8)*

These epigraphs illustrate the fact that the juxtaposition of the notion amnesty, inherent, as Kant saw it, with the right to punish, and the need to exercise that right, is nothing new. It continues to exist as a perennial problem, and is a seminal part of the peace versus justice debate.

What I intend to attempt in the paper that follows is to ask whether the question often posed in contemporary literature whether amnesties are incompatible with international law (given the growth of international tribunals to which the term atrocity law is ordinarily applied) is the right one. And whether the answer that is most often given to it, that of incompatibility, is correct.

I will rather wish to suggest that amnesty can be compatible with law in the sense of its continuity as a functioning legal system and that amnesty is permissible, as whilst it might affect the validity of another punitive law, it does so only, and only ever contingently what this paper will seek to address is the legal permissibility of amnesties.

### Moral and Legal Permissibility

In a recent essay Christopher Heath Wellman discussed the moral permissibility of amnesties. He in fact posed three interlinked questions: under what conditions is it rational to grant

amnesties; what conditions is it morally permissible to grant amnesties; under what conditions must international community respect amnesties granted by individual domestic governments which then proceeds in turn to address (May, 2008, 249ff).

Whilst I do not intend, to draw comparison with each of the moral conundrums he poses and answers with respect to amnesties, it is worth noting that he recognises a contingency within the system of laws that grants the amnesty that does not affect the continuity (or legitimacy) of that system, save where the grant becomes the norm rather than the exception. With respect to the second challenge to his conclusion in answering the question of morally permissibility in the affirmative, as a indication of that *moral* permissibility, he is faced with the state is under an obligation to punish all its criminals (ergo obliged *not* to grant amnesty) as not to do so infringes the right of other law-abiding that criminals be punished. Wellman response to this is that so long as the state can ensure its fulfils its requisite function of securing its citizens' basic human rights, satisfactorily, it is possible and permissible for it not to punish each and every last criminal (253). In short the ability to exercise discretion in choosing to grant amnesty is finds its justification on the very system of legitimate government and its adherence to and exception from the laws it passes. That is equally I contend the foundation of the *legal* permissibility (and from such legal validity) of amnesty. It is predicated on its consistency with maintenance of the legal system in which it is granted.

Wellman concludes his essay with reference to the concrete example of Iraq, although I read his remarks as intending their application beyond that particular example. Having discussed whether there is obligation on the international community to respect amnesties granted by the Iraqi transitional government and having distinguished between those crimes committed in Iraq by Iraqis and those committed by or against others, Wellman concludes that nonetheless "I believe that the best course would be to respect and "valid" amnesties where validity is a function of the free and informed preferences of the Iraqis as a whole" (265).

It is the very issue of the legal validity of such amnesties (and the legal validity of any subsequent rescission) that this paper seeks to address.

## **Valid Positive Laws and the recourse to Morals**

What this essay thus intends is to provide a plausible solution to identifying such validity from a legal perspective, as I contend, if one identifies that the amnesty has no consistency (or logical entailment) within the legal system that purports to offer such, then that very contradiction will be sufficient to affect the validity of the amnesty. It is then not necessary recourse to underlying moral contentions, which if relatively autonomous, in the sense MacCormick intends, would be less conclusive than the heteronomous, albeit also arguably relative, (2008, 256ff) perspective the institution of law, the legal system would offer.

MacCormick indicates that this nature of morality's autonomy and law's heteronomy is what makes them conceptually distinct, and thus I suggest merit, analysis individually. This is not to deny that there are pertinent moral questions to be posed with respect to amnesties. However amnesty whilst certainly removing the legal sanction related to the act committed (although its rescission is equally capable of re-imposing that sanction) amnesty does not in the same manner remove the moral disapprobation of that act.

This paper central concern is the legal validity of amnesty laws, and their relation to the norm of legal sanction or punitive law for those who have committed atrocities.

The validity of law is significant because in the absence of validity, there would be no *legal* obligation to follow or respect the law. We may of course choose that we will not follow the law, that other *values* we possess we consider supersede that obligation established by the legal system under which we, and others, reside. That we might exercise individual choice yet be governed as one of a multitude by laws, is, I believe, the distinction MacCormick makes in describing morality autonomous, law heteronomous.

The grant of amnesty is evidently an act of positive law. As “‘*jus positivum*’ means ‘law laid down’ and ‘positive law’ is ‘*jus positivum*’ translated into English” and where “[l]aw’s ‘positive’ character is nothing more than than [the] very characteristic that it is laid down through intentional human acts aimed at regulating human conduct” one can explain amnesty as such law. Why? Because it is possible and permissible in the *system* or one might say

*institutions* of law<sup>1</sup> that legislated the prohibition of the act that the amnesty in the sense of abrogating the punishment of, permits.

H L A Hart, in his seminal work noted that even though the proposition, “that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it...it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly a reference to morality or justice” (1997, 185)<sup>2</sup>. The possibility then of their not being necessary explicit recourse for the validity of individual laws could suggest that one might determine the obligation to respect such laws and indeed the possibility to pass such laws as relating to that system from which they are derived rather than influences upon that system. There are of course others who view the issue differently. Dworkin remarks “[i]t is obviously of capital practical importance whether moral tests...among the tests that judges and others should apply in deciding whether such propositions [of law]<sup>3</sup> are true” (2006, 2).

I would not either deny that recourse to moral tests. It is necessary, I contend, rather to demonstrate, first the coherence of amnesty laws with the legal framework in which they are promulgated. For if such were a contradiction<sup>4</sup>, namely that punishment and not-punishment (amnesty) simultaneously occur, one would have to be false. In that sense either amnesty or punishment would not be logically permissible. And if not logically permissible, as we will see in remarks from Kelsen shortly, it cannot logically be a valid law. Hence it is necessary to demonstrate the logical permissibility of amnesty, and thus its legal validity, before turning to the question of the moral permissibility of such.

The focus of this paper might then be said to address the existence of amnesties, as a legal norm in the positive sense Kelsen wrote of that “they have the characteristic of regulating their own creation and application”<sup>5</sup>. The next two subsequent chapters in effect address the issue of the creation of amnesty laws, as a permissible contingent exception from punitive

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<sup>1</sup> MacCormick remarks that of “The institutional character of institutional normative order...the ‘positive character of law is simply another way of expressing this” (2008, 277)

<sup>2</sup> Yet that is not to say that Hart denies that morality does influence law, indeed he provides examples of such, see (1997, 203f). Rather the point is that there no necessary recourse for such in respect of particular laws.

<sup>3</sup> In the example he gives statutes, legislation.

<sup>4</sup> Describing such in very simple terms the first law of logic, that of non-contradiction states that the facts p and *not p* cannot be simultaneously true.

<sup>5</sup> Kelsen, *The Function of a Constitution* in Tur and Twining (1986, 111)

laws<sup>6</sup>, the last two chapters addressing then the application of amnesty laws, evidencing their logical consistency and lack of contradiction with neither the legal system in which they prevail nor the principles of precedent in that system. Or to describe it another way what gives an amnesty its *validity*.

### Kelsen's *Pure Theory* and Legal Validity

The author who will continue to permeate this paper is Hans Kelsen. One of, if not the, eminent jurist of the 20<sup>th</sup> century, Kelsen is famed for his *Pure theory of law*. It is not alone however for that reason that I seek to rely on aspects of his work. He offers I suggest both elements of his ways in which his work is sometimes thought of as [neo]Kantian and his focus with respect to the topic on which this paper pivots, logic, and a particular type of logic at that. Kelsen considered that the *Pure Theory* had “discovered...a general logic of norms<sup>7</sup>, that is a logic of ‘ought’”. (quoted in Tur and Twining, 1986, 190<sup>8</sup>). He also articulated the analogy of his theory in its methodology with that of Kant, in the following terms:

“Just as Kant asks how it is possible to have an interpretation, free from all metaphysics, of the facts given to our senses, in terms of laws of nature formed by natural science, so a pure theory of law has asked how it is possible to have an interpretation of the subjective meaning of certain facts as a system of objectively valid legal norms, describable in legal propositions, without recourse to metalegal authorities such as God or Nature. The epistemological answer of a pure theory of law is, on the condition that one presupposes the basic norm: one ought to conduct oneself as the constitution prescribes” (Tur and Twining, 116).

The constitution is the foundation and the structure of the legal order and that order is posited. Kelsen further asserts that “[a] positive legal order represents a system not of coordinate but of superordinate and subordinate norms—that is, a hierarchy of norms, whose highest tier is the constitution, which is grounded as valid by the presupposed basic norm, and whose lowest tier is the individual norms positing a particular concrete mode of conduct as obligatory. In this

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<sup>6</sup> From the norm that crimes must not go unpunished – or that punishment follows the law (Wellman?)

<sup>7</sup> I will return to the issue of the logic of norms in chapter 4 when discussing deontic logic.

<sup>8</sup> This quotation is taken from the Ota Weinberger essay in that volume entitled *Logic and the Pure Theory of Law* who is citing a 1953 essay by Kelsen *Was ist die Reine Rechtslehre* (What is the Pure Theory of Law) itself published in Klcatsky, H., Marcic, R, and Schambeck, H. (eds.) (1968) *Die Wiener rechtstheoretische Schule*, Vienna.

way the validity of the higher norm regulating the creation of the lower norm always grounds the validity of that lower norm. The function of a constitution is the grounding of validity” (*Ibid*, 119)

The lower norm is the category to which amnesty laws would apply, given their being passed necessarily in legal systems that are already extant and which have laws prohibiting conduct which the amnesty addresses. You do not need amnesty in the absence of extant rule which imposes a sanction for that prohibited conduct. Therefore amnesty for atrocities is always in response to extant criminal laws (posited (positive) legal norms). The existence of those preceding laws is founded on statutes passed by authorised bodies and their authorisation to pass such laws, founded on a constitution. To prevent “the idea that the basis for the validity of a lower norm [being] the validity of a higher norm” and such leading “to an infinite regress” Kelsen determines that “one can refer back to a historically first constitution” (*Ibid*, 111). And this is fundamental premise that enable the translation of the subjective meaning of the act of will (in our case the draft of legislation, willing that what we *ought* to do) into its objective meaning (that it is a binding law for us, that which we must do – if we do not wish to suffer the sanction the legal order imposes). The validity that ensures the objective meaning is it does comport with the higher norm.

Now whilst that seems to fit coherently, the difficulty presented is that it is necessary for the basic norm to be presupposed. And the *grundnorm* can only be presupposed – if it were posited then it would simply fall again into the category of a subjective (real) act of will the meaning of which, in order to be objectively valid would require its valid based in a preceding non-posed norm.

However Kelsen remarks, that the “historically first constitution...is, begin with, the subjective meaning of an act of will or a number of acts of will; and if one asks why the subjective meaning of the act creating the constitution is also its objective meaning—that is, a valid norm—or, in other words, what is the basis of the validity of the validity of this norm, the answer is: because one presupposes, as jurist, that one ought to conduct oneself as the historically first constitution prescribes. That is the basic norm.” (114).

Those then authorised to posit norms representative of that historically first constitution are the basis of the validity of each subsequent posited norm (that remains consistent to that basic norm)

He continues, “The basic norm may, but need not, be presupposed. What ethics and legal science say about this: only if it is presupposed can the subjective meaning of acts of will directed towards the conduct of others be interpreted also as their objective meaning, these meaning-contents be interpreted as binding moral or legal norms. Since this interpretation is conditioned by the presupposing of the basic norm, it must be granted that ought-propositions can be interpreted as objectively valid moral or legal norms only in this conditioned sense” (116).

This presupposition however, in thought, only may be thought problematic: “[t]o the assumption of a norm posited not by a real act of will but only presupposed in juristic thinking, one can validly object that a norm can be the meaning only of an act of will and not an act of thinking, that there is an essential correlation between ‘ought’ and ‘willing’. One can meet this objection only by conceding that along with the basic norm, presupposed in thought, one must also think of an imaginary authority whose (figmentary) act of will has the basic norm as its meaning” (116f).

When presented with the imaginary authority that has the basic norm as the meaning of its act of will, Kelsen responds that whilst such fiction, in the sense as the font of the basic norm, contradicts reality “since no such norm exists as the meaning of an actual act of will”(117) (in the sense of his early remarks on positive legal norms characterised by regulating their own creation and application) and that it contradicts itself in that it in effect indicates that which lies beyond the basic norm. However in relying on Vaihinger, Kelsen considers such fiction an aid to thinking (and in Kelsen’s case juristic thinking) where the aim of such thought cannot be reached by the material available he determines “[t]he aim of one’s thinking in presupposing the basic norm is: to ground the validity of the norms forming a positive moral or legal order; that is to interpret the subjective meaning of the acts positing these norms as their objective meaning, i.e. as valid norms, and the acts in question as positing norms.”(*Ibid*) Kelsen’s fiction however is a nonetheless necessary fiction to enable the system of law to be grounded and retain its validity.

Having deliberated now on the foundations for Kelsen's *grundnorm*, I wish to juxtapose his arguments with those of another significant 20<sup>th</sup> century jurist, Carl Schmitt. The reason for such is that Schmitt, position, as we will see, with respect to the primacy of sovereign decision can be challenged by consideration of the two Roman maxims, which form the subject of the next chapter.

The definition of the norm for Kelsen "is the *meaning* of an act of will, not the act of will" (1967, 8) and that it is incorrect to characterize legal norms as the will or command of the legislator (*Ibid*). Schmitt in contrast extols a decisionist theory of law. He remarks that "the concept of the legal order....contains within it the contrast of the two distinct elements of the juristic – norm and decision. [and] like every other order, the legal order rests on a decision and not on a norm" (2005, 10).

Kelsen arguably suggested that the norm's validity rests in its efficacy<sup>9</sup>. Validity he saw as an *ought*, efficacy as an *is*. It is the act of obedience that makes a law valid. The act is demonstrable of the law's efficacy. And its efficacy provides its validity. As Kelsen remarked "[a] general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree" (1967, 11) Thus if efficacious a law maintains validity. Equally, as we will see in chapter 3 the norm maintains its validity notwithstanding judgments (value-judgments) such as judicial decisions that may run contrary to that norm. In that sense an amnesty does not invalidate the norm that we are to be held accountable for our actions, for its sphere of validity, to use Kelsen's term is spatially, temporally or materially finite. In other words because the amnesty is limited in its scope it is a permissible exception from the norm. If one were to contend that the norm, that we are to be accountable for our actions, is the basis of law, or in Kelsenian terms is the *grundnorm* (basic norm),<sup>10</sup> there is still the permissibility of exception from even the basic norm. The reason for such is that Kelsen considered that the Basic Norm of the legal order rests ultimately on the historically first constitution, be that posited by the resolution of an assembly or created by way of custom (or more properly the behaviour from which that

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<sup>9</sup> This is a particularly simplified version of his argument found in his essay *Norm and Value*, in Kelsen (1973) 276ff and the question of validity and efficacy the *ought* and *is* he considers in greater detail in his *Pure Theory of Law* (1967) 10ff

<sup>10</sup> The Basic Norm is a similar notion to atomic facts in theories of logic in that is it neither irreducible, nor does it rely on anything for its justification.

custom derives) (1991, 255).<sup>11</sup> What the historically first constitution does is to confer capacity to decide upon a sovereign, but as we have seen it is the state of affairs that is the intended outcome of those decisions – that which we ought to do; the *meaning* of the act of will – that is the basis of the legitimacy, thus validity and efficacy of those intended outcomes.

Schmitt's views which underpin his famed suggestion that exception is solely a matter of a sovereign's decision relate principally to states in facing emergencies. In that sense one might think of Schmitt as concerning himself with necessary exceptions. The author to whom Schmitt alludes in support of his contention, Jean Bodin argued that there was a distinction to be made in times of emergency to the position that the sovereign stood in relation to the law. The suggestion Schmitt makes of Bodin's view is that in short, the ordinary recourse that the prince would under his commitments to peoples (the estates) that ordinarily bind the sovereign do not bind in times of emergency. In surmising this position Schmitt remarks that for Bodin, "the prince is duty bound towards the estates or the people only to the extent of fulfilling his promise in the interest of the people; he is not so bound under conditions of urgent necessity" (2005, 8). Necessity thus offers a reason to be excepted from ordinary obligations. That suggestion shall be considered further at the conclusion of this paper. Although Schmitt and Bodin were concerned with what we might loosely term states of emergency, the fundamental premise of Schmitt's contention, following Bodin, that sovereignty was defined by the capacity to make the decision to except is equally as significant for the question of amnesty. If Schmitt is correct in contending that "...the authority to suspend valid law – be it in general or in a specific case – is so much the actual mark of sovereignty" (*Ibid*, 9) and the capacity to decide is the determination of sovereignty then such is fundamental to the question of amnesty.

### **Obligation, permission, and precedent**

The ordinary premise from which Schmitt, *per* Bodin, suggests exception may be made in times of emergency is the consensual nature of obligation. I will discuss such a nature of obligation and its significance to amnesty in the first chapter. Put in the simplest terms I can,

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<sup>11</sup> It is perhaps worth noting here than Kelsen himself notes the relation in German between *Pflicht* (duty) and *pflegen* (to be accustomed). He uses this comparison to illustrate his point of the presupposition that underlies the idea "that people ought to behave as they are used to behaving" 1991, 3

people consent themselves to be bound, that is to say agree to place themselves under obligation, rather than have obligations imposed upon them. This argument, I suggest can be founded on the principles of Roman law *quod principi placuit* and *pacta sunt servanda*, which, although there are variations roughly translate as “what the prince pleases” and “agreements must be respected”. I will term these principles the historic notion of obligation. They give both edicts and agreements their force of law – or put another way their binding nature. Whilst one might remark that it is naïve to suggest that at times throughout history people have not been subjected to the imposition of obligations, compelled to obey, I do not seek to maintain such an argument. Rather I suggest that if one looks to the dichotomy between compulsion and impulsion, an argument can be sustained in favour of what is, in short the social contract theory. What chapter 1 attempts, in relying on these principles of Roman law (and I should remark that I choose these principles as they remain extant today, even if not articulated in their original Latin - though often they are), is to emphasise that they underlie the very premise of contractual obligations both within and between states. This informs both the issue of law and exceptions from it, which is what amnesty amounts to.

*Quod principi placuit* and *pacta sunt servanda* are the cornerstones of the national and international legal order. Now that admittedly is a very bold statement to make, but my suggestion is that these principles are the foundations of normative order in their respective contexts. And whilst they work independently within those spheres (national and international) in Chapter 2 I argue that they are intrinsically linked by virtue of the simple fact that we are obligated to keep our promises. Drawing on detailed considerations of Roman codifications of law, I argue that the manner in which the Romans understood the principle of *quod principi placuit* was not in the manner in which absolute monarchies which were to arise in subsequent centuries did taking the wish and decision of princes as authoritative to a point of infallibility. Rather the Romans conceived it – and I suggest theirs is the correct interpretation of *quod principi placuit* – as concession of power from the masses to individuals in anticipation that they would rule with reason. Now although there are arguments as the primacy of international and national law or legal orders, as a matter of logic, the notion of *quod principi placuit* must precede *pacta sunt servanda* at least in so far as the latter is considered a fundamental principle of international law. For both logically and linguistically you cannot of course have a system of *international* relations until you have nations capable of forming such relationships. Which itself is predicates on there being a system of states in existence. And in that sense I seek to conclude chapter 1 with the suggestion that one can consider the international and national legal orders, the latter being

the jurisdictions from which amnesties are issued, the former, more commonly in the last two decades, the jurisdiction in which the rescission of amnesty occurs, as based on a synonymous foundation. That foundation, the basis from which obligation flows, is that of consenting to be bound.

I shall then, in Chapter 3, turn to the inevitable question with regard to amnesty, namely by what mechanism can we suggest that those who have not fulfilled their obligation to obey laws prohibiting the acts we are terming atrocities. I will suggest that an answer lies in the subject of the second chapter, a further Latin maxim, *lex permissiva*. This simply is permissive law, and through a detailed consideration of this notion in Kant and particular interpreters of his work I will contend that this notion can be defined as contingent exception. This idea of excepting from rule or norm is of course nothing new. Reform by its very nature is begun with exception. The chapter will argue that whilst permissive laws in Kantian terms create obligations that would not otherwise exist, in the context of the subject of amnesty and in light of the studies of Kant's permissive law undertaken by Brandt, amnesty can be seen as an example of this newer obligation. This obligation to amnesty, through Brandt's interpretation of Kant, I will suggest can be succinctly thought of as a contingent exception from the norm that from law (in the context of atrocities) follows punishment. In considering Kant's work, I will principally be addressing a passage from the first part of his *Metaphysics of Morals*. Kant's discussion of *lex permissiva* related to the law of property (ownership), however as I contend his discussion equally relates to the property of law. And one can use interpretations offered of Kant's theory in indicating the possibility of excepting from norms, or as we have seen, their validity which is another way of referring to obligation. Brandt's Kantian permissive laws are that they permit that which would otherwise be prohibited. This, I suggest is a means by which we can understand the phenomenon of amnesty and its rescission. It is I believe only appropriate to situate Kant's remarks on permissive law in light of his wider work. *Lex permissiva*, Kant remarks is a postulate of practical reason. I will consider that suggestion more in the second chapter but suffice to say that if we consider the definition of what makes a postulate of practical reason, we can speak to the efficacy and thus validity of amnesties. This I attempt in chapter 3.

The fourth chapter will pick up on the theme of the obligation to keep promises, and combine that with the discussion of *lex permissiva* in the second chapter and the notion of contingent exception. To do so I will look at a field of analytical philosophy that concerns both

obligation and permission and may offer an answer to the question whether as a matter of logic we are obliged to grant and rescind amnesties. In other words, whilst there may exist an obligation to obey the law, is there equally, logically, an obligation in certain circumstances to depart or except from that obligation? And within a normative framework if such is so permissible ought it to be obligatory? Although in this chapter I will concern myself with what I might loosely term a deontic theory for amnesty, or what amnesty ought to be, and whether one can logically argue that there is an obligation to grant and rescind amnesty, my argument is for a distinctly legal rather than ethical or deontological theory of the practice of amnesty. Amnesty is nought without a law against which the amnesty is offered and only exists (or *is*) to derogate or abrogate from already extant laws.

Considering principally the works of G H Von Wright whose 1951 essay *Deontic Logic* is considered a watershed in the field, I will use the systems of deontic logic that he developed to argue for there being an obligation, in certain circumstances to grant and rescind amnesties. Deontic logic is sometimes referred to as the logic of norms<sup>12</sup>. The attempt of norm-logicians to bridge the is-ought gap whilst pertinent to the study at hand is one that I cannot in detail consider here, although in the third chapter I attempt to relate some of the salient points to the question of amnesty. What I argue in chapter 4 is that what is termed dyadic deontic logic provides a system which is consistent as an explanation of the practice of amnesty as a contingent exception. Where it is possible to grant amnesty it thus makes such a practice permissible, and if we are permitted to do so then finally, I will ask are we obligated to do so?

In the fifth chapter, having argued for the possibility and logical permissibility of amnesty I turn to ask if the grant or rescission of amnesty has consequences, in terms of the setting of, or departure from precedent. In considering the notion of precedent, I will particularly concern myself with the principle of *stare decisis*. This is the first premise of the legal notion of precedent as I will seek to address it, namely that certain courts are bound (that is to say under an obligation) to follow the decisions of certain other courts. Simple examples are the decisions of higher courts binding on those below them. In the context, however, of atrocity law, the courts within which accused are tried for their alleged crimes, are not so similarly bound. For example decisions of the ad hoc tribunals for the former Yugoslavia and Rwanda

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<sup>12</sup> Von Wright in one of his last papers in 1991 posed the question *Is there a Logic of Norms?* which in distinction to Kelsen, he claimed to argue in the affirmative. My concern however is whether that logic can in certain circumstances - conditional as von Wright would term his later variations of his original system of deontic logic – support the proposition that there is an obligation to grant or rescind amnesty.

are not binding upon the ICC. In keeping with the analysis I have undertaken of the work of Kelsen in the previous chapters, I will address the question of precedent thought the lens of Kelsen's essay on derogation. This chapter will advance an argument that amnesty can be understood in the context of derogation, rather than negation, of the norm that punishment follows the law. Following Kelsen, illustrate the relative nature of derogation and illustrate its influence of on what Kelsen terms spheres of validity. Such influence I will argue is equally indicative of the principle of *stare decisis* and by virtue of such accords amnesty, and its subsequent rescission with the idea that it has a relative, finite status. This principle will also be compared to what has been termed the *lex posterior* derogating rule. Paulson as we will see remarks that "the rule *lex derogat legi priori* serves as a means of resolving conflicts between legal norms issued at different times". Such may be of assistance then in determining the authoritative and peremptory nature of precedents and if they are to be followed. Or might we ask are derogating rules contingent? And if they are contingent does such mean amnesty can be considered obligatory, and thus what we must do? Addressing these questions will be the concern of this final substantive chapter.

Having indicated throughout each of the preceding chapters the nature, as I argue it exists of the malleable and fluid nature of amnesty, in conclusion I will ask whether one nonetheless considers amnesty and/or its rescission necessary. Whilst on the face of it this suggestion might seem self-contradictory, for how can an act and its opposite *both* be thought necessary, I hope to have argued with sufficient clarity to illustrate how not only can such practices co-exist, but to some degree can be thought of as necessary complements. I hope to argue that by considering amnesty in the light of precedent, and thus being bound by such (if that is the case) I can argue for there being an obligation, in the strict legal sense, that supports the contention, not that there is a need for amnesties but that in certain circumstances amnesty is a necessity. In short to suggest that one might travel from the idea that we ought to grant amnesty to that we must.

If, as I contend, amnesty is a matter of law and not morality (albeit there is much debate as to whether there is a separation between the two) it is possible to advance a theory of obligation to examine the practice of amnesty and its rescission.

For all of the remarks which I have made in this introduction and in the chapters which follow, much of which concerns historic notions, authors and debates, I argue that each of the

themes discussed has contemporary resonance and influence. And lest it be suggested that amnesty in atrocity law is counter-prevailing one should note that the preference of amnesty to accountability is a notion reflected in treaty law pertinent to those conflicts which form the bulk in the contemporary world, non-international armed conflicts. And that in such treaty law is a clear example of the obligation (albeit to some degree qualified) to grant amnesty.

In 1977 the Second Additional Protocol to the Geneva Conventions was adopted and for those state parties to this Protocol remains extant treaty law today. Paragraph 5 of Article 6 reads, in part that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict [...].” The Second Additional Protocol however applies only to non-international armed conflicts. I will not pursue here the debate as to what fulfils the criteria either of an armed conflict, nor whether it is non-international in character. What I do want to draw attention to is the fact that there is no like provision in any of the four Geneva Conventions, nor the First Additional Protocol (applicable to conflicts of an international character). Thus even in the space of the last three decades, there has been both an expectation and arguably a treaty obligation to grant amnesty for internal conflicts. The inclusion of the term “endeavour” is of course not without significance in this context. The extent of obligation is thus, to some extent, diluted by such a qualification. To endeavour to fulfil an obligation one might suggest offers a degree of discretion that a mandatory requirement (simply ‘shall’ or ‘must’) does not. In legal terms the interpretation most likely to be offered for the phrase “endeavour” is that it means that all reasonable steps are to be taken to bring about the intended end. In this case that is the grant of amnesty. That we should take reasonable steps therefore to grant amnesty, is to suggest that we are under an obligation where it is reasonable to do so we ought to grant amnesty. That where it is reasonable to do so that is what we ought to do, is arguably another way of suggesting that that which is reasonable is right. In those circumstances the contention is not tenable that we are under an obligation to do the wrong thing. The notion that right is action guided by reason is of course nothing new. And this contention is the premise, I suggest in the chapter that follows, that underlies the concession of power by peoples to sovereign who are thus given the capacity to make the decision (the act of will), the meaning of which is the validity of what makes that decision a norm, rule or law.

That capacity as I hope to demonstrate in the chapters that follow becomes fundamental to understanding the validity and efficacy of amnesty based, as I argue it is, in a framework of

obligation. Such a framework makes allowance for permissibility of exception, such exception being contingent, in logical, moral and legal terms, and such contingency makes it possible to derogate from laws with which an amnesty would otherwise be incompatible. The argument however also holds I content for the rescission of amnesty, and, far from taking a position either on the grant or rescission of particular amnesties, my intention with this paper is to look to the strengthening the force of law by demonstrating that is it not a question of compatibility, but rather one of congruity.

## 2.

# AMNESTY AND OBLIGATION

### Obligation and Consent

We saw in the introduction that for Schmitt, the sovereign is he who decides on the exception. It is that very capacity to do so which defines who is sovereign. This later proposition answers the question; who, or what, is sovereign? However, this leaves unanswered the question as to how the capacity to decide is obtained.

Whilst that capacity might and has often has, historically and contemporaneously, been obtained through force, this chapter will look to address this question, from two maxims, derived from Roman law, which, although ancient in origin, are modern in their continuing effect. It is safe to suggest that what follows is a concern with the question of how national and international laws acquire or gain efficacy. This efficacy turns equally on the question as to whether there is an obligation to obey to laws, and from whence that obligation derives. It is necessary to answer this question first, as the validity of laws is both seminal to this question and significant from the perspective of the issue of grant or rescission of amnesty.

As outlined in the introduction and to which I shall return to in detail in the next chapter, for Kant, a permissive law imposes upon individuals an obligation that would not otherwise exist (or perhaps more properly described, be present). If you can interpret such laws as permitting that which would otherwise be prohibited, it is nonetheless necessary to concern ourselves with the means by which obligations are derived under law. For, as I have already indicated, one cannot except unless one already has a rule to except from. Hence it is equally essential that we identify the means and methods by which obligation to the law is derived, for were there no obligation, amnesty would not be required.

Given the multitude of studies conducted into the question of obligation in and under law, this chapter will only concern itself with the relation between two principles – *quod principi placuit* and *pacta sunt servanda* – which I will argue can be seen as the basis for obligation

under national and international law respectively. I wish however to posit that rather than being premised on distinct bases, they are arguably synonymous, in the fact that they both derive from consent. I will not draw a distinction between contract theory and consensualist or voluntarist theories<sup>13</sup>, for such is more appropriate to a larger study.

The first pillar of my argument is that obligation to obey the law derives its force from the consent to be subject to the law that each person gives. Now one might counter such a suggestion with a myriad of critiques, to argue that obedience relates to numerous other factors such as coercion, sanction, or more particularly the fear of each. However, whilst I will not contend that coercion and sanction are insignificant factors in terms of the obedience to extant law, my concern, for the purpose of this chapter, is rather the source from which obligation is possible.

In both national and international law if one wants to maintain the view that consent is the basis of obligation, it is feasible to suggest, as I shall, that the notion, consent to be bound<sup>14</sup>, is illustrative of this argument and demonstrable to the practice of law both domestically and between states.

There is of course nothing new in the idea of consenting to be bound or governed. Martti Koskenniemi remarks in his forward to Elias and Lim (xv, 1998), “[f]rom Rousseau and Locke, and certainly from the American and French Revolutions, it has been axiomatic for public power to derive its justification from the consent of the governed.” Such is the axiom of popular sovereignty. The point I am attempting to make in this chapter, is that the axiom conceivably precedes this period. Now I do not seek to deny the existence of absolute monarchies, and the form of rule to which Rousseau, Locke and the Revolutions responded. Rather, I wish to use the very terms which those absolutist rulers sought to invoke and show that a closer consideration of those maxims, far from endowing such rulers with absolute power, is more illustrative of the sense of rule by consent. Having demonstrated this from those Roman texts invoked, and argued consent as the foundation of domestic rule, I will then turn to illustrate why precisely the same rule, both in principle and practice, as illustrated by

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<sup>13</sup> Elias and Lim (3, 1998) begin their study of consensualism in international law with the antinomy of voluntarist and intellectualist conceptions of *opinio juris*. They equate voluntarist with consensualist and illustrate how consensualism, even if paradoxical in some of its aspects is nonetheless efficacious for law.

<sup>14</sup> One might suggest that there is a distinction between consenting to be bound and intending to be bound. This topic, whilst highly interesting and significant to adherence to law, is unfortunately one I cannot, for want of space, consider in detail here.

the notion *pacta sunt servanda*, holds for international relations, for I see law as concerning itself principally with the regulation of relations and thus by extension international law concerns, relations internationally

This paper is, of course, concerned principally, with amnesty. However to properly understand the opportunity to except from law, one must first understand how law acquires its force, hence requiring exception from. Both historically and contemporaneously this, I suggest, is best appreciated through considering the relationship between the sovereign and the law. However before doing so I must properly situate human beings generically in relation to the law. That is to say relative to the law. Historically and contemporaneously, I believe, the answer can be found in a fuller understanding of the foundations of rule. One of those foundations is the principle *quod principi placuit*.

### **Quod Principi Placuit**

I wish to suggest that by a proper reading of the maxim, and associated themes, one can disassociate the notion from its pejorative use, and reclaim the idea of the power to decide on what shall have the force of law as premised simply and singularly on consent.

*Quod Principi Placuit* is most often associated with determinate rule by a single individual for it invokes the notion that “What pleases the Prince has the power of law” (Kantorowicz, 1957, 150 quoting *Digest* 1,4,1,)

If one thinks of sovereign in the concept of an individual the question which then arises, arguably, is to whether the individual is sovereign as empowered by the will of peoples or whether by imposition of his will on peoples. The former view is, I consider, the proper reading of the concept of *quod principi placuit* if one looks to the Roman *Institutes* of both Justinian and Gaius.

Widely regarded as the premise, if not the origin, of much of modern law, the *Institutes*, along with the *Digests*, of the Roman Emperor Justinian, shall serve as the focus for my deliberations on how obligation to obey law pertains in domestic legal systems.

Following the generally recognised reference for Justinian’s works, I shall begin at *Inst* 1,2,6

“Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit.”

And translated as:

“A pronouncement of the emperor also has legislative force because, by the Regal Act, relating to his sovereign power, the people conferred on him its whole sovereignty and authority” (Birks/McLeod 1987, 38)

### The Law in Writing

An imperial pronouncement forms part, we are told earlier in the passage, of Roman written law. Whilst it is not the only form of written law, acts, plebeian statutes and resolutions of the senate are, *inter alia*, other such forms, it is illustrative of the relation of a sovereign to the determination of law. The description given to an act is pivotal; it is as a consequence of the Regal Act (cum lege regia) that the Emperor derives sovereignty.<sup>15</sup> The description ascribed to an act in Justinian’s *Institutes* is perhaps a little convoluted, in that “An act is the type of law which the Roman people use to make motion of a senatorial magistrate, for instance a consul” (*Inst 1,2,4*). A more succinct and perhaps clearer exposition can be found in *The Institutes of Gaius*, a work which preceded and informed the work of Tribonian, the Minister of Justinian, credited with composing the latter *Institutes*. Gaius explains (dependent upon translation, but in terms akin to Justinian) that the laws of the Roman people are to be found in *leges*<sup>16</sup> or acts<sup>17</sup>, plebeian statutes etc. A *lex* (singular of *lege*) is a command or ordinance of the *populus*<sup>18</sup> or an act is law which the people decide and enact<sup>19</sup>. And whilst Gaius does not use the term, *quod principi placuit* to explain the Emperor’s capacity, when one appreciates the meaning of “act”, the way in which the sovereign makes law is evident, for; “An imperial constitution is what the emperor by decree, edict or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his

<sup>15</sup> For probably the seminal exposition of this relation in the mediaeval world and beyond see Kantorowicz (1957)

<sup>16</sup> Zulueta (1946, 4). For the purpose of this comparative analysis of translations, I will footnote the respective pages in those translations here as opposed to the usual practice in this paper to cite pages references in the main text.

<sup>17</sup> Gordon / Robinson (1988, 20)

<sup>18</sup> *supra* Zulueta note 4

<sup>19</sup> *supra* Gordon / Robinson note 5, at 21

*imperium* (sovereign power) through a *lex*”<sup>20</sup>; “An imperial enactment is law which the Emperor enacts in a decree, edict or letter. It has never been doubted that it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority”<sup>21</sup>

Zulueta, in his Commentary to Gaius draws the comparison between the Imperial constitution *Constitutio principis* and the passage cited above from Justinian:

**“Constitutiones principum.** Ulpian (*Inst. 1,2,6*) says much the same as Gaius: imperial constitutions have the force of *lex* in virtue of the *lex* investing in the Emperor with *imperium*. Here *imperium* designates the totality of the powers conferred on him and the *lex* referred to must be the so called *lex de imperio*, i.e the ratification by the *populus* of the senatusconsult which invested an incoming Emperor with the traditional accumulation of powers. If the imperial constitution was to be regarded as legally continuous with that of the Republic the Emperor’s power to legislate could be derived from no other source, and though such a power was not, it seems, among those expressly conferred by the *lex de imperio*, those that were granted were so extensive that the power to legislate was an inevitable practical consequence.”

(15)

The legitimacy of the sovereign’s determination of that which is (written) law, is thus a consequence of the conference of the power to determine law, vested, originally it would appear in “the people” generically, by virtue of a command, ordinance or act of the people to the sovereign.

Equally, one ought not forget the significance which, following Kantorowicz, can be attributed to the inclusion of the conjunctive *et* in the Roman text. As Kantorowicz remarks such is indicative of the fact that the will or pleasure of the prince is but one form of legislature. The question as to whether this amounts to a permanent transfer of power from peoples to sovereigns per se or rather a conditional concession “only a limited and revocable *concessio*” (103) from people to an individual sovereign gave rise to a dualist notion of

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<sup>20</sup> *supra* Zulueta note 4

<sup>21</sup> *supra* Gordon / Robinson note 7

sovereignty, that of corpore and politic, which are examined at length and indeed are the two bodies in the title of Kantorowicz's seminal work.

To understand the significance of the concession of power from the people to the prince, and the manner in which such power was employed throughout periods often thought of as absolute rule, one needs to consider two apparently conflicting notions related to *quod principi placuit*. The first is that the sovereign is not bound by the law, sometimes expressed as the maxim, *Princeps legibus solutus est*. The second, that sovereigns demonstrate their worthiness to be sovereign by subjecting themselves to law, found in the *lex digna*.

The fundamental point is not that the sovereign had no obligation under the law. In fact it may be argued that the sovereign ought to place himself under the law, for not to do so would be indicative of his unworthiness to rule (contra the *lex digna* “it is a statement worthy of a ruler for the Prince to profess himself bound by the laws” Tierney, 1963b 386). Rather the consequence was that there was no effective sanction against him for want of a tribunal capable of coercing obedience. It is not that the sovereign were not even under the jurisdiction of the law, for indeed it was the sovereign who would say (*dicere*) what the law (*juris/jus*) was and by virtue of such place himself under its jurisdiction. It should be borne in mind, as Tierney remarks that that there is no magistrate who can sit in judgment on the sovereign is not explicit in the work of the glossator. When dealing with, what might be thought of as the concept of binding precedent,<sup>22</sup> Accursius' gloss is that “magistrates could not be subjected to coercion by equal or inferior magistrates” (*Ibid*, 388). Tierney explains that whilst “[t]he gloss at this point did not draw any further conclusions about the status of the emperor...the implication was obvious. There was no magistrate superior to the emperor; therefore he was not subject to legal coercion” (*Ibid*). Clearly in a constitutional contemporary context, the separation of powers have the effect of subjecting governments to legal coercion, the significant point to note is that the intention underlying both the medieval and contemporary principles is an expectation that those who rule do so ‘in accordance with the law’. Finally it is the proper sense of accordance that is to say in agreement with the law, which implies the notion of consensualism, in that to act in accord is synonymous with consenting to be bound.

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<sup>22</sup> In Chapter 5 I will discuss in more detail the principle of *stare decisis* or binding precedent and its relation to the question of amnesty.

Kantorowicz's consideration of the sovereign's own subjugation to the law is equally helpful in this light. In reconciling the notions of subjugation discussed above, Kantorowicz cites Frederick II who remarked to the senators and people of Rome "For although our majesty is free from all laws, it is nevertheless not altogether exalted above the judgement of Reason, the Mother of all Law" (1957, 105f). Kantorowicz's observation of this imperial pronouncement is that it amounts to a statement of the "Prince's *voluntas ratione regulata*, his "Will directed by reason"" (*Ibid* 106).

In the discussions as to the nature of this dichotomy one solution, proffered by Schulz, is that one may take the view that by virtue of the *lex regia* both peoples consent to be bound by the decisions of their sovereign, when taken *voluntas ratione regulata*, and that the sovereign equally consents to be bound. For not to do so would negate the efficacy of the power to make law as "so much does our authority depend on the authority of the law" (quoted in Tierney, (1963a))

In this sense, if one adopts such reconciliation between *lex regia* and *lex digna* in that it does not disavow the sovereign of the capacity not to be sanctioned by the law, but nonetheless remained obligated to it we can begin to analyse the concept of the grant and rescission of amnesty in light of obligation and dispensation. Taking Tierney's quote from Aquinas' *Summa Theologica* "the Prince is also above the law in that, if it is expedient, he can change the law, or dispense from it according to time and place" (1963a, 304), the significance of this phrase both in light of our subsequent discussions of contingent exceptions and its role in the grant and rescission of amnesty, is evident. The sovereign, whilst acting within the bounds to which he has committed himself to, nonetheless, when expedient, which is a lower threshold than necessary, may contingently except from the law, for himself or others. Expediency may thus be a factor in support of the exception from law, for example as amnesty.

## The Law in Custom

Now as we have seen the question of acts and imperial pronouncements have the force of law, yet are clearly written law. This then raises the question, arguably preceding that point of the drafting of conventional, codified law, of how customary law acquires the force of law.

One answer can be found in a work of seminal importance to the common law tradition of English law, and for that matter many other legal systems that derive from its premises. In the thirteenth century work of Henri de Bracton we find the following explanation; “England uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved. Nevertheless it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law”. (1968, 19) This would seem to imbue custom with a similar *force of law* as conventional, written law.

Bracton might be said to reflect Gaian and Justinian jurisprudence and the place of the king in relation to the law as not the sole arbiter on that which is to be considered law. However, such reflections may seem to leave unanswered, the extent to which the power to legislate, so derived, may be exercised by the sovereign.

Bracton’s contemporary, St Thomas Aquinas arguably provides the necessary restraint to the exercise of the sovereign’s unfettered will; reason. In a passage entitled “Reason and Will in Law” in the *Summa Theologica* St Thomas remarks

“Reason has the power to move action from the will, as we have shown already: for reason enjoins all that is necessary to some end, in virtue of the fact that the end is desired. But will, if it is to have the authority of law, must be regulated by reason when it commands. It is in this sense that we should understand the saying that the will of the prince has the power of law. In any other sense the will of the prince becomes an evil rather than law” (1959, 111)

It is not without significance that the penultimate sentence has a footnote in the translation which reads “The reference is to the text in the Roman law: “*Quod principi placuit legis habet vigorem*” (*Ibid, n 1*)

Reason is thus the regulation of law, when it is the expression of will. Law founded on unreason, is not just bad law, but - if we look to the Latin original, translated as evil, *iniquitas* – it is iniquity.

The object and purpose of law, is for St Thomas, the Common Good. And the right to promulgate it is, in line with both his Aristotelian views and the Roman juristic principles espoused in the *Institutes*, that of the community as a whole, or those who, to use Thomas' words, have as their duty or charge the representation or care of the community.

Some three centuries after Bracton and Aquinas, Alberico Gentili, in his 1589 work, (which was later enhanced in his work published in 1612) having cited the passage discussed above from the *Institutes*, comments; “It is true that the people conferred all sovereignty and power, but they did so in order that they might be governed by men, not sold like cattle. Reason tells us this, and the *language* (my emphasis) of the decree shows the same thing. Listen to it “Let power and control issue from the city, when the Senate has decreed it or the people have voted it” (Cicero *on Laws III (ii), 9*)...Did the people give more than it possessed itself? Even the people could not do that. The theologians are mistaken and the jurists flatter, when they maintain that everything is allowed to princes and that they have supreme and unrestricted power.” (1933, 371)

The suggestion Gentili makes is an allusion to the pejorative manner in which the maxim is now regularly employed. It is said to express the unjust nature of absolute rule. However to describe the maxim pejoratively I would contend is to misdirect criticism against the notion, when it ought to be properly directed at its exegetes. As we have seen the context in which the terminology was used in Roman law is clearly in the sense of a notion of pleasure commensurate with the intentions of the populace as a whole. That, rather than the unchecked decision of “sovereign” will, was the sentiment the maxim was to express. The sovereign is thus restricted in the manner to which they may legislate, to the extent that the people could (or perhaps would) permit. Some might suggest my argument displays a naivety of the nature of absolute rulers throughout history. I do not deny that such have and no doubt continue to exist, but that is not my argument. More significantly I wish to illuminate the positive, not pejorative nature of the maxim, when properly interpreted. One should resist the temptation to apply a Machiavellian gloss to tenets of Roman law. In this sense I wish to follow the papers written by Brian Tierney concerning Accursius and Bracton on the place of the prince in relation to the law. In conclusion Tierney notes that Accursius, far from inferring absolutist maxims from the constitutional principles extolled in Roman law, rather elicited those constitutional intentions from the texts “intended to buttress Justinian’s theocratic absolutism.” (1963b, 400)

The real question thus to be asked is whether one can safely interpret the notion of *quod principi placuit* as synonymous with the notion of *pacta sunt servanda*.

In that sense one may perhaps pose the question; does a sovereign consent themselves to be bound by law and does so in good faith? If one follows Tierney's argument on Accursius' gloss on the *Corpus Iuris Civilis* it would appear certainly that the answer to the first part of the question is in the affirmative; "Nevertheless by his own will he subjects himself" (*Ibid*, 391)

Furthermore Gentili provides one possible, albeit linguistic, explanation for the notion of good faith being the premise of agreement. In a commentary entitled, *On the Law of Agreements*, Gentili writes "...a contract of sovereigns, all of whose agreements are based on good faith. All the dealings of sovereigns are upon the basis of right and justice (*ex bono et aequo*); all are dependent on the customs and institutions of the nations according to the accepted view of all the interpreters" and that "...as Baldus himself says...the name of treaty (*foedus*) is by some derived from faith (*fides*)" (1933, 361)<sup>23</sup>

Exactly a century after Gentili, Locke wrote *Two Treatises on Government*, and echoes his predecessor by remarking, ably surmised by Tierney, that "since [man] did not have absolute power over his own life, he could not concede an absolute power over himself to anyone else." (1992, 60). The concept of the concession of power is of course infused throughout the point I am seeking to make. It is as a result of the concession of power by the people, who are imbued with such power given their natural state of self-determination, that the sovereign gains the capacity to rule. "Government with the consent of the governed" as Locke would have it. Even though Locke's *Two Treatises* are a response to Filmer's absolutism and the *Second Treatise* is the work from which the celebrated maxim above is drawn and said to have influenced the American and French revolutions and no doubt much since, such sentiment, is equally present and indeed prevalent in a proper reading of the notion of *Quod principi placuit*. If I am right in that contention then the synonymy of consent between this maxim and the one fundamental to the practice of international law, and for that matter relations is clear.

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<sup>23</sup> Theodor Meron draws on this passage in his paper *The Authority to Make Treaties in the Late Middle Ages* AJIL Vol. 89, No.1, (Jan., 1995) pp.1-20

“A command is binding, not because the individual commanding has an actual superiority in power, but because he is ‘authorized’ or ‘empowered’ to issue commands of a binding nature. And he is “authorized” or empowered” *only* if a normative order, which is *presupposed* to be binding, confers on him this capacity, the competence to issue binding commands. Then, the *expression of his will*, directed to the behaviour of another individual, *is* a binding command...the binding force of a command is not “derived” from the command itself but from the condition under which the command is being issued. Supposing that the rules of law are binding commands, it is clear that binding force resides in those commands because they are issued by *competent authorities*” (1946, 31f)

Although in the above passage Kelsen is remarking on Austinian jurisprudence, he could equally, I would suggest, be remarking on *quod principi placuit*, for the capacity the command is the *lex regia*, and the condition under which the command is issued is the condition of consent to be bound.

The correlation of consenting to be bound, when combined with the notion of the *lex digna* indicative, one might argue, of good faith, allows us to next consider the nature of obligation in international law; *pacta sunt servanda*.

### **Pacta Sunt Servanda**

In international law, obligation is invariably, if not exclusively, in the first instance, derived from and defined by the notion, *pacta sunt servanda*. Its significance may be illustrated by the suggestion that it “is arguably the oldest principle of international law” (Shaw, 633.) One explanation of the concept is that it is “the principle of good faith fulfilment of obligations under international law” (Lukashuk, 1989, 513). Intriguingly it is both consensually based yet necessary for the practice and continuity of international relations; “the principle of good faith fulfilment of assumed obligations is objectively needed. It is the *jus necessarium*. Nevertheless, no matter how great the need for a principle, it could be established only by way of the consent of states” (*Ibid*).

That there is in Lukashuk’s view an objective need, a necessity, underlying the principle is interesting, particularly when we refer back to our previous observations of each of Kant’s

postulates of practical reason being equally based upon a necessity. Nonetheless this necessity is and must be predicated on consent, as, following the *Lotus* case before the Permanent International Court of Justice, Lukashuk boldly asserts, “Like all other rules of international law, the principle of good faith fulfilment of obligations derives from, and is kept in force by, the general consent of states. The detailed content of the principle can also be seen to be developing on a consensual basis. Consent is the only way to establish rules that legally binds sovereign states.” (*Ibid*)

The legal maxim *pacta sunt servanda* expresses then both the idea that agreements (treaties) will be binding on those, and only those, who enter into them and that they must be performed in good faith (Shaw 633; Brownlie 620). Having explored the idea and application of this doctrine, I will pose the obvious question, in light of the extant topic of this paper: Is the rescission of amnesty (when articulated in a peace agreement) not a contradiction of both the elements of the principle *pacta sunt servanda*? On the face of it the answer would appear self evidently, yes. Those who have entered into the peace agreement clearly do not consider themselves bound by that provision, and in a contemporary setting it begs the question, if international justice is anticipated, whether such agreement was, in fact, entered into in good faith.

It is worth noting the contemporary codification of the principle of good faith fulfilment of obligations found in Article 26 of the Vienna Convention in the Law of Treaties. This article, entitled “*Pacta sunt servanda*” reads, simply:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

The commentary to the draft article reads:

#### *Commentary*

- (1) *Pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations. As to the Charter itself, paragraph 2 of Article 2

expressly provides that Members are to "fulfil in good faith the obligations assumed by them in accordance with the present Charter"<sup>24</sup>

Shaw observes of *pacta sunt servanda* that "[t]he law of treaties rests inexorably upon this principle since the whole concept of binding international agreements can only rest upon the presupposition that such instruments are commonly accepted as possessing that quality" – It is not the instrument but, to use Lukashuk's phrase, "the international rules that impart legal force to them" (516). Brownlie comments "*Pacta sunt servanda*. The Vienna Convention prescribes a certain presumption as to the validity and continuance in force of a treaty and such a presumption may be based on *pacta sunt servanda* as a general principle of international law; a treaty in force is binding upon the parties and must be performed by them in good faith" (620).

Good faith, it seems thus is seminal to the notion I am concerned with here. The International Court of Justice (ICJ) in 1974 remarked "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith"<sup>25</sup> Good faith is, in the view of the ICJ therefore the very foundation from which obligation derives its force.

One might of course object to my discussion of *pacta sunt servanda*, and particularly reference to it as a provision of the Vienna Convention, as the Convention, by its very nature has as its subjects, states, not individuals. Inevitably, given the nature of contemporary conflict, the majority of parties to peace agreements are "non-state actors", who by definition are incapable of concluding treaties and their associate obligations. However as indicated by the ICJ its significance, by virtue of the presence and purpose of good faith, extends beyond mere treaties, concluded between states, to agreement per se whomsoever the parties may be.

## **Good faith**

In reviewing the work of Elizabeth Zoller, which he thought seminal to any discussion on the concept of good faith, Virally remarks that the moral premise upon which Zoller places good

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<sup>24</sup> p.211 Yearbook of the International Law Commission, 1966, Vol II. Draft Articles on the law of treaties with commentaries; Retrieved from [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf).

<sup>25</sup> ICJ Reports, 1974, pp 253, 267 cited in Shaw, p.81

faith, is unsurprising given it is viewed by her as subjective; “resting upon individual psychology”, but that for Virally “[g]ood faith is certainly that, but not only that”. It is also indicative of “rules of behaviour”. (1983, 131) One might suggest then that it concerns a shift from intuition to action.

If one wishes to see an example of the call to action the doctrine of good faith invokes, one might consider Mikhail Gorbachev’s speech to the UN in 1988. Gorbachev in translation is reporting as “urging ‘the political, judicial and moral importance of the ancient Roman maxim: *pacta sunt servanda!* – agreements must be honored,’ and noting that ‘[a]s the awareness of our common fate grows, every state would be genuinely interested in confining itself within the limits of international law.” (Koh n156). Gorbachev would it seems be drawing a link between the notion of good faith which is the premise and basis upon which *pacta sunt servanda* draws its validity, and the commonality and communalism which it is intended to foster.

In a chapter entitled, *State Responsibility and the ‘Good Faith’ Obligation in International Law*, Guy Goodwin-Gill offers a number of observations from which I shall now draw. Citing the same quotation from the judgment of the ICJ given above, Goodwin-Gill asserts that not only is good faith integral to the principle *pacta sunt servanda*, “but also applies generally throughout international law” (2004, 85). Similarly indicative of this contention is the iteration of the term in fundamental documents underlying the principles and practice of international law and relations, the UN Charter being only one such instrument. Further and illustrative of its pervasiveness in international relations, Goodwin-Gill cites the catalogue of instances enumerated by the ICJ in a 1998 Judgement arising from a dispute between Cameroon and Nigeria. The dictum of this case, he remarks was invoked by the Simon Brown LJ in the matter before the Court of Appeal, with which Goodwin-Gill was principally concerned in his article. The citation reads “Although the principle of good faith is ‘one of the basic principles governing the creation and performance of legal obligation...it is not in itself a source of obligation where none would otherwise exist’” (102). Now whilst the citation is correct, it is in fact a compound of two previous dictum by the ICJ in two separate cases. The recognition that good faith is “one of the basic principles governing the creation

and performance of legal obligation” was first drawn by the Court in the *Nuclear Tests*<sup>26</sup> case and was reiterated in the *Armed Activities* case. The significance is that in that latter judgement, the citation from the *Nuclear Tests* case is followed by a semi-colon, before the court, in the *Armed Activities* case, then remarked “it is not in itself a source of obligation where none would otherwise exist”. In this light, I think it safe to view that comment then as a qualification to the basic principle. Now if I am right in that contention, this may be significant for the purpose of the subject under analysis here, because as we saw earlier Kant argued that the effect of *lex permissiva* is that it grants or authorises the existence of an obligation where one would not otherwise exist. Whilst there is a slight variation in the language, the parallel between Kant’s remark and the ICJ dictum are striking. And striking for this reason: *lex permissiva* is itself a source of obligation where none would otherwise exist. Arguably therefore permissive laws qualify the principle of good faith. One might wish to contend contra Goodwin-Gill who opines “Good faith regulates the area between the permissible and the clearly impermissible” (p.100), rather whether that which is permissible can be said to regulate the purview of good faith.

We can now turn to the dichotomy amnesties may be thought to present, both in terms of good faith obligations under treaties or agreements specifically, or international legal obligations generally. Taking Goodwin-Gill’s description of the principle above one might ask whether to rescind an amnesty (in anticipation of prosecution) is breaching the obligation to abstain from acts which would defeat the object and purpose of a Treaty<sup>27</sup>, or whether the granting of an amnesty is in some way inconsistent with a state’s other obligations under international law<sup>28</sup> such as *jus cogens* or *obligations erga omnes*, both of which might be viewed as on the impermissible or in bad faith.

One need only look to the definitions and commentaries to be found in the *Restatement of the Law The Foreign Relations Law of the United States* published by the American Law Institute

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<sup>26</sup> The complete paragraph from which the quote is regularly drawn reads “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.” (*Nuclear Tests ICJ Reports 1974*, p.268 para 46; p.473, para. 49)

<sup>27</sup> Consider Article 18 Vienna Convention on the Law of Treaties

<sup>28</sup> Consider Article 15 European Convention on Human Rights

in 1986, for a demonstration as to the impermissibility of acting contrary to *jus cogens*. Considered peremptory norms of international law that is to say they are expected to be thought of as without challenge, the text reads at §102 “*k. Peremptory norms of international law (jus cogens)*. Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.” (1986, 28) Permitting no derogation might raise the question as to whether these rules might be thought axiomatic, in which case they would share that characteristic with Koskenniemi’s axiomatic derivation of public power from consent. One may be tempted to ask; what are the consequences of granting of amnesty if such is contrary to *jus cogens*, given the rule is said to prevail over and invalidate treaties contrary to its principle. And in order to act contrary to the norm one is only permitted in doing so by virtue of a norm of like nature. This permissible capacity for modification may however provide the solution, particularly in terms of atrocity law, if one posits the view that the notion that crimes so atrocious ought not go unpunished is itself a peremptory norm.

I will return to the issue of peremptory norms and non-derogation in the fifth chapter. For now it is worth noting that the characteristic of a peremptory norm can now be found in Art 53 and 64 of Vienna Convention. Whilst to be peremptory the norm needs, of necessity, to be “accepted and recognised by the international community of states as a whole”<sup>29</sup> that such is in reality not universal consensus rather consensus amongst “a very large majority”. Reflecting on Simmons’ comment that “The legal system (in stable societies) needs only *general* compliance to function at peak efficiency, not universal compliance” (127) it is evidently possible and of practical necessity for there to be variance in peremptory norms, even in the face of dissent, although the dissent clearly must be in the minority. Were there not such possibility nothing would be practically achieved for want of universal consent.

Now having identified the contention that the rescission of amnesty would seem an anathema to the principle *pacta sunt servanda*, and may indeed be contrary to the object and purpose of the treaty itself, I will turn to the next inevitable question. Are there circumstances in which one can act contrary to that fundamental principle? The answer, perhaps not surprisingly, is

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<sup>29</sup> See Article 53 and Reporters’ note p.34 *Restatement of the Law Third*

maybe, in certain, contingent circumstances. With the exception of a treaty being deemed invalid fifteen articles of the Vienna Convention provide for circumstances in which one may denounce, terminate or suspend the operation of a treaty (Aust, 2000, 224). I will not consider those provisions in detail here, but illustrate them to draw note to the fact that acts contrary to the intention to be bounds by the terms of the treaty in perpetuity are envisaged and one might suggest are indicative of parallels between treaty extent and the Lockean and Gentilian notions of the limit to which one can consent to be bound in domestic terms.

### **Consent to be bound**

That the principle *pacta sunt servanda* is consensually based is, of course, problematic, for as equally as we may choose to agree, we may equally choose to disagree. As Shaw remarks, “To accept consent as the basis for obligation in international law begs the question as to what happens when consent is withdrawn. The state’s reversal of its agreement to a rule does not render that rule optional or remove from it its aura of legality. It merely places that state in breach of its obligations under international law if that state proceeds to act upon its decision. Indeed, the principle that agreements are binding (*pacta sunt servanda*) upon which all treaty law must be based cannot itself be based upon consent.” (1997, 9) Fortunately, Shaw equally remarks, that it is equally not possible to ignore the issue of consent in international law and “[t]o recognise its limitations is not to neglect its significance” (*Ibid*). A notion can be equally incomplete, yet pervasive. Furthermore, as we have indicated above, consent need neither be absolute nor universal.

In the history of law the promulgation of agreements of an international nature led positivist legal theory to divide into two camps. Shaw again, “The monists claimed that there was one fundamental principle which underlay both national and international law. This was variously posited as ‘right’ or social solidarity or the rule that agreements must be carried out (*pacta sunt servanda*). The dualists, more numerous and in a more truly positivist frame of mind, emphasised the element of consent” (25). Amongst the leading monist, that is to say that national and international law are part of the same system of law, was Kelsen. Shaw critiques Kelsen’s view as too rigid, and finds potential tautologies in the fact that states ought to behave as they tend (customarily) to behave and thus ought to obey the rules that they obey (41).

The passage, of which Shaw is critical, is from Kelsen's *General Theory of Law and State*. In explaining the "Basic Norm of International Law" Kelsen sequences his argument thus

1. Begin with the lowest norm, the decision of an international court
2. Why is the norm created by the court valid? Because of the international treaty in accordance with which the court was instituted (constituted)
3. Why is the treaty valid? Because of *pacta sunt servanda* (in Kelsen's words "the general norm which obligates the states to behave in conformity with the treaties they have concluded")
4. "This is a norm of general international law and general international law is created by *custom* constituted by acts of States" (italics mine)
5. The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: "The States ought to behave as they have customarily behaved". Customary international law, developed on this basis of this norm is the first stage within the international legal order." (1967, 369)

In referring to Kelsen, Nussbaum summarises his position on international law thus, "Kelsen attributes binding force above all to international custom. From the latter, binding force of treaties is derived: *pacta sunt servanda* is in itself a customary rule. The binding character of international custom constitutes the initial hypothesis (*Grundnorm*) which is inherent in any legal system, but which cannot be subjected to further legal analysis; hence Kelsen...declines to answer the fundamental question why custom is binding." (1947, 286)

One attempt to answer such a question may be, paradoxically, to contend that custom, in the same way as conventional law is binding, creates an obligation by the very consent given in submitting to be bound. This is the synonymy I have been seeking to illuminate throughout the comparison I have drawn thus far between *quod principi placuit* and *pacta sunt servanda*.

Now the difficulty with this contention, some might argue is that if consent is all that is required to create obligation, one can simply decide not to offer one's consent and in doing so remove the obligation under which one had placed oneself. Of course if everyone chose such a view, anarchy is the logical and inevitable conclusion. The reason why everyone does not adopt such a course is, I would suggest that necessity overrides volition. In order for society

to subsist and sustain, there is a need that people can and do live in concert. The premise of that concert is the recognition of obligation.

However, having demonstrated I hope the basis for the recognition, in terms of amnesty we need to look for a means by which that recognition can be both sustained and yet excepted from, and to do so in a permissible manner. To attempt an answer to this conundrum, I will turn now to Kant and his notion of permissive laws.

### 3.

## AMNESTY AND PERMISSION

### Introduction

In the introduction we saw that Kelsen discuss his *pure theory* as following, or drawing from the methodology of Kant. We might equally suggest that the connection can be disputed my reason in considering Kant does not turn singularly on that relationship purported or otherwise.<sup>30</sup> The reason is rather that his theory and its explication offers I consider a sustainable argument to maintain the legal permissibility of amnesty.

To permit an act is to indicate that you allow an individual to behave, or who has behaved, in such a way that consequences, which might otherwise ordinarily follow, will not do so on this occasion because the individual acts under the *authority* of permission. To suggest that act needs permission implies that in the absence of such permission it would be unpermitted, or illicit. I wish to stress that the significance of the issue at hand is not the permitted/not permitted dichotomy *per se* but rather the concern of how and why and conceivably when, laws are needed that permit action.

The purpose of this chapter is to determine whether the concept of amnesty can be suggested as illustrative of Kant's notion of permissive law (*lex permissiva*). Such a determination will rest on two issues. What permissive laws might generally be thought to be and what Kant used to illustrated his idea of them. I shall take the second issue as my principal concern in this chapter.

By way of preliminaries however it is worth noting that law is generally thought to be concerned with obligation, though much debate could be had about the role obligation has with regard to obeying the law. Laws are often said to be prescriptive<sup>31</sup> and prohibitive or proscriptive. The former obliges that we act in a certain way the latter that we don't act in a

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<sup>30</sup> See Alida Wilson *Is Kelsen Really a Kantian* (Tur and Twining, 1986, 37ff) and Hillel Steiner *Kant's Kelsenianism* (Tur and Twining, 1986, 65ff)

<sup>31</sup> Although similar in many senses, it is not always the same as the when prescriptive as used as the alternative to descriptive in logic.

particular way. Laws in that sense are dos and don'ts. Before turning to what Kant used to illustrate his concept of *lex permissiva* let us first consider his remarks about permission and its relation to law for these explain the point I have just made and properly situate Kant's subsequent use of *lex permissiva*.

When describing the “Rudimentary concepts of the Metaphysics of Morals (*Philosophica practica universalis*)” (1999, 14f), Kant describes a number of concepts common to his metaphysics of morals. For the purposes of the extant discussion I wish to concern myself with the descriptions he provides to obligation, permitted actions and duty. The concepts of obligation, permission and duty are central to the subsequent development in this paper of deontological, teleological and deontic conceptions of amnesty, which will follow in the next chapter. “*Obligation*” Kant describes, “is the necessity of a free action under a categorical imperative”. And in his following remarks considers “[a]n imperative is a practical rule through which an action, in itself contingent, is made necessary” (15). Practicality, contingency and necessity are all it seems, in Kant, pertinent to the determination of obligation: “An action is *permitted (licitum)* if it is not opposed to obligation, and this freedom that is not limited by any opposing imperative is called entitlement (*facultas moralis*)” (16). We are entitled therefore to act in a permitted or licensed way. “Hence it is obvious what is meant by *unpermitted (illicitum)*” (*Ibid*). When opposed to obligation we are not so entitled to act. Thereafter Kant reaches his conclusion; “Duty is that action to which a person is bound. It is therefore the content [*Materie*] of obligation” (*Ibid*).

Kant thus recognised the inextricable link between obligation, permission and right. The title of the notion which Kant considered indicative of permissive law was the *Postulate of Practical Reason with Regard to Rights* (40). In order to properly explore and explain the contention I suggest it is necessary to review, in at least some details, elements of Kant's first two Critiques both of which precede<sup>32</sup> his *Metaphysics of Morals*, in the first book of which Kant's example of *lex permissiva* is to be found. It is through such an appreciation of the genesis of *lex permissiva* located, I suggest, in the discussions undertaken in the Second and informed by the First *Critique*, that it is then appropriate to relate permissive laws beyond the realm of proprietary rights, or rights of ownership – the manner in which Kant considered it.

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<sup>32</sup> *Critique of Pure Reason* (1<sup>st</sup> Ed. 1781, 2<sup>nd</sup> 1787) *Critique of Practical Reason* (1788) *Metaphysics of Morals* (1797). It should similarly be noted that the *Groundwork to the Metaphysics of Morals*, to which the Second *Critique* has a significant relation dates from 1785.

It may be suggested that such extension is not necessary for, in the context of the extant discussion, of amnesty for the power to confer and rescind such depends on ownership in the sense of possession of the power to legislate. If however one holds the view that what Kant was actually talking about was physical possession of a tangible object, such as a property, then I will contend that Kant concerns himself not only with the law of property, but with the property of law.

We will see Kant's view is that the postulate can be called a permissive law of practical reason. This is so because it grants either an authorisation or entitlement that *mere* concepts of right or justice would not confer, namely that there are under an obligation, which they would not otherwise be under, not to interfere with our property for we are the first to have taken possession of them. The first part of the sentence I suggest attends to the property of law, the second the law of property. The purpose and intent of the permissive law is to authorise, entitle, licence or permit us to impose obligations on others where such obligations do not exist. The latter part of that sentence is in one respect common to all laws, be they prescriptive, prescriptive or permissive. All laws will impose an obligation that did not otherwise exist, if they did not they would be otiose. However in terms of permissive laws it is the authorisation to act rather than the imposition of the obligation that is operative.

It may well be in this sense that the author on whom I will greatly rely, Reinhard Brandt, sought to distinguish permissive from prescriptive or prescriptive laws. It may be prudent at the outset to make clear Brandt's principal point which, as translated, was to view "permissive laws as laws that provisionally authorise actions which are, strictly speaking prohibited" (Flikschuh, 2000, 117). Whether such view accords with a more general understanding of permissive laws I will look to at the end of this chapter. Brandt's work was thought by Flikschuh an important paper on the postulate and indeed she acknowledged her debt to him in her subsequent discussion. Tierney thought the paper "pathbreaking" (2001b, 381). I will likewise adopt Brandt's interpretation although in terms of the question of amnesty I would shorten his point to contend that permissive laws can be simply considered as *contingent exceptions*.

## **Exception and contingency**

I intentionally use these two words for the following purpose. Contingency, as I will argue is pivotal to an understanding of the contemporary view of the purpose and practice of amnesty. This theme will also resonate in chapters 4 and 5. We will see evident from both Brandt's view and Flikschuh's interpretation that contingency is essential to a proper comprehension of permissive laws. Related, if not synonymous to this concept of contingency is that whilst an amnesty will be demonstrated as contingent in its application it is also necessarily provisional in its effect. There must be amnesty from something and it must be for a limited duration or else it would simply become the norm. To talk of exception necessarily implies the prior existence of a rule. The issue of priority is similarly fundamental to grasping the purpose and consequence of amnesty.

On a simple analysis one could easily suggest that amnesty is a permissive law for it too, on one view, could be said to provisionally authorise actions which are, strictly speaking prohibited. However the first problem one faces in such a statement is tense. Amnesties apply to acts which have passed; they are by their very nature retroactive. They are not proposed as prospective. That is not to say that one might not act in contemplation of a prospective amnesty. Indeed such contemplation may to some degree lie at the heart of those acting with a sense of impunity in anticipation of the possibility of subsequent amnesty. There are of course those who will suggest that those acting with impunity tend to be so confident of the basis of their impunity, for they control the levers of power, that they need not give a second thought to amnesty. That is of course feasible, but for fear of being distracted from the focus of amnesty, I shall simply contend that equally feasible is to act with impunity, conceiving the possibility that impunity may one day as a result of a shift in power become amnesty. The provisional nature of the authorising is similarly problematic if one takes the view as outlined at the beginning of this study of the intention of amnesty as having an oblivious rather than provisional effect. The idea of amnesty as oblivion, as the paper will illustrate, is no longer readily acknowledged. Indeed if one thinks what amnesty in a contemporary practice is it is evidentially provisional, rather than what it was once thought that it ought to be, oblivion.

On one view then, amnesty cannot be a permissive law for the former relates to excusing acts that have passed, whilst the latter it may be argued, given its tense, permits an action yet to come.

However the contrary view, I wish to advocate, is that by properly understanding what Kant meant *lex permissiva* to be and what Brandt considers the extent and arena to which such laws should and would apply enables amnesty to be viewed as a permissive law and therefore practiced as a contingent exception, that is, as a means by which to depart from a law's validity, that is to say applicability, whilst not ultimately affecting the premise of a law *per se*, the legal system and its continued validity. And, as we have seen the notion of validity can be thought of as related to efficacy.

I will now turn to explore first some of Kant's interpreters and their explanations of a postulate to inform the relationship of Kant's concepts of practical reason to the idea of amnesty. Having conducted this review I will return to Brandt's interpretation in further illustrate the relationship in order to identify amnesty as a permissive law.

### **What is a Postulate?**

A number of different commentators on Kant have given views on the definition of a postulate. Lewis White Beck (1960) in his commentary to the *Critique* gives Kant's definition of a postulate as "a theoretical proposition which is not *as such* demonstrable, but which is an inseparable corollary of an unconditionally valid practical law" sees a postulate in philosophy "is an assertion of the possibility or actuality of an object as a corollary to the acknowledgement of a necessary law" and indicates "[t]he practical proposition is the law (or rather its associated imperative); the postulate is a theoretical proposition, but it is not a proposition that is theoretically (i.e., apodictically) certain" (252). Kant's own view is that "a **postulate** of pure practical reason (by which I understand a *theoretical* proposition, though not one demonstrable as such, insofar as it is attached inseparably to an a priori unconditionally valid *practical* law)" (1997, 102). Ladd relies on and quotes L.W. Beck's translation of 1956, (Kant, 1999, 47 n18). I cite these definitions for Flikschuh suggests Brandt's interpretation of permissive laws, given above, allows him to offer explanations of "Kant's obscure references to the postulate as an 'a priori extension of pure practical reason'". (2000, 117)

Another description offered as to the nature of Kant's three practical postulates by the editors of is that *Early Political Writings of the German Romantics* "these ideas are 'postulates in the

sense that, although reason cannot demonstrate them to be true, it can justify belief in them for the purposes of moral conduct". Or again that "practical reason provides grounds for assuming the reality of certain metaphysical ideas which could not be established theoretically" (Beiser 1996, 3n1).

The last two of these interpretations also being the most succinct I find the most helpful in the sense that they can, for example, easily be applied to comprehend the notion of the *grundnorm* (or basic norm) in Kelsen. If one accepts the view that the *grundnorm*, whilst not demonstrable is nonetheless justifiable, and thus effective, in providing a basis for all other norms upon which and to which laws are to be measured, then the *grundnorm* can be accepted in the same manner as other postulates. It may be unreasonable, yet it is justifiable to maintain a belief in the *grundnorm*, for the purpose of (the regulation of) moral conduct, by amongst other means, norms or laws.

The consequence of the review of these descriptions of what a postulate is in Kant is that, in order to maintain that amnesty is a permissive law I need to demonstrate that it satisfies the criteria of a postulate of practical reason. To enable me to sustain this argument it is necessary that I discuss first the relationship and significance to practical reason as both a basis and consequence of postulates proposed.

## **Practical Reason**

The purpose of "postulates of pure practical reason" is that practical reason provides grounds for assuming the reality of certain metaphysical ideas which could not be established theoretically. However the consequence of relying on such a postulate is that it can inform our actions when premised on an assumption or set of assumptions, which whilst not demonstrable are nonetheless accepted as reliable for the further purpose of guiding conduct. One may be inclined to avoid use of the word faith, given its religious connotation, however, descriptions offered of such reliance is that it is "reasonable faith" or "rational faith". In one sense it is a belief which whilst not demonstrably evident none the less makes sense to maintain. By elucidating Kant's arguments what I hope to illustrate is how that maintenance becomes sustainable. Such sustainability it may be succinctly argued is a result of it appearing to be right or appearing to "fit". Appearances, as the adage goes, can be deceptive. However, and this may be the key point to the discussion at hand is that notwithstanding the deception

(conscious of it or not) we are prepared, for practical purposes, to accept the appearance of right. Certainty secedes to practicality.

In the *Critique of Practical Reason*, Kant saw three postulates of practical reason; the immortality of the soul, freedom and the existence of God. He explains that “These postulates are not theoretical dogmas by *presuppositions* having a necessarily practical reference and thus, although they do not extend speculative cognition, they give objective reality to the ideas of speculative reason in *general* (by means of their reference to what is practical) and justify its holding concepts even the possibility of which it could not otherwise presume to affirm” (1997, 110)

The remainder of this chapter will concern itself with the question as to whether amnesty properly fits within that description and in doing so seek to reinforce Brandt’s contention, in the sense that it fits in permitting that which is otherwise prohibited.

Kant begins Part one of Book one of the *Critique of Practical Reason* with his definition on principles of pure practical reason; “Practical *principles* are propositions that contain a general determination of the will, having under it several practical rules. They are subjective, or *maxims*, when the condition is regarded by the subject as holding only for his will; but they are objective, or practical *laws*, when the condition is cognized as objective, that is, as holding for the will of every rational being” (*Ibid*, 17). In his work on Kant’s categorical imperative, Williams cites this paragraph in a footnote to two similar paragraphs in the *Groundwork*. He surmises Kant’s position thus, “while objective principles, or laws, express how men *ought* to decide to act, maxims are simply rules on which men do, *in fact*, act” (1968, 14). In that sense Kant could be said to identify the is/ought dichotomy. The consequence of such conclusion is that maxims do not necessarily accord with morality, as compared with practical laws. Williams continues to explicate thereafter the distinction between maxims, which he describes as ‘material’, or ‘formal’ which we feel either inclined to follow or consider under a duty to follow (*Ibid*, 20f).

Kant’s fundamental law of pure practical reason “So act that the maxim of your will could always hold at the same time as a principle in a giving of universal law” (1997, 28) is a reflection of his categorical imperative. He explains how we comprehend this and how as a result of a realisation of it demonstrates its fundamentalism “Consciousness of this

fundamental law may be called a fact of reason because one cannot reason it out from antecedent data of reason for example, from consciousness of freedom (since freedom is not antecedently given to us)" (*Ibid*). We saw earlier that freedom was one of Kant's postulates of practical reason, and therefore we are entitled to accept its premise, notwithstanding it is not capable of empirical verification. Kant recognises such in his cautionary note with which he ends his remark to the fundamental law "However, or order to avoid misinterpretation in regarding this law as given it must be noted carefully that it is not an empirical fact but the sole fact of pure reason which, by it, announces itself as originally lawgiving (*sic volo, sic jubeo*)" (29). The citation in Latin is intriguing for our purposes for as the editor notes it is taken from the Roman Juvenal's *Satire 6; What I will, I command.* (29 n j). A sentiment that might be said to resonates in Schmitt, and some interpretations refuted in chapter 2.

The *Corollary* which Kant draws to his fundamental law is perhaps amongst the most succinct iteration of the basis of the Enlightenment project; "Pure reason is practical of itself and gives (to the human being) a universal law which we call the *moral law*" (29) Reason thus becomes the cornerstone for practical morality.

The basis upon which postulates rest has been described, dependent upon the translation of the German *Vernunftglaube*, as variations of reasonable or rational and faith or belief, (*glaube* may be either of the latter terms). The term reasonable faith John Rawls thought best to reflect the idea of faith supported by reason (cited in Kant, 1997 n6 xiv). The idea that it is acceptable to rely on such a premise can perhaps best be garnered from the use to which Kant puts it in referring to another postulate of practical reason, the existence of God. Before turning to that we would do well to note before immediately examining that concept in the second *Critique*, Kant deals with the first of his postulates, the immortality of the soul. Before reaching his conclusion that "the highest good is practically possible only on the presupposition of the immortality of the soul" (102), he explains the progressive nature of moral action. For Kant, the highest good, morality, is only attainable in "*holiness*" which is in "complete conformity" with the "dispositions of the moral law", which "can be fully accomplished only in an eternity, it led to the postulate of immortality" (104). The purpose of practical action then is that it must strive for the highest good and must do so in "*endless progress* to that complete conformity" (102). In that sense whilst unattainable in practical physical terms, acting as we ought to in order to continue in an endless progression towards

the highest good, morality is necessary for “[t]he production of the highest good in the world is the necessary object of a will determinable by the moral law” (102).

In his introduction to the Gregor translation of the *Critique of Practical Reason*, Reath summarises Kant’s argument as to the postulates of pure practical reason and their relationship to the moral law that the “generates a duty to do all we can to bring about the highest good, which for now we may understand as the state of affairs in which the ends of mortality are realized in their totality.” (Kant 1997, xiv) The issue of the “ends of morality” is one rife with contention, both in a generic and specific sense. I will not consider that here suffice to say that the duty referred to can perhaps be thought of as that which we *ought* to do. Reath continues to explain the relationship thus; “But the only way in which we can regard the highest good as a practical possibility is by assuming the immortality of the soul and the existence of God as a moral author of the universe who has ordered the world so as to support the ends of mortality. Since the duty to make the highest good is unconditional, it licenses [permits] us to postulate the existence of God and the immortality of the soul, as conditions of the practical possibility of the highest good” (*Ibid*).

As I have already dealt with the postulate of the immortality of the soul, that it may be postulated given the eternal nature of progression toward “complete conformity”, I will turn now to the second postulate. In short, it is necessary to postulate the existence of God for the possibility of the highest good, which Kant established the duty to strive for, “can therefore be postulated, while our reason finds this thinkable only on the presupposition of a supreme intelligence; to assume the existence of this supreme intelligence is thus connected with the consciousness of our duty” (105). Kant goes on to explain that in a theoretical context such an assumption to explain its existence is can be considered a hypothesis. However, and this is the significant point, with regard to the highest good, and because to fulfil then practical necessity of action “it can be called *belief* and, indeed, a pure *rational belief* since pure reason alone (in its theoretical as well as in its practical use) is the source from which it springs.” (105). As we saw earlier, it is as a practical tool, a guide towards action as opposed to theory that we are entitled to maintain a *belief* or *faith* in that which is postulated.

What is indicative therefore of all the postulates of pure practical reason as we saw earlier is their “having a necessarily practical reference” (110). Kant explains the specific necessities in relation to each of the postulates, immortality, freedom and the existence of God thus;

“The *first* flows from the practically necessary condition of a duration befitting the complete fulfilment of the moral law”. An eternity is necessary in order to reach the highest good. “[T]he *second* from the necessary presupposition of independence from the sensible world and of the capacity to determine one’s will by the law of an intelligible world, that is, the law of freedom”. We must be free in order to ‘be able to will’, the very premise of moral judgment. We must have the ability, not be disabled by exterior determination. “[T]he *third* from the necessity of the condition for such an intelligible world to be the highest good, through the presupposition of the highest independent good, that is, of the existence of God” (*Ibid*). It is necessary that there must be a summit, to which reference is to be made to determine the height towards which we should strive in fulfilling our duty to the moral law or else we would not know in which direction to aim our ascent.

In responding to potential critiques of the premises upon which the postulates lie, Kant indicates that whilst we are not *cognisant* of them we are warranted in *assuming* them for the practical purposes of directing our will and thus action. It is for this reason that Kant looks to the moral law in its practical rather than ephemeral aspect; “[t]he moral law is...for the will of a perfect being a law of *holiness*, but for the will of every rational being a law of *duty*, of moral necessitation and of a determination of his actions through *respect* for this law and *reverence* for his duty” (70). The determination derives from the actor’s subjective recognition, demonstrable by respect and reverence, and not from any other impulse.

### **The Erlaubnisgesetz and translating the Postulate**

In translation the German noun *erlaubnis* is to permit or to licence, and permission, *gesetz*, law. That Kant meant by the term *Erlaubnisgesetz* a law that licences or permits would seem to be without doubt both in his use of the German and that he follow this term with *lex permissiva* in parenthesis.

However, one should not ignore the significance of differences in the translations of the Postulate.

In the Gregor translation is with regard to *Rights* (Kant 1997, 40)<sup>33</sup>, (the German title reads *Rechtliches Postulat der praktischen Vernunft* (AA, p.246)<sup>34</sup>) whereas Tierney (seemingly following Gregor) cites the Postulate as with regard to *Right* (2001a, 304) and Flikschuh follows suit (2000, 113). Rights are phenomenal, Right, noumenal<sup>35</sup>. By describing something in the plural, such takes it from abstraction (concept) to the empirical (factual, or more correctly, actual). It also, I would argue, implies possession. People are able to acquire rights (or a right); however they do not acquire Right. This point could be of singular import; for what Flikschuh sees as the antinomy of Right, the solution to which she contends may be found in *lex permissiva*, is predicated by the question of how external objective, phenomenal possession is possible, which itself “resolves itself into the question” of how rightful, intelligible, noumenal possession is possible, and how such is compatible with the universal principle of Right. This distinction, which I feel should be made, is necessary because of the nature of the antinomy of Right, as “all of the antinomies share certain methodological features”, which are, that they “take the form of a dispute between a thesis and antithesis, where the thesis always represents a generalised rationalist position, while the antithesis always defends a generalised empirical position” (59). Now the question is whether noumenal is consanguineous with rational, phenomenal with empirical, the former being capable of apprehension only by intuition, the latter by observation. A proper exposition of this discussion goes far beyond the scope of this paper. I nonetheless thought it prudent to at the very least illustrate the significance of the variations in translations for the grant or rescission of amnesty may well relate to question of whether that is the right thing to do or if it infringes the rights of others.<sup>36</sup>

In Ladd (Kant 1999) the translation reads, with regard to the necessity of there being different meanings to the concept of possession (42) as “*sensible possession* and *intelligible possession*.” And possession “[u]nder the first sense is to be understood the physical possession of the object and under the second sense a purely juridical possession”. This qualification correlates sensible with physical (or objective, phenomenal) and intelligible with juridical. In the Ladd text *lex permissiva* is the “Juridical Postulate of Practical Reason”. One

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<sup>33</sup> Gregor describes the title generically in her footnotes as *Rechtliches Postulat* and in her translation notes remarks on *rechtlich* as used by Kant as an adjective (amongst others) of *Recht* (see p.xxxv)

<sup>34</sup> In his essay Brandt (1982) refers to and cites as either “rechtliche Postulat der praktischen Vernunft oder Erlaubnisgesetz (lex permissiva) der praktischen Vernunft” (p.233).

<sup>35</sup> Cf as analogous Steiner when in posing “the question as to whether there can be a *theory* – in Kant’s sense of the term – law, as such. Do laws inhabit the phenomenal or noumenal world?” (in Tur and Twining, 1986, 66)

<sup>36</sup> Although I will touch on the issue of amnesty as the derogation from rights in Chapter 5, this will not address the issue of whether amnesties are *right* in the moral sense. Cf Wellman (May, 2008)

may interpret the German adjective *rechtlich* as legal, judicial. The intention then would seem to relate the postulate to the noumenal realm, of Right, rather than the phenomenal realm of Rights.

### The Brandtian view – political and provisional

Thus far I have sought to illustrate the nature of a postulate of practical reason and to some degree consider how amnesty might be reflective of that. In so doing I have begun my contention that amnesty may be considered a permissive law and as such a postulate of practical reason. As a permissive law we can explain how it is to be distinguished from other forms of law, and, as a postulate of practical reason, explain its practical purpose upon which its legitimacy, or perhaps efficacy, is based (the latter potentially being the virtue by which it attains and sustains legitimacy and capacity for distinction). I will now turn to the author whose conclusions may be most illustrative and supportive of my contention that amnesty is *lex permissiva*.

Brandt refers in his paper to other authors' views of permissive law, both contemporary and historical. He cites the following passage from Gregor's *Laws of Freedom* "A permissive law states the conditions under which a general prohibition does not apply, and the permission to prohibit others from interfering with our exclusive use of an object is a limitation upon the prohibition, contained in the inherent right of freedom, against interfering with the freedom of others" (58, 239f in Brandt). The nature of the conditions to which Gregor refers, is, it seems to me the matter with which Brandt, and similarly Flikenschuh, in her comments on his work, are concerned.

It is worth recognising that Brandt acknowledges the historical heritage of permissive law. In the notes to his essay, Brandt refers to Hugo Grotius and Joachim Georg Darjes<sup>37</sup>. Darjes' work was written in 1751 and is the subject of short consideration in Tierney's later essay on the provenance of *lex permissiva* up to Kant. Tierney (2001b) explains, likewise, that for some medieval lawyers the idea of permissive law was certainly not new and indeed may offer a way out of the apparent impasse arising from contradictions between or inabilities to reconcile the concept of natural right with the principles of natural law. An interpretation was

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<sup>37</sup> Twenty-sixth observation (*de jure naturali permissivo*) in his work, *Observationes juris naturalis socialis et gentium*.

that law is both permissive and preceptive (or prescriptive) as well as prohibitive and punitive. Huguccio (c.1190) offered the following suggestion; “By the law of nature something is mine and something is yours, but this is by permission not by precept, for divine law never commanded that all things be common or that some things be private but it permitted that all things be common or some private and so by natural law something is common and something is private” (381f). This is perhaps not a surprising conclusion to be reached by a canonist, and yet reflects to some degree what Kant will argue six centuries later.

Having recognised that laws may be thought of in three terms, prescriptive, proscriptive and permissive I will turn to consider how permissive laws may be thought of as a resolution to the inevitable paradox that presents itself in the face of conflicting notions of right, or one might say of conflicting norms.

Flikschuh, in her extensive essay on *lex permissiva* when reviewing the dispute between the thesis and antithesis of the antinomy of Right, finds reconciliation of them analogous to the third antinomy in the *Critique of Practical Reason* (2000, 124). An antinomy, or paradox, is the outcome of the conflict between different views, both claiming valid conclusions in contradistinction to each, yet the basis for which view is an agreed premise. They start from the same point, head off in different directions and conclude in polarity.

Let us first consider what I purport can be thought of as the paradoxical relationship between atrocity law and amnesty. In order to acquire binding force, both law and amnesty have to be derived from the source of a legitimate authority. Clearly the issue of legitimacy of authority is rife with difficulty, but for the purpose of my discussions, I will take it that, if the authority is legitimate then its pronouncements (of law or amnesty) are capable of acquiring binding force. Now the fact that their binding force is derived from the same source satisfies the first criteria of the antinomy definition above, their divergence begins after the pronouncement of their effect from the legitimate authority. Law in the sense of criminal and particularly atrocity law is prescriptive. Amnesty on the other hand, as I have sought to illustrate as an example of *lex permissiva*, is permissive. Their contradiction it would seem could not be starker. Whilst law demands accountability and subsequently requires sanction, amnesty excuses accountability and therefore denies sanction. Yet they both, to conclude the illustration of their paradoxical relationship, or their antinomy, claim validity.

Flikschuh expects “the antinomy of Right to be resolved through the formulation of a third perspective, which takes on board aspects of thesis and antithesis without fully endorsing either position.” (*Ibid*) This to some degree echoes both Brandt’s work in his sense of permissive law’s provisional nature and Kant’s predecessors, attention to which is drawn in Tierney’s review (2001b). Flikschuh’s formal and substantive arguments are a critique of a paper by Kersting in which, she considers, when reaching his conclusion in favour of the thesis over antithesis, he errs in affording an affirmation of the postulate, extending to dominion, constituting a “transcendental relation of Right” and conferring on freedom of choice an absolutism of legal power. Flikschuh thinks this oversteps the mark. The postulate “only asserts that subjects’ claims to external objects of their choice cannot be contrary to Right” (2000, 128).

A third alternative she looks for is to respond to the “two equally unpalatable alternatives”, by which “[e]ither we exercise our freedom of choice and accept our actions’ unavoidable effects on the possible choices of others, or we respect others’ equally valid claims to freedom and desist from exercising our freedom of choice and action” (135). The third alternative is, contingency. By being contingent, actions will acquire permissibility consistent for purpose. In terms of the contemporary practice of amnesty, which I will argue is distinct from its absolutist predecessor, the notion of contingency, and as we shall see later, their being provisional is fundamental to its validity. Amnesties only now acquire their legitimacy as a consequence of their provisional contingency.<sup>38</sup> Indeed Flikschuh’s “principal argument...is that the postulate, a *lex permissiva*, offers a provisional solution to the antinomy of Right...the postulate makes possible a determinate solution to the problem of Right” (117). The basis of this solution is “grounded in subjects’ reflective recognition of their obligations of justice towards one another” (*Ibid*). And the sequence of Flikschuh’s argument as she herself makes clear “is from the conflict of Right to provisional Right, and from provisional Right to determinate, or peremptory Right” (*Ibid*). This sequence is of fundamental significance when one comes to apply it to law and norms. To align determinate with peremptory however can perhaps be confusing. The latter is an insistence on immediate attention, or obedience, the former that of exactness or discernible limits. Peremptory norms are those thought not subject to challenge. It may be that rather than determinate, Flikschuh

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<sup>38</sup> The legal validity of amnesties being predicated on their being provisional and contingent will be further illustrated in Chapters 4 and 5.

ought to talk of a determinative solution, for this implies direction, definition, qualification. That would offer a fairer description of the route from opacity to clarity that is sought.

It may perhaps though be in the context of seeking to peer through the opaque that Flikschuh is considering Brandt's characterisation of permissive laws as "dark preliminary judgements". Either Flikschuh or Brandt have removed the comma from Kant's original notes which Brandt cites, which could in their transcriptions have had the potential effect of evoking a sinister element which in Kant's writing, given the location of the comma, in the original, was not, I believe, intended. Dark for Kant related to obscurity, an inability to perceive definitively, hence preliminary. That is why it reads 'dark, preliminary' and not 'dark preliminary'. Admittedly Flikschuh identifies the evocative use of the latter, absent comma, iteration of Brandt and she properly, I think, concludes that Kant's dark, preliminary judgements were "tentative attempts at practical political judgements" (139), intended, ironically perhaps, to illuminate our search for a determinate (or determinative) judgement. Kant is further cited in that "before embarking" one "will already have formed a preliminary judgement about his likely destination. Preliminary judgements precede determinate judgements" (*Ibid*). The significance of this characterisation for the question of amnesty is though, perhaps, clear. This clarity is more evident, and particularly so, when we consider the arena to which Brandt saw permissive laws pertaining; the political.

Amnesties could be said to serve "as provisionally valid principles of action with respect to political problems that stand in need of a solution but for which no solution readily presents itself...they count as provisionally just" (*Ibid*). The benefit of Brandt's analysis is that as Flikschuh remarks it "hinges on his reading of the postulate as a type of practical judgement peculiar to the context of political agency" (136). This then makes it possible for me to contend its significance and relevance to amnesty in atrocity law, as an action of the political agent. That political agent is of course likewise, lawmaker. For it is in the capacity or potentiality to make laws that the power to suspend those laws, rests.

I consider it satisfactory to adopt Brandt's interpretation of *lex permissiva* for if one reads on in the text it is clearly feasible to see how he reached his conclusion. Kant wrote "permissive law...gives an authorisation that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have..." (Gregor 1996, 41). And "Brandt has argued that the function of the *lex permissiva* is precisely to permit a

provisional violation of the universal principle of Right”<sup>39</sup> (Flikschuh 2000, 136). I would posit that from such an observation one would be justified in inferring that the very concept of *lex permissiva* must be inherent in the notion of amnesty. The basis of this contention lies in the combination of the duty to seek the highest good and the possibility of permitting, provisionally, that which is otherwise prohibited. The suggestion of permissive laws is to argue that there are laws which would contradict other *ordinary* prohibitory norms or laws. This is what the notion of amnesty law implies, even though it may seem paradoxical.

Flikschuh suggests “[i]n the sphere of law, permissive laws mediate between the prescriptive laws and the prohibitive laws of pure practical reason. Permissive laws apply to actions which, though not morally indifferent, cannot be classed either under obligatory actions or prohibited actions” (139). In this light it is easy to comprehend the nature of amnesty as a permissive law. Amnesty in effect places in abeyance the obligations the law would otherwise impose and delays the consequences of violating the prohibitions which the law otherwise provides.

The next question to turn to is; Should amnesties be thought of as those acts which “strictly speaking are unlawful ‘a nevertheless honest’”? An action’s honesty, Flikschuh remarks, is because of the knowledge of the law not in spite (or despite) of it. And further “unlawful acts...are none the less honestly committed because committing them is unavoidable under the circumstances” (137). The question of the unlawfulness or illegality of amnesty, may be questioned in relation to the honesty with which it may be intended.

However the concordance of amnesty, with being unlawful, yet nevertheless honest, applied in a transitional manner as a possible solution to an otherwise impossible situation, in a political context, offers amnesty as that contingent solution (as an exception from rule) to the paradox of Right. And in this light amnesty cannot be considered anything but *lex permissiva*. Its contingency derives from its political efficacy, its exceptionality from its provisional effect, for “[p]ermissive laws count as provisionally just; they are valid in anticipation of...laws that do accord with the requirements of pure practical reason” (138). And thus if

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<sup>39</sup> The correspondence of permission, obligation and Right raises questions with regard to Kant’s ethics, often thought deontological. The issue of deontology, teleology and deontic with regard to the question of amnesty will be addressed in the next chapter.

amnesties may well be interpreted as a permissive law they may well equally be provisionally legal, in the sense that they are legal valid.

In order to maintain such an argument we need to explore in greater detail the relationship between ideas of duty or obligation, arguably informing, or informed by notions of Right and the concept of permission. In the next chapter I will consider that very issue as a question of deontic logic.

## 4.

### AMNESTY AS OUGHT

“It has become a commonplace that most contemporary liberal theory is ‘deontological’; that is, it gives priority to the right over the good. This is in contrast to its utilitarian predecessors, which were ‘teleological’; that is, they gave priority to the good over the right.” (Kymlicka 1988, 173)

#### Good and Right

Will Kymlicka’s description above, following Rawls, provides me with a succinct comparison between the influences that are at play in the grant and rescission of amnesty. The grant of amnesty it might be suggested is teleological, its rescission deontological. Suffice to say that in maintaining such a position, the simplest explanation is that because the efficacy of granting amnesty can be measured in the “good” it offers in the cessation of hostilities it can be thought of as prioritising that good over the right of prosecuting perpetrators for the commission of crimes. The deontological alternative is, of course, such prosecutions.

This chapter will be centred on the following questions; is the grant, or rescission, of amnesty something which we ought to do? ; is it logical in certain circumstances or under certain conditions to make the possibility of amnesty, or its rescission, a fact? And if so are we under an obligation to do that which we ought to do?

It is worth noting in respect of the quotation above that, in comparison to teleology (the study or doctrine of final ends or causes and of special significance when related to the evidences of design or purpose is derived from the Greek τέλος, (telos) meaning simply end), deontology is drawn from the Greek τό δέον (to deon) meaning ‘that which is proper’ or ‘what *ought* to be’ (Kelsen, 1991, 73). The standard dictionary definition of deontology gives its etymology as from the Greek δέον δέοντ - that which is binding, duty - and describes it as the science of duty that branch of knowledge that deals with moral obligations: ethics.<sup>40</sup> Bentham authored a

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<sup>40</sup> All references to standard or dictionary definitions are to the Oxford English Dictionary (2<sup>nd</sup> ed.) (1991).

work entitled Deontology, wherein the first few pages he talks of “[d]eontology or *Ethics*” as synonymous<sup>41</sup>(1983, 124).

Now if one thinks of deontology as related to duty that is to say that which we ought to do, to understand it as an indication of obligation is to, arguably, says the same thing, and is tautologous. The philosophical comparative to ought is, is. In the introduction to Kelsen’s essay collection, Weinberger considers that Kant’s philosophy of “the clear separation of judgement and norm of ‘is’ and ‘ought’”<sup>42</sup> (1973, xiv) is clearly to be found in Kelsen’s work. And von Wright makes clear seeing if this gap can be bridged is of seminal import “to the question of whether norms can be true or false” (1985, 369). This paper cannot do justice to the debate surrounding this issue and nor will I attempt to do so. I merely note these views to situate my discussion<sup>43</sup>.

If ethics are synonymous with deontology, on a etymological, if not Benthamite interpretation, then one may think of ethics in terms of moral obligations and moral obligations equally as that which we ought to do. Such a view however may then pose a dilemma or possible antinomy in terms of amnesty. As indicated, is granting or for that matter rescinding amnesty that which we ought to do and thus is there a moral or legal obligation to grant or rescind amnesties?

Taking the opposition we have seen above it would seem that the paradox between the grant and rescission of amnesty in that it is irresolvable or impossible to reconcile the two notions: One where right is above good, the other vice versa. Clearly, as a matter of fact, granting and rescinding occur but accepting that fact is one thing, explaining it another. What I intend in this chapter is to attempt to demonstrate a logically sound explanation for *both* the grant and the rescission. If one were tempted to describe it in these terms what follows is an attempt to provide a logical justification for both actions.

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<sup>41</sup> It is of course necessary to be careful in reading too much into the synonymy for Bentham of course in the terms we are talking about is teleological rather than deontological in his authorship of the fundamental principle of utilitarianism; greatest happiness for greatness number Hilpinen and Føllesdal also remarks however that Bentham’s use of ‘deontology’ is for “the science of morality” (Hilpinen, 1971, 1)

<sup>42</sup> The comparison of judgment and norm, or as we shall see later value and deontic, as much as its separation, is arguably central to my discussions that follow.

<sup>43</sup> One can go back to Hume’s infamous passage and consider more contemporaneously such seminal papers as John Searle’s *How to Derive “Ought” from “Is”* The Philosophical Review 73 (1964) 43-58 and Max Black’s *The Gap between “Is” and “Should”* The Philosophical Review 73 (1964) 164-181 both papers that von Wright (1985) responds to, see note 11 below.

## Deontic Logic or the Logic of Norms

The answer I suggest may be found in a field of logic which shares a direct etymological root as the description given to the science of duty above. This field, part of modal logic, is the formal logic of deontic modalities (von Wright, 1951, 1), more succinctly described as *Deontic Logic*. The latter term was the title of an article in 1951 by G.H. von Wright a paper which, it is suggested, has been the stimulus for much of the subsequent work in this field. (Hilpinen, 1971, 1). In light of that contention and given the limitations of space imposed on this paper, I shall limit my discussions of deontic logic and its application to the question of amnesty principally to some immediate responses to Von Wright's 1951 paper, and his response, together with some later works by Von Wright spanning 40 years since his first excursion on the topic.

The term deontic logic has however it seems a number of variations. It is prudent, and will be beneficial to the arguments that follow to illustrate some of those variations. Deontic logic has been described as a logic of obligation, logic of norms, logic of normative systems (Hilpinen, 1), a logic of conduct (Chisholm, 33) and a “logic of the will” (Hart, 112).<sup>44</sup> It has also been suggested the subject is “closely related to the logic of imperatives (or the logic of commands)” (Hilpinen, 1). This latter description might be said to derive from a work earlier than that of Von Wright, on in which it is suggested the term deontic is first used in the sense with which we are concerned.

The German philosopher Ernst Mally in 1926 wrote a work which, it is suggested the term deontic was first employed with regard to a logical study of language of normative expressions, such as obligation, duty, right and permission (Hilpinen, 1). In his work, *Grundgesetze des Sollens: Elemente der Logik des Willens* Mally’s concern was to present an

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<sup>44</sup> In his *Essays on Bentham* Hart remarks, “‘deontic’ logic which [Bentham] called the ‘logic of the will’” (1982,112; see Bentham 1970, 15 for his description as such logic being “in contradistinction to the...*logic of the judgement* and the footnote to Bentham reference which directs our attention to (1996, 299 n b2) is indicative of Bentham’s definition of law; “the idea of a law as an expression of the lawmaker’s volition” (p.111); “1. A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.” (Bentham, 1970, 1). Hart also remarks on “[b]etween the legislator’s will...laws Bentham finds certain ‘necessary relations’ of...certain logical relationships of compatibility and incompatibility” and that these it was equally necessary to understand those relationships to understand the structure or system of laws. To illustrate “these relationships Bentham developed and in fact discovered the foundations of imperative or ‘deontic’ logic” (Hart 1982, 111f)

axiomatic system for the concept of ought. In their introduction Føllesdal and Hilpinen explain “[a]ccording to Mally, judging (*Urteilen*) and willing (*Wollen*) are two different attitudes towards states of affairs. Classical logic is the logic of judgment; it lays down the criteria for correct and incorrect judgment. Mally proposes to construct a similar logic for the attitude of *willing* that a state of affairs be the case. This theory is termed ‘Deontik’<sup>45</sup>. A person willing that a given state of affairs  $p$  be the case may be expressed by sentences of the form ‘ $p$  ought to be (the case)’ ( $p$  *soll sein*). This notion of ought is the deontic primitive of Mally’s system.” (*Ibid*, 1f.)

Now consider what the same authors say of von Wright 1951 system “Von Wright’s approach to deontic logic is based upon the observation that there exists a significant (sufficient) analogy between the deontic notions *obligation* (ought) and *permission* and the modal notions *necessity* and *possibility*. Obligation and permission are related to each other in the same way as necessity and possibility: a proposition is necessary if and only if its negation is not possible, and similarly a state of affairs (or an act)  $p$  is obligatory if and only if  $\sim p$  is not permitted...The notion of permission is the deontic primitive of von Wright’s system.” (*Ibid*, 8).

This distinction of deontic primitives, a term I take to mean a if not the premise of each system, at least its fundamental tenet, can be illustrated by considering von Wright’s conclusion of obligation being derived from permission; “If an act is not permitted, it is called forbidden...if the negation of an act is forbidden, the act itself is called obligatory” (1951, 3). The example he provides “it is forbidden to disobey the law, hence it is obligatory to obey the law” (*Ibid*?) illustrates his argument of the analogous position described above. The idea of the possibility of negation is of course pivotal to my discussion of amnesty as an exception from that which we are ordinarily obligated to obey. And that negation is premised on permission, yet logically related to that which we ought and ought not to do.

Now to contend that deontic logic is both a logic of will and a logic of norms is interesting when one seeks to compare the likes of Schmitt and Kelsen. One, as we have seen, is

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<sup>45</sup> Von Wright (1968 11, n1) remarks on Broad’s suggestion to him, the etymology from Greek, Bentham’s and Mally’s use of deontology and deontik respectively. The online Stanford Encyclopedia of Philosophy also noting Broad’s suggestion, says of both deontic and deontik, “Both terms derive from the Greek term, δεοντικός, for ‘that which is binding’, and οὐ, a common Greek adjective-forming suffix for ‘after the manner of’, ‘of the nature of’, ‘pertaining to’, ‘of’, thus suggesting roughly the idea of a logic of duty. (The intervening “τ” in “δεοντικός” is inserted for phonetic reasons.)” <http://plato.stanford.edu/entries/logic-deontic/notes.html#1>

illustrative of a will based notion of law (and its exception), the other, illustrative of attempts at founding a norm based system. Von Wright considers Kelsen comparable to Weber and Marx for the depth of his influence on social science (1998, 365), and draws attention to a 1953 paper in which Kelsen, indicating the impossibility of proceeding from an *is* to an *ought*, states such a “essential position of the Pure Theory of Law”. Von Wright also quotes Kelsen’s claim that “the logic that the Pure Theory of Law was the first to discover, so to speak, is the *general logic of norms*, that is: a logic of Ought or of Ought-sentences” (*Ibid*, 366). The logic of ought or ought-sentences is yet another definition for deontic logic. Von Wright sees Kelsen’s confidence in his assertion of having discovered *Normenlogik* as being partly founded on the influences of the debates to which he (von Wright) was instrumental during the 1950s. Von Wright suggests that Kelsen is “a bit too egocentric” to attribute the discovery to his Pure Theory, but it is worth noting that the responses to von Wright’s 1951 paper<sup>46</sup> that I have found, all post date Kelsen’s 1953 essay. What is clear and will be shown when I come to consider some of Kelsen’s essays in the 1960s and parts of his last substantial work, *General Theory of Norms* is Kelsen’s concern to find logic in the law.

## Modes of Obligation

What follows is an attempt to use the early debates in response to Von Wright’s 1951 paper to see if we can illustrate a logic to both the grant and rescission of amnesty. Before turning to that issue a comment on my language seems appropriate. Throughout this paper I use the verb, “grant” and the noun, “rescission”. Now at the risk of further complicating the discussion, the former term is a description of an act, the latter an identification of a class of things. Those things are the action of annulling or abrogating. Now of course annulment or abrogation of law is precisely what the action of the grant of amnesty does so in those terms is it equally correct to talk of the rescission of laws by the act of amnesty as it is to talk of the rescission of amnesty by the act of law.

Now this apparent divergence, I hope will now become clear when we turn to consider Von Wright’s paper. He begins by describing, in comparison to other modal concepts (alethic, epistemic, existential) “deontic modes or modes of obligation”. These are the concepts obligatory, permitted and forbidden. The three concepts are described as “that which we

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<sup>46</sup> Prior (1954), McLaughlin (1955) Chisholm, (1963)

ought to do...that which we are allowed to do...that which we must not do". von Wright's first issue is to define those "things" that are "pronounced obligatory, permitted, forbidden". His name for those things is acts (1951, 2).

Leaving aside for the moment the issue of tense, in that he of course refers to future act, and not, one would suggest with respect to amnesty, the fact that it deals with past actions, the point to stress here is that in contemplating the issue of deontic logic, we are to be concerned both with the use of language and its utterances (oral or written) and that we are concerned with the actions of individuals.<sup>47</sup>

I will now address one specific, yet pivotal, aspect of von Wright's 1951 paper, a critique of it, and his response to that critique which may provide a logical explanation to the grant and rescission of amnesty. In doing so I am following the author in his progression from single to multiple acts, singular being the example of obedience to the law given above (1951, 3f).

### **Promises and Commitment**

For the sake of accessibility, I am intentionally avoiding describing the arguments symbolically, and hope that by doing so I will not in any way devalue the points I wish to make. A law or truth of Von Wright's system of deontic logic (or a deontic tautology as he describes it) (13) is that doing one act commits us to do another act. The example Von Wright gives is that "giving a promise commits us to keep it" (4). This sentiment as we saw in a previous chapter is the very premise of *pacta sunt servanda*, and if one accepts my point implicit in the principle *quod principi placuit*, as a legitimate expectation of peoples towards their Sovereign, or those exercising sovereign power. As a result and in light of such it provides an, if not the, appropriate part of Von Wright's system from which to address the question of amnesty.

This notion of commitment - by virtue of one act we are, by implication, obliged to undertake another act – becomes central to Von Wright's discussion, and is the first of his six laws on "commitment" (13). In his original position, (the 1951 paper) Von Wright remarked pithily

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<sup>47</sup> I do not refer to action to the exclusion of intention, however to discuss whether I intend to do that which I ought, am allowed or must not do, is an argument that cannot be pursued in this paper.

that “Commitment can thus be explained in terms of compatibility” (4)<sup>48</sup>. Three years later, A.N. Prior demonstrated an antinomy in Von Wright’s system when drawing the analogy between the paradoxes of strict implication and as he defines it “the paradoxes on derived obligation”. Evidently an obligation is derived where it is the result of two actions the first of which commits us to the second. Prior’s point, put as simply as I can is that the notion of commitment may give rise to a paradox if as a result of derived obligation one were to undertake an act that was forbidden and that if an act is forbidden, then it is likewise forbidden to do that act in conjunction with any other act (64), To paraphrase Von Wright’s description of Prior’s point in his response; if an act is forbidden it is obligatory not to do that act or to do another arbitrary act (1956, 508)

Von Wright accepts this criticism and thinks that his previous description “*is not* an adequate expression...of the notion of commitment or (derived obligation)” (italics in original, 509). His solution is the introduction in effect of the notion of contingency (509). His description, as an explanation of his symbolic terms is “‘p’ is permitted under conditions ‘c’”, ‘p’ being an act and ‘c’ being conditions (which he further remarks may equally be acts). He then introduces two further axioms to his original system on the basis of which “one can develop a system of “relative” permission, prohibition, and obligation” (509). Von Wright termed this system, new deontic logic. However he had remarked on in his earlier paper that whilst he dealt with deontic propositions as “absolute” it was possible, and I would add may well be practical, to make them “relative” (1951, 15). He argued that they may be relative to a so-called moral code. Put simply “[w]hat is obligatory in one moral code, may be forbidden within another” (*Ibid*).

In his 1956 paper Von Wright nonetheless thought his “absolute” notions survived and were included in the new system. This relative system may said to *include* the old system of “absolute” permission, prohibition and obligation by virtue of the fact that the laws, which hold in the old system, appear in the new system in the form of laws for permission, prohibition, and obligation *under tautologous conditions* (509). In the preface to a later essay Von Wright (1968) now describes this system as dyadic deontic logic. Dyadic for Von Wright is “conditional, hypothetical, relative” (22) as opposed to his earlier “*monadic* (absolute, categorical, unconditional) deontic logic. In his dyadic system *permissibility*, as a

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<sup>48</sup> Now if this is reversed, that which is compatible we are committed to do, is I believe how the paradox to which Prior challenges Von Wright to resolve arises

deontic possibility of action resembles *ability* in its sense of the natural possibility of action (4). In other words, von Wright sees a relation between that which we are physically able to do “subject only to the restrictions which are imposed by the laws of nature” and that which it is possible to (or that which we are permitted to do) subject only the restrictions imposed by a normative order (58), or if you want to draw the comparative, the law of man. What, in short, Von Wright has done is to illustrate the entailment between what he terms natural and deontic possibility, which is another means of explaining the suggestion “ought implies can”.<sup>49</sup>

It seems prudent, at this point to explain, in more detail, the way in which I contend one can apply Von Wright’s dyadic system to the question of amnesty. In his response to Prior, Von Wright was concerned with “paradoxes of derived obligation” in the sense, as contended by Prior that because one can draw the analogy between strict implication and Von Wright’s description of being committed (having a derived obligation) from one act to another, that this could give rise to the paradox where “the doing of what is forbidden commits us to the doing of anything whatsoever” (1954, 64). Now of the part of his law of deontic logic at issue as we have seen above was that if an act is forbidden it is obligatory to not undertake that act or another arbitrary act, but as Von Wright remarks, because he suggested in his 1951 paper “that by doing A commits us (morally) to do B” then a “paradox” instantly arises. His way out of the paradox is his dyadic rather than monadic system. And that as we have likewise seen is one based in contingency, or put another way is conditional.

Now I will consider the question of amnesty through the prism of dyadic deontic logic. If an act is forbidden (as a matter of law) this entails (that is to say it is a logical consequence) that commits those (with the requisite ability) to hold to account those who have performed that act. Now in an absolute or monadic sense, being so committed (a derived obligation) requires those persons who perform the act to be held to account each and every time they perform the act. That would not seem contentious in a normative framework or law (as Von Wright describes his deontic “life-tree”, the topological pictorial representation of the possibilities of action (1968, pp 51, 64)). However what the practice of amnesty, and for that matter its rescission requires is that neither the entailment nor the logical consequences that ordinarily follow do so. This is where the dyadic system takes effect, for it allows one to no longer be committed to hold those to account when certain conditions pertain. The conclusion von

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<sup>49</sup> See also Rescher (1967, 133f)

Wright reaches is that it does not follow that “an ‘absolutely’ forbidden act commits us to any other act nor that any act commits us to an ‘absolutely’ obligatory act...[t]hus what Prior called The Paradoxes of Derived Obligation to not arise in this system” (1956, 509). If that is so it makes it possible under certain conditions to no longer be subject to an absolute obligation derived from a law<sup>50</sup>. It offers in other words a *contingent exception*, not dissimilar I would posit from the conclusion of Brandt’s interpretation of Kant *lex permissiva* in Chapter 2. Again I am only concerned, at this stage, with the possibility of their being certain conditions not to be obligated, not what those conditions might be.

## Duty and Conditional Permission

The third chapter of Von Wright’s 1968 work is an extended version of a paper he presented at the University of Pittsburgh in 1966 and is reproduced in part from Rescher (1967). The title of the presentation in Pittsburgh was *The Logic of Action – A Sketch* during which Von Wright provided two definitions of deontic logic “The logical study of the permissibility of actions...from the point of view of a normative order is...called *deontic logic*” (Rescher 134) and “Deontic logic is the logical study of action from the point of view of their permissibility” (Rescher, 135). This latter description is compared to prohairetic logic, “the logical study of acts from the point of view of their preferability...the core of a general logic of value concepts.” (*Ibid.*) When considered with the distinction which Von Wright makes as important at the beginning of his extended 1968 essay, that “between deontological or normative concepts on the one hand and axiological or value concepts on the other” (12), (the latter being good and bad, useful and pleasant, to give but two of his comparative examples) one can note similarities between Von Wright’s comparison of deontological to axiological<sup>51</sup> (or right to value) and Kymlicka’s Rawlsian comparative of deontological to teleological, which I have already argued is instructive in terms of the question of amnesty.

Now that von Wright indicates that his absolute (monadic) system is included in his new (dyadic) system is indicative of the fact that notwithstanding the conditional nature, of exceptions from rule, it follows that the absolute system will still sustain despite departures from it.

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<sup>50</sup> This argument could equally be sound in terms of moral obligation. It means that the ‘norm’, that those who commit crime ought to be punished, can be excepted from whilst maintaining the validity of that norm.

<sup>51</sup> Furthermore Von Wright remarks that “[t]he important notion of preference is also axiological” (*Ibid.*). Whether amnesty is preferable is again a matter to be discussed in the next chapter.

If one also considers Roderick Chisholm's paper on contrary-to-duty imperative and Von Wright's comments to that view, we may consistently develop the argument I am advancing in understanding the notion and practice of amnesty and its rescission. Chisholm explains that contrary-to-duty imperatives are "imperatives telling us what we ought to do if we neglect certain of our duties" (1963, 33). Von Wright gives what in effect is the rationale or norm underlying punitive law, "[a] man who has...done the forbidden, usually thereby becomes committed to undergoing some penalty" in order to right the wrong, and having given examples of apology and compensation states, in reference to Chisholm's paper, that he "has drawn attention to this type [and] has coined for it the name Contrary-to-Duty Imperative" (1968, 74). Now whilst von Wright remarks that from a moral or legal point of view these remarks might not be of great interest (a point I would concur given their arguable, if not demonstrable, self evidence) he does see a problem from the point of view of logic. His concern is, to paraphrase, I hope correctly, how to express, logically, the change in norms, or normative codes or laws, or to retrieve (he uses the word "hook", but I am confident that his and my interpretation are sufficiently similar) the normative code extant prior to the forbidden act. In the case I am concerned with between law and penalty, and amnesty and absence of penalty (or for that matter rescission and subsequent penalty), this question is pivotal to the validity of each grant and rescission. The answer he considers is that retrieval "should be effected by means of the notion of *conditional* permission, obligation, and prohibition" (*Ibid*, 75), in short by his dyadic system of deontic logic, which we can therefore apply to amnesty.

There is however another exchange between Chisholm's and von Wright's respective papers in the preceding paragraph which is perhaps even more pertinent, in terms of the examples used by the authors, to the notion of amnesty. In comments to von Wright (Rescher 1967) Chisholm takes the view that von Wright seems to view deontic logic psychologically that is to say that if you say an action is permitted that implies it is "permitted by someone or other, or by laws, or by the state" (*Ibid*, 138). Now this for Chisholm presents a further difficulty as if as he says Von Wright contends deontic logic is concerned with man-made law, "we have no guarantee that the law will not be such as to forbid *p* and also to forbid not-*p*" (*Ibid*), *p* being the action permitted above. Von Wright's response, given in recognition that he agrees to the criticisms, is that he does "not want to view deontic (and prohairetic) logic *exclusively* in what Chisholm calls the 'psychological' way...[b]ut I would wish to *include* this view too in my conception of deontic (and prohairetic) logic." He thus allows

latitude, or relativity, to enter his system once more, and concedes that whilst von Wright claims that the principles of deontic logic (for which I read his dyadic system, given this paper is presented a decade after his paper establishing the basis for that system) are valid for man-made law, he remarks a lawgiver who “prohibits both of two contradictory modes of action to one and the same subject on one and the same occasion, contradicts himself...and what the self-contradicting lawgiver issues are not (“real”) *prohibitions*” (*Ibid*, 144f).

What von Wright’s system does allow for, noting that penalty *usually* follows the commission of a forbidden act and that real prohibitions (or obligations or permissions), is that it can follow where the lawgiver prohibits (or permits or obliges) two contradictory modes of action *not* to one and the same subject or *not* on one and the same occasions. If I am right in that contention, amnesty is possible in terms of dyadic deontic logic, and likewise amnesty’s rescission.

### **Kelsen’s accordancy**

Contemporaneously to von Wright and Chisholm, in 1965, at 84 years old, Hans Kelsen wrote an essay entitled *Law and Logic* propounding the widely held view “that it is a specific property of law to be “logical”; which is to say, that in their mutual relations the norms of law correspond with the principles of logic” (1973, 228). As a demonstration of this argument, Kelsen describes a “relation of accordancy” and uses the example of the death penalty for murder (247). Kelsen considers there being a logical relation between the “state-of-affairs established *in concreto*” by a court “under the state-of-affairs defined *in abstracto* in the general norm” (246). The Latin terms simply refer to the investigation and determination by the judge of the elements of the offence which legislation defines. He sees accordance between the punishment for murder being hanging (the abstract case), and that that is the decision which the judge reaches having established the “concrete case”, or put another way, the facts. Now as the judge sentences the offender to death by hanging, this “individual norm accords with the general norm” (247). However Kelsen’s contention is that does not mean that the “validity of the individual norm follows logically from that of the general one” (*Ibid*) because if I take Kelsen’s comments correctly, it *only* presupposes (or as he puts it creates the presupposition) for the judge to apply (or posit) the individual norm, and that application is a matter of the judge’s will (*Ibid*).

Such sentiments no doubt reflect Kelsen's contention that norms are the result of an act of will. They are always in that sense prescriptive, not descriptive. And Kelsen is categorical in both that you cannot derive an 'ought' from an 'is' nor can an 'is' be inferred from an 'ought'.<sup>52</sup>.

For the purposes of this study however, Kelsen's short addition to this essay written two years later and entitled *Law and Logic Again*, (1973, 254ff) written two years later, resonates even more strongly for the remarks he offers to a paper by Karel Engliš<sup>53</sup>. Kelsen here concurs with much of Engliš' remarks, which clearly maintain the view that norms do not, and cannot, unlike judgments have truth-values. Furthermore whilst judgments may have among them logical contradictions, norms may not. However in Engliš' rationale for this Kelsen differs. “[t]he reason [Engliš] gives, why there can be no logical contradiction between norms is that “The norm cannot be negated”. But this reason is not sound” Kelsen indeed considers “‘To negate the norm’ can mean to negate the validity of a norm. That is the statement that a norm prescribing some sort of conduct is *not valid*. Such a statement is possible and can be true or false.” (255) Thus it may permit of contradiction, and in this sense the negation of only the validity but not of the norm makes exception permissible.

It should however be made clear here that Kelsen explains his position that “the validity of a norm is the meaning of an act of will” and that following the second edition of his *Reine Rechtslehre (Pure Theory of Law)* which he references, he regards “the norm, not as “an act of will” but as the *meaning* of such an act” (1973, 256). In this sense one may think that the norm is concerned with what is meant by the act, it being willed into existence, and its validity, the intention behind it, the outcome (or end) intended to result following its promulgation. On the question of its validity, Kelsen, concurring again with Engliš maintains the view that there can be no logical contradiction between norms, as “a contradiction can

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<sup>52</sup> Cf. *On the Concept of Norm* (Kelsen, 1973, 216). This essay similarly written in 1965 Kelsen remarks forms the first chapter of his larger work “The General Theory of Norms” (Allgemeine Theorie der Normen 1979 trans. 1991). In the concluding paragraph Kelsen cautions against drawing the synonymy between must and ought, for the former expresses causal, the latter, normative, necessity. Now in light of his essay I would read causal as must follow (that is that it has to) and normative in that it ought to (or that it should), or at the risk of the former statement being a tautology, that it will follow, or that it may follow. One might be tempted to suggest such indicative of the distinction in von Wright's monadic and dyadic system, although this may be thought too much of a leap of faith, but Kelsen's view would seem to imply a latitude in terms of ought-sentences not present in must-sentences.

<sup>53</sup> *Die Norm ist kein Urteil* (The Norm is not a Judgment). This title is intriguing again if one thinks of von Wright comparative of deontological or normative to axiological or value concepts, the latter, including as von Wright remarked (1968, 12), preference, are judgments, not norms.

subsist only between propositions that are true and false, whereas norms are neither” (*Ibid*, 255) There can though be logical contradictions between judgments. However when Kelsen provides the example with which I am most concerned he departs, albeit slightly from his concurrence with Engliš. A “norm-positing subject”, for Engliš, may, by another act of will, “put his norm out of action, recall, abolish or change it” (*Ibid*) and may do so of their own volition or by someone authorised by the subject for that purpose. This of course seems indicative of the very nature and practice of legislative reform, an example of which is the grant and rescission of amnesty. However Kelsen takes the view that such total or partial abolition is only possible by virtue of a specific norm “a derogating<sup>54</sup> norm” (*Ibid*) specifically created (one assumes by an act of will) for that purpose. “This case” Kelsen remarks “must be distinguished from that in which the validity of a norm prescribing some sort of conduct is met by that of another prescribing the opposite; as in “Whoever commits murder is to be punished with death” and “Nobody is to be punished with death”. There is a *conflict* of norms, which is not a logical contradiction” (*Ibid*).

The question which this then poses is whether amnesty, in response to an extant punitive law, or rescission in response to an amnesty, conflict, in that they appear the negative of the other. If one thinks as Kelsen contends not of the negation of norms, but rather of the validity of norms. This would thus negate *only* its validity, which may be re-established, not the norm *per se*. For negation for in the circumstances I am concerned with regarding atrocity law, the law, the amnesty and the rescission are all arguably if not demonstrably acts of will.

Interestingly Kelsen, concludes his article with reference to a paper in which Ota Weinberger in 1958, refers conceivably to an application of logical principles (as we have seen above with regard to those relations such as contradiction and entailment obtaining between norms, notwithstanding their lack of truth-value) “under the proviso that logic can be extended by the addition of a special logic of ought-statements (*Ibid*, 256). That special logic is deontic logic.

Peter Geach, in his paper *Imperatives and Deontic Logic* provides as an illustration of his argumentation the example of a king’s pardon for a traitor’s act. This I would suggest, and at least as far as I can discern, is the closest example to the question of amnesty evident in the works on deontic logic I have considered. Geach proposes three answers the question “Ought

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<sup>54</sup> I will return to derogation more substantively in the next chapter.

I to do P?” It is your duty to do P; it is all right for you to do P, and also it is alright for you not to do P; and it is your duty not to do P. (1958, 49) He describes the second as the conjunction of the negations of the first and last, yet explains that such an suggestion, like others requires the foundation (“backing”) of a general moral principle. Geach suggests “they need to be backed up by general *permissive* principles, of the form “For anybody satisfying the conditions C, it is alright to do P (or: not to do P).” (50). That suggestion is of course precisely the description given by von Wright (1956, 309) in defining his relative or conditional, dyadic deontic logic. Now Geach’s example of “moral reasoning from general permissive principles” is of a counsellor’s indicating to the king his option; to pardon or punish, and the “counsellor is appealing to general permissive principles that he accepts.” (*Ibid*). Those general permissive principles, I argue, equally pertain to the question of amnesty which, if not synonymous, is related to the concept of pardon<sup>55</sup>.

Kelsen critiques Geach in suggesting that what Geach is referring to “is not a case of permitting but of empowering”, and claims the lack of distinguishing between the two is indicative of a number of writings on deontic logic (1991, 101 n7). The distinction Kelsen is arguably seeking to draw is between the capacity to decide and the decision itself. To permit is the decision made, empowering is being in the position of being able to permit, or in Kelsen’s words “conferring on an individual the power to posit and apply norms” (*Ibid*, 102)<sup>56</sup>.

### The technical Ought

To summarise the position thus far: We have reached a stage where logic allows, in certain conditional or contingent circumstances to depart from absolute norms (Prior). We can logically do so whilst not affecting the continuity of the norm or law (Chisholm). Finally, we can do so with the backing of general permissive principles (Geach).

I shall now turn to what I see as von Wright’s conclusion, reaffirming each of these three points.

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<sup>55</sup> See also Wellman (May, 2008, 249, n1)

<sup>56</sup> The notion of empowerment is intrinsically linked both to my discussion of the basis of obligation in Chapter 1 and to the question of the recognition of a ‘norm-creating authority’ to use Kelsen’s phrase in the next chapter.

As we saw earlier, in 1951 in drawing the distinction from other modal concepts, Von Wright remarked “[t]here are the deontic modes or modes of obligation. These are concepts such as the obligatory (that which we ought to do), the permitted (that which we are allowed to do), and the forbidden (that which we must not do).” (1)

In summarising his position on the Is-Ought debate, over thirty years later, von Wright wrote<sup>57</sup> “Norms pronounce certain things (actions or states) to be obligatory, permitted or forbidden.” (1998<sup>58</sup>, 379). These pronouncements are prescriptions, not descriptions of those deontic modes. It is however in the content, and by referring to such I presume von Wright means, not in the concept, that the significance lies. The content being “*that which* norms pronounce obligatory, permitted or forbidden” (*Ibid*) and which are intended to describe the ideal to which we should direct our endeavours. It is in the content that relations can exist and the study of those relations is for von Wright the subject matter of deontic logic (*Ibid*).

Von Wright’s view is that in consideration of action in respect of norms, the concern is principally the satisfaction of the norm. This leads to the conclusion both that “unless such-and-such is done the norm will not be satisfied...therefore if the norm is to be satisfied such-and-such ought to be done”. (*Ibid*) This ought is not the ought that the norm prescribes, e.g. you should not kill, the “normative Ought”, rather in von Wright’s terminology, it is a “technical Ought”. This he describes “expresses a requirement, a practical necessity, and it is often – and perhaps better – rendered by the word *must*” (*Ibid*, 377). This proposition he explains by the example of promise and commitment. Such, as we have seen, was the example by which he responded in 1956 to Prior and that which formed the basis arguably of his dyadic system. In defining a *technical* Ought, which von Wright see as “equally common” yet clearly different from “the deontic or normative ought of moral or legal norms” he suggests its ‘technical’ sense can be understood by the example “If I have given a promise, I ought (must, have to) fulfil it *in order to* satisfy the obligation constituted by the norm which prohibits breach of the promise given.”(*Ibid*). The norm is that you ought to keep your promises. The technical ought is that you must keep your promises, or else the norm will no longer be satisfied and arguable thereafter no longer a norm.

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<sup>57</sup> Immediately preceding this summary, von Wright engages with the two seminal papers referred to at note 2 and what follows are his comments to Searle and Black. See (1998, 376ff)

<sup>58</sup> von Wright’s essay *Is and Ought*, which I have taken from Paulson (1998) was first published in *Man, Law and Modern Forms of Life* Bulygin, E. et al (eds) in 1985.

As the technical Ought is for von Wright a fact and in that sense is an ‘is’ as it is a statement (or might one say description) of a fact “which is *internal* to the assumed existence of a ‘normative’ Ought...nothing normative follows from [the technical Ought], although something normative may be presupposed in it.” (379). And if a technical Ought is a practical necessity, this may offer one conclusion as to the practice, if not the concept of amnesty and its rescission.

Now earlier in his paper von Wright discussed the practice of legislation and remarked that such is illustrative of circumstances in which “a technical Ought can be said to ‘back’ or to justify a deontic Ought.” (378)<sup>59</sup> We have of course seen this notion of “backing” already in Geach’s paper above. And it is to Geach’s notion of general principles accepted by those party (or subject) to the system that von Wright refers.

Von Wright then turns to what, from the point of view of the principal concern of this paper is arguably the pivotal issue.

“The question might be raised: Is it theoretically conceivable that all laws of the state could be given a backing [or justification] in technical norms?” (379). I consider that here he is referring in an equally synonymous fashion to technical oughts for he continues “[s]o that every ought of a legal norm could be, as it were, translated into the Ought of a technical norm which is to say that *unless* certain things are the case (citizens and officials observe certain conduct<sup>60</sup>) the law-givers’ aims will be forfeited?” (379). The word *unless*, italicized in the original, is again indicative of his notion of negation that we saw at the beginning of the chapter.

He continues, “[t]o the best of my knowledge no law code is written in the form of technical norms” and von Wright explains that this would not enable an ought to be reducible from an is (or rather the ‘is’ of a technical ought) “[f]or the law-code would not be ‘meant’ to be a description of what is required if certain aims are to be attained; it would be ‘meant’ to urge

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<sup>59</sup> It should be noted that as far as I can discern his use of the term normative Ought and deontic Ought are synonymous. That which is deontic is normative. He also however uses the remark “technical norms”, which he explained earlier in his paper as “closely related to that which Kant called a ‘hypothetical imperative’ (1998, 377)

<sup>60</sup> Cf. D Dachies Raphael’s remarks on what be termed the capacity to compel (1954, 348). It is worth noting as an aside that in this article the author refers to *Pacta sunt servanda* as a normative principle in Social Contract theory (as opposed, or perhaps in addition ,to the context I referred to it in the first chapter).

‘all those concerned’ to live up to the ideal. Its ‘meaning’ *qua* law would be prescriptive not descriptive.”(379). This last sentence is perhaps of even greater interest if one asks whether it is reflective of Kelsen’s what the “meaning” of a norm is. Given its significance it is worth quoting the passage from *General Theory* in full:

### **“III. The Norm as the Meaning of an Act of Will**

When it refers to a prescription or command, the word ‘norm’ means that something is to be or is to happen. Its linguistic expression is an imperative or a *sollen* [ought]-sentence. The act whose meaning is that something is commanded or prescribed is an act of will. That which is commanded or prescribed is primarily particular human behaviour. When someone commands or prescribes, he wills that something *ought* to happen. The Ought-the norm-is the meaning of a willing or act of will, and-if the norm is a prescription or command-it is the meaning of an act directed to the behaviour of another person, an act whose meaning is that another person (or persons) is to behave in a certain way” (1991, 2)<sup>61</sup>

A technical ought, when thought of in relation to a norm (legal or moral) thus provides for the deontic possibility of departing from that norm, in certain or conditional circumstances, in other words is a contingent exception.

The question one should then ask is whether the grant and rescission of amnesty are thought of as technical or normative (or deontic) oughts and if the former, do they in some way ‘back’ or ‘justify’ the latter.

In considering an amnesty one must first assume the existence of a law, against which the amnesty is offered to be a fact. To apply von Wright’s approach; that the law exists must be presupposed (as a norm) in contemplating whether one ought to grant an amnesty.

Secondly, in considering rescinding an amnesty, similarly one assumes that an amnesty has been granted as a fact, therefore it must be presupposed in contemplating its rescission. Thus

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<sup>61</sup> It may be recalled from note 5 above that the essay *On the Concept of the Norm* was to form the first chapter of *General Theory of Norms*. There is however a difference in the passage just quoted and the one to be found in the earlier essay (1973, 217). It remarks that rather than the Ought, “Obligation, the norm, is the meaning of an act of will”. If this is not an error of translation, it would indicate that Kelsen maintains the position that that which we ought to do is obligatory. Thus if there ought to be for example amnesty granted or rescinded then it follows that there is an obligation to make it so. And if amnesty is thought of as a deontic utterance (an ought sentence) in for example von Wright’s dyadic system, then does it again follows that it ought to be and thus we are under an obligation grant or rescind?

in both circumstances, given that presupposition and as a technical ought amnesty (and rescission) are logically permissible.

Having reached the conclusion that it is logically possible we need then to ask whether amnesty or its rescission is right, and thus something it is necessary that we must do.

### **The Right to Amnesty or Is Amnesty the Right thing to do?**

In the same journal as the final work of Von Wright that I have considered<sup>62</sup>, two authors from Jagellonian University in Kraków, draw a stark analogy between deontic logic and law. Opałek and Woleński state that “[t]he concept of permission analysed in deontic logic and/or the logic of norms, corresponds roughly speaking to the concept of right investigated by the study of law.”<sup>63</sup> And that given that particularly legal theory and jurisprudence look at difficulties concerning the concept of right, “jurists consider the concept of right, like logicians that of permission, in the context of duty (or obligation)” (1991, 335).

I return then to the questions I posed at the outset of this chapter, ought we to grant or rescind amnesty, that is to say is it obligatory that we do so? Or to suggest a final variation, is there a right to amnesty (or its rescission) and is that action the right thing to do?

Taking von Wright’s position and the comparative Opałek and Woleński draw above suggests an answer to those questions. Going back to Von Wright (1951)<sup>64</sup> and substituting amnesty for *p* we can suggest amnesty is obligatory if, and only if, not-amnesty is not permitted. This is of course the logical explanation of the position that whilst there is a punitive law there can be no amnesty. We have however seen that there is the possibility of certain circumstances of excepting from norms (or laws), of being permitted to do so, and one might argue that this is in circumstances where it is the right thing to do. To then apply the comparative, amnesty is obligatory if, and only if, not amnesty is not right. Thus it logically follows that if amnesty is

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<sup>62</sup> In 1991 von Wright posed the question *Is There a Logic of Norms?* And in an essay of the same title sought to answer in the affirmative. His remarks, “One could well have a meta-norm to the effect that the not-prohibited is permitted. The well-known principles *Nulla poena sine lege* and *Nullum crimen sine lege* may be thought of as versions of this meta-norm” will be considered in more detail, I consider more appropriately in the next chapter. It may be worth noting that in *Is and Ought* von Wright thought the term logic of norms, misleading (1998, 379)

<sup>63</sup> The authors remark that they omit intentionally the problem of permission in ethics

<sup>64</sup> See above

right<sup>65</sup>, it is obligatory. In that sense I believe we can resolve the antinomy between the deontological and teleological view referred to at the start of this chapter. The same argument works equally when we consider that rescission is right.

In concluding his essay von Wright (1998) seeks to defend a positivist position in terms of the philosophy of legal and moral norms. He argues that “[t]he law of the state says that we ought this and that”, but asks “ought we, without exception to obey the law” (380). Those, for von Wright who say they ought not to obey the law, claim “to have a *right* to dissent”. And he asks if when asserting such a right, it is true that the claimant could say he “is free, is permitted has a right to disobey” (*Ibid*). The foundation however for von Wright of such a claim is not truth, but what he calls *assent*. Most of our actions to conform with the law are done “just because it is the law”. There may however be reasons of expediency for doing so, but von Wright concludes “[s]ometimes, finally, one obeys thinking it is *right* to do so – either because one considers the thing is right as such, or because one considers it right to obey the law of the state as such. Then one assents to the legal Ought.” (380f). This of course suggests that one is at liberty to assent or dissent, if not at will, then certainly with some degree of latitude or freedom. Von Wright further remarks “By assenting to the norm given to him by some external norm giving authority, the agent gives the same law to himself so to speak – transforms it from heteronomous to autonomous. In this same sense of ‘assent’ a subject may also create norms for his own conduct. Assenting, one could also say, is prescriptive and not descriptive (mental) activity.” (381) Therefore if assenting is prescriptive, and, as we have seen that which we ought to do is equally a prescription, one may conclude that if we assent to prescription we consent ourselves to be bound. We see that which we ought to do as obligatory. Hence, if we believe we ought to grant or rescind amnesties when certain conditions are present, then there is an obligation to do so. However in the context of atrocity law, the existence of such conditions and thus those obligations that they permit has to be reconciled against questions both a precedent and of derogation. I will now turn to the question of that reconciliation.

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<sup>65</sup> The term right however raises the question of the distinction between amnesty however being as a matter of right or the right thing to do. One might again think of this rather than a legal but more as a question of moral permissibility. See Wellman (May, 2008)

## 5.

### AMNESTY, PRECEDENT AND DEROGATION

For any normative order to subsist, the notion of precedent must, I suggest, have to central role to play in that subsistence. The very notion of normativity is that there is a norm that ought to be followed, and in that sense is arguably of a precedential nature. Precedent in its general sense is, arguably, the idea that there is a form of obligation to follow the decisions or actions of others in previous, yet like situations, to the circumstances we face. In legal and especially judicial terms this is a means of ensuring consistency which in turn support validity, and the efficacy of laws, and for that matter the legal system. One might suggest that an idea of precedent may be thought to reflect in positive law what Hume spoke of in terms of laws of nature, that of constant conjunction. If there is constant conjunction then it is reasonable to assume the ‘truth’ or validity of that law. This amounts to the argument that certainty and predictability of actions and decisions is necessary for continuity of the adherence to the rules given in and by a system and thus its legitimacy or validity.

This chapter will seek to address the question of precedent and remark on the relationship of precedent to amnesty through two aspects; *stare decisis* and rules of derogation. In response to those who may contend that amnesties are incompatible with international law because they conflict with non-derogable rights, I will contend that following the three previous chapters, there are circumstances in which amnesties are permissible derogations.

In essay considering the premises of the notion of precedent, Postema considers Hobbes’ remark in the Leviathan that law is not counsel but command as indicating that law “is an *authoritative, peremptory* directive to action. As *authoritative*, the fact of the law’s having been declared or established is thought to be reason enough to follow it. As *peremptory*, it is intended to preclude independent deliberation regarding the merits of the actions in question by those who fall under the rule” (1987, 13). Why we should follow precedent or as Postema terms it “the past decision as a *peremptory rule*” (*Ibid*, 15) is for that very necessity of certainty and predictability. If we want a rule to sustain it makes good sense, or there is good reason, to follow that past decision as peremptory, and thus as precedent. If we choose

consistently to not follow a precedent it loses its normative status, for if no longer efficacious as a rule of action, the law loses its validity.

If the question of following precedent is one of the peremptory nature of a rule, the acknowledgement of it as authoritative is the premise of its validity. By virtue of what H L A Hart termed a “rule of recognition”, the acknowledgment of the rule as authoritative, provides it with, if you will, the force of law because it provides “the *proper* way of disposing of doubts as to the existence of the rule” (1997, 95). The rule of recognition is for Hart the very basis of legal order, rather than a “general habit of obedience to a legally unlimited sovereign” (*Ibid* 292). However as I sought to demonstrate in the first chapter, the notion of the “legally unlimited sovereign” is, if one considers those maxims that predicate much of modern law, arguably fallacious. If as Hart remarks the rule of recognition provides “authoritative criteria for the identification of the valid rules of the system” (*Ibid*), we can relate the notion of recognition or acknowledgement of *authoritative* status with the consensual concept of obligation for we consent ourselves to be bound as we recognise the legitimacy of the authority in whom we vest the capacity to make those decisions. As Cross summarises “[t]he rule of recognition does not owe its validity to another rule, but the fact that it is accepted and acted upon by the appropriate officials” (1977, 213). The appropriateness of the officials be they legislators or judges, the latter appointed in system for which the legislators provide, is determined, both as a result of the expression of will of the populace as discussed in Chapter 1.

Having discussed an arguable basis for precedent, based on recognition and acknowledgement of the authority which has made the decision which is the precedent to follow, I shall now turn to ask in what circumstances it is possible, permissible or necessary to not follow precedents.

### ***Stare Decisis***

Postema’s essay reviews three concepts which he describes may be seen of as *Some Roots of our Notion of Precedent*. The title itself indicates that his does not consider his list exhaustive, but the three approaches, (classical) positivist, traditionalist (or classical common law theory) and conventionalist are in his view indicative of, if not pervasive upon, contemporary notions of precedent and indicating their roots raises pertinent questions of contemporary use of

precedent in practice (1987 13/33). Indicative of the positivist concept, evident, as Postema sees Bentham influence was the notion of “binding precedent” or *stare decisis* (33)

*Stare decisis* is described by another author, Cross, thus; “[the] general orthodox interpretation of *stare decisis* [is as] *stare rationibus decidendis* (‘keep to the *rationes decidendi* of past cases’)” (1977, 105). This description indicates that there may be variations to this interpretation, and likewise he indicates that the notion of *ratio decidendi* has varying interpretations (*Ibid*). Nonetheless with these caveats that the rule of *stare decisis* may not be universally interpreted or applied, it is the principle that informs the practice of precedent, in the sense that it creates an obligation that courts can be, and are, bound to follow a previous decision. Such obligation of course depends on the respective relationship of the court deciding and the court that has decided. Two comments from Cross perhaps best allude to the application of these principles to practice. First to say a judge or a court is so bound he suggests, “the judge is under an obligation to apply a particular *ratio decidendi* to the facts before him in the absence of a reasonable legal distinction between those facts and the facts to which it was applied in the previous case” and second, that “[i]t is recognised by past and present holders of the judicial office who use it as a justification for their conduct” (104)<sup>66</sup>. The obligation to follow the decision of others arises then from the recognition of those previous deciders holding the office from which the justification and legitimacy of that decision derives. This arguably institutional theory is both endemic and essential to any legal system in order to maintain consistency and through consistency maintain legitimacy. As Postema describes from the point of view of the “conventionalist” conception of law, a marriage of positivist and traditional concepts, that “[t]he most important property we demand of law...is that they be *certain and settled*” (25), or in the Humean terms, that Postema quotes, “steady and constant” (27). In conclusion as we have seen Postema notes that each of these conceptions is not without difficulties, but nonetheless the notion of *stare decisis* prevails and it is to the question of ‘binding precedent’ that I must turn my attention in respect of the question of amnesty.

Amnesty as I remarked in the introduction may seem the very anathema to precedent. If one considers precedent beyond the sense of *stare decisis* and the practice of courts the very notion is essential to the continuity of adherence to the law, because if you did not expect or

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<sup>66</sup> Of course such recognition as we have already seen in Cross’ comment on Hart’s rule is the very source of the Rule of Recognition’s validity (1977, 213) cited above.

anticipate the law to apply, you may not be inclined to adhere to it. The notion of precedent therefore perpetuates the expectation that law will apply and that your obligations to adhere to it need constantly to be met. Expectation of application, enforced by the notion of precedent, is integral to the efficacy of law.

Now the question of the viability of amnesty can arguably turn on the rigidity of the application of the notion of precedent or *stare decisis*.

Given the exploratory nature of this paper I will only turn initially to just one jurisdiction to look for a possible answer to the question of rigid and flexible application of precedent. I take the view however that the principles espoused can have application beyond that singular realm.

What might be termed a deontological approach was espoused by the highest court of the realm of the United Kingdom, the House of Lords in what is known as the *1966 Practice Statement*. This statement, made by the House independent of any proceedings by the Lord Chancellor of the time, Lord Gardiner on 26<sup>th</sup> July 1966 read

“Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as the basis for orderly development of legal rules”

So far so good for those adhering to the conventionalist concept, however the statement continued,

“Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from previous decisions when it appears right to do so.”

There is no qualification to what determines the appearance, nor the rightness of when departure can or should occur. Yet the House did not finish there. To conclude they remarked,

“In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House” (cited in Cross, 1977, 109)

Thus the House sought to preserve the norm of precedent that underlies the certainty that law, in order to maintain both validity and efficacy requires but for them, and them alone, hence the “elsewhere”, precedent can be subject to a contingent exception.

In response to technical contentions as to the validity of the Statement Cross remarks “can there be any doubt that it owes its validity to the inherent power of any court to regulate its own practice?”(110). However perhaps the House itself offers the best reflection on its own statement when, six years after the Statement, Lord Reid explained that given there were a number of decisions “which were generally thought to be impeding the proper development of the law” and where the “old view” of basically binding precedent be adhered to this would give rise to greater uncertainty than if these decisions were overruled (112). This of course indicates that as a matter of practice, where previous decisions might be thought to impede the law’s proper development, they may be excepted from; you need not follow precedent. Lord Reid cautioned that such an exercise must be “used sparingly”, one might say, judiciously, but it nonetheless, in the context of a court regulation of its own practice, permits exception from the general rule of precedent, or *stare decisis*.

In a subsequent paper on the theories of adjudication for judges trained in the English common law tradition, Wesley-Smith describes for the purposes of his argument *stare decisis* as “the doctrine of binding or authoritative precedent, according to which judicial decisions *must* be followed in appropriate subsequent cases” (1987, 73 n1)<sup>67</sup>. Wesley-Smith’s contention and conclusion is that those theories of adjudication are incompatible with an absolute binding effect. Precedent, on his view, is not law. That is to say, for the statement may be perceived as misleading, the obligation to follow precedent may be superseded by the obligation to follow law. In Wesley-Smith’s words “judges owe their fidelity, not to the

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<sup>67</sup> Whilst subsequent to Cross, Wesley-Smith’s paper is taken from the same volume as Postema’s

pronouncements of predecessors, but to the law...they are ultimately free to reject precedent if they do not believe it represents the law.” (87)

In order to appreciate how he reaches this conclusions we need to look to the two theories with which Wesley-Smith concerns himself; declaratory and positivist. A declaratory theory of the decisions judges (adjudication) is that they *only* declare what the law is. A positivist theory is that judges by their decision have the capacity to *make* law.

If one thinks of this as an example of a precedent that permits an exception then one might suppose or propose that such is the same as a norm that permits derogation to perhaps following Wesley-Smith that when departing from precedent the rationale is “not that such... was *bad law* but that it was *not law*” (78). It is equally feasible that being fallible judges (and equally legislators) might make mistakes as to the law in that same way that all make mistakes as to fact. And in that sense the precedent might not be said to accord with the law, for the accordance was erroneously determined.

Wesley-Smith gives as an indication of what he terms “the practical requirement for certainty” a quote from Bentham, which is, there can be little doubt influential on, if not a source for, Hart’s rule of recognition described above; “The deference that is due to the determination of former judgments is not due to their wisdom, but to their authority” (84 n53). And when faced with the question as to why precedents or those decisions that are precedents are applied to successive decisions Bentham extols it is “[n]ot because it *ought to have been established* but because it is established” (*Ibid*). This very remark on establishment indicates that at some point the decision must have come into being, was not immutable and if not immutable, then it must be, by definition variable and thus capable of contingent exception.

Wesley-Smith subsequently remarks that “if...judges turned to the notion of accepting that they are capable of making law, at best they could accept on vertical *stare decisis*, not the horizontal variety” (85). This conception, limited to vertical, that is to say hierarchical system, enables us to explain the fact that, as established under principles of international law, such as *pacta sunt servanda* and the Vienna Convention on the Law of Treaties, international tribunals are not so vertically bound. There is not such relationship between them, and in light of such the contention that amnesties granted are incompatible with international law, must fail, at least on the basis of arguments predicated on precedent.

To summarise, the determination must be one where judge is declaring the law and is thus obligated to apply the law. In the words of a Australian judge, in 1913, prior to his appointment as Chief Justice of Australia describing the declaratory theory of adjudication stated “A prior decision does not constitute the law, but is only a judicial declaration as to what the law is” (quoted in Wesley-Smith, 1987, 76). Or to adopt the second approach, that the judge is able to adopt and adapt precedent so as to make law. In each circumstance the concept of binding precedent, in Wesley-Smith’s view, which I find highly convincing, is incompatible with theories of adjudication. That incompatibility, perhaps some might suggest paradoxically, but nonetheless rationally, thus makes, at least in the terms described above, amnesties compatible with international law. I will return to the issue of compatibility in the conclusion.

Cross, we can recall, considered the expansion of the legal Latin maxim to properly reflect the role of reason in adherence to previous decisions. The rationale for a decision can inform thus both the obligation to adhere and to depart from it. If that previous rationale is thought erroneous, the very concept of *stare decisis*, on Cross’ elucidation of it, permits of exceptions. One might contend that Cross and Wesley-Smith thus appear thus at odds. If the former illustrates the consistency of application of *stare decisis* even when the precedent is departed, and the latter argues its inherent incompatibility with theories (and the practice) of adjudication, does such not appear contradictory. This may be, however, for my purpose both views, I suggest support my assertion of the permissibility, and not just because it is a possibility, but arguably a necessity of the continued validity of law, of exception from precedent, binding or otherwise. This however is not to contend that such permissibility is without limits, but as I have indicated earlier in this paper, in the space available I am not able to consider the parameters of those limits, merely I am able and intending to argue that permissibility exists.

## **Derogation**

Earlier I commented on Wesley-Smith’s conclusion as to theories of adjudication being incompatible with the notion of “binding precedent” in an absolute form. Having illustrated the application of that conclusion to the question of amnesty as seen as a departure from precedent, I now need to turn my attention to the contention that the notion or practice of

amnesty is incompatible with atrocity law. This is because, by its very nature, amnesty offers derogation from position that, as matter of atrocity law, one is not able to derogate from.

Although there is some merit in the argument that there is a distinction between the practice of derogation and the practice of precedent, in terms of my discussion I see them as two sides of the same argument which I am looking to critique, although not necessarily refute. The argument for following precedent, at least in terms of not granting amnesty is concomitant with the argument from non-derogation. They are almost, in this context, synonymous.

The concept of derogation centres on the premise that you cannot or should not derogate from obligations under which you are. This notion can be said to extend to your not being able to derogate from obligations which you have placed *yourself under* in correlation to the rights those obligations afford others. In terms of atrocity law the contention must follow these lines that States cannot derogate from the obligation that they have to prosecute atrocity crimes because of their very nature and gravity. Now this obligation to prosecute may be enshrined in treaty, for example the Rome Statute (establishing the International Criminal Court), or it may be thought of in terms of non-conventional duties. The latter, it might be argued is that the necessity for law to be efficacious is predicated on the fact that violations of it will not go unpunished. In short, in order to protect, you need to punish. Or at least have the possibility of punishment (arguably derived from the practice of precedent). And if you go one step further to contend that the duty to prosecute the gravest of crimes, those so atrocious that it is unconscionable to let them go unpunished, you are arguing that the duty to punish is a peremptory norm of law. And if peremptory it cannot be derogated from.

I will, in the conclusion address a contemporary discussion of such a position with respect to international law, but I now wish to return to Kelsen, and particularly a paper he wrote in 1962 entitled *Derogation*.

### **Kelsen, Derogation and Validity**

We saw in an earlier chapter Kelsen's contention that the validity of a norm is intrinsically linked to its efficacy. If not effective it cannot conceivable maintain valid. Norms in a positive moral order are more likely, Kelsen thinks, to lose their validity as a result "of the expiration of time for which they were valid" (1962, 261). This temporal validity is determined by either

the norm itself or another norm's dictates. Or validity is lost "by the fact that is no longer is obeyed or applied and thus has lost its efficacy and thereby its validity, *efficacy being a condition of validity*" (italics mine) (261). In the latter loss validity derives from the lack of application or obedience both of which are question of fact.

When might a norm's validity may equally be invalidated by derogation? Kelsen contends that the loss of validity as a result of derogation is distinct from the loss as a result of disobedience of in-application. Derogation is the *repeal* of the validity of a valid norm by another norm. This repeal is by virtue of a derogating norm, but this refers not to particular behaviour, in a way that norms ordinarily stipulate the type of behaviour that we ought or ought not to do, that which is permitted and that which is prohibited, but to the ought (or the imperative) itself. As Kelsen remarks "The derogating norm repeals the *ought*, and that means, the validity of another norm according to which certain behaviour or the omission of a certain behaviour ought to take place. Consequently, a derogating norm cannot exist by itself but only in relation to the norm whose validity it repeals, and in that sense it is a dependent norm" (261). I previously noted Kelsen's description of laws as norms and we may safely extend his discussion of norms from the moral to the legal realm. The question of the relationship and dependency amongst laws, as I have already suggested is pivotal to understanding the concept of amnesty. Amnesty (as a concept rather than by any particular content) cannot exist independently of the law against which it is offered. In that sense it is a dependent law. (Even if you were not to accept the contention that laws are synonymous or an example of norms, the relational dependency argument could still be maintained in respect of the suggestion that amnesty relates to the norm that those who commit atrocious acts ought to be accountable for them, or more broadly still we are responsible for our actions). However because, as we have seen above, derogation is an act of repealing the *ought* (Kelsen describes such as establishing a *non-ought* (*Ibid*) and as Kelsen contends that the derogating norm "does not conflict with the norm whose validity it repeals" (263). Thus derogation, as repeal, provides exception from, rather than negation of a norm's existence.

In so far as the act of derogation is concerned Kelsen believes such can be legislative and in terms of the impetus for such legislation, "the norm-creating authority may hold the validity of a norm is unwanted and, therefore may wish to terminate its validity" (262) and thus render the norm ineffective. Again we return to the possibility of permitting, because its application is "unwanted" exception from a norm by a legislative act. Amnesty as illustrative of such an

act of derogation, as the validity of a norm being (contingently) unwanted) can be easily drawn.

To take but one example Article IX of the Lome Peace Agreement provided that the Government of Sierra Leone, which of course I contend is a ‘norm-creating authority’ was “in order to bring lasting peace to Sierra Leone” to take “legal steps” to provide amnesty or pardon in terms of ensuring “no official or judicial action” would be taken against those whose behaviour would have amounted to atrocity crimes and to take “legislative and other measure necessary” offer guarantees of immunity to former combatants to facilitate “reintegration within a framework of full legality” (Hirsch, 2001, 143). The absence of want for the norm of accountability is evident in these words, but the concluding phrase, I suggest indicate that the temporal or spatial validity is what is affected, again exception from the norm, not negation of the norm itself.

Because amnesty removes obligations that you would otherwise be under, the only way in which this properly or logically can be removed, is by legislation that derogates from those obligations. As that act of derogation is an act of legislation from, in Kelsenian terms, a norm-creating authority, this gives rises to another obligation that of recognizing the amnesty.

The next question on which Kelsen remarks is then pivotal to my discussion, the issue of non-derogation; “the question whether norms exist which cannot be derogated” (1973, 264). Kelsen’s proposition that “[a] norm can exclude its [own] derogation by another norm, but it cannot prevent the loss of its validity by loss of its efficacy” resonates from the work Kelsen footnotes of Regelsberger who, in 1893, wrote, “There is no law that cannot be changed. A legislator can make a change or the repeal of a legal norm very difficult by imposing conditions and limitations, but he cannot control the unchangeability of a legal norm, even for a limited period of time” (275n3). Thus the question of change or indeed the possibility of change is key. In line with his discussions as to the effect of derogation Kelsen remarks to the quote from Regelsburger “[t]here is no doubt that the legislator can ‘decree’ that a norm shall not be change, but the question is, what legal effect does it have if in spite of such a provision a norm is adopted which conflicts with it” (*Ibid*). The mere pronouncement of non-derogation would, in such circumstances, it seems, be insufficient to affect the effect, for example, of a legislative act of derogation.

## **Derogation and the resolution between conflicting norms - *lex posterior derogat priori***

Having identified the feasibility of derogation from that *ordinarily* thought not possible to derogate from, we need to ascertain how it is acceptable to do so. At the start of this paper I spoke of the need for amnesty not to give rise to a logical contradiction with other laws, as it might on the face of it appear to do. We saw earlier Kelsen's remark on the specific property of law be that it be 'logical' (1973, 228). Kelsen thought this point self evident to jurists and like the proposition that of two mutually contradictory statements, both cannot be true, "so, according to this assumption, only one of...two conflicting norms can be valid and the other must be invalid". He considered "[t]his finds expression in the principle: '*lex posterior derogate priori*'" (*Ibid*).

Paulson's, in his description of Kelsen's varying interpretations of the principle, *lex posterior derogate legi priori*, describes the maxim and its effect as a "means of resolving conflicts between legal norms issued at different times" (Tur and Twining, 1986, 229). Paulson's remarks leads us ultimately to Kelsen's 1962 *Derogation* paper (1973, 261ff) which was the fourth and final phase of Kelsen's views on the *lex posterior* principle. Kelsen's concern is fundamentally in the four position he held, the first and third being consistent with each other, in that they considered the principle, *a priori* or non-contingent in nature, and the second and last influenced by a colleague of Kelsen's from the Vienna School, Alfred Merkl as considering the principle *a posteriori* and contingent (229f). In terms of amnesty as we can see it is of a dependent nature and would seem thus to be only capable of being defined in terms a posterior and contingent. This contention may of course be subject to further argument but I consider the following two quotes illustrative of the inherent or implicit nature, both, of the possibility of change, indicated as fundamental to the question of norm-validity above, and of the *lex posterior* principle itself. In 1918 Merkl wrote "It is not correct to say that the principle of *lex posterior derogat legi priori* makes it possible to change the law. Rather it is just the reverse: it is the possibility of change (from within the legal system) that allows one to give expression to the *lex posterior* principle in the first place" (quoted in Paulson, 1986, 237) and Kelsen in the second edition of *Reine Rechtslehre* "Since the organ issuing norms - the king, say, or the parliament - is normally authorized to issue norms that may be changed and

therefore repealed, the maxim *lex posterior derogate legi priori* can be assumed [angenommen] to be included in the authorization” (*Ibid*, 243)<sup>68</sup>

Having very briefly addressed the contingent or non-contingent nature of *lex posterior*, I shall now return to von Wright who forty years after his first excursion into deontic logic posed the question: *Is there a logic of norms?* (1991).

In this paper, von Wright considered the *lex posterior* rule. He explained this as a means by which to resolve conflict between O-norms (those of obligation) and P-norms (those of permission). To resolve a contradiction between a norm that obliges and one that permits, von Wright sees the feasibility or possibility of some type of “meta-norm”, to remove this conflict which he agrees it is not possible for logic to do. (*Ibid*, 277). *Lex posterior* is but one type of meta-norm and where norms are simultaneously given, (the giving deriving from the same “‘source’ (norm-authority, law-giver)” (*Ibid*)), due to the inapplicability of *lex posterior* or *lex anterior* principles von Wright can conceive of a meta-norm by which obligation derogates permission or alternatively “a meta-norm of contrary nature which places “permission above obligation” (“granted freedom above duty”) (*Ibid*, 277f).

Such a “meta-norm” that accords primacy to permission over obligation, is the premise of amnesty. As the giving of that norm is from the “norm-authority or law giver” which can pass legislation to enable departure from the precedent, of ordinarily following that obligatory norm, because its application is unwanted, such law is an act of permissible derogation from a norm. And whilst this affects the spatial or temporal validity of the norm, does not invalidate the norm itself.

The preceding can then provide us with a response to those who contend amnesty’s incompatibility with atrocity law as a result of their being certain norms or right, which we ought not to derogate from. The possibility of changeability inextricably leads to the feasibility of derogation, which, in and of itself, does not detract from the peremptory nature of the norm that atrocities ought to be punished.

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<sup>68</sup> In his conclusion Paulson is of the view that the categories ‘contingent’ and ‘non-contingent’ are “inappropriate”. However his alternative “something taken from the model Duhemian holism” (246) does not defeat the argument I am seeking to sustain, if any it is supportive of the possibilities of change I am alluding to.

## 6.

# CONCLUSION

Having identified the manner in which obligation to the law is properly understood to be established from the consensual perspective argued in chapter 2, through the permissibility both legal and logical, to be excepted from that obligation, posited in chapters 3 and 4, and that in so doing we do not violate the principle of precedent argued in chapter 5. Indeed amnesty is, in that sense, a derogation. And where “derogation is the repeal of the validity of a valid norm by another norm” this will not have consequences beyond the validity of that norm. Furthermore, “the derogating norm repeals the *ought* , and that means, the validity of another norm according to which certain behaviour ought to take place. Consequently, a derogating norm cannot exist by itself but only in relation to the norm whose validity it repeals, and in this sense is a dependant norm” (1973,261). The derogation’s dependency, in the e context of amnesty is also its contingency. The independent norm of punitive law may replace the dependent norm of amnesty.

### To derogue from norm or not

To begin this conclusion I will turn to one contemporary argument in respect of the non-derogation position<sup>69</sup>. In an article that discusses this argument in detail and is concerned with the extent to which there may be international recognition for amnesties granted in respect of war crimes Yasmin Naqvi concludes “[a]mnesties covering war crimes may be recognised in the limited circumstances where their non-recognition would amount to a threat a threat to peace and security, for example by undermining a peace agreement” yet “[e]ven in these circumstances, only those amnesties which are limited to internationally accepted parameters and which are not inconsistent with the fundamental obligations of States should be accorded international validity”.(624). The first conclusion as to the question of the effect of non-

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<sup>69</sup> Another example than the one that follows can be found in the same publication where Dukic (2007) discusses the obligation to prosecute for war crimes and remarks that the corollary of such an obligation would be a ban on granting amnesties. His position is made in a few short paragraphs (707) and is similar in the respects I am concerned with to Naqvi’s position. It is possible of course and should be recognized that other authors speak to the possibility of amnesties when meeting certain criteria. Mallinder’s 2007 paper, *Can Amnesties and International Justice be Reconciled?* is a particularly strong example of a pragmatic approach.

recognition is reliant on such a determination, Naqvi argues, by the United Nations Security Council and follow such determination derives its validity from the primacy of obligations under the UN Charter when such conflict with obligations under “any other international agreements” (591)<sup>70</sup> Whilst I would not disagree with Naqvi contention, it should be noted that the Article from which she quotes is silent on the relationship of primacy between obligations under the Charter and obligation derived from domestic agreements or sources. This is important when one considers as remarked earlier the obligation clearly expressed in Article 6 of the Second Additional Protocol to the Geneva Conventions. Naqvi quotes from the ICRC commentary to the Protocol that “[a]mnesty is a matter within the competence of the authorities.” (n 86) My interest however lies in the development of that comment in the next sentence in the Commentary describing amnesty as “an act by the legislative power which eliminates the consequences of certain punishable offences, stops prosecutions and quashes conviction” (ICRC, 1987, 1402) The Commentary does not further describe the nature of those authorities or legislative powers but it may be equally arguable that such authorities may well be domestic and if so then the comment to Article 103 of the UN Charter may lose its force. Indeed in the footnote to the preceding quote which deals with the English and French definitions of the term amnesty, the commentator remarks of amnesty that “[i]ts mode of operation and effect may obviously differ from country to country. This suggests that those authorities or legislative powers are ordinarily of a domestic nature. The other qualification necessary to Naqvi argument from the point of view that this paper is addressing the issue is the fact that as the determination as to what amounts to a threat to peace and security is, one can easily demonstrate, dependant on varying factors with varying influence, so is potential for variation in the “internationally accepted parameters” which are envisaged to limit the scope of, if not the very determination itself.

Naqvi’s premise for the inapplicability of Article 6(5) to war crimes is interestingly, the good faith principle found in the Vienna Convention. I have already dealt with the notion of good faith and the maxim *pacta sunt servanda* which underlies the practice of the exercise of good faith pursuant to the Vienna Convention. Naqvi argues, as a result of the rules of interpretation, that this is support for his contention that “it is difficult to conclude that Article 6 covers amnesties for war crimes” because such would be “inconsistent with the primary objective of the Protocol”, that being “ensuring greater protection for the victims

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<sup>70</sup> The primacy of obligations under the Charter is derived from the Charter itself at Article 103.

of...conflict". Although the argument is commendable and I do not disagree with his summation of the intention behind the Protocol, she nonetheless foresees the possibility of permitting amnesty in certain contingent circumstances. Such is counterintuitive to an argument of their being rights which do not permit derogation from them.

Naqvi indicates one other approach to the interpretation of Article 6(5) when she includes reference in a footnote to Roht-Arriza and Gibson's paper. Their suggestion is to interpret 6(5) with certain qualifications of which they give examples of basically recognition of victim's rights or that "letting these criminals go free" might lead to social unrest. Whilst I do not disagree with their sentiments per se I find it difficult not to simply use the text and the word 'possible' (which at the risk of being tautologous explicitly suggests possibilities and infers contingencies) as indicative of the myriad of contingencies which may inform either the grant or the rescission of amnesty, and thus a further attempt at definition is counterproductive to the end of applying the law to facts, not facts to the law.

Naqvi in her argument it seems wishes to counter a number of courts who supported their findings that amnesties are valid under international law, and that their conclusions were reliant on an interpretation that the rationale behind the treaty obligation to endeavour to grant amnesty in Article 6(5). Her argument is that one can counter that applicability and thus validity.

In order to be valid law must first be applicable. That is why we have the principle of jurisdiction. If your argument is that law does not apply then from the point of view to which the law does not apply it is not law at all. It amounts to no more than an expression of a point of view. To contend that one thing does not apply to another (for example a law to an action) is one step beyond suggesting that those things are incompatible. I started this chapter and this paper by arguing that it is incorrect to contend that amnesty is incompatible with international law. Equally it is erroneous to suggest it is incompatible with atrocity law. Why? First turns on the word itself. I do not consider what follows to be mere semantics, for in law and amnesty is an aspect of law, language is key for that is what lawyers do, they interpret the language, generally written by others, although occasionally written by themselves. To say amnesty is incompatible with an area or form of law is to suggest the two are mutually exclusive, or to use the definition from the Standard English "mutually intolerant" or "irreconcilable". To describe the relationship as inconsistent or incongruous is I

contend much more appropriate. I have not sought to argue in this paper that amnesties are universally good or beneficially, nor could I contend so given some amnesties are self-granted and may as a result be later determined manifestly unjust or absurd. No, the point is that amnesty is a permissible practice within those very spheres of law that others have contended are irreconcilable with amnesty. Amnesties might very well be inconsistent with the principles practice and application of international law at any given time. It is for that very reason that international tribunals are able to prosecute notwithstanding the grant of an amnesty, because even the subject of applicability is not one incompatible with the notion of exception.

## **Compatibility and Congruity**

At the conclusion to my introduction I suggested that one should look at amnesty in the context not of its compatibility or not with other laws, be they domestic or principles or practice of international law, but rather is congruence or not with those laws. I can now return to those issue and demonstrate why, incongruity is a more appropriate, realistic if you will contention. Congruity is as a matter of accordance or harmony, agreement in character or quality. Incongruity is the want of accordance with what is reasonable or the want of self-consistency. Such sentiments are more indicative of the inconsistency prevalent in any imperfect system, which law must to some degree be (and even more so in the case of positive law, given human fallibility), but which nonetheless is reconcilable in given contingent circumstances. In practical terms the use of incongruity lends the necessary latitude in which the grant and rescission of amnesty may and must be performed, such latitude, demonstrable as I have contended in the context of legal obligations, enhances the efficacy and thus, in Kelsenian terms, the validity of the given law, be that amnesty, or the subsequent statute of the tribunal to try those crimes for which amnesty had been granted.

“In philosophy we constantly confront the painful fact that what we deem to be rules have their exceptions” (Rescher 2006, 75). Such confrontation I would suggest extends well beyond the realms of philosophy and may we be the understanding which we must ultimately in face in any discussion of the exception from rules. In terms of amnesty it may well seem paradoxical to think that the absence of the obligation to prosecute, which is the effect of the grant of amnesty, as a matter of law, is the result of a subsequent obligation which requires us to adhere to that amnesty law. The issuance of that law (or its rescission) from the law-giver

or norm-authority to use von Wright's terminology is the premise if its validity and the precondition for its efficacy. We may follow Rescher in the combination of his two discussions of the aporetic method in philosophy and the structure of philosophical dialectic in recognising that whilst "an apory is a group of contentions that are individually plausible but collectively inconsistent" (17) there is a means to restore consistency. That means is the "recourse to *modification*, replacing the abandoned belief with a duly qualified version thereof" (76). Now whilst I have indicated throughout that it is not a question of the abandonment of a belief that those who commit crimes of atrocity, ought to be punished, the recourse to modification, must and I hope I have illustrated in terms of the qualifications which are present in each of the issues I have discussed in the preceding chapters. The basis of obligation is qualified by the consent of those who wish so to be bound; obligations may permit of exceptions, in turn giving rise to other obligations; the relationship of obligation to permission is qualified in it being of only relative, logical application; accordance to precedent may equally be excepted from and derogation, by its very nature permits of exception from what might otherwise be thought peremptory laws.

### **Interpreting amnesties**

There are perhaps two predominate schools of thought in contemporary treaty interpretation. Those who adopt for a literal or textual interpretation of the text and those who might be described as intentionalist or purposive, that is to suggest that one should look behind the veil of the text and interpret a treaty in light of what the parties to the treaty *intended* either its effect to be or what their obligation would be. The topics under discussion in this paper may then be properly put in a wider context in the debate between what can be described as the *object and purpose* interpretation of international law and treaties or agreements in particular, and a *literal or textual* approaches. The purposive approach has been adopted practically and argued extensively by Aharon Barak. Barak, a former President of the Supreme Court of Israel concluded that " Purposive interpretation meets the condition of efficacy" namely it can "extract legal meaning from the range of semantic meanings of the text" and "[u]nlike some systems of interpretation, like textualist systems, it has the power to resolve every interpretive problem presented to it" (2005, 219) However that is only one part of the equation, 'proper' interpretation "must be able to give the text the meaning that best achieves the goal of interpretation" (*Ibid*), that goal being "to achieve the objective – in other words, the purpose – of law" (*Ibid*, 220). Such a system is qualified by the permissible exercise of judicial

discretion, which can resolve uncertainty but such discretion “is a legitimate – but neither exclusive nor primary – component of purposive interpretation” (*Ibid*, 219).

The purposive approach or tradition is equally, one can suggest strong in the United States. In his recent work, Stephen Breyer spoke of his adherence to the purposive tradition (2008, 113f) and the manner in which it imbues his interpretation of the US Constitution in the spirit of active liberty. Active liberty, is equally resonant I suggest of the arguments I have been advocating since the first chapter. It is a reflection, as Breyer describes of the philosopher Benjamin Constant’s reference to the distinction of “‘liberty of the ancients’ and the ‘liberty of the moderns’” (9). Active liberty, seeks to encourage the notion of the sharing of sovereignty amongst the nation’s citizens its people (10, 25). This is the very same sentiment that underlies the consensual notions that give rise to obligation that I discussed in the first chapter.

This brings me to my final point. In light of the forgoing can we put the question that goes to the heart of this paper thus: Can you have a purposive interpretation of the obligation to follow peremptory norms such that it, in the context of amnesty permits of contingent exceptions from those norms?

My suggestion is that, notwithstanding the aporetic nature of juxtaposing the terms peremptory with exception and incongruous though they may be, the answer, as I hope to have demonstrated is yes.

In this paper I have sought to look at the question of exception from rule through the lens of apparently conflicting obligations: to punish or to permit. What I hope to have demonstrated is that

1. That adherence to obligation can be said to arise, ordinarily, consensually.
2. Laws which we are thus obligated to follow may also be permissive in that they allow for us not to, on occasion, follow obligations that we would otherwise have.
3. Logically, the relationship between obligation and permission is a conditional one.
4. We can thus, derogate from that which paradoxically it might seem is not capable of derogating from.

Thus to conclude, that amnesties and the obligation they give rise to, being laws themselves, is a permissible contingent exception from the peremptory norm that we should be punished for our actions, even where though actions are thought atrocious. The question as to what the conditions that qualify that exception ought to be, I leave to others, such as Mallinder. My attempt has been only based on the answering the broader question of the permissibility of exception from rule. Schmitt may well have been right that the sovereign is he who decides on that exception, but I believe that it is not the capacity to decide that defines sovereignty, rather the congruity with which those decisions ultimately reflect, for want of a better word, reason. And that is why the question as to how the question of permissibility is answered is I feel so significant.

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