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## A Reciprocal Turn in Criminal Justice? Shifting Conceptions of Legitimate Authority

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### 1. Introduction

In most legal systems, including the Dutch legal system, the judiciary is invested with the authority to try, on behalf of the community at large, persons suspected of having committed a criminal offence. The exercise of this authority results in binding judgments that make a claim to legitimacy. The idea that both the authority ascribed to penal judgments and the public's faith in the legitimacy of these judgments are dwindling, seems to have become something like a truism over the past few years. The past decade has seen the rise of a fierce, ongoing controversy in the Netherlands regarding the authority of the criminal courts and the legitimacy of the criminal justice system as such.<sup>1</sup> The Netherlands is certainly not the only country to face disputes on the conditions for the legitimate exercise of authority in criminal justice. Controversies over legitimate authority seem to haunt many a jurisdiction, and have given rise to international debates.

Although the takes on the nature and possible causes of actual or supposed deficiencies in the legitimacy of the exercise of authority in the criminal law, and also the views on the possible solutions for these deficiencies differ widely, some basic assumptions appear to be shared by most contributors to the debate. The legitimacy crisis is often defined metaphorically in terms of a 'gap' between criminal courts and society. And, accordingly, solutions for the crisis usually focus, albeit in different ways, on strategies for courts to bridge this gap and reinstate the link with society. It is often said that criminal law officials ought to develop a more 'communicative' attitude, and to be more 'responsive' to different social needs and expectations that are projected onto them.

It is my impression that the debate on authority and legitimacy in relation to differing aspects of criminal justice shows two important blind spots. The first one is related to the rather strong fixation on the image of the gap and the accompanying, alleged necessity of developing a more responsive system of criminal justice. Virtually all attention is thereby directed toward the 'output' of the system. Much is being said and written about the ways in which the judge reaches his judgment and, more still, about the ways he communicates the judgment reached and presents the grounds for the judgment. However, apart

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1 See for example: M. Borgers, 'De Communicatieve Strafrechter', 2011 *Handelingen van de Nederlandse Juristen-Vereniging*, no. 1, pp. 103-185; G. van den Brink, 'Justice and Credibility. About Bridges built by Judges', 2009 *International Journal for Court Administration*, no. 1, pp. 2-17; H. Elffers & J. de Keijser, *Different Perspectives, Different Gaps: Does the Public demand a more Responsive Judge?*, 2006; J. de Keijser & H. Elffers (eds.), *Het Maatschappelijk Oordeel van de Strafrechter. De Wisselwerking tussen Rechter en Samenleving*, 2004. See more generally A. Barak, *The Judge in a Democracy*, 2006.

from these output-related forms of the transfer of information, there are also some input-related forms of the transfer of information that deserve our attention.

In criminal law, governed as it is by the principle of legality, the 'input' is first and foremost constituted by the (written) *law*. Besides that, of course, no single judgment can be reached until the facts and circumstances, to which the law is to be applied, have been sufficiently ascertained. All of this is of course self-evident. However, the input on which the deciding judge depends in his effort to reach his judgment is not comprised solely of general legal (statutory) provisions and concrete facts. In addition, the *doctrines* (or 'dogmatics') of the general part of the criminal law also form an important part of this input, comprising as they do an armamentarium that enables the judge to create legally valid connections between facts and norms.

The academic debates on authority and legitimacy in criminal justice have paid no or hardly any attention to a number of developments concerning the doctrines of the general part of substantive criminal law. Those developments themselves, where they exist, have surely not gone unnoticed in the literature, but they have not yet been analysed against the background of the wider question as to whether they are, in some as yet unidentified way, related to the topical issue of authority and legitimacy in the criminal justice system. This is the first blind spot in the debate on authority and legitimacy. Already here, I want to point out that what I refer to as the doctrine of the general part of substantive criminal law has a somewhat unclear origin and legal status. In the next section I will return to this issue and provide a definition of the terms doctrine and general part.

The second blind spot concerns the fact that the academic debate on authority and legitimacy in criminal justice suffers from a measure of one-sidedness due to the fact that it has kept itself locked inside the discourse of the criminal law itself. Debates on authority and legitimacy in criminal justice are often triggered by incidents and tend to proceed in a panicky or sometimes frantic course. It is my firm conviction that the legal debates can be much helped with the establishment of some conceptual clarity regarding the primal subjects of the discussions, and hence with an answer to the following question: What do we actually refer to when using the words 'authority' and 'legitimacy'? For an answer to this question we need to refer to (political) philosophy. In that discipline, a number of remarkable shifts are taking place with regard to the conceptual analysis of the conditions for legitimate authority, which are, or so I am inclined to think, highly relevant for the debates that directly concern the criminal law.

In this article I want to make a tentative start with the filling in of both lacunae. I want to investigate in what manner – if at all – a number of developments within the doctrine of substantive criminal law are related to the concept of authority and to contemporary views on the general conditions for a legitimate exercise of authority. To this end, I will primarily focus on a number of general, interlocking developments within the doctrinal system of the general part of *Dutch* substantive criminal law and a number of institutional developments within the Dutch system of criminal procedure. I will present these as an illustration of a more general point that I want to make: I want to point out how these sorts of developments within the criminal law can be interpreted as shifts in the way in which *authority is distributed* over various agents that are involved in criminal proceedings. Furthermore, I will suggest that these shifts in the distribution of authority *parallel* the movements within the philosophical literature on the notion of legitimate authority.

So a connection will be made between developments in criminal law and developments in (political) philosophy, which necessarily also involves a combination of two different kinds of scholarly discourse. For reasons explained above, this article starts from an account of doctrinal and institutional developments in Dutch criminal law, exemplifying more generally possible similar developments in other legal systems (that I will not go into in this article). The foregoing boils down to the following hypothesis: recent shifts in the theoretical perspectives on the political-philosophical concept of legitimate authority have a connection with a number of doctrinal developments within the general part of Dutch substantive criminal law and institutional developments within the Dutch system of criminal procedure. I am well aware that the term 'connection' is epistemologically very vague and, consequently, complex. Toward the end of this article, in Section 4.1, I will make some clarifications on this point.

This article is structured as follows: in Section 2 I briefly discuss a number of interrelated developments relating to the doctrine of the general part of Dutch substantive criminal law, coupled

with two developments within the system of criminal procedure. Then I will make a U-turn: in Section 3 I will pay attention to a number of developments within certain branches of political philosophy and jurisprudence regarding the notion of legitimate authority, in order subsequently to turn back home in Section 4, where I will relate the criminal-law developments to the philosophical developments. This I will do with the help of a number of insights drawn from a relatively new, general theory that tries to explain the nature of law in terms of ‘social planning.’ This theory will enable me to interpret the doctrinal and institutional developments within criminal law as symptomatic of a more general shift in the distribution of authority over different participants and officials within the criminal justice system. Finally, I will connect the discussed shifts and developments to the altered and still changing views on the conditions for the legitimate authority of the judgments of criminal courts.

Before I proceed, I want to mention a few disclaimers. The present article does in no way contain a fully completed account. It forms a part of a larger research project, which has only recently been adopted. My aim in this article is to provide nothing more than an initial impetus to the construction of a theoretical framework with the help of which a number of developments that are occurring within criminal law can be analysed. I would like to note, therefore, that this article consists of a rather theoretical account, one that does not even profess to provide a complete picture of the different developments (and counter-developments) that are taking place.

## 2. A sketch of some developments within Dutch criminal law

### 2.1. *The concepts of doctrine and the general part, and their function*

In the past few decades there have been a number of interrelated, doctrinal developments within the general part of Dutch substantive criminal law that, taken together, indicate that substantive criminal law doctrine is becoming more and more flexible. The three developments that I will indicate briefly below cannot be considered wholly apart from two developments that have occurred within the Dutch model of criminal procedure. Before I venture to present a description of these developments, I first want to redeem a promise made in the introduction by making a few remarks on the meaning of the concepts of the general part and doctrine and on the function of doctrine within the context of judicial interpretation and decision-making in substantive criminal law.

The concepts of the general part and doctrine are closely related. The term general part refers to a collection of general rules of substantive criminal law, i.e. rules that are applicable to more than one legally defined criminal offence from the special part of substantive criminal law.<sup>2</sup> In essence, the general part contains a *theory* of the special part: it is comprised of a collection of theoretically more or less fine-grained doctrines regarding the differing, general substantive concepts that stipulate how individual statutory definitions of crimes ought to be interpreted and applied to actual cases by the deciding judge. The Dutch legislator has assembled a number of those general concepts in the first book of the Criminal Code that bears the title: ‘General provisions.’ However, in this book we do not find much more than a very rough indication of the substance of the general concepts.<sup>3</sup> These general concepts owe their further contents to a non-statutory source that I will henceforth refer to as ‘doctrine.’

2 Recently, the general part of substantive criminal law has also gained much academic attention in the Anglo-American world, as can be judged by a conference devoted to this topic under the title: ‘The Legacy of Glanville Williams. The Sanctity of Life and the General Part of the Criminal Law’ (King’s College, Law School, London, 3-4 December 2011) and as can be judged by a number of publications. See for example the contribution to the mentioned conference by G. Moore, ‘The Specialness of the General Part of the Criminal Law’; and see P. Cane, ‘The General/Special Distinction in Criminal Law, Tort Law, and Legal Theory’, *2007 Law and Philosophy*, no. 5, pp. 465-500; A. Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law*, 2009, pp. 1-6; S. Shute & A. Simester (eds.), *Criminal Law Theory. Doctrines of the General Part*, 2002; J. Gardner, ‘On the General Part of the Criminal Law’, in A. Duff (ed.), *Philosophy and the Criminal Law. Principle and Critique*, 1999, pp. 205-256.

3 Of some doctrinal concepts, one will find no traces in the first book, such as the concepts of causality and intent. What concepts find expression in statutory rules, and in what detail, is a highly contingent matter. For example: the *Model Penal Code* in the United States – promulgated by the American Law Institute (a non-governmental organization of lawyers, judges and scholars) in 1962, and revised on a number of occasions – contains provisions on most or all central substantive criminal law concepts, such as action, omission, intent and negligence, that are spelled out in such detail that the book reads almost like a textbook designed for educational purposes. The *Model Penal Code*, which has stimulated criminal law reform and has had a big influence on the enactment of new criminal codes in a large number of states, thus contains many ‘doctrinal’ passages, which one would not find in, e.g., the Dutch Criminal Code or the German Criminal Code.

The concept of (substantive criminal law) doctrine can be defined as the framework of theoretical concepts that clarify the content of valid legal norms (of substantive criminal law) and reformulate them as a systematic unity.<sup>4</sup> What is here referred to as criminal legal doctrine is something that, in the Netherlands, is traditionally first and foremost rooted in a number of important judgments of the Dutch Supreme Court (which in turn may or may not to some degree build on certain doctrinal viewpoints which may have been expressed by the legislator), and that are elaborated theoretically in the scholarly literature.

Legal doctrine is distinct from both judicial decision-making and jurisprudence or legal philosophy. Doctrine is different from judicial decision-making in that it is more abstract, more oriented towards general theses and arguments; and it differs from jurisprudence in that jurisprudence is a meta discipline, which focuses on abstract questions such as ‘What is (the nature of) law?’ and ‘What do we understand by the concept of a legal norm?’, and which takes legal doctrine as one of its objects of inquiry. I will assume legal doctrine to be located *between* judicial decision-making and legal theory proper, in that I take doctrine to comprise the theoretically refined criteria that are actually *employed* by courts when they apply certain legal concepts and rules to concrete cases.<sup>5</sup> However, I take the ‘province’ of legal doctrine to have no definite boundaries. Theoretical, doctrinal concepts that clarify and systematize differing legal rules may have evolved mainly in scholarly work, in case law, or even in statutory law, or they may be rooted in a combination of these sources.

In recent work, I have tried to show that doctrine has a, what I prefer to call ‘symbolic function’.<sup>6</sup> What I mean by that is – to put things very briefly – that criminal law doctrine serves to enable the judge to relate the facts and circumstances of a specific case to the applicable, written norms of substantive criminal law in a correct manner. The behavioural directives – in the form of prohibitions or requirements – contained in the definitions of crimes from the special part of substantive criminal law represent ‘action lines’ that all subjects are expected to ‘follow’. A statutory definition of a certain criminal offence can be regarded as a symbolic designation of the behavioural directive that it implicitly contains, in the sense that the statutory definition harbours a condensed notation of the action line that every subject is under a legal obligation to follow.

The norms of the criminal law are also, of course, addressed to the adjudicating judge, who is called upon to decide whether an accused person has acted ‘in line’ with a behavioural directive, or has deviated from it in his actions to some criminally relevant degree. In a radical sense, doctrine depends on a form of *proceduralization*: it consists of a symbolic code that determines who can legally take the floor, when, subject to what conditions, what sorts of arguments can be validly put forward, etcetera. Doctrine serves as a means to bring the adjudicating judge in line with the applicable norm. Doctrine consists of a collection of ‘techniques’ that *position* the judge vis-à-vis the applicable norms in such a way as to enable him to establish the correct meaning of the norms that are to be applied to the case at hand.<sup>7</sup> The foregoing is not meant to imply that this ‘symbolic’ function is an exclusive feature of legal doctrine; in theory, also detailed statutory provisions could fulfil this function. Nor is it meant to imply that doctrine always succeeds in fulfilling its function satisfactorily. Moreover, doctrine can perform its tasks in different ways: it can be predominantly strict, but also predominantly loose, leaving relatively much leeway for a flexible application of criminal law concepts to concrete cases.

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4 A. Aarnio, *Reason and Authority. A treatise on the Dynamic Paradigm of Legal Dogmatics*, 1997, p. 75: ‘Referring to these tasks, it is an established practice to speak about the double function of legal dogmatics: it *interprets* and *systematizes* the law. Legal dogmatics concentrating on interpretation can also be called practical, and that reformulating the system theoretical legal dogmatics.’ See also A. Aarnio, *Essays on the Doctrinal Study of Law*, 2011. Compare J. de Hullu, ‘Op zoek naar Begrenzings van Strafrechtelijke Aansprakelijkheid’, in P.H. van Kempen et al. (eds.), *Levend Strafrecht. Strafrechtelijke Vernieuwingen in een Maatschappelijke Context*, 2011, pp. 271-285; A. Klip, ‘Towards a General Part of Criminal Law for the European Union’, in A. Klip (ed.), *Substantive Criminal Law of the European Union*, 2011, pp. 15-33, p. 17.

5 A. Peczenik, *On Law and Reason. Second edition*, 2008, pp. 13-14. Compare G. Fletcher, *The Grammar of Criminal Law. Volume I: Foundations*, 2007, pp. 91-97.

6 F. de Jong, ‘The End of Doctrine? On the Symbolic Function of Doctrine in Substantive Criminal Law’, 2011 *Utrecht Law Review*, no. 3, pp. 8-45.

7 I am aware of the ambitious tone and the compactness of my account of the so-called ‘symbolic function’ of doctrine in substantive criminal law. For my purposes in this article, however, a more detailed account is unnecessary. For a more elaborate philosophical underpinning of my view on this function, see the publication referred to in the previous footnote.

## 2.2. Three doctrinal developments within the general part of the Dutch substantive criminal law

Earlier on I noted that in the past few decades there have been a number of interrelated, doctrinal developments within the general part of Dutch substantive criminal law that, taken together, indicate that substantive criminal law doctrine is becoming looser and more flexible. I want to repeat the reservation I made in the introduction: I do not pretend to present a complete picture of the developments that are occurring. Furthermore, my account is not based upon any extensive study of the original source material, covering a specified period so as to render the different developments mutually comparable in relation to a fixed timeline. I think it is a reasonably safe assumption that the developments have started to become explicitly recognizable in (landmark) judgments of the Dutch Supreme Court, and have thus manifested themselves at the surface of doctrine, roughly since the beginning of this century.

But other than that, it would seem to me to be practically impossible to introduce even any remotely accurate periodization into the account of the three developments I will discuss below. Any periodization would be essentially arbitrary. Not only are these three developments closely connected with each other and with the institutional developments that I will address later on, it should also be noted that the initial stages of some of the developments date back to a considerably early time. The different doctrinal concepts of the general part, moreover, have, at varying times, been exposed to the effects of the developments to a varying degree. Hence, when I talk of three different developments, I refer to an *analytical* classification of differing shifts in three types; I do not mean to imply that these developments occurred in a sequential order, nor that they occurred *ex nihilo*.

A first development concerns the shift from a predominantly *ontological* to a more *epistemological* orientation within the doctrinal concepts of the general part of Dutch substantive criminal law, especially within the Supreme Court's case law. By this I mean that in relatively many of the Supreme Court's judgements on a variety of general substantive concepts, criteria that can be used for the furnishing of proof of a specific doctrinal concept appear to take the place of substantive criteria. Doctrine is less concerned with questions like 'what *is* negligence?' and more with questions like 'what criteria should be used to *prove* negligence in the sense of Section 6 of the Road Traffic Act of 1994?'<sup>8</sup> With reference to what I referred to as the 'symbolic function' of doctrine within the context of judicial interpretation in substantive criminal law, this first development toward an epistemological orientation seems to suggest that doctrine seeks to bring the adjudicating judge 'in line' with an applicable norm of substantive criminal law, not by way of providing insight into the theoretical contents of a specific doctrinal concept, but rather by way of providing sets of criteria according to which a specific doctrinal concept is supposed to be applied in concrete cases.

A second development concerns a shift from a relatively *closed* and *stringent* to a relatively *open* and *flexible* doctrinal system. It seems that case law and the theory based thereon more and more explicitly emphasize the importance of *casuistry* when it comes to the application of doctrinal concepts.<sup>9</sup> With regard to the concept of action performed by corporate bodies and other legal persons, for example, the Supreme Court has famously stipulated that 'no general rule' can be formulated that could be used to establish whether or not such a person has acted in a criminally relevant sense. Surprisingly often, the application of central substantive doctrines is said by the Supreme Court to ultimately depend on the 'facts and circumstances of the case'. The growing emphasis on flexibility and openness, furthermore, manifests itself in the fact that an increasing number of doctrinal concepts are filled in with rather vague and open-ended criteria, the most notorious of which is the criterion of 'reasonable ascription'. For example: for the concepts of functional or corporate action, of causality, and of *mens rea* in relation to corporate entities to obtain, it must be established that these concepts can 'reasonably' be ascribed to the defendant. Other examples are criteria such as the 'nature' and the 'external appearance of the act',

8 A clear example of this is provided by the Supreme Court case of 1 June 2004, *Nederlandse Jurisprudentie (NJ) 2005, 252* (on negligence). Reference may also be had to the Supreme Court case of 1 October 2003, *NJ 2006, 328* (on corporate action), and to the Supreme Court case of 25 March 2003, *NJ 2003, 552*, in which the Supreme Court formulated a number of criteria that have to be taken into account in order to establish whether a defendant had acted with conditional intent or with advertent negligence.

9 See A. Franken, 'Casuïstiek en Legaliteit in het Materieel Strafrecht', 2006 *Delikt en Delinkwent*, no. 9, pp. 949-958; N. Rozemond, 'De Casuïstische Grenzen van het Materiële Strafrecht', 2007 *Delikt en Delinkwent*, no. 5, pp. 465-495; K. van Willigenburg, 'Casuïstiek en Scherpe Normen in het Materiële Strafrecht', 2011 *Delikt en Delinkwent*, no. 4, pp. 365-387.

‘general rules of experience’, and the ‘nature of the offence’, which are relevant to a variety of doctrinal concepts.<sup>10</sup>

Finally, and related to the foregoing: there is a development from a *differentiating* to a *unifying* orientation within the doctrine of the general part of substantive criminal law. In the first place, the unifying tendency is likely to be an effect of the aforementioned epistemological approach that is used to explore and mark the lower limits of doctrinal concepts and to formulate sets of criteria that are supposed to be taken into account when furnishing proof of a certain concept. In the second place, the unifying tendency concerns the substance of these criteria: increasingly, doctrinal concepts are defined with the aid of *identical* criteria.<sup>11</sup> To mention only a few examples: the criterion of ‘reasonable ascription’ applies to the furnishing of the proof of causality and corporate or functional action; the criterion of the ‘external appearance of the act’ is normative for concepts like criminal attempts, the preparation of criminal offences and conditional intent; the ‘nature of the act’ is used as a criterion for establishing causality, conditional intent, and corporate action. A result of this unifying orientation is that boundaries between different doctrinal concepts become less sharp and that the grey areas between the different concepts increase in size and number. Seen against the background of the symbolic function of doctrine, both last mentioned developments suggest that doctrine is becoming less ‘directive’ due to an increased use of rather vague and broad criteria.

Judged in their interrelationship, the three developments point to an important shift within the doctrine of the general part of Dutch substantive criminal law. Doctrine evolves from a collection of more or less static, semantically demarcated and limited concepts – that have to be applied to always new cases, and that consequently sometimes need to be interpreted extensively so as to meet the need for a certain measure of flexibility – into a dynamic set of semantically rather fluid concepts that are better capable of acquiring varying contents depending on the facts and circumstances of the cases tried. The answer to the question of whether or not a certain doctrinal concept of substantive criminal law obtains in a concrete case is increasingly made dependant on a rather broad sense or intuition of *reasonableness*. As we will see below, the facts of a case are the results of a specific presentation, delivered by different agents: the public prosecutor, the defence, and the adjudicating judge.

### **2.3. Two institutional developments within the Dutch system of criminal procedure**

At the outset of this section I mentioned that (substantive criminal law) doctrine has a procedural foundation: it consists of a symbolic code that determines who can legally take the floor, when, subject to what conditions, what sorts of arguments can be validly put forward, etcetera. The three briefly discussed doctrinal developments within the general part of Dutch substantive criminal law bear witness to an increased measure of interrelatedness of substantive and procedural criminal law. This interwovenness has also been reinforced from the side of criminal procedure. The doctrinal developments cannot therefore be considered in isolation from a number of shifts that have occurred or are still occurring within the model of criminal procedure. Past research has documented two shifts in institutional relations between participants in criminal proceedings that are especially relevant in this connection, because they run parallel to, and enhance the impact of the doctrinal developments.<sup>12</sup>

In the first place, there is a development on the *horizontal* level. Defence and prosecution have come to bear an increasing *responsibility* for how and when they present their views on the facts and circumstances of the case and on the applicability of norms and doctrinal concepts during proceedings.<sup>13</sup>

10 See Franken, *supra* note 9; A. Machielse, ‘De Opmars van de Uiterlijke Verschijningsvorm’, in A. Franken et al. (eds.), *Constance Waarden*, 2008, pp. 233-242; L. van Kessel, ‘Diversiteit van de Uiterlijke Verschijningsvorm in het Strafrecht’, 2012 *Strafblad*, no. 4, pp. 308-316; L. Stevens, ‘De Verleiding van Feiten van Algemene Bekendheid’, 2012 *Delikt en Delinkwent*, no. 1, pp. 69-82; F. de Jong et al., ‘Objectiverende Tendensen binnen het Voorwaardelijk Opzet’, 2007 *Delikt en Delinkwent*, no. 9, pp. 929-958.

11 On this development, see especially S. Janssen, ‘Unificatie in het Materiële Strafrecht?’, 2007 *Delikt en Delinkwent*, no. 4, pp. 370-385. And see J. de Hullu, *Materieel Strafrecht. Over Algemene Leerstukken van Strafrechtelijke Aansprakelijkheid naar Nederlands Recht*, 2012, pp. 539-550.

12 A. Peters, *Het Rechtskarakter van het Strafrecht*, 1972, marks an important point of departure for the institutional developments that are described in this section. I am indebted to one of the anonymous reviewers for reminding me about this, and for urging me to point out more clearly that the interrelatedness of substantive and procedural criminal law has since then become more and more evident.

13 The possible role of victims I will leave aside. See R. Kool, ‘Verantwoorde Slachtofferparticipatie in het Vooronderzoek’, in F. de Jong & R. Kool (eds.), *Relaties van Gezag en Verantwoordelijkheid: Strafrechtelijke Ontwikkelingen*, 2012, pp. 159-178; E. Stamhuis, ‘Enkele

This increased self-responsibility is visible, for example, in the demands with which any standpoints taken by the defence or the prosecution during trial have to comply in order to impel the adjudicating judge to give a reasoned account for his decision in his response to the expressed views in case he dismisses them or in case he considerably deviates from the views in his final judgment.<sup>14</sup> But also in the context of the investigative phase of criminal proceedings, there is an increasing individual responsibility for the involved parties regarding the way in which they bring their views on the facts and circumstances of a case to the attention of the relevant authorities. In this connection, we may think of the (recently revised) rules concerning the compilation of the case-file.<sup>15</sup>

In the second place, there is a development on the *vertical* level, that is to say: a development with regard to the relationship between the involved parties on the one hand, and the adjudicating judge on the other, and between lower and higher courts. Lower courts have come to enjoy more *freedom* to fill in doctrinal concepts in concrete cases and to apply them in a manner that fits – or, literally, does justice to – the facts and circumstances of a concrete case. The limiting conditions according to which the adjudicating judge construes the doctrinal concepts are, as was noted earlier on, rather formal in nature and epistemologically geared: an increasing number of doctrines are taking the form of ‘checklists’ that consist of a set of criteria according to which the judge can – but not always necessarily must – determine whether or not a certain doctrinal concept obtains in the facts of the case.

The criteria are formal in the sense that they create a formal framework within which the proof of a certain concept is to be furnished, and in the sense that they sometimes involve an allocation of tasks over different agents: the adjudicating judge may take some assumptions for granted if and as long as other parties do not protest against the assumption or present a different account, or as long as the judge himself sees no specific reason to inquire further into some specific topic. This again indicates that the defence has increasing responsibility for the correct presentation and substantiation of views to complete, balance or diffuse the ‘narrative’ previously construed. The criteria are generally, as was also noted earlier, very open-ended, whereas also the relative weight of the different criteria is often rather unclear.

The adjudicating judge, thus, can do many things with the doctrinal criteria, and so can the involved parties. The criteria lend themselves to various scenarios, for different ways of framing them and fitting them in narratives. The involved parties’ increased responsibility for the correct presentation and substantiation of their views on the facts and the applicability of norms and doctrinal concepts, therefore, can be considered in connection with the fact that the judge also increasingly *depends* on the contributions of the defence and the prosecution to the proceedings: the criteria supplied by doctrine are often too vague and open-ended, and too susceptible to variable application, for the adjudicating judge to be able to ascertain by himself what precise meanings should be given to specific doctrinal concepts for the adjudication in a specific case. The judge needs to balance the narratives presented by the involved parties, to contrast them with one another, and to construe them in such a way as to find a correct point of convergence with the criteria that he must use in his application of doctrinal concepts.

Doctrine appears to draw back and to leave the application of its concepts more to the discretion of the adjudicating judges.<sup>16</sup> They construe the doctrinal concepts on a case-by-case basis, by balancing different criteria, standpoints, and circumstances. Apparently, doctrine parts with a number of its tasks, or with part of what it formerly considered to be its tasks. Instead of authoritatively dictating the substance of its most important concepts from above, instead of purporting to present the substance of its concepts as pre-given, theoretical truths, doctrine appears to outsource, to a certain degree, the task of fleshing out these concepts to the parties involved in the proceedings. In addition, higher courts assess the way

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Observaties over het Nederlandse Strafproces’, in P.H. van Kempen et al. (eds.), *Levend Strafrecht. Strafrechtelijke Vernieuwingen in een Maatschappelijke Context*, 2011, pp. 549-557; J. Coster van Voorhout, ‘Shifting Responsibilities: Duties and Responsibilities of the Criminal Defence Lawyer’, in M. Hirsch Ballin et al. (eds.), *Shifting Responsibilities in Criminal Justice. Critical portrayals of the changing role and content of a fragmented globalizing law domain*, 2012, pp. 31-49.

14 Sections 359 and 359a of the Dutch Code of Criminal Procedure. See F. Kristen, ‘Aandacht Vragen, Aandacht Krijgen en Aandacht Verdienen’, in A. Franken et al. (eds.), *Constate Waarden*, 2008, pp. 313-322; S. Meijer & R. Hermans, ‘Verzoeken ter Terechting: Vorm en Inhoud, Beoordelingsmaatstaf en Motiveringseisen’, 2007 *Delikt en Delinkwent*, no. 10, pp. 1034-1062.

15 See R. Hermans, ‘Nieuwe Regels voor de Kennisneming van Processtukken’, 2012 *Delikt en Delinkwent*, no. 4, pp. 290-308.

16 Compare the critical remarks made by A. Franken, ‘De Zittingsrechter in Strafzaken’, 2012 *Delikt en Delinkwent*, no. 5, pp. 361-368, p. 364. On the notion of balancing see Barak, supra note 1, pp. 164-176.

lower courts have applied doctrinal concepts to a specific case in a primarily *formal* manner: have the appropriate criteria been used, and have the grounds for the judgment been sufficiently reasoned?<sup>17</sup>

#### 2.4. *Interim conclusion*

To be sure, the observations in the preceding sections are just that: observations. I do not mean to suggest that the discussed developments are, on balance, a change for the worse, nor that we are facing a problem that we should now go on to solve. That said, I think we may conclude that, taken together, the developments indicate that doctrine in Dutch substantive criminal law is becoming *sketchier*. Doctrine has become theoretically less refined and the lines it draws between its different concepts have become less sharp. Moreover, doctrine delegates – brings downwards – a part of its tasks: as noted, the task of fleshing out the different doctrinal concepts is partly left to the adjudicating judge who balances differing criteria and circumstances, depending on the way these are being presented by different agents.

In the past, doctrine could be seen as a phenomenon that was employed within the framework of a broader effort aimed at leaving juridically uncovered as little as possible and aiming at producing a sophisticated system of doctrinal rules and sub-rules that could render virtually all social facts amenable to a classification under the dichotomies of legality: some social fact is or is not an instance of the juridical concept of intent or duress, etcetera. The marginal areas between different, adjacent doctrinal concept were kept as small and thin as possible.

This approach is substituted for a doctrinal approach more aimed at levelling down the criminal law until it fits more directly the categories of social life. Borderlines between doctrinal concepts are less sharp and larger grey areas appear. The doctrinal criteria employed to distinguish different concepts from one another have become less substantive and more ‘adjective’ or formal. The criteria, most notably the general rules of experience, the nature of the act and the external appearance of the act, also ‘incorporate’ more of society. In this way, the criteria that the adjudicating judge takes into account in his effort to reach his judgment have come to occupy a place less removed from society: lower courts have more freedom to shape the doctrinal concepts of the general part of substantive criminal law, due to the open-endedness of the criteria handed down by the Supreme Court, and due to the primarily *formal* manner in which higher courts assess the way lower courts have applied doctrinal concepts to a specific case. This implies that ‘lower’ regions within the criminal justice system are invested with at least some of the responsibility for the exercise of what I termed the ‘symbolic function’ of doctrine at the beginning of this section.

In light of the increased normative dividedness of Dutch society, it seems that the criminal law, as it were, takes cover behind a formal approach with an emphasis on casuistry constituting the inevitable correlate of this approach. The application of open-ended criteria results in a certain kind of ‘formalization’, that is, an orientation on *form*. The criteria lead away from substantive matters are oriented towards externality, and primarily give expression to external delineations of doctrinal concepts. The developments discussed in this section also provide evidence of a certain measure of ‘proceduralization’: the defence, for example, bears increasing responsibility for the correct presentation and substantiation of views to complete, balance or diffuse the ‘narrative’ previously construed.

Doctrine is developed increasingly bottom-up instead of top-down. For the law in general, this trend is hardly new or uncommon. The discussed developments are responsive to an increased need for flexibility that cannot be easily met when one keeps adhering to a stringent form of traditional *Systemdenken*.<sup>18</sup> The doctrinal system of the general part – understood as a collection of relatively static, substantively demarcated theoretical concepts that suggest to appeal to ageless truths – has lost some of its prominent position. However, the criminal law has of old offered rather strong resistance against such developments: compared to other legal domains, the criminal law has traditionally attached much

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17 Compare Y. Buruma, ‘Rechtspreken in de Dramademocratie. Kanttekeningen bij Lekenrechtspraak en Motiveringsvereisten’, 2006 *Delikt en Delinkwent*, no. 10, p. 1077-1088; D.H. de Jong, ‘Naar een *Common Law*-Conceptie van Legaliteit?’, 1999 *Delikt en Delinkwent*, no. 8, pp. 687-690; Janssen, *supra* note 11; Rozemond, *supra* note 9; Franken, *supra* note 16.

18 See Th. de Roos, ‘Shifting Responsibilities and the Flexibility of Criminal Justice’, in M. Hirsch Ballin et al. (eds.), *Shifting Responsibilities in Criminal Justice. Critical portrayals of the changing role and content of a fragmented globalizing law domain*, 2012, pp. 71-79. And see A. Mooij, ‘Hermeneutiek en Strafrecht’, in A. Harteveld et al. (eds.), *Systeem in Ontwikkeling*, 2005, pp. 429-450.

importance to clear systematization, to maximum predictability, and to keeping the amount and sizes of grey areas between doctrinal concepts to a minimum.

I would like to immediately add that with all of the above I do not mean to suggest that all boundaries between doctrinal concepts are demolished or are on the verge of being demolished. Moreover, there are also a number – albeit a small number – of counter-developments, as can be deduced from recent case law on causality, criminal participation, self-defence, recklessness, and on the borderline between conditional intent and advertent negligence.<sup>19</sup> Nonetheless, I want to submit that, broadly speaking, the doctrinal concepts of the general part of substantive criminal law have become sketchier and have lost a certain measure of theoretical profundity.

And to repeat: I must also add that I am not convinced that, on balance, the outlined developments are to be valued negatively. At least, it is far from impossible that they (also) produce significant favourable effects. The developments indicate, I think, a changed view *on the source of the authority and the legitimacy of the judgments of criminal courts*. The doctrinal developments and the related institutional developments within the model of criminal procedure reflect the awareness at a ‘high level’ that the right way to apply the doctrinal concepts can no longer be determined in a top-down manner by doctrine alone, but ought to be determined in an interplay between a relatively loose and flexible doctrinal system and the concrete facts and circumstances of the tried case. The authority of the judgments reached by criminal courts is grounded less on ‘ageless theoretical truths’ and more on the judge’s individual capability of construing – with the help of the involved parties – the fluid and open-ended doctrinal concepts in a manner sufficiently attuned to and resonating with the facts of the case at hand.

### 3. A sketch of some developments in the philosophical literature on legitimate authority

#### 3.1. Returning to the hypothesis

The fact that the adjudicating judge has come to bear increased responsibility for finding a right point of convergence between the constellation of facts and the set of criteria that can or must be used when applying a specific doctrinal concept, points to a changed conception of the conditions for the legitimate exercise of authority by the judge. The developments that were discussed in the previous section have certainly not escaped the attention of legal scholars, but, as far as I am aware, they have not yet been analysed from the point of view of the wider question as to whether the developments bear witness to a changed notion of the sources of the authority and legitimacy of the judgments of criminal courts. In the remainder of this article, I want to make a tentative start with an attempt to fill this lacuna, by relating the doctrinal and institutional developments to a number of developments that can be traced within the philosophical literature on the nature of legitimate authority.

In the introduction I formulated the following hypothesis: recent shifts in the theoretical perspectives on the political-philosophical concept of legitimate authority have a connection with a number of doctrinal developments within the general part of Dutch substantive criminal law and with a number of institutional developments within the Dutch system of criminal procedure. The account of doctrinal and institutional developments in Dutch criminal law was meant to exemplify more generally possible similar developments in other legal systems. Now I want to leave the doctrinal and institutional developments within Dutch criminal law for what they are, and move on to a completely different domain. In the present section I will engage in some theories stemming from legal and political philosophy, insofar as these theories occupy themselves with the question: What is legitimate authority?

Recent philosophical literature indicates that the way this question is dealt with is in motion. I would like to note that I will not purport to do full justice to all sorts of nuances in the extremely rich literature on this subject-matter. My sole purpose in this section is to sketch a number of the more significant developments in broad outlines, which can be linked together with the doctrinal and institutional

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19 On causality, see HR (Supreme Court) 27 March 2012, *LJN* BT6362, and E. Witjens, ‘Het Bewijs van Causaal Verband in de Groninger HIV-zaak’, 2012 *Delikt en Delinkwent*, no. 5, pp. 369-381; on recklessness HR 22 May 2012, *LJN* BU2016 and HR 3 July 2012, *LJN* BW4254; and see De Hullu, *supra* note 11, p. 242 and p. 326; A. Hartmann, ‘Medeplegen: Back to Basics?’, 2012 *Delikt en Delinkwent*, no. 5, pp. 449-460.

developments that were discussed in the previous section.<sup>20</sup> I will start off with a discussion of the concept of ‘practical authority’. In that connection I will chiefly go into the conditions under which a person or an institution can be said to *have* that sort of authority. Subsequently, I will discuss a number of developments in the philosophical views on the conditions that have to be met in order for the exercise of practical authority to be ‘legitimate’.

### 3.2. *What is authority?*

Authority is a notion that is used in a variety of contexts and that consequently resists our attempts at capturing the notion in one accurate and orderly definition. Within the notion of authority, one can nevertheless make two conceptual distinctions that – as far as I have been able to gather – are hardly, if at all, controversial, and that have demonstrated their value in the philosophical discourse on (legitimate) authority. In the first place, it is important to distinguish between so-called *theoretical* authority and so-called *practical* authority. Theoretical authority concerns the exertion of influence on what a subordinate subject believes to be true. Practical authority, by contrast, concerns a certain kind of control or say over the actions that a subordinate subject is under an obligation to perform (or to refrain from performing), quite apart from this person’s subjective take on the correctness of the obligation with which the authority has burdened him.

Practical authorities claim the right to obligate subordinates, even if the obligation in question is in some respect erroneous. A subject subordinate to a theoretical authority, by contrast, is not expected to act on the basis of the advice of this authority when he knows that this advice is mistaken.<sup>21</sup> Legal authorities are typically practical authorities. For example, the authoritative figure that is at the centre of the present article, the criminal judge or court, is invested with the authority to alter, of course under legally regulated conditions, the ‘normative situation’ of subordinates (suspects and offenders) by imposing, usually against their will, certain obligations, such as the obligation to undergo some sort of state-inflicted punishment.<sup>22</sup> In the remainder of this article, the term ‘authority’ will be used to refer to the notion of practical, not theoretical authority.<sup>23</sup>

A second important conceptual distinction is the one between *de facto* authority and *de iure* or legitimate authority. *De facto* authority concerns the question whether or not – or to what degree – someone, in fact, *has* authority. Here, fluctuations are possible that can be the object of, for example, sociological research. *De iure* or legitimate authority concerns the question as to whether or not the exercise of practical authority is *justified*, morally or otherwise. This question can similarly be regarded as an empirical question that could be dealt with by conducting research into (developments in) the opinions or attitudes of subordinate subjects. However, *de iure* authority can also be regarded as a normative phenomenon: Does an institution fulfil the conditions under which it *ought to have* authority, regardless of the answer to the question whether or not it in fact has legitimate authority according to the public.

The question as to what it takes to *have* practical authority can thus at any rate be treated separately from the question as to what are the conditions for the *legitimacy* of practical authority. In the remainder of this subsection, I will only try to answer the first question: What does it take to *have* practical authority? A person who has practical authority (whether *de facto* or *de iure*, that is irrelevant here) exerts a measure

20 Of course, there have been proposed philosophical models on legitimate authority quite different from the ones I discuss in this article, for instance in the wake of the work of Max Weber or Hannah Arendt, and many later authors (Niklas Luhmann, Jürgen Habermas and John Rawls, to name but a few). However, in this article I focus primarily on the movements that can be traced in the Anglo-American philosophical literature. The Anglo-American literature itself already contains an ocean of sources on the topic. I have chosen to focus on one philosophical ‘genre’ within the literature, namely that of *conceptual analysis*. I take the work of Joseph Raz as a starting point, because a discussion of his ‘rationalistic’ approach, coupled with the different types of criticism it has solicited, will serve to provide a representative illustration of an important shift in the philosophical discourse more generally: a shift from a top-down to a bottom-up conception of legitimate authority.

21 S. Shapiro, ‘Authority’, in J. Coleman & S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2002, pp. 382-439, at pp. 399-401. Shapiro also mentions that the authority of an expert is entirely personal, whereas practical authority is always impersonal. See also V. Wellman, ‘Authority of Law’, in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2010, pp. 559-570.

22 A. Marmor, ‘An Institutional Conception of Authority’, 2011 *Philosophy & Public Affairs*, no. 3, pp. 238-261, p. 239.

23 I should make one more clarification: I use the term ‘(practical) authority’ to refer to either the sort of ‘normative power’ that is the topic of this subsection, or the person or institution *in possession* of that sort of normative power.

of control over the actions of certain other persons, within a certain context. By definition, therefore, practical authority involves a certain type of *normative power*: someone has practical authority if, and only if, he has the ability to alter the normative situation, that is, the rights and obligations, of one or more subordinate subjects, and if the alterations can be made unilaterally, that is, at the instigation of the person in possession of practical authority.<sup>24</sup>

Although it is true, as was noted before, that the fact that someone *has* practical authority does not mean that he also *ought to be* invested with that authority, nor that his judgments or directives are necessarily legitimate, it is also true that practical authority presupposes a pre-established *normative context*. A person owes his practical authority to a system of interlocking norms and conventions, which are rooted in a durable social practice or ‘institution.’<sup>25</sup> The normative power exerted by practical authorities is – at least in the typical cases and in most cases – a strongly regulated and rule-bound power, and thus not a kind of power that is seized, so to speak, ‘ad hoc.’<sup>26</sup> The normative power of practical authorities is constituted by a set of interlocking norms that stipulate, among other things, who can qualify for the role of a certain authority, subject to what conditions, what powers are bestowed upon the authority, when, how and with regard to whom these powers can be exerted, how the observance of the authority’s directives is to be monitored, and what the reactions to different forms of noncompliance should be.

The norms ultimately determine who has a say on what matters and subject to what conditions. Therefore, it makes little sense to speak of practical authority without presupposing this context of norms that both confer and limit normative power. These norms, of course, have a certain pedigree. Their origin is *social* in the sense that they are part and parcel of a social practice in which the norms are actually being followed. They can be conventional in nature, but in many cases they are of an institutional nature, that is to say: promulgated as such, and codified. Practical authorities, therefore, typically operate within rather advanced and complex institutional practices.<sup>27</sup> In Section 4 I will discuss the view according to which the *law’s* most essential defining feature is constituted by the fact that it produces – by way of sophisticated forms of ‘planning’ – exactly these kinds of social norms that *allocate practical authority* over specific officials.

Now that we have seen that *having* practical authority is tantamount to having a specific form of normative power that is granted by a system of interrelated institutional norms, we should still consider the question: What is entailed in the *exercise* of practical authority? On this matter, we may consult someone who is widely regarded as the most prominent theoretical authority on the concept of practical authority, Joseph Raz. According to Raz, the directives issued by practical authorities are a specific kind of *reasons*. And the exercise of practical authority entails that subordinate subjects recognize these reasons as reasons of a particular sort and weight:

‘The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.’<sup>28</sup>

This formula is known under the name of the Pre-emption Thesis. The directive issued by an authority constitutes a reason of a mixed type. It is a *positive* reason in the sense that the directive serves as a reason to perform the required action. Simultaneously it is a *negative* reason in the sense that the directive serves as a reason not to act on the basis of certain competing other reasons, that is, reasons that are incompatible with the contents of the directive.

24 J. Raz, *The Authority of Law. Essays on Law and Morality. Second edition*, 2009, pp. 16-20; Marmor, supra note 22, pp. 240-241; J. Finnis, ‘Authority’, in J. Raz (ed.), *Authority*, 1990, pp. 174-202.

25 Marmor, supra note 22, pp. 241-247.

26 A frequently used example of ‘ad hoc power’ is the following: when there is a fire in a theatre, a person takes charge and directs the panicking crowd toward the emergency exits. This person exerts a certain measure of power over other people, but this power is not established by previously laid-down rules.

27 Marmor, supra note 22, p. 246 and p. 248.

28 J. Raz, *Ethics in the Public Domain*, 1994, p. 198.

A person thus has practical authority if he has the ability to obligate another person by issuing a directive that, at least partly, constitutes the *reason* for the subordinate person to observe and not frustrate the directive. To the extent that a subject complies with the obligation on the ground *that* the obligation stems from an authority, the reason to comply with the obligation is termed a 'content-independent reason.'<sup>29</sup> For example, if I, after having inquired into the reasons for some disagreeable directive, ultimately content myself with an answer that runs: 'Because I say so!', and I subsequently do as the authority requires, then I act on the basis of a content-independent reason.

### 3.3. *When is the exercise of authority legitimate?*

#### 3.3.1. *The rationalistic model*

But why *would* anyone perform an action (solely) on the basis of a content-independent reason, that is, on the 'say-so' of another person? Is it not *irrational* and irresponsible to have your own deliberation on the arguments that count against and in favour of the performance of a certain action be pre-empted by the judgment of another person, just because this judgment emanated from an authority? These questions point to a well-known paradox within the notion of practical authority. Raz formulates the paradox as follows:

'To be subjected to [practical, FJ] authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is of the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational.'<sup>30</sup>

In response to the alleged incompatibility of practical authority with moral autonomy, Raz submits that it is by no means irrational to be guided by a practical authority if and as long as one accepts the authority as a *legitimate* authority. The legitimacy of the exercise of practical authority, according to Raz, is the effect of the fulfilment of an instrumental condition: insofar as an institution invested with practical authority in fact manages to adequately balance all relevant reasons counting for and against the performance of a certain action, and bases its directives upon the results of this weighing, the directives issued by the authority must be considered to be legitimate.<sup>31</sup> Authorities issue directives that we are under an obligation to follow, precisely because we are expected to presume that following those directives will increase the likelihood of acting rationally, and thus of doing what is 'right'. The chance thereof is greater when we simply rely on and follow the authority's directives, then it would be in the event that we would rely on our own balancing of reasons for and against the performance of a certain action. An authority, consequently, mediates between persons and reasons:

'The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.'<sup>32</sup>

This formula captures the essence of what Raz refers to as the Normal Justification Thesis. Authorities essentially provide services: their services include that they help subordinate persons in bringing their actions in conformity with the requirements of reason. For this reason, Raz's theory on legitimate practical authority has come to be known as the Service Conception. This conception is highly rationalistic and

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29 Shapiro, *supra* note 21, pp. 389-390; Wellman, *supra* note 21.

30 Raz, *supra* note 24, p. 3. The *locus classicus* of the idea that practical authority and moral autonomy are incompatible is R. Wolff, *In Defense of Anarchism*, 1970. See on this paradox also Shapiro, *supra* note 21, pp. 385-393.

31 This requirement is summarized by Raz in his so-called Dependency Thesis, which says that the reasons on the basis of which an authority issues directives must, to a sufficient degree, reflect the contents of the 'first-order reasons' on the basis of which the subordinate subjects would have deliberated. See Raz, *supra* note 28, p. 214.

32 J. Raz, *The Morality of Freedom*, 1986, p. 53.

it links up the notion of legitimacy with demands of *substantive justice*: an authority issues legitimate directives if, and only insofar as, these directives are based upon a *correct balancing* of all relevant values and interests.

At the same time, the model immunizes the concept of practical authority against the accusation that it would be irrational to allow oneself to be guided by an authority, because to do so would be inconsistent with the moral autonomy of people. In response to this charge of irrationality, Raz submits that as long as the requirement stipulated by the Normal Justification Thesis is at least *grosso modo* satisfied, it is reasonable to act on the 'say-so' of an authority and to comply with its directives, even if the authority is sometimes mistaken.

The views of Raz that were just discussed have long formed the standard model of legitimate authority in philosophy. Recently, however, the Service Conception has come under attack, from different directions.<sup>33</sup> A shared point of criticism concerns the following idea: the fact that someone or some institution 'knows better' than I do, does not imply that this person or institution therefore also has or ought to have 'normative power' (as discussed in Section 3.2, *supra*) over me. Further arguments are needed, and the fulfilling of further conditions is needed, in order to ground the legitimacy of authority. In the remainder of this section I want to briefly discuss two types of criticism aimed at the rationalistic model of the Service Conception.<sup>34</sup>

### 3.3.2. *The procedural model*

A first form of criticism concerns the rather paternalistic purport of the Service Conception. Raz will have us believe that the legitimacy of the exercise of practical authority is a function of the degree to which this exercise of authority ensures that the actions of persons conform to the demands of reason. In this way, so the criticism goes, the importance of *procedural* conditions for the legitimacy of practical authority is being completely ignored.<sup>35</sup> Partly due to the fact that we live in normatively divided societies, the law, for example, is thought to derive the legitimacy of its authority not primarily from the substantive correctness of its directives and judgments, but first and foremost from the extent to which these directives and judgments result from procedures that are regarded and experienced as *fair* by the subordinate subjects.

The procedural model emphasizes that the legitimacy of the exercise of authority is dependent upon the way subordinates are being treated by the authorities. The idea is essentially that the quality of the procedures followed and of the treatment of subjects within these procedures is of decisive importance for the *acceptance* of the outcomes of the procedures. Also unfavourable outcomes, and sometimes even outcomes that are considered by some subjects to be incorrect, tend to be accepted as legitimate outcomes if one has the feeling that one has been treated decently and fairly. An important voice in this debate concerning the procedural nature of the conditions for legitimacy belongs to Tom R. Tyler, a scholar who has his academic base not in jurisprudence or political philosophy but in social psychology, and who has conducted an enormous amount of empirical research devoted to the conditions under which people generally accept the judgments of authorities. This research has yielded the following general picture:

'One important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process. This includes having

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33 Raz has repeatedly responded to much of the criticism that has been voiced over the years, and he has also amended some parts of his theory in light of some of that criticism; see S. Hershovitz, 'The Role of Authority', 2011 *Philosophers' Imprint*, no. 7, online publication available at <[www.philosophersimprint.org/011007/](http://www.philosophersimprint.org/011007/)> (last visited 16 December 2012). And see J. Raz, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*, 2009, pp. 126-165.

34 For an earlier criticism of some aspects of the Service Conception, see K. Greenawalt, 'Legitimate Authority and the Duty to Obey', in W. Edmundson (ed.), *The Duty to Obey the Law. Selected philosophical Readings*, 1999, pp. 177-191; and see also Shapiro, *supra* note 21, pp. 402-432, who calls the Razian approach a *decision model*.

35 To avoid a possible misunderstanding: the term 'procedural' is here used in a different sense than that of the term 'criminal procedure' used in Section 2.3, *supra*. Here, the term 'procedural' is used to refer to a number of role-specific safeguards for different parties involved in criminal proceedings, which are considered to be indispensable for the fairness and legitimacy of the proceedings and the outcomes. The line of thinking discussed in the present section is primarily based on a reading of the work of Tom R. Tyler, but has philosophical roots in the notion of *Legitimation durch Verfahren* (N. Luhmann, 1969), in Jürgen Habermas' *Theorie des kommunikativen Handelns* (Vols. I-II, 1981), and is also strongly present in the inaugural lecture delivered by Peters, *supra* note 12.

an opportunity to present their arguments, being listened to, and having their views considered by the authorities. Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is.<sup>36</sup>

These results are perhaps for many rather unspectacular, but the point is that the Service Conception does not appear to contain any conceptual space for these findings. In the conception defended by Raz, the fairness of procedures has no intrinsic value; procedures matter only insofar as they exhibit a capacity to help a practical authority to fulfil the requirement of the Normal Justification Thesis.<sup>37</sup> The procedural model confronts the rationalistic model with the finding that authorities sometimes do *not* derive their legitimacy from the extent to which they mediate successfully between persons and reasons, that is, from the extent to which they are capable of ensuring that subjects act on the right 'balance of reasons'. The procedural model's relation to legitimacy is thus indirect: by way of the mediating mechanism of a procedure experienced as fair, the outcome of the procedure will be accepted as legitimate.<sup>38</sup>

One problem that accompanies the procedural model, however, is that the insights it contains cannot easily be generalised. This holds true particularly in criminal law, as the reasons why individuals attribute legitimacy to, or withhold it from, criminal law officials can vary widely, depending on the sort of individual in question: those directly involved in criminal proceedings may hold opinions on the legitimacy of the judgments reached that are diametrically opposed to the opinions held by the general public that has been informed (or misinformed) about the judgments by the media. Another problem is that, in criminal proceedings, there is often so much at stake for those directly involved that one can hardly expect that a fair procedure and a fair treatment alone could generate acceptance even of possibly *wrong* judgments. Therefore, the procedural model does not provide an *alternative* for the rationalistic model, because the legitimacy of authority appears in some cases to be grounded at least partly in the substantive correctness of the authority's judgments.<sup>39</sup>

### 3.3.3. *The reciprocal model*

A second form of criticism directed at the Service Conception of legitimate authority is more difficult to put into words, because it hosts a number of quite different theoretical approaches. The objection raised is that the rationalistic model of the Service Conception mistakenly denies the significance for the concept of legitimacy of the notion of *reciprocity* between authorities on the one hand, and the general public of subordinate subjects on the other.<sup>40</sup> Of course, this still sounds very obscure. In order to make the point of the objection somewhat clearer, I want to put three philosophers on the scene, the first of whom is Andrei Marmor. In an article that appeared in 2011 he states this:

'For A to have authority over B in matters C, is for A to have the normative power to alter the rights and obligations that B has in matters C. (...) Power, in the relevant sense, is essentially an institutional construct: its existence and scope is constituted by rules or conventions. (...) It makes no sense to speak of power without some normative background already in place,

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36 T. Tyler, *Why People Obey the Law. Second edition*, 2006, p. 163. At p. 109 he touches on normative dividedness: 'Because there is no single, commonly accepted set of moral values against which to judge the fairness of outcomes or policies, such evaluations are difficult to make. People can however agree on the fairness of procedures for decision-making. Evaluations of authorities (...) therefore focus on the procedures by which they function, rather than on evaluations of their decisions or policies'. See also T. Tyler (ed.), *Legitimacy and Criminal Justice. International Perspectives*, 2007; T. Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-regulation', 2009 *Ohio State Journal of Criminal Law*, pp. 307-346.

37 Marmor, *supra* note 22, p. 255; Hershovitz, *supra* note 33, p. 3.

38 See Shapiro, *supra* note 21, pp. 432-439, who discusses these insights under the heading of the *arbitration model*. For a similar view, but with regard to the authority of the legislator, see J. Waldron, *Law and Disagreement*, 1999.

39 Hershovitz, *supra* note 33, p. 6 and p. 18.

40 It was suggested by one of the anonymous reviewers of this article that the central preoccupation of the differing 'reciprocal' models could be summarized in the slogan: We need democracy! The need for feeling *represented* by authorities is indeed fuelled by a generally felt need for democracy. My contention, however, is that the notion of democracy does not quite fully capture the essence of the objection raised by the authors under discussion. In my view, the objection is not primarily grounded in the idea that citizens demand a bigger say in the different matters concerning criminal proceedings. The point is slightly more 'emotional': citizens demand more confirmations of and attentiveness to some shared, overarching narrative that is expressive of what the citizens have in common as a political community.

which includes a set of norms enabling certain agents to introduce changes in this normative framework. (...) The institutional obligation to comply with an authority's directives is always conditioned by reasons to participate (cooperatively, that is) in the practice that confers the relevant power on the authority.<sup>41</sup>

This means that authority and the legitimacy thereof cannot be completely explained without reference to an institutional, normative context underneath the exercise of authority by officials, and within which authorities and subordinate subjects must participate cooperatively. The legitimacy of practical authority, according to Marmor, depends on the legitimacy of the practice or institution in which authorities operate, on the specific roles and functions of the authorities in question, and on the reasons to participate in the practice or institution.<sup>42</sup> Here, the relevance of the notion of reciprocity emerges. Whereas Raz maintains that the legitimacy of practical authority depends entirely on the correct way of balancing the reasons that count for and against a certain action in concrete cases, Marmor holds that legitimacy in addition depends on the reasons for *having* the practice in which the authorities operate and the reasons to *participate* in the relevant practice (whether voluntarily, as a member of a sports club for example, or 'by default', as a subordinate of a legal system).

Another philosopher, Stephen Darwall, makes a similar point in more contractualist terms. In his view, legitimate authority has everything to do with a moral context underneath the actual exercise of authority. Against the rationalistic approach defended by Raz, Darwall raises the objection that satisfaction of the condition stipulated by the Normal Justification Thesis cannot in and of itself lead to the conclusion that the exercise of authority is legitimate, because satisfaction of this condition does not suffice to introduce a *right* to be obeyed on the side of the practical authority or an *obligation* to obey on the side of the subordinate subject.

Naturally, if you know that you stand a better chance of doing what is rational or right if you simply follow the directives of another person than if you would rely only on your own deliberations, you would be foolish to ignore the other person's directives. However, this cannot generate more than a reason to treat the other person *as if* he were a legitimate authority. For legitimate authority to actually exist, Darwall argues, a pre-established moral context must be in place, within which the subordinate subject has to be *accountable* to the practical authority:

'If one person has practical authority with respect to another, then this would seem to mean not just that the latter has a reason of whatever priority or weight for acting as the former directs but also that the latter has some responsibility to the former for doing so, that the latter is, in some way or other, answerable to the former. Practical authority is not just a relation in the logical sense; it is a standing in a relationship.'<sup>43</sup>

A somewhat more radical stance, in conclusion, is taken by Paul W. Kahn. In his view, the legitimacy of authority is partly conditioned by the requirement that the exercise of authority sufficiently expresses the *identity* of the community in whose name authorities pass their judgments. Kahn submits that legitimacy is as much a function of the degree to which subjects can 'recognize' themselves in their political and juridical institutions, as it is a function of substantive and procedural matters. This recognition can be furthered by having political and juridical procedures connect with and repeatedly fall back on a shared

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41 A. Marmor, 'The Dilemma of Authority', 2011 *Jurisprudence*, no. 1, pp. 121-141, at p. 130 and p. 133.

42 Marmor, *supra* note 22, p. 248 and p. 252. On the concept of an institutional practice see A. Marmor, *Social Conventions. From Language to Law*, 2009, pp. 50-52. For a similar view see Hershovitz, *supra* note 33, p. 11: 'Authority is a feature of roles embedded in practices. To justify authority, we need to justify the practices in which roles of authority are embedded.' And at p. 17: 'The normal justification thesis allows that you might have authority over me simply in virtue of the fact that you can direct my behavior better than I can myself. That strikes me as seriously wrong. (...) In the face of a claim to authority, one can always ask, "What right do you have to make demands on me?"'

43 S. Darwall, 'Authority, Accountability, and Preemption', 2011 *Jurisprudence*, no. 1, pp. 103-119, p. 109. See also S. Darwall, 'Authority and Second-personal Reasons for Acting', in D. Sobel & S. Wall (eds.), *Reasons for Action*, 2009, pp. 134-154. His views on the nature of legitimate authority form part of a much bigger contractualist theory put forward in S. Darwall, *The Second-person Standpoint. Morality, Respect, and Accountability*, 2006.

*narrative* that is expressive of the identity of the political community in question. In a recent book on the concept of sovereignty, Kahn writes:

‘Liberal political theory, accordingly, has no place for sovereignty but only for law. Without the sovereign, liberal theorists understand a just law to be a legitimate law. But even of just laws we can and do ask, “Whose laws are they?” Is this not the question that Europeans ask of the output of Brussels? It is the same question Americans ask of international law. A law becomes our own when we recognize the free act that brings it into being as our own. (...) The mistake is made from both directions: the scholar thinks of legitimacy as a matter of justice; the revolutionary thinks of legitimacy as a matter of authenticity. We would do better to think of legitimacy as a matter of both justice and authenticity, reason and will.’<sup>44</sup>

I have to note that presenting Marmor, Darwall, and Kahn as representatives of a single current in the philosophical discourse on legitimate authority is in several respects rather inappropriate. These philosophers have very different views on many issues.<sup>45</sup> But what is important to me is that all three demonstrate the significance of reciprocity and representation in the relationship, not only between authorities and those to whom their judgments are directly addressed, but also between authorities and the entire group of subordinate subjects. In the Service Conception, these subjects are kept anonymous and silent, but in the views just discussed they are given a voice, a voice that can raise the question: ‘Who are you, to think that you can oblige me to comply with your judgments?’

#### **4. A reciprocal turn in criminal law?**

##### ***4.1. The ‘connection’ between the developments in criminal law and the developments in the philosophical literature on legitimate authority***

Meanwhile, one might rightly ask what purpose is served with the exposition of the rather abstract views in the previous section. I hope that the considerably rough lines I have drawn throughout the philosophical debate has made clear that this debate attests to a development starting from a top-down and relatively paternalistic conception towards a more bottom-up and reciprocal conception of legitimate authority. My intention has been to present an account of this movement within the philosophical discourse that can be connected with the juridical discourse on authority and legitimacy in criminal law. In the present section I will therefore return to the doctrinal developments within the general part of Dutch substantive criminal law and the institutional developments within the model of Dutch criminal procedure.

But first: a note on the term ‘connection’. With this word I do not mean to suggest that the developments in criminal law that were discussed in Section 2 have something like a *causal* relationship with the developments in philosophy regarding the notion of legitimate authority, nor that the developments in criminal law could in some way or another be *explained* in terms of the philosophical developments. We are, I think, still far removed from a complete explanation of the developments in criminal law, even leaving aside the fact that these developments have not yet – at least not in this article – been brought into vision sufficiently clearly. What I do want to submit is that there exists a *conceptual* link between the developments in criminal law and the developments in the philosophical discourse.

More to the point: I want to suggest two things. The first suggestion is that the developments within criminal law can be interpreted as shifts in the way in which *authority is distributed* over various agents that are involved in criminal proceedings. The second suggestion is that these shifts *parallel* the movements within the philosophical literature on the notions of authority and legitimacy. In the

<sup>44</sup> P. Kahn, *Political Theology. Four new Chapters on the Concept of Sovereignty*, 2011, p. 141 and pp. 146-147. See also P. Kahn, *Legitimacy and History. Self-government in American Constitutional Theory*, 1992, pp. 216-223; B. van Klink, ‘Waarom zouden we ons aan de Wet houden? Een Pleidooi voor Versterking van het Staatsgezag’, in T. Jansen et al. (eds.), *Gezagsdragers. De Publieke Zaak en haar Verdedigers*, 2012, pp. 263-276; H. Lindahl, ‘Authority and Representation’, 2000 *Law and Philosophy*, no. 2, pp. 223-246.

<sup>45</sup> Marmor, for example, argues against Darwall’s view that subjects are not answerable to (or accountable vis-à-vis) the authorities themselves, but to the members of the community or practice in whose name the authorities exert their normative powers. See Marmor, *supra* note 41, and Marmor, *supra* note 22, p. 256; compare A. Westlund, ‘Autonomy, Authority, and Answerability’, 2011 *Jurisprudence*, no. 1, pp. 161-179.

remainder of this section, I hope to be able to make a reasonable case for these two suggestions. I will do so by first discussing in some detail a relatively new philosophical model concerning the nature of law: the Planning Theory proposed by Scott J. Shapiro. This means, I am afraid, that I will introduce yet another theoretical layer into my analysis. However, I hope that my discussion of some aspects of the Planning Theory will prove to be a fruitful exercise: the theory provides a highly suitable conceptual tool in my effort to connect the philosophical notion of authority (as discussed in Section 3.2, *supra*) with the developments in criminal law, and will serve as a prelude to my reasoning for the two mentioned suggestions in Section 4.3.

#### 4.2. *The Planning Theory and the distribution of authority in criminal law*

In a recent book,<sup>46</sup> Shapiro argues for the proposition that law – that is to say: a given legal system and the totality of legal rules that apply within this system – in at least two ways is intrinsically connected with sophisticated forms of what he refers to as ‘social planning’. Not only does law constitute the never definitive result of an ever ongoing process of social planning, law also results *in* a form of social planning and forms the continuous embodiment thereof.<sup>47</sup> According to the definition offered by Shapiro, plans are ‘abstract propositional entities that require, permit, or authorize agents to act, or not act, in certain ways under certain conditions.’<sup>48</sup> Plans are thus the embodiments of a specific kind of norms. We use the word norm to indicate standards that are both prospectively indicative of how to act in a certain situation, and retrospectively indicative of the answer to the question whether a given action conforms to the requirements of an applicable norm. A norm, as was also noted in Section 2, thus has a prescriptive or indicative function, in the sense that it functions as a standard for the correct or valid way of continuing the ‘action line’ that it represents or ‘symbolizes’. I will now first briefly discuss some general traits of plans and (individual) planning, and will subsequently deal with the question as to how law and planning are conceptually related.

A subject who adopts a plan for himself places himself under the governance of a *norm*. A first important feature of planning concerns the fact that the norm that is created during planning has a *partial* or elliptical structure: the action line that it indicates never offers a completely exhaustive description of the various steps to be taken in order to realize the objectives of the plan. Plans thus constitute condensed notations of such fully detailed, step-by-step descriptions. To the degree that a plan condenses this detailed overall picture, it is based on something external to itself: plans are built on our previously gained experiences and on our previously acquired insights, and in order to be reasonable to entertain, plans need to be consistent not only with our other plans, but also with these previously attained beliefs.<sup>49</sup> On account of the fact that plans constantly leave blank a number of steps that need to be taken in order to achieve the overall aim, plans possess a measure of flexibility that enables us to flesh out such plans over time. Plans, therefore, usually consist of a number of sub-plans, and are themselves nested in larger, more abstract plans.

A second important feature of planning is its *dispositive* and *purposive* nature: plans are created to be norms that purport to settle what is to be done. They dispose their subjects to actually – unless certain unforeseen events happen to occur – put the plans into effect. The normative *aim* of plans is to settle beforehand what is to be done; the moment they are adopted, plans are supposed to, as it were, take over their subjects’ thinking. In other words, plans exert the sort of ‘pre-emptive force’ that is entailed (as we have seen in Section 3.2, *supra*) in the exercise of practical authority: plans are supposed to pre-empt, and purport to provide a reason to pre-empt, any further deliberation on the balance of reasons. This shows that individual planning consists in a manner of exerting *practical authority* over oneself. The authority of plans derives from instrumental rationality: in the pursuit of specific goals or ends, the

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46 S. Shapiro, *Legality*, 2011. The proposition on the nature of law is strongly inspired by a number of insights taken from the work of Michael E. Bratman (‘human beings are planning agents in a social world’; see M. Bratman, *Faces of Intention. Selected essays on Intention and Agency*, 1999, pp. 1-12). See also M. Bratman, ‘Shapiro on Legal Positivism and Jointly Intentional Activity’, 2002 *Legal theory*, no. 8, pp. 511-517; De Jong, *supra* note 6.

47 Shapiro, *supra* note 46, p. 176.

48 Shapiro, *supra* note 46, p. 127.

49 See Shapiro, *supra* note 46, p. 124.

planner adopts a plan, thereby committing himself to a certain course of action and subjecting himself to certain normative requirements fixated in the plan.

We are now able to see that plans are related to norms in a specific way: a subject who adopts a plan for himself places himself under the governance of a norm that has a partial, composite and nested structure, that is created by an incremental, dispositive and purposive process, and that is supposed to settle questions about what ought to be done. This specific connection between plans and norms is characteristic not only of individual planning, but also of *shared* forms of planning.<sup>50</sup> Plans can also be adopted for other subjects, and for groups of subjects. The regulation and coordination of instances of massively shared agency impel the creation of rather sophisticated, self-regulating mechanisms of group planning. Law can be regarded as the most important form of social planning in a given society. Law not only results *from*, but it also results *in* a highly sophisticated form of social planning. The set of features of this form of social planning that, according to Shapiro, defines the identity or nature of law, that is, the necessary and sufficient conditions for something to be called 'law' and not something other than 'law', can be summarized in the following formula: 'a group of individuals is engaged in legal activity whenever their activity of social planning is shared, official, institutional, compulsory, self-certifying, and has a moral aim.'<sup>51</sup> This formula contains four defining features of law.

First, for some activity to constitute a legal activity, it is necessary that this activity is an activity of *social planning*.<sup>52</sup> Like all other forms of planning, legal planning aims to guide, organize and monitor the behaviour of people. Legal planning is *social* in nature, in the sense that it creates and applies norms that represent communal and, mostly, publicly accessible standards of behaviour. Law is always the provisional result of an ever ongoing process of planning.<sup>53</sup> Legal planning is *dispositive* in nature, in the sense that the individuals who are subjected to the legal rules normally obey these rules. Legal planning is *purposive* in nature in that its very point is to create norms 'that are supposed to pre-empt deliberations about their merits, and that purport to provide a reason to pre-empt deliberations about their merits.'<sup>54</sup> Certain norms are designated as *authoritative* so as to ensure that the involved subjects can simply rely on the contents of these norms without the need for further deliberation, negotiation or bargaining about the proper ways to act in different circumstances. Note that, also here, the practical authority of legal planning is grounded in the notion of instrumental rationality: legal plans are said to have pre-emptive force exactly because it would be irrational for subjects to continuously balance the legal provision against all other possibly relevant reasons for or against a certain action.<sup>55</sup>

Second, for some activity to count as a legal activity, this activity must also be a *shared* one.<sup>56</sup> Legal activity is shared in that various legal agents, each with their own tasks and competences, are involved in one or more of the different stages of one unified process of legal planning. The process of legal planning is characterized by (vertical and horizontal) *distributions of planning activities* and by the introduction of *hierarchy*. The introduction of hierarchy results in a shared plan for a number of selected individuals who are authorized to (that is: they are bestowed with the 'normative power' to) either formulate, adopt, repudiate, apply or enforce plans on behalf of the community at large.<sup>57</sup> These individuals are the occupants of durable *offices*. Their being so authorized is not a function of the individuals' personal identities or names, but is made dependent on a set of appropriate qualifications that these individuals will have to meet in order to be eligible to occupy these offices. In this way, the hierarchical process of legal planning is impersonalized.

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50 On this see Bratman 1999, *supra* note 46, pp. 93-163.

51 Shapiro, *supra* note 46, p. 225.

52 Shapiro, *supra* note 46, pp. 195-204.

53 It should be noted that this incremental process is not only characteristic of the common law tradition's 'judge-made' law. Also legislatively enacted *codes* consist of collections of rules that largely codify existing, previously developed law. See Shapiro, *supra* note 46, pp. 198-200.

54 Shapiro, *supra* note 46, pp. 128-129; compare J. Raz, *Practical Reason and Norms*, 1999, pp. 40-45 and pp. 73-76.

55 Compare B. Celano, 'What can Plans do for Legal Theory?', in D. Canale & G. Tuzet (eds.), *The Planning Theory of Law. A critical Reading*, 2012, pp. 131-137, who argues that the Planning Theory illegitimately moves from the level of individual planning to that of legal planning. According to Celano, it may well be irrational to reconsider a *personal* plan once adopted, but it cannot in and of itself be called irrational to reconsider a plan that *someone else* has adopted for you. Here, however, Celano seems to miss an essential point, captured in Raz's Normal Justification Thesis (see Section 3.3.1, *supra*).

56 Shapiro, *supra* note 46, pp. 204-209.

57 Shapiro, *supra* note 46, p. 176; Marmor, *supra* note 42, pp. 46-52.

Third, in order for an activity to count as a legal activity, the activity must be performed by an agent who, or an institution which, is generally presumed to be authorized to do so. Law is a *self-certifying* planning organization. This means that a legal norm is presumed to enjoy legal validity. Unlike other planning organizations, a legal system is not required or expected to demonstrate to a superior organization (if it exists) that its rules are valid before it can legitimately exercise its normative power or practical authority.<sup>58</sup> Furthermore, legal activity is not only a shared, official and institutionalized form of social planning, it also constitutes a *compulsory* form of authority, in that consent is not a necessary condition for the validity and applicability of the law's demands.<sup>59</sup>

Fourth and last, for some activity to constitute a legal activity, it must be supposed to have a specific *moral aim*. According to what Shapiro refers to as the Moral Aim Thesis, legal activity aims at remedying the moral deficiencies of alternative forms of planning.<sup>60</sup> These deficiencies of non-legal forms of planning obtain in what Shapiro terms the 'circumstances of legality'. The circumstances of legality are the social conditions that render sophisticated, specifically legal forms of planning desirable. The need for law comes in when a society is faced with complex moral problems, the solutions to which are either too arbitrary or too contentious for non-legal forms of planning to produce. Less sophisticated techniques than the forms of planning that only legal institutions can provide cannot remedy the failure of consensus and produce lasting and stable answers to emerging moral questions.<sup>61</sup>

According to the Moral Aim Thesis, it is part of the identity of a legal order that it pursues a moral end. I want to dwell a bit more upon the meaning of the Moral Aim Thesis, because I think that this thesis can help us understand the doctrinal and institutional developments that were discussed in Section 2. I want to start by mentioning some meanings that the thesis does *not* have. The fact that law entertains a moral aim does not mean that law also necessarily succeeds in achieving this aim. Nor does it mean that law necessarily has to pursue some specific substantive goal: the Moral Aim Thesis is agnostic as to which moral problems the law ought to address and as to how these problems should be dealt with.<sup>62</sup> As the exercise of legal practical authority is tantamount to the exercise of a certain type of normative power, it produces changes in the normative situations in which subjects find themselves. And as those normative situations are governed by moral concepts, such as rights and obligations, legal authority is to be regarded as a form of practical authority with regard to *moral* situations.<sup>63</sup> This, however, does not imply that legal authority is by definition a morally justifiable form of authority, or, the other way round, that a morally unjustified order could not bear the label of a legal order.

This implies that a legal norm is not dependent on its moral legitimacy in order to exist as a *legally valid* norm. The function of plans – also of legal plans – is that they, so to speak, *take over our own thinking*: exactly because plans are drawn up in order to answer certain moral questions beforehand, they relieve subjects of the necessity of conducting potentially endless deliberations and negotiations each time a similar question arises. This then means that the existence and the contents of a given plan or norm are in principle to be determinable by means of a method that does not comprise a search for the morally correct answer to the normative question that the norm is supposed to have already answered.<sup>64</sup> This legal-positivist claim contains an important insight regarding the nature of the relation between law and the social world. By means of legal planning an artificial space is being created that is at a distance from the moral demands governing a society. This distance 'enables us to talk about the moral conception of a particular legal system without necessarily endorsing that conception.'<sup>65</sup>

58 Shapiro, *supra* note 46, pp. 220-221.

59 According to Shapiro, coercion and the provision of sanctions are not necessary features of law. Whether or not this is correct does not matter for my purposes in this article. See Shapiro, *supra* note 46, pp. 166-170 and pp. 209-212. Compare F. Schauer, 'The Best Laid Plans', 2010 *Yale Law Journal*, pp. 586-621; Celano, *supra* note 55, pp. 147-149.

60 Shapiro, *supra* note 46, pp. 213-217.

61 See Shapiro, *supra* note 46, pp. 161-164, p. 170, and at p. 173: 'A community needs law whenever its moral problems – whatever they happen to be – are so numerous and serious, and their solutions so complex, contentious, or arbitrary, that nonlegal forms of ordering behavior are inferior ways of guiding, coordinating, and monitoring conduct.'

62 Shapiro, *supra* note 46, p. 213.

63 See Shapiro, *supra* note 46, pp. 101-102, pp. 110-111, and p. 182.

64 Shapiro, *supra* note 46, pp. 177-178. 'In principle': in his book review, Waldron rightfully notes that the law cannot always avoid that a certain legal provision (or a certain legal 'plan') raises exactly those moral controversies which the legal provision concerned was supposed to settle; J. Waldron, 'Planning for Legality', 2011 *Michigan Law Review*, pp. 883-902, at p. 895.

65 Shapiro, *supra* note 46, p. 186.

Seen from the *legal point of view*,<sup>66</sup> subjects are ‘morally’ bound by the demands of law. The law claims legitimate authority, but this does not mean that everyone has to agree on the underlying moral theory according to which the law in fact purports to be morally legitimate.<sup>67</sup> The legal point of view, in other words, consists of an interposed ground between the legal subject and the social world. It is a kind of ‘firewall’ between the demands of morality and the demands of the law.<sup>68</sup> According to the Moral Aim Thesis, legal planning always aims at providing solutions for moral problems that alternative forms of planning or of coordinating shared agency cannot rectify. Although its name might suggest otherwise, the Moral Aim Thesis does not, however, provide a criterion for the moral quality of legal planning and it does not have any psychological value: its meaning is independent from the opinions and attitudes of those involved, as planners or as subjects, in a given legal order.

What, then, is the meaning of the Moral Aim Thesis? The moral aim of legal planning is a *formal* aim: the moral aim of law is the rectification of problems with regard to the *distribution of practical authority*.<sup>69</sup> Law settles, in a stable and binding way, who gets to decide on what questions, and under what conditions. Law introduces both vertical and horizontal hierarchical divisions that are constitutive of a formal framework within which authority is distributed over a variety of planners or officials. Different officials are allotted different roles, tasks, and competences. The most distinctive defining feature of legal planning, then, is not that it settles substantive issues relating to behavioural demands on citizens, but that it settles adjective, procedural issues relating to the distribution and allocation of practical authority. The question ‘Who gets to decide what?’ is ubiquitous; it exists wherever there is social interaction. The essential point is that law settles the question of authority, or at least purports to settle this question, in a binding and lasting manner. Law has a specific way of settling the moral question of who gets to decide what: legal planning is a systematic method for allocating practical authority over officials in an impersonal, institutional, compulsory, self-certifying, and official way. This formal aim is the moral aim of law.<sup>70</sup>

#### **4.3. A reciprocal turn in Dutch criminal law?**

Criminal law, like all of law, claims legitimate authority. As was shown in the previous subsection, law also claims *supreme* authority: law is a self-certifying planning mechanism that produces binding norms. We also learnt that law, by definition, entertains the moral aim of rectifying issues concerning the allocation of practical authority over a selected group of ‘planners’ that are invested with practical authority. The model provided by the Planning Theory serves as a tool to conceptually *link* the general developments in (political) philosophy with regard to the conditions for legitimate authority, on the one hand, and the doctrinal and institutional developments within criminal law, on the other. Partly due to an increased awareness of the normatively divided character of contemporary Western societies, the perspectives within the philosophical discourse on legitimate authority have shifted from a top-down and relatively paternalistic view to a more bottom-up, procedural and reciprocal view on the conditions for legitimate authority. And in the criminal law, the doctrinal system of the general part of substantive criminal law is flattening, and the task of fleshing out the doctrinal concepts is partly shifted to the adjudicating judge and the involved parties.

Now my *first suggestion* (mentioned in the introduction to the present section) was that the developments in Dutch criminal law that were sketched in Section 2 can be understood as shifts in the way authority is being distributed over different agents within the Dutch criminal justice system.<sup>71</sup>

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66 See A. Schiavello, ‘Rule of Recognition, Convention and Obligation: What Shapiro can still Learn from Hart’s Mistakes’, in D. Canale & G. Tuzet (eds.), *The Planning Theory of Law. A critical Reading*, 2012, p. 85; Raz, *supra* note 54, pp. 170-177.

67 See Raz, *supra* note 24, pp. 3-33.

68 I have borrowed this metaphor from the lecture ‘The Architecture of Jurisprudence: Part I’, delivered by Jules Coleman at the conference *Neutrality and Theory of Law* (Gerona, Spain, 20-22 May 2010).

69 See Shapiro, *supra* note 46, pp. 178-188; Schauer, *supra* note 59, p. 597 and pp. 601-604; W. Edmundson, ‘Shmegality. A Review of Scott J. Shapiro, *Legality*’, 2011 *Jurisprudence*, no. 1, pp. 273-291, pp. 275-276.

70 We already encountered this insight in Section 3.2.1, *supra*; see Marmor, *supra* note 22, p. 243: ‘Practical authorities get to determine, within a certain range of options, what types of normative changes they can introduce, how to make those changes, who is subject to them, often also how to monitor compliance, and how to respond to noncompliance. In other words, systemic power is inevitably complex, constituted by a set of interlocking norms (...)’

71 With regard to the position the defence counsel, see Coster van Voorhout, *supra* note 13.

Practical authority appears to be shifting in a downward direction. In Section 2 I defined (substantive criminal law) doctrine as the framework of theoretical concepts that clarify the content of valid legal norms (of substantive criminal law) and reformulate them as a systematic unity. There I also noted that doctrine can perform its tasks in different ways: it can be predominantly strict, but also predominantly loose, leaving relatively much leeway for a flexible application of criminal law concepts to concrete cases.

In the past, the collection of substantive doctrinal concepts constituted a theoretical framework that was handed down from above, and that authoritatively guided the adjudicating judge in his effort to apply the criminal norms and concepts to concrete cases. Currently, however, we have a rather flexible doctrinal system of relatively sketchy concepts, only the external delineations of which are determined top-down. The task of fleshing out the concepts is partly left to the adjudicating judge himself, who balances differing criteria and facts, depending on the way these are being presented by different agents during proceedings. The manner in which doctrine seeks to bring the adjudicating judge ‘into line’ with the action line symbolized by an applicable norm of substantive criminal law has become looser, and the task of determining the right way to do this is partly transferred to the discretion of lower authorities.<sup>72</sup>

Note, however, that the substance of the *concept* of practical authority remains intact. As was shown in Section 3, the standard theoretical model of the concept of practical authority starts from the so-called Pre-emption Thesis, according to which subordinate subjects normally have their own (normative) deliberations on the arguments that count against and in favour of the performance of a certain action pre-empted by the judgment of a practical authority. Furthermore, the criminal law has not ceased to make a *claim to the legitimacy* of the practical authority that it exercises. But the *process* of legal planning that is supposed to produce that legitimacy is increasingly structured bottom-up instead of top-down. Viewed against the background of the Planning Theory, Dutch criminal law appears to be subject to a shift from top-down planning to bottom-up planning, in two respects.

First, the parties involved in criminal proceedings have come to bear a bigger individual responsibility with regard to the ways in which they contribute to the proceedings and its outcome. And second, by way of the open-ended and fluid criteria that are being used to fill in the doctrinal concepts, a larger amount of ‘society’ is being channelled into the general part of substantive criminal law. Phrased in the terms of the Planning Theory, we get the following idea: the ‘plans’ or ‘plan-like norms’ that doctrine provides surely continue to be dispositive and purposive norms that have the moral aim of settling normative questions beforehand, but the doctrinal norms become increasingly partial or elliptical in the sense that they – when compared to the doctrines of the general part of earlier days – possess a larger measure of flexibility that enables the involved parties to flesh out the rules of criminal law over time and in direct conjunction with the concrete facts of the case before the court. In this connection, one could say that the doctrines of the general part are becoming ‘flatter’.

As was already noted in Section 2, this does not necessarily mean that this development is, on balance, unfavourable. For my *second suggestion* is that this downward shift parallels the developments within the philosophical discourse on legitimate authority discussed in Section 3. To be sure, compared to other domains of law, the criminal law in the Netherlands has traditionally been strongly characterized by its top-down construction, with a firm emphasis on statutory regulation and on the importance of the predictability of the criminal courts’ judgments. This top-down approach has traditionally also permeated – in addition to the statutory law as the normative core of the criminal law – the more peripheral determinant of the substance of valid criminal legal provisions: doctrine, consisting of a system of theoretically refined sub-rules or ‘sub-plans’ that clarify the contents of valid legal provisions and integrate them into a systematic unity. Doctrine, in a manner of speaking, was a continuation of the law proper and was constructed in accordance with the same principles, on the basis of relatively strict distinctions and relatively hard, substantive criteria.

72 In this connection, we may also be reminded of the frequently expressed idea that the Dutch criminal justice system, that has been known to be a predominantly inquisitorial system characteristic of the civil law tradition, has in certain respects moved in the direction of the adversarial systems characteristic of the common law tradition. See for example Coster van Voorhout, *supra* note 13, pp. 34-38. Compare K. Riesenhuber, ‘English Common Law versus German *Systemdenken*? Internal versus External Approaches’, 2011 *Utrecht Law Review*, no. 1, pp. 117-130; J. Gardner, ‘Some Types of Law’, in D. Edlin (ed.), *Common Law Theory*, 2007, pp. 51-77; R. Kagan, ‘On “Responsive Law”’, in R. Kagan et al. (eds.), *Legality and Community. On the Intellectual Legacy of Philip Selznick*, 2002, pp. 85-98, at pp. 89-92.

How, then, – assuming that the desiderata of the predictability and clarity of law are, as such, undisputed – is the trend within the doctrinal system of the general part of substantive criminal law linked up with the developments within the philosophical discourse on legitimate authority? The question at hand is thus whether or not the perspectives on the conditions for the legitimacy of the criminal courts' judgments are changing and, if so, whether or not these changing perspectives reflect the changing perspectives on the concept of legitimate authority in the philosophical literature on the subject. My contention would be that the general shift in the direction of a more bottom-up form of legal planning is in keeping with the philosophically and sociologically supported insight that people have become less willing to consign themselves unconditionally to an authority.<sup>73</sup> Instead of, as it were, handing themselves over 'wholesale' to a given authority, people tend to ascribe authority and legitimacy in more 'measured' dosages to institutions. Authority and legitimacy have become hard-won qualities for institutions: practical authorities are faced with the continuous task of demonstrating that they merit being invested with their normative powers.<sup>74</sup> Accordingly, the degree to which authorities are regarded as legitimate authorities fluctuates more than it previously did.

Of course, these observations are very general and considerably vague. But, for now, they may suffice to tentatively conclude that there has been an increase in the importance of *reciprocity* regarding the conditions that must be met if an authority (that is: an institution or person endowed with practical authority) is to live up to its claim that it exercises its powers legitimately. The citizen wishes to see something of himself reflected in the institutions in which he invests his trust. On the relatively 'small' scale of suspects and other people directly involved in criminal proceedings (such as victims), this is shown by an increased sensitivity to the levels of correctness and fairness of the treatment people are subjected to by criminal justice officials, and to other issues of procedural justice. And on the much grander scale of the public at large, it appears that people have become more sensitive to the extent to which they see their expectations of the criminal justice system and their views on the functions of the criminal justice system – that is, their views on the reasons for *having* and for *participating* in a criminal justice system to begin with – being mirrored in individual criminal judgments.<sup>75</sup>

The doctrinal developments and the related institutional developments within the Dutch system of criminal procedure are illustrative of a more general theoretical development. They are symptomatic of the acknowledgement that it has become practically impossible to determine the exact meaning of the doctrinal concepts of substantive criminal law at a 'high level'. The obviousness or naturalness of the way in which criminal norms and doctrinal concepts are and should be applied to always-new cases – an obviousness which doctrine itself was meant to produce – can no longer be authoritatively obtained top-down, but has to be produced in an interplay between a relatively loose and flexible doctrinal system and the concrete facts and circumstances of the tried case. The authority of criminal judgments is grounded less on 'ageless theoretical truths' and more on the capability of the adjudicating judge to construe – with the help of the involved parties – the fluid and open-ended doctrinal concepts in a manner sufficiently attuned to and resonating with the facts of the case at hand.

The concrete case is increasingly being promoted to the rank of a *locus* within which law and justice are to be found. By this route, a host of casuistically variable factors and views can be taken into consideration, in order to reach an optimally fitting judgment. The idea behind this seems to be that the judgments reached at the end of the criminal trial, if they are to live up to their claim to legitimacy, need to have resulted from a procedure that was experienced as fair by the involved parties, and need to be sufficiently responsive to the preoccupations of the general public. The doctrinal and institutional developments discussed in Section 2 indicate a shift in the perspectives on the conditions for the legitimate authority of

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73 On the differences between top-down and bottom-up planning, see Shapiro, *supra* note 46, pp. 190-200.

74 See generally G. van den Brink, 'Hoe het Gezag uit Nederland Verdween en... weer Terugkwam', in T. Jansen et al. (eds.), *Gezagsdragers. De Publieke Zaak en haar Verdedigers*, 2012, pp. 19-36, p. 33. The same can be said of many theoretical authorities, like scientists or doctors.

75 This is not to say that a shift towards responsiveness and reciprocity is without any danger; compare Borgers, *supra* note 1, pp. 165-172; and Kagan, *supra* note 72, p. 88: '[R]esponsive law is a "high risk" mode of governance. By making the law more flexible and political, it runs the risk of making law too malleable, eroding its authority and delegitimizing legal institutions. Much depends on the capacity of legal officials to build wisely on the steadier foundations of autonomous law, to walk a fine line between a responsive pursuit of justice and over-responsiveness to particular ideologies and interests.'

criminal judgments: the traditional, predominantly rationalistic model of legitimate authority seems to be replaced with a model according to which both procedural safeguards and notions of reciprocity are considered to be particularly determinative of the legitimacy of the practical authority with which the adjudicating judge passes his judgments.

## 5. Concluding remarks

Legitimacy and authority are, quite naturally, very thorny issues in the context of criminal justice. Much is being written and said about the actual or supposed deficiencies in the legitimacy of the exercise of authority in the criminal law, not only within the academic arena, but also outside of it. My account of the doctrinal developments in the general part of Dutch substantive criminal law and the related institutional developments in the Dutch system of criminal procedure served as an illustration of more general theoretical developments that may also be found in other legal systems. Although the Netherlands still belongs to the so-called high-trust countries,<sup>76</sup> one frequently encounters the observation that the Dutch criminal justice system is firmly locked in the grasp of a legitimacy crisis. Whether or not that really is the case, I do not know. It would depend, of course, on one's conception of legitimacy and also, for that matter, on what one understands by the concept of a crisis.<sup>77</sup>

In the meantime, different proposals for the solution of the differing problems regarding the legitimacy of the criminal justice system follow each other in rapid succession: recommendations are put forward in favour of introducing the involvement of laymen in criminal proceedings, increasing the participatory role of victims, making public dissenting opinions held by members of the Supreme Court, improving the quality of the reasoning of the judgment already reached by the adjudicating judge, etcetera. My intention, by contrast, has been to first take a step back, by discussing a number of developments that concern the process that *precedes* the judgment reached by the adjudicating judge, that is, developments in the supply of pre-given sources on which the adjudicating judge needs to rely in order to reach his judgment, and by relating those developments to a question that is scarcely, if ever, posed within the context of criminal law scholarship itself: 'What *is* legitimate authority?'

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76 See K. van den Bos & A. Brenninkmeijer, 'Vertrouwen in wetgeving, de overheid en de rechtspraak. De mens als informatieverwerkend individu', 2012 *Nederlands Juristenblad*, pp. 1451-1457.

77 I do not mean to sound too relativistic. It would seem to me, for example, that it is not an exaggeration to say that every single miscarriage of justice that has come to light in the Netherlands in the past few years (see for example A. Franken, 'Finding the truth in Dutch courtrooms. How does one deal with miscarriages of justice?', 2008 *Utrecht Law Review*, no. 3, pp. 218-226) has generated a crisis with a direct bearing on the legitimacy of the Dutch criminal justice system. The only reservation I want to make is that I am not convinced that those crises can be generalised to one general (more or less deep) legitimacy crisis that could be supposed to haunt the Dutch criminal justice system *as such*.