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The Political Character of Legal Institutions and Its Conceptual Significance

Abstract. The essay seeks to make contributions to the clarification of the conceptual relation between law and politics. It characterizes law as an institutionalized and normative social practice that makes authority claims on its participants. On this basis, legal institutions are defined as institutions that systematically seek to influence human conduct by providing authoritatively binding practical reasons. The essay claims that the elucidation of the conceptual features of legal institutions touches upon a series of issues of justification that belong to the realm of political philosophy. This makes concepts like political institution and political obligation relevant for conceptual legal theory. After an analysis of the concept of political institution, the essay claims that the concept of legal institution and the concept of political institution have the same applications. This conclusion is used in support of the main thesis of essay: legal institutions are to be treated as political institutions in conceptual legal theory. The essay also examines whether the conceptual framework outlined here can be compatible with a viable notion of political communities. The essay makes an attempt to clarify the relevance of the main thesis in respect to legal reasoning; it insists that the position taken here is unlikely to lead to some radical reorientation of legal reasoning.

Keywords: legal institution, the normativity of law, authority, obligation, political institution, political obligation, political community, political legitimacy, legal reasoning

There have been several attempts in legal theory to clarify the conceptual relation of law to politics. The present paper is a part of one of those attempts. I do not undertake to present here my standpoint on this conceptual relationship in its entirety. I have done that elsewhere.[1] This paper will have a distinctive emphasis: it concentrates on the conceptual characteristics of legal institutions. It is only one part of a full analysis of the conceptual relation of law to politics, but certainly a crucial part of it.

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[1] See Bódig, M.: A jog és a politika közötti fogalmi kapcsolat: Egy tisztázási kísérlet. (The Conceptual Relation of Law to Politics: An Attempt of Clarification). *Állam- és Jogtudomány,* 2004. 51–86. See also Bódig, M.: *Jogelmélet és gyakorlati filozófia: Jogelméleti módszertani vizsgálódások* (Jurisprudence and Practical Philosophy: Jurisprudential Methodological Investigations). Miskolc, 2004, 525–553.

First, I shall outline my views on the basic conceptual characteristics of law. Then I compare it to an analysis of the conceptual nature of the "political". This will serve to establish my main thesis that legal institutions are to be treated as political institutions in conceptual legal theory. Later, I deal with some possible objections to my position. In the closing section of my paper, I consider some implications of my thesis in respect to legal reasoning.

My thesis is neither new nor radical, and I have no wish to present it as a revolutionary discovery. Several authors have put forward similar views concerning the nature of legal institutions,[2] and several authors have encouraged us to connect legal theory to political philosophy in some similar way.[3] Nevertheless, I think there is room for further improvement in this region of conceptual legal theory. It is also important that, as far as I can see, the position I take deviates from any similar position. I hope I can make some contributions to the clarification of the complicated conceptual relationship between law and politics.

Some Conceptual Characteristics of Law

To put ourselves into perspective, we need a good grasp of the basic conceptual characteristics of law. In the following paragraphs I put forward some claims that concern these characteristics. The claims I make summarize the results of an interpretive analysis that I have carried out elsewhere in detail, and that I will not repeat here.[4] This time around, I use these claims to outline my starting point.

Law consists of purposive human activities that are connected to one another in several ways and that are subjects of specialized communication among the affected agents. This basic feature can be summarized by saying that law is a social practice. Law as a social practice serves various individual and communal goals, so it cannot be characterized adequately in terms of its objectives, points or functions.[5] The basic conceptual character of law lies in its distinctive way of serving any function. Law treats human beings as rational agents who are capable

[2] Joseph Raz took it as one of Hart's main achievements that he depicted law as a kind of political institution. See Raz, J.: *Ethics in the Public Domain*. Oxford, 1994, 204. Cf. Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 540–551.

[3] See Lloyd L. Weinreb: *Natural Law and Justice*. Cambridge, Mass., 1987, vii.

[4] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 509–535.

[5] See Coleman, J.: *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory.* Oxford, 2001. 184.

of acting on reasons. Law is one of the social practices that influence human conduct by way of providing (practical) reasons to the participants of the practice. It is its reason-giving character that makes law a *normative* social practice. "Legal" reasons addressed to the participants of the practice are not simply given: they are systematically provided. It is a further characteristic feature of the legal practice that certain individuals and groups (bodies) have the task of systematically providing reasons to other participants. I call these individuals and bodies "legal institutions". This feature makes law a characteristically *institutionalized* normative social practice.

If law is only one of the social practices that influence human conduct by way of providing practical reasons there must be something distinctively "legal" in the reasons provided by legal institutions. Or, more exactly, if law is to be taken as having practical relevance some reasons must owe their distinctive practical force to their "legal" character. Law seeks to make some practical difference in respect to participant behaviour. And law can be treated as a separate social practice if the practical difference it makes cannot be attained in any other way. This is one of the considerations that are summed up in the so called "practical difference thesis" put forward by several contemporary legal positivists.[6]

It is now a commonplace that legal reasons are typically *authoritative* reasons. Law seeks to make a practical difference by way of providing authoritative reasons.[7] This is what we normally mean by saying that law claims *authority* over its addressees.[8] However, pointing to the way the legal practice is based on authority relations is only one step towards clarifying the distinctiveness of law. Authority relations are pervasive features of social life. Law must be differentiated from the non-legal forms of authority like the parental authority over the children, the teacher's authority over the students, the referee's authority over the football players, etc. The key to drawing the relevant distinction can be found if we concentrate on the way law is related to the public life of communities. As opposed to many other alleged authorities, law claims

[6] See *ibid.* 69. See also Shapiro, S. J.: The Difference That Rules Make. In: *Analyzing Law: New Essays in Legal Theory* (Ed.: Brian Bix), Oxford, 1998.

[7] Recently, several authors challenged the standard view that law's normative claims are to be characterized in terms of authoritative reasons. See Soper, Ph.: The Ethics of Deference: Learning from Law's Morals. Cambridge, 2002. p. xiv. I reject those views for reasons not to be explicated here. See, however, my *Jogelmélet és gyakorlati filozófia... op. cit.* 189–193.

[8] See Raz: *Ethics in the Public Domain*. *op. cit.* 215.

public authority. And, as a public authority, law claims superiority over rival authorities in cases of collision.[9]

Let me dwell a little more on the issue of authority. I chose to characterize law in terms of the (authoritative) reasons it seeks to provide, and I find it particularly instructive if we reveal some features of those reasons. Of course, authoritative reasons have several essential features. However, one can point to two particularly important ones: these reasons are both *pre-emptive* and *content-independent*. We might call a reason pre-emptive if it plays a distinctive role in practical deliberation: it "is not to be added to all other relevant reasons when assessing what to do, but should replace some of them".[10] The practical reasons generated by legal provisions are not to "beat" rival reasons in a deliberative process that takes all of them into consideration. Legal reasons claim to render most of the potentially rival reasons ineffective and irrelevant in respect to the practical situation they address. If they provide a clear determination of what to do in themselves, no other reasons should play any role in the process of deliberation. In respect to law, the functioning of pre-emptive reasons can be characterized quite effectively by pointing to an age-old legal principle: *contra legem non est argumentum*.

I take a reason to be content-independent if it is "intended to function as a reason independently of the nature and the character of the actions to be done".[11] This is implied in the widely accepted claim that statutes and judicial decisions are to be followed not because they always provide good guidance to human actions but because they are the decisions of the proper legal authority. The practical force of reasons is dependent upon their sources rather than their content.

For me, these two characteristic features of authoritative reasons have an obvious implication: the addressee who has an authoritative reason to act upon can be said to be *bound* to act in a certain way. In other words, the notion of authority conjures up a correlative notion: *obligation*. I do not claim that obligations are always generated within the framework of some authority relation. That would be a pretty silly claim. Promises and contracts are obvious sources of obligations, and they presuppose no authority relation between the affected parties. Nevertheless, authority relations are also sources of obligations. One of the implications of exercising authority over a person is that the one exercising authority can obligate the addressee by her unilateral acts. There is no

[9] See Raz, J.: *Practical Reason and Norms*. Princeton, N. J., 1990. 149–154.

[10] Raz: *Ethics in the Public Domain. op. cit.* 214.

[11] Hart, H. L. A.: *Essays on Bentham: Jurisprudence and Political Theory*. Oxford, 1982. 254.

need for the endorsement of either the addressee or any other agent. As my readers will see, the notion of legal obligation will have a central position in my analysis. In insist that one can hardly have any grasp of the nature of law without understanding that law provides reasons to its addressees that are meant to be obligating (authoritatively binding).

One could carry on listing and elucidating conceptual features of law but this will be enough for my present purposes. The summary I have provided concerns several conceptual features of law. In the present analysis, however, we have a special emphasis: we concentrate on legal institutions. So we can formulate the claim that is of central significance for us now as follows: when we are talking about legal institutions we are referring to institutions that systematically seek to influence human conduct by providing practical reasons that authoritatively bind the affected parties.

Why Should the Concept of Political Institution Figure in our Analysis?

The thesis I am defending here states that legal institutions are to be taken as political institutions. One can quite rightly ask why we need this thesis. What would it add to the conceptual characteristics that I have listed above and that made no reference to political institutions?

The basic point I have emphasized above concerns the bindingness of law. Legal institutions claim that they can provide practical reasons that are authoritatively binding on the addressees. However, this normative claim is problematic. It is so problematic that one can doubt whether it can ever be made intelligibly. It is far from self-evident that one can provide authoritatively binding reasons to other persons. First, seeking to influence other people's behaviour this way is an intervention that is always in conflict with their autonomy.[12] So the very concept of authoritative reason might require us to show that there are situations in which such reasons can be provided in some justifiable way. I take this as an intelligibility condition. And, even if we successfully formulate an overall justification of authority, we will still need to find the way it can be applied to the case of law. One can quite easily admit that there are cases in which the normative claim we are talking about is absurd rather than simply problematic. It would be absurd if an Argentinean in Buenos Aires claimed that he can provide reasons that are authoritatively binding on me.

[12] This is the point around which philosophical anarchism typically centres. See Wolff, R. P.: *In Defense of Anarchism*. Berkeley, Cal., 1998. Cf. Simmons, J. A.: Philosophical Anarchism. In: Simmons: *Justification and Legitimacy*. Cambridge, 2001.

For me, the upshot of these considerations is that the normative claim of law we are talking about would be absurd without the possibility of pointing to some "normative state of affairs"[13] that provides the framework within which one can provide binding legal reasons to certain addressees.

So if we wish to argue that law's normative claims make sense (that they are intelligible in the sense of being potentially justifiable), we have to show that the functioning of legal institutions takes place within the framework of some normatively relevant relationship between legal institutions and their addresses. The normative claims that legal institutions typically make cannot be taken as (at least potentially) justifiable outside that framework, and one can hardly regard a normative claim intelligible (i.e. not absurd) if it cannot be taken as reasonably justifiable.

The conceptual structure that I have outlined above would collapse without finding some solution to this problem of potential justifiability, and I am convinced that there is only one way we can do it: by invoking considerations that belong to the realm of *political philosophy*. Ultimately, the issue of the practical force of law is to be clarified by political philosophy.[14] This conviction can be based on several theoretical sources but there is one particular consideration that has a prominent role for me. As far as I can see, the problem of intelligibility I referred to above is very much like the issue of *political obligation* in political philosophy.[15]

The issue of political obligation concerns certain institutional practices (political practices) that claim to provide binding reasons. Those reasons can be treated as binding if the addressees can be said to have an obligation to obey the reasons provided by the institutions in question. The analogy between the conceptual problem of political obligation and the normative claims of law is so strong that it might justify in itself the claim that the conceptual clarification of law's distinctive normativity is connected to one of the central issues of political philosophy. Although I do believe that the concept of legal obligation is conceptually connected to the issue of political obligation and that the authority claims inherent in law are claims to political authority, I would not be content with relying on this analogy alone. I think the thesis that legal institutions are to

[13] Cf. Dworkin, R.: *Taking Rights Seriously*. Cambridge, Mass., 1978. 51.

[14] Cf. Dworkin, R.: *Law's Empire*. London, 1986. 108–113.

[15] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 530–531. See also Győrfi, T.: Politikai kötelezettség (Political Obligation). In: *Államelmélet: A mérsékelt állam eszméje és elemei II. Alapelvek és alapintézmények* (The Theory of State: The Idea and the Elements of the Moderated State II. Basic Principles and Basic Institutions.) (Ed.: Bódig, M. and Győrfi, T.). Miskolc, 2002.

be understood as political institutions (institutions claiming political authority) can be supported by deeper conceptual considerations.

The point I try to make is that the conceptual clarification of both legal and political institutions leads us to the problem of authority claims. And if we identify the institutions that can be taken as making these claims we will identify the same institutions in both cases.

Political Institutions

I suppose that there are political institutions and there must be something distinctive that makes them political. We often speak of political institutions, and, by doing that, we apply criteria that are supposed to identify political institutions. There might be something about the discourse on political institutions that helps us outline a conceptual construction that can be associated with political institutions.[16]

Let me start with a sort of a definition of institutions that was already inherent in my analysis of the conceptual characteristics of law. I would define institutions as frameworks of human interaction that have the function of shaping human conduct in certain ways. It might mean to change the conditions (i.e. risks or prospective benefits) of human conduct, to provide access to certain goods people want to acquire, to change the ways people can have access to what they want, to change the ways they perceive what they want, etc. Most institutions base their activities on the realization that human beings are rational agents so their conduct can be influenced by providing reasons to act in certain ways. Most of the institutions can be adequately characterized in terms of the reasons they provide to rational agents.

If we look for the distinctive features of political institutions that differentiate them from any other institution we are likely to find an important clue in the popular and professional discourse on politics. We can quite naturally arrive at the suggestion that the political character of anything must have a lot to do with issues of *power*. It sounds really promising, as the concept of power is capable of accounting for the reason-giving character of political institutions. Power is a typical and important source of practical reasons. Powerful people can motivate others to cooperate with them by offering to distribute goods that they have and that others need. Powerful people can also have an influence on other people by

[16] This is a roundabout way of indicating that I am about to reveal the conceptual characteristics of political institutions by an interpretive analysis. On my views on the interpretive methodology, see Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 423–506.

being able to make credible threats. In these cases, the power of the powerful people is a source of various practical reasons for others: power can be used to motivate people to act in certain ways and scare them off from certain acts.

This way of approaching the conceptual problem of the "political" seems to be encouraged by the fact one can hardly imagine any political institution without possessing considerable amount of material power. This seems to be a good basis of accounting for even the most complex political concepts like "political sovereignty".[17] The reasons political institutions provide may prove stronger (and, in this sense, "superior") to any conflicting reasons. These are institutions that have enough material power to have a decisive influence on certain people's conduct–they can outweigh any rival institution in this respect.

Yet, there are problems with treating political institutions as mere "institutions of power". Not simply because this way of approaching the conceptual issues might have difficulties with differentiating between familiar political institutions like governments and others that we never call political (like well-organized criminal gangs). The basic trouble is that the conceptual account centring around power relations could hardly handle one aspect of political institutions. These institutions do not simply claim that they are in the position to provide reasons of supreme significance: they claim that they have the *right* to provide those kind of supreme reasons.[18] By having the right I mean that their claim can be regarded as *legitimate*. Officials of political institutions often do their jobs thinking that their activities are supported by justifications that can be reasonably accepted by the addressees of their activities: they have a right "to rule". Of course, I do not believe that such a conviction is always characteristic of the officials of political institutions. Nor do I believe that this conviction is always reasonably acceptable. However, this conviction makes sense in respect to political institutions in a way that it never does in respect to some "institutions of power" like large criminal gangs.

This point must not be confused even if we admit that, in our sublunar circumstances, we cannot imagine successful political institutions without enormous material power. Of course, political institutions often attain their objectives by displaying and exercising their material power. However, we can easily end up with a series of misconceptions if we push this line of reasoning too far. Political institutions do exercise power but they do it in a remarkable way. They present

[17] For an elucidation of the concept of political sovereignty in terms of power, see Benn, S. I.: The Uses of "Sovereignty". *Political Studies,* 1955. 109–122.

[18] Cf. Strauss, L.: *Természetjog és történelem* (Natural Right and History). Budapest, 1999. 136.

their power as justified by their right to rule. In other words, they exercise their power in the name of their *authority*.

The conceptual consideration to be emphasized here is that a sufficient grasp of the political nature of certain institutions will have a normative dimension. The claim to legitimacy made by political institutions raises several issues of justification that have some conceptual relevance. As a matter of conceptual explanation, the political character of certain institutions lies, at least partly, in the normative aspects of their functioning. Some institutions are able to make very strong claims on human conduct without making any intelligible claim to being political institutions. So referring to power relations is not enough to single out the conceptual characteristics of political institutions.[19] As the functioning of political institutions has a lot to do with normative notions (like sovereignty), the need to find the conceptual characteristics of political institutions once again conjures up the concept of authority. We cannot have an adequate grasp of the nature of political institutions without raising the issue of authority.

If we encounter again the issue of authority we are also faced with the issue of distinguishing political institutions from other institutions that are authoritative in other ways. We have already admitted that it might be characteristic of many institutions that they seek to provide authoritative reasons. I do believe that the distinctiveness of political institutions is to be revealed by reflecting on the claim to *sovereignty* that can be taken as characteristic of such institutions. Sovereignty is to be understood here as a kind of "superior authority".[20] What distinguishes political institutions from other authoritative institutions is the way they are related to rival authority claims. It is quite obvious from the fact that there are several kinds of authoritative institutions that there can be and there are cases when they make conflicting claims on certain people's conduct. In these cases, some institutions might claim that the authoritative reasons provided by

[19] The same applies to any attempt to define the political in terms of the influence on social relations. As an example of this approach, see Győrfi, T.: *Az alkotmánybíráskodás politikai karaktere* (The Political Character of the Constitutional Review). Budapest, 2001. 11. The influence-based approach is but a more abstract version of the power-based approach. It is to be remarked, however, that Győrfi's other works reflect a view on the concept of the "political" more similar to the one taken here. See Győrfi: A politikai kötelezettség. *op. cit.* 65.

[20] I have provided a conceptual analysis of sovereignty elsewhere. See Bódig, M.: Szuverenitás és joguralom (Sovereignty and the Rule of Law). In: *Államelmélet… op. cit.* That analysis, however, had a different emphasis, and did not give this role to the claim concerning superior authority. On this occasion, I do not attempt to explain how that analysis is related to this one.

them are superior to any conflicting authority claims. Or, more exactly, they claim that within a designated territory, over a designated group of people and in respect to designated forms of conduct they exercise supreme authority. I call institutions that make this claim *political institutions*.

It is worth making a remark here concerning my terminology. I follow Joseph Raz in distinguishing political institutions from political organizations (like political parties).[21] Political institutions are authoritative–they systematically provide reasons that are supposed to be authoritatively binding. Political organizations lack this feature.[22] They organize human activities with the purpose of influencing authoritative institutions. It can be done in various ways: helping their members to become officials in political institutions (through elections), putting pressure in political institutions (by way of demonstrations, petitions), etc. It clearly implies that political institutions have a sort of conceptual priority over political organizations. The activity of political organizations could not be described intelligibly without making reference to political institutions. As a matter of fact, the whole point of any political activity concerns the existence and the functioning of political institutions. It would be odd to call "political" any activity that is not related to political institutions–i. e. not directed to taking part in the activities of political institutions, or influencing political institutions from without, or shaping other people's views on the political institutions, or protecting human beings from the influence of the political institutions, etc.

This way of clarifying the conceptual structure of the "political" allows for a better understanding of the issues of justification that figure in our analysis. Especially the significance of the concept of political obligation. It seems obvious that the claim of political institutions to supreme authority is problematic. It is a relevant question whether an institution can ever exercise such an authority over human beings. It is even more relevant whether certain actual institutions can justifiably claim this kind of authority over certain people in actual situations. The fact that the normative claims of political institutions are problematic makes issues of intelligibility dependent upon the answerability of several issues of justification here. And this is where the conceptual significance of the issues of political obligation become manifest.

[21] See Raz, J.: *The Morality of Freedom*. Oxford, 1986. 4.

[22] The terminology I use here may seem a bit misleading. Political organizations like political parties clearly fall under my definition of institutions. However, they might lack the necessary features of political institutions. They are institutions but not political institutions.

The "Legal" and the "Political"

We have now some conceptual claims on legal institutions and a short analysis of the nature of political institutions behind us. It is time to connect them if we want to use them in support of the thesis I defend in this paper. Of course, there are striking analogies between the two analyses. But what is the significance of those analogies? In order to clarify that, we need to concentrate on the real life applications of my abstract conceptual constructions. We need to try to identify institutions that fit in my analysis, which can be taken to provide practical reasons the way I indicated.

Unfortunately, this issue of application concerns a series of complicated methodological problems, and this is not the proper occasion to explore those problems. As I have tried to handle those problems elsewhere,[23] I simply put forward the conclusion of that analysis here. I hope that my claims will not be counter-intuitive. The relevant conclusion has two elements. The first is that the characterization of political institutions that I have provided can be applied, among others, to courts, legislative assemblies, and administrative agencies. The second element is that the way I characterized legal institutions would single out very much the same institutions: courts, legislative assemblies, administrative agencies. On the level of applications, there is no difference in respect to the implications of my two analyses. And the best explanation of this conclusion is that legal institutions are political institutions.

There are two further questions still to be considered here. The first is about the possibility of other plausible explanations of this identity of applications. Are we bound to accept that the identity of the applications is enough to establish my thesis? As far as I can see, there is only one possible alternative to my explanation of this identity. One could claim that the issue of application is not conclusive here for it is possible that the legal and the political character are two different dimensions of the institutions we have singled out. Just like a novel can be the source of historical knowledge and artistic experience at the same time, the legal and the political character of the same institutions might be analytically distinguishable. A version of this position is represented by some advocates of system theory.[24] They claim that the social system is divided into autopoietic subsystems. The "legal" and the "political" mark two of these subsystems. And although there are institutions (like legislative assemblies) that play a role in both subsystems, they can be clearly differentiated if we concentrate on their different functions and their different ways of selecting information.

[23] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 509–535.
[24] See Pokol, B.: *A jog szerkezete* (The Structure of Law). Budapest, 1991. 65–67.

Can we be forced to accept this approach? I do not think so. If the above analyses were not basically mistaken, the legal and the political character cannot belong to different conceptual dimensions of the same institutions. We should not forget that the characterization of the "legal" and the "political" were related to the same aspects of the institutional practice: the distinctive character of the reasons they seek to provide. The conceptual characteristics were heavily dependent upon the authority claims of the institutions in both cases.

The second question to be considered here concerns a possible incongruence of my thesis and its justification. My thesis was that legal institutions are actually political. However, when I tried to provide arguments to support it I claimed that some institutions are both legal and political. My thesis suggests that the "political" is conceptually more basic than the "legal", and my arguments did not justify this priority claim. On the basis of my analysis, one could claim with equal plausibility that political institutions are necessarily legal in their character.

Of course, I claim that the "political" must have some conceptual priority if we try to clarify the nature of legal institutions. My justification for this claim is a consequence of the realization that the conceptual analysis of legal institutions will necessarily encounter problems that belong to the realm of political philosophy. Referring to the political nature of legal institutions provides the key to the solution of several conceptual issues concerning law. I do not think that the same can be said of the legal character of political institutions. Referring to the legal character of political institutions would not open up an analytic dimension that would not be revealed otherwise. This methodological consideration is the heart of the thesis that I defend in this paper.

Vicious Circularity?

There is a further question that is to be handled here and that deserves even more attention. I have argued that conceptual legal theory must treat legal institutions as political institutions. Someone might object that my justification for this claim is straightforwardly implausible. When I provided a basic characterization of law, I emphasized that law claims public authority. Although I failed to provide even the outlines of an adequate clarification of the meaning of "public" here, a careful analysis would reveal that I tacitly assumed that the public life to which law is to be taken to belong is something that we normally associate with political communities. When I reached the conclusion that legal institutions *are* political institutions it was no more then a mere consequence of this tacit

assumption. And, as the underlying point was not justified, I was begging the question here in a quite damaging way. I failed to inform my readers on the conceptual significance of political communities (that have public lives in the relevant sense). I still owe them a useful definition of political communities and their public lives.

Even more unfortunately for me, my analysis does not seem to have the resources for providing such a definition. I relied heavily on the concept of political institutions. But we do not have any clear idea of political institutions without understanding that they are to be taken as representatives of political communities. They would not be political without having a political community they could represent. So I am in a lot of trouble if we realize that my analysis contained nothing that could allow for a clarification of the concept of political communities or, more exactly, the criteria that make certain communities political. My analysis is so strongly and thoroughly tied to the conceptual characteristics of institutional practice that I would not be able to provide any elucidation of the nature of the "political" without making reference to institutions. That would force me to describe political communities as communities having political institutions: a community would not be political without being dominated by political institutions. Then it would be terrible confusion around the claim that political institutions represent political communities. It would involve a pretty vicious circularity.

This is undoubtedly a formidable challenge to my position. But I am confident that it can be met. I admit that my way of elucidating the nature of the "political" is strongly tied to the issues of institutional practice. I have no wish to deny this. What I have got to deny is the dependence of my position on a "pre-institutional" notion of political community. I think there is one point in my reasoning that can be used as a starting point here. We can guarantee a sort of conceptual priority to the claim that some institutions claim superior authority over rival authorities. Then we could point to this as the heart of nature of the "political". And, as we have a chance of clarifying the conceptual character of authority in terms of the distinctive reasons they provide, this superiority claim can provide a first approximation of the concept of political institutions without begging any question.

Then, in the next phase, we could point to the problematic nature of such an authority claim. It is not self-evident that such an authority claim can ever be justified. In order to make it intelligible, we need to show the relevant context in which it can be made with any chance of being justified. Such an authority claim should be situated in the framework of some distinctive relationship among persons. This framework cannot be generated by some "private" relation-

ship based on direct interpersonal connections (like ordinary contracts or family ties). This is where the need for making reference to something like the "public" character comes from. Then, we could argue that the practice of an institution cannot involve such an authority claim without taking the addressees to belong to a community that the institution in question can represent. It must be a community that could not be maintained without the contribution of institutions that claim superior authority over the members of the community. We might call this kind of communities (for which the functioning of political institutions is an existence condition) "political".

In this case the clarification of the conceptual nature of communities would have two essential elements: the concept of political institution and the considerations concerning the need for such institutions in certain communities. I do not think that such a clarification would involve any vicious circularity. In this case, we can define political institutions without even mentioning political communities. The concept of political community figures in our reasoning when we ask what gives rise to the need for political institutions in certain communities. In other words, the concept of political institution is given to us as a conceptual possibility on the basis of our reflection on the various forms of providing practical reasons to rational agents, while the concept of political community figures in the analysis when we begin to raise questions concerning the applications of such a conceptual possibility. The concept of political community has no constitutive role in the basic conceptual characterization of political institutions. Political communities become a factor in the conceptual analysis when we begin to elucidate the issues of justification concerning political institutions.[25]

What about Legal Reasoning?

I would like to make one last point. If the conceptual claim I have made is acceptable we need to raise questions concerning its significance. Of course, a

[25] It sounds like separating conceptual issues and issues of justification. Yet, I claim that the issue of justification is relevant in respect to singling out the conceptual characteristics of political institutions. Is not it a straightforward contradiction? No. Issues of justification play two roles here. They have a conceptual significance: in respect to some concepts, we have to realize that their elucidation must make reference to issues of justification. But making that reference is still a conceptual claim. When we go further and try to answer substantial issues of justification we leave the territory of conceptual analysis. So what I was referring to was partly based on the difference between determining the conceptual characteristics of issues of justification and providing substantial answers to issues of justification.

conceptual claim can be significant in several respects. What I am particularly interested in is its bearing on issues of legal reasoning. Lawyers normally believe that legal reasoning can be clearly differentiated from political deliberation. The conceptual claim I have made seems to undermine this way of perceiving legal reasoning.

One could object that my highly abstract analysis cannot have such far-reaching consequences in respect to legal reasoning. The way I attributed political characteristics to legal institutions was hardly more than a way of emphasizing their authoritative nature. And that is something already inherent in the way lawyers perceive the task of legal reasoning. Although I warn anyone against drawing some hasty conclusions from my standpoint concerning legal reasoning, I would hesitate to downplay its practical significance this way. One aspect of my analysis suggests possibly far-reaching consequences. I have tried to reveal a conceptual connection between legal and political obligation. Everyone knows that legal obligations play a central law in legal reasoning. Legal reasoning normally concerns issues of personal legal responsibility, and legal responsibility is always a matter performing legal obligations. On the other hand, political obligation is a matter of justifying obedience. In other words, it has a lot to do with the problems of political legitimacy. If legal obligations are conceptually connected to some construction of political obligation, legal obligations might become heavily dependent upon political legitimacy. And political legitimacy is something that is notoriously controversial.

Of course, I cannot clarify this issue now. I admit that I have a lot to do to clarify the implications of my conception concerning the issues of legal reasoning. I use this occasion only to deepen our understanding of the way issues of political legitimacy concern legal reasoning. I will indicate that it is highly unlikely that I could end up with requiring some radical reorientation of legal reasoning.

How could issues of political legitimacy have a profound effect on legal reasoning? Let me outline one possibility. Political legitimacy presupposes justifying reasons that are addressed to every member of the community. And as some people can hardly be motivated by moral reasons, such a comprehensive justification may be destined to be tied to some very basic forms of self-interest. (Like avoiding violent death.) It may be that only those interests can have equal justifying force in an existing community. In this case, the basic justification of political obligation will centre around prudential reasons originating from self-interests. And if legal obligations are conceptually connected to the relevant construction of political obligation they will be tied to certain prudential reasons as well. The whole point of legal institutions will be the service of self-interest. And this may deprive legal reasoning of its value-content–of its moral worth. It

provides a basis for deeply amoral practical orientations concerning law that are sensitive only to the relevant prudential reasons. Law will have to be depicted as a web of strategic interactions. Treating legal institutions as political institutions will turn out to be a demoralizing aspiration. In other words, we might end up with Holmes' suggestions that we should see the law from the "bad man's" point of view when we consider issues of legal reasoning.[26]

I am quite sure that some legal theorists would happily accept these consequences, but I do not share their views on law. I would hesitate to subscribe to a conceptual explanation of law that treats it as a web of strategic interactions and that renders legal reasoning a competition of mere prudential reasons. However, I am convinced that it is not to be taken as a necessary implication of my conception.

Let me try to elucidate my views on this matter with the help of a highly relevant example. Very similar considerations can be put forward when we are discussing the justificatory issues of democracy. It might seem unrealistic to claim that democratic institutions are to be treated as manifestations of a self-governing political community consisting of morally committed members. It is more realistic and reasonable to claim that the democratic process provides a framework for making political decisions that have considerable advantages over rival institutional solutions. And the advantages are to be explained only in terms of the self-interests of the affected parties. Democracy might be acceptable for everyone because it guarantees that his or her interests will have an effect on the political process. We may reasonably hope that elected officials in a democratic regime will understand that they will not stay in power if they frequently and openly ignore the interests of those they seek to govern. (Or, more exactly, if they do not even make an attempt to justify their activities in terms of the interests of the governed.) The democratic process links the interest to stay in power with the perceived interests of the governed.[27] Of course, it will not guarantee that merely self-interested practices by the officials will be impossible or will always be revealed and eradicated. We have got to settle for a more modest claim: the democratic process seems to be the most effective of the available measures against ignoring the interests of the governed.

[26] See Holmes, O. W.: The Path of the Law. In: *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Ed.: Burton, S. J.). Cambridge, 2000. 200–204.

[27] See Kis, J.: *A politika mint erkölcsi probléma* (Politics as a Moral Problem). Budapest, 2004. 66–73. See also Bentham, J.: Plan for Parliamentary Reform. In: *Works of Jeremy Bentham* (Ed.: Bowring, J.), vol. 3, Edinburgh, 1843.

Does this mean that a viable justificatory theory of democracy must be based solely on prudential reasons generated by the perceived interests of the officials and the governed? I do not think so. When we describe the actual operation of democratic institutions and its effect on ordinary people we need a framework that is not tied to ideal assumptions concerning human conduct and that does not presuppose attitudes and patterns of behaviour that are unlikely to prevail amongst members of existing communities. What makes democracy work effectively is to be explained largely in terms of the self-interest of the participants. And certain issues of justification are to be answered along the lines of this explanation. In this case, democracy appears to be a web of strategic interactions. However, it does not mean that the issue of justification is exhausted by such an explanation.

The fact that democracy as a working institutional framework does not presuppose a community of moral heroes says not much on the moral worth of democracy. When we turn to issues of moral worth we need more elevated conceptions that go beyond what makes political institutions effective. These elevated conceptions reflect several normative (value-related) aspects of the democratic process that are also embodied in the operation of democratic institutions. It becomes pretty obvious when we are faced with the language of the democratic discourse. That language is permeated by ideals and ideal assumptions that have a significant effect on the outcome of democratic decision-making. If we are to account for this fact we need to depict democracy as a system that makes use of various forms of self-interested behaviour without losing its deeper moral point. And that way of depicting democracy will reveal some moral aspects of democratic policy that are highly relevant even if they are ignored by many members of the democratic community. Without taking these moral aspects into account, we would not be able to elucidate what makes democracy valuable for us, what makes democratic institutions worthy of our support.

There are aspects of the theoretical and practical problems of democracy that may steer us towards a rather mundane view. However, the mundane view of democracy often breaks down. So we need to pay attention to other issues as well (like the issue of what makes democracy worthy of our respect) that steer us towards less mundane views–elevated by substantial practical principles and several ideal assumptions.

Although it would be too early to claim that I have elucidated the implications of these theoretical problems, I suspect that we would reach very similar conclusions in respect to legal reasoning. Of course, there are aspects of the legal practice that would not be effective without addressing the prudential reasons available to the affected parties. It well may be that we will be more sensitive to those aspects if we claim that legal obligations are conceptually connected to

issues of political legitimacy. But there are other relevant aspects as well that cannot be explained in terms of mere prudential reasons. Claiming that issues of political legitimacy figure in legal reasoning is unlikely to force us into a sort of demoralization of legal reasoning. I am quite sure that this suggestion would be reinforced if we considered the most characteristic cases where issues of political legitimacy are linked with issues of legal obligation: cases of civil disobedience.[28]

[28] Cf. Bódig, M.: Rendszerváltás, politikai moralitás, legalitás (Political Transition, Political Morality, Legality). *Fundamentum*, 2003, 87–94.