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Torben Spaak, Mathieu Carpentier

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## Sources of law in continental analytical jurisprudence

Torben Spaak & Mathieu Carpentier

### Introduction

The concept of sources of law has been with us throughout the history of Western legal thought.<sup>1</sup> It is traditionally attributed to Cicero, who uses the phrase *'fons legum et iuris'* ('the source of laws and of law/justice') in various writings (see notably : *De Legibus*, I, v), and it appears also in Livy's *Historia Romana*, which says that the Twelve Tables are the *'fons omnis publici privatique juris'* ('the source of all private and public law'). At the time, the term 'sources of law' functioned as a metaphor, which covered mainly what modern legal theorists call *material* sources of law. The idea of sources of law as the facts, or the texts, that give laws their existence or validity is much more recent. The *Kodifikationsstreit* in the early 19<sup>th</sup> century marks the beginning of an intense reflexion on the status and value of various sources of law (*die Volksgeist*, custom, statute, and so on): the distinction between material and formal sources appears at that time, and for all its flaws it remains nowadays an inescapable way of thinking about sources. Since then the phrase 'sources of law' has become so commonplace in the discourse of lawyers on the Continent that many a law textbook starts by giving an overview of the various sources of law for the particular legal sub-discipline covered by the book.

It is therefore not surprising that many legal theorists on the Continent have spoken at length about sources of law, since the concept of sources has acquired such a routine function in both legal practice and legal scholarship that it appears to be an element of every legal system.<sup>2</sup> However, is there a characteristic way that legal theorists on the Continent theorise and think about sources of law? Answering this question is trickier than it seems. There are many reasons why such an answer is fraught with difficulties.

First, one must ask whether legal theorists speak of sources in the same way that ordinary lawyers do. The concept of sources of law is not a specifically legal-philosophical concept (unlike, for instance, the concepts 'rule of recognition', '*Grundnorm*' and 'law-as-integrity'). The difficulty here stems from the fact that there are varying degrees of intertwinement between

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<sup>1</sup> For a good overview of the history of the concept of sources of law, see Stefan Goltzberg, *Les sources du droit* (Presses Universitaires de France 2016), 15-36. On the history of sources, see Jaap Hage, 'Sources of law' in Jaap Hage, Antonia Waltermann and Bram Akkermans, *Introduction to Law* (2nd edn, Springer 2017).

<sup>2</sup> Throughout this chapter, 'Continental' means, and is used interchangeably with, 'in the civil law tradition.'

the doctrinal study of law and legal theory<sup>3</sup> (or legal philosophy).<sup>4</sup> The concept of sources plays an important role in both legal scholarship, which is concerned with the question *quid juris?* (what is the law?), and in legal philosophy, which asks *quid jus?* (what is law?), but they do not always have the same function or meaning in these different contexts. There is an unavoidable fluidity between the concepts of doctrinal discourse and the concepts used by legal philosophers. However, as we shall see later on, many Continental legal theorists have warned against the ambiguities of the term ‘sources of law’ and have proposed suitable conceptual replacements.

Even if we could isolate a set of core properties of the concept of sources of law *qua* a jurisprudential concept, there would still remain many different ways to tackle that concept, and there are many different jurisprudential traditions in this respect. We are not fully convinced that the Anglo-American v. Continental divide is a particularly apt way of framing these differences (pace, e.g., Guastini<sup>5</sup> and others), as there are many differences among Continental jurisprudential traditions, too. Paradoxically, the globalisation of jurisprudence has deepened the gap among Continental traditions themselves: the main tenets of Hartian and post-Hartian jurisprudence have been discussed and engaged with at length in the Spanish-speaking world<sup>6</sup> – including in publications in English – though not so much in French-speaking countries.<sup>7</sup> To take an example from the theory of sources, many Continental legal theorists have adopted, or at least discussed,<sup>8</sup> the idea, defended by Joseph Raz,<sup>9</sup> John Gardner,<sup>10</sup> and others, that legal positivism is mainly a thesis about sources of law,<sup>11</sup> even though many legal philosophers (for instance in France or in Italy) conceive of legal positivism, and legal theory in general, in a

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<sup>3</sup> See on this intertwinement Aleksander Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as Source of Law* (Springer 2005) 5-9.

<sup>4</sup> In what follows we will take ‘legal theory’, ‘jurisprudence’ and ‘legal philosophy’ to be broadly synonymous.

<sup>5</sup> See, e.g., Riccardo Guastini, ‘On the Theory of Legal Sources. A Continental Point of View’ (2007) 20(2) *Ratio juris* 302.

<sup>6</sup> See, e.g., Manuel Atienza and Juan Ruiz Manero, *A Theory of Legal Sentences* (Springer 1998) 141-160; Eugenio Bulygin, *Essays in Legal Philosophy* (OUP 2015) 117-123, and the debate between Bulygin and Ruiz Manero: Eugenio Bulygin, ‘Algunas consideraciones sobre los sistemas jurídicos’ (1991) 9 *Doxa* 257; Juan Ruiz Manero, ‘Normas independientes, criterios conceptuales y trucos verbales. Respuesta a E. Bulygin’, (1991) 9 *Doxa* 281; E. Bulygin, ‘Regla de Reconocimiento: ¿Norma de obligación o criterio conceptual?’ (1991) 9 *Doxa* 311.

<sup>7</sup> This is hopefully changing: see Gregory Bligh, *Les bases philosophiques du positivisme juridique de H.L.A. Hart* (Institut universitaire Varenne 2017).

<sup>8</sup> For instance, see Bulygin, *Essays in Legal Philosophy* (n 1) 136-145; Jose Juan Moreso, *Legal Indeterminacy and Constitutional Interpretation* (Springer 1998) 66-72; Fernando Atria, *On Law and Legal Reasoning* (Hart Publishing 2001) 189.

<sup>9</sup> Joseph Raz, ‘Authority, Law and Morality’ in Joseph Raz, *Ethics in the Public Domain* (OUP 1994); Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 44.

<sup>10</sup> John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46(1) *The American Journal of Jurisprudence* 199.

<sup>11</sup> This is Raz’s so-called sources thesis, which rests on a fairly abstract and thin notion of sources as ‘social facts’. This thin-ness has been criticised by Guastini, ‘On the Theory of Legal Sources’ (n 5).

different fashion, viz. as a theory of legal science.<sup>12</sup> So there remains a divide, or rather *divides*, but they are subtler than one might think at first.

To sum up: The concept of sources of law is not a specifically legal-philosophical concept, and indeed many Continental philosophers of law have rejected it as confused or ambiguous; there is no specifically Continental concept of sources, but a greater, albeit partial, integration between traditions. These are the reasons why what follows is not a mere state-of-the-art overview of the Continental analytical philosophy of sources of law, because it may very well not exist. So we will not try to encompass every legal-philosophical tradition on the Continent, and we will make a number of references, when suitable, to developments in post-Hartian jurisprudence. We will also advance our own view of sources of law, even if it will be grounded in the discussion of what others have said before us.

What we intend to do in this chapter, more specifically, is to tackle two distinct problems about sources of law. In the first part, we will try to show that there is an indeterminacy in the very concept of sources of law, which results from a kind of partial ambiguity, that is, a kind of lexical ambiguity where different meanings partially overlap. In the second part, we will study the classical controversies regarding the various types of sources of law, such as the respective status of legislation, precedent, custom, legal doctrine, etc., and explain how legal philosophers may address them.

## I. The Concept of Sources of Law

### A. The Ambiguity of the Term ‘Sources of law’

Many Continental legal philosophers have pointed out that the term ‘sources of law’ is ambiguous. In the first edition of *The Pure Theory of Law*, Hans Kelsen wrote that ‘enactment and custom are usually brought together in the concept of ‘source of law’, a metaphorical expression and therefore ambiguous’.<sup>13</sup> And in *General Theory of Law and State* he maintained that “‘source of law’ is a figurative and highly ambiguous expression’.<sup>14</sup> In his *Theorie der Rechtsquellen*, Alf Ross said that the problems raised by the concept of sources of law do not

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<sup>12</sup> See on this Fabio Shecaira, ‘Legal Scholarship and the Subject-Matter of Jurisprudence’ (2015) 101 *Archiv für Rechts-und Sozialphilosophie* 411.

<sup>13</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson trs, Clarendon Press 1992) 67.

<sup>14</sup> Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, first published 1945, The Lawbook Exchange 1999) 131-132. On Kelsen’s criticisms, see Norberto Bobbio, ‘Kelsen et les sources du droit’ (1982) 27 *Archives de philosophie du droit* 135.

have ‘a character of methodological unity’,<sup>15</sup> ‘sources of law’ having different meanings according to different purposes. Many other authors underscore these ambiguities in different ways.<sup>16</sup>

The term ‘sources of law’ is ambiguous insofar as it has an array of distinct yet overlapping meanings. We can distinguish between at least four such meanings: 1. Sources as *facts*; 2. Sources as *norms*; 3. Sources as *authoritative texts or materials*; and 4. Sources as *causes*. Let us examine and illustrate each meaning in turn.<sup>17</sup>

### 1. *Sources as facts.*

This is the broadest meaning of ‘sources of law’: sources are *social facts*, from which laws derive their existence, or their validity.<sup>18</sup> This view of sources and law-creating social facts has become quite commonplace in Anglo-American jurisprudence. For instance, Joseph Raz writes that ‘the sources of law are those facts by virtue of which it [the relevant law] is valid’.<sup>19</sup> But many Continental legal theorists use the term ‘sources of law’ with this meaning as well (even if it is usually only part of a richer concept of sources). For instance, Riccardo Guastini writes: ‘It is a matter of common agreement that by source of law one should understand any law-producing act (or fact)’<sup>20</sup> even if, as we shall see later, he thinks that such a definition is flawed, at least if one adopts a sceptical view of legal interpretation.

Understood in this broadest way, sources are nothing but the facts which must obtain in order for a given rule or norm to be a *legal norm*. We might say that they are methods for law-creation. In any given legal system, if you want to create law you must perform the acts, or bring about the facts, which bring about legal validity in that system. We do not need here to develop further the concept of validity we have in mind. Suffice it to say that according to us, a rule is a valid rule of a legal system if it belongs to that legal system, if it is part of the laws

<sup>15</sup> Alf Ross, *Theorie der Rechtsquellen* (Franz Deuticke 1929) 291.

<sup>16</sup> See, e.g., Enrico Pattaro, *The Law and the Right: A Reappraisal of the Reality that Ought to Be* (Springer 2005) 43-44; Riccardo Guastini, *Le fonti del diritto: Fondamenti teorici* (Giuffrè 2010) 45.

<sup>17</sup> There are many other possible conceptual typologies. See, e.g., Fabio Shecaira, *Legal Scholarship as a Source of Law* (Springer 2013) 9-15; Josep Aguilo Regla, *Teoría General de las Fuentes del Derecho (y del Orden Jurídico)* (Editorial Ariel 2000) 21-35.

<sup>18</sup> Many legal philosophers identify validity with existence: see Hans Kelsen, *Pure Theory of Law* (2nd ed., Max Knight tr., University of California Press 1967) 10; Raz, *Authority of Law* (n 9) 146. On the conceptual diptych existence/validity, see Stephen Munzer, *Legal Validity* (Nijhoff 1972) 5-43; Matthew Grellette, ‘Legal Positivism and the Separation of Existence and Validity’ (2010) 23(1) *Ratio Juris* 22; Paolo Sandro, ‘Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law’ in Pauline Westerman, Jaap Hage, Stephan Kirste and Anne Ruth Mackor eds, *Legal Validity and Soft Law* (Springer 2018).

<sup>19</sup> Raz, *Authority of Law* (n 9) 47.

<sup>20</sup> Guastini, ‘On the Theory of Legal Sources’ (n 5) 304.

that make up that system. This is the very function sources of law have: they are the facts or acts that bring about legal validity.

An interesting figure in this respect is the Danish legal philosopher Alf Ross. One of his earliest works is devoted to the theory of sources,<sup>21</sup> but his treatment of the subject matter is less jurisprudential than historical in its outlook. He returned, however, to the topic in many subsequent writings, and he emphasised this aspect of sources as formal criteria of ascertainment of the difference between law and non-law. For instance, in *Towards a Realistic Jurisprudence*, he explains that sources of law are used to determine the legal status of norms, and that they are the epistemological basis of our knowledge about what is and what is not the law:

Positive law (the law of the land) is the sum and substance of norms that have come into existence in a historical process which by virtue of certain external, observable characteristics qualify the norms as valid law. The doctrine of the sources of law is the doctrine of these external characteristics. A source of law – e.g. statutes – denotes such an external characteristic – the form of legislation – which as a general form guarantees that the content of norms expressed herein is law. The concept ‘legal source’ thus denotes a certain *general form*, which is the epistemological basis for the knowledge that the normative content given therein is law.<sup>22</sup>

Ross is careful to point out that the determination of legal validity is one thing, and that the interpretation and application of valid legal norms is another: ‘The activity which, when a norm is given in a legal source, aims at establishing its complete and precise, abstract or concrete legal meaning, is called interpretation, or judicial method’.<sup>23</sup> Although he does not discuss this question, he clearly assumes that we can in a meaningful way distinguish between the existence of a legal norm, expressed, say, by a statutory provision, and its precise content. It is worth noting here that the distinction that Ross insists on is often ignored in Nordic legal thinking, where many writers think of sources of law not only as methods for law-creation, but also as methods for law-interpretation and law-application.<sup>24</sup>

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<sup>21</sup> Alf Ross, *Theorie der Rechtsquellen* (n 15).

<sup>22</sup> Alf Ross, *Towards a Realistic Jurisprudence* (Annie I. Fausbøll tr, Scientica Verlag 1989) 125-126. Note that Ross here refers to *statutes* as a source of law, even though, on his own analysis, it is legislation that is a source of law, whereas its products – statutes – are legal norms.

<sup>23</sup> *Ibid* 127.

<sup>24</sup> The interested reader, who happens to know the Scandinavian languages, may wish to consult Torstein Eckhoff, *Rettskildelaere* (4th ed. with Jan Helgesen. Tano, 1997) 17-19.

As we shall see (in Section 4), in his later work, Ross came close to endorsing a much broader concept of sources of law, understood as the set of factors that influence judicial decisions.

## 2. Sources as norms

On another understanding sources are *norms*. They are the norms that empower certain persons, organs or institutions to make new law, and that regulate the way legal norms are to be created. Two kinds of norms can be described as sources of law. First, *immediate source-norms*, which regulate the production of norms that are situated immediately below them in the normative hierarchy. For instance, the Constitution is the source of the validity of statutes insofar as it regulates the way statutes are to be enacted by the legislature. Secondly, *ultimate source-norms* are the ultimate reason for the validity of legal norms; an example would be Kelsen's basic norm.

Although some authors dismiss this understanding of sources as a category mistake,<sup>25</sup> others assert that it is part of the very concept of sources, or at least that it is one of the various concepts of sources to be found in the literature. Hans Kelsen, for instance, makes a distinction between sources as facts and sources as norms, though he also recommends that legal scholars stop using this term precisely because of its ambiguity:

Enactment and custom are usually brought together in the concept of 'source of law', a metaphorical expression and therefore ambiguous. 'Source of law' may signify these two divergent methods for creating general norms—enactment, a purposeful creation brought about by central organs; and custom, an unwitting, decentralised creation by way of the legal parties themselves. Or, 'source of law' may signify the ultimate basis of the validity of the legal system, which is expressed here with the concept of the basic norm. In the broadest sense, however, 'source of law' signifies every legal norm, not only the general but also the individual legal norm, in so far as the latter *qua* objective law yields law in the subjective sense, that is, in so far as it yields a legal obligation or a legal right. Thus, a judicial decision is the source of the special obligation of one party and the corresponding right of the other party. Given its ambiguity, the expression 'source of law' seems of no use at all, and it would be well to replace the metaphor with a clear and straightforward statement of the problem to be solved in a given context.<sup>26</sup>

<sup>25</sup> See Fabio Shecaira, 'Sources of Law are Not Legal Norms' (2015) 28(1) *Ratio Juris* 15.

<sup>26</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 13) 67. Note that here (and, as we shall see, in *General Theory of Law and State*, and in the second edition of *Reine Rechtslehre*) Kelsen does not identify *precedent* as a source of law. As we shall see below, his view is that whereas legislation and custom give rise to general legal norms, precedent gives rise to *individual* legal norms, unless otherwise authorised to create general norms.

According to Kelsen, the term ‘sources of law’ can refer to a variety of different things; ‘source of law’ can denote a method for law-creation – something quite close to our sense 1 –, but, in another sense, a source can also be a norm, specifically a norm which regulates the way other norms of the legal system are to be created. In Kelsen's dynamic theory of normative validity, a higher-ranking norm can be described as the ‘source’ of the lower-ranking norms whose creation it regulates: for instance, the Constitution is the source of the validity of the statute. However, given the many meanings attributed to the term ‘source’, Kelsen advises that it should be abandoned altogether

### ***3. Sources as authoritative texts/materials***

On this understanding, a source is not, say, the act of legislation (sense 1 above), or the norm that empowers the legislature and regulates legislation (sense 2), but the *text* of the statute. Sources are, therefore, all the texts or materials (including statements of customary practices) that law-applying organs are empowered to interpret and refer to in their reasoning.

The distinction between sources as *(f)acts* and sources as *materials* is not a distinction between two kinds of sources (two species of the same genus), but between two concepts of sources.<sup>27</sup> The intensions of the two concepts are partially overlapping, but they have different focal points. The former concept is centred around the process of law-creation and the ascertainment of legal validity; the latter is concerned with the process of law-application and law-interpretation and the ascertainment of legal content. This distinction is still vague: do sources-as-texts include only ‘classical’ sources (statutes, precedents, etc.), or do they include all possible determinants of legal content (including *travaux préparatoires*, foreign legal texts, precedent, doctrinal scholarship)? The concept of sources as texts appears to entail that every text with a reasonable degree of authoritativeness referred to in the process of law-application and law-interpretation is a source of law. This tends to blur the distinction between law-creation and law-application: either statutory texts are special, because they are the product of a law-creating (f)act – contrary to, e.g., legal scholarship – in which case meaning 1 enjoys conceptual priority; or they are not special, just more authoritative – since a source of law is any legal text used in the application process – in which case the distinction will be blurred.

Be that as it may, the distinction between sources as facts and sources as texts is an interesting one, as it can serve a variety of theoretical purposes. For instance, rule-sceptics who

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<sup>27</sup> See Riccardo Guastini, ‘Fragments of a Theory of Legal Sources’ (1996) 9(1) *Ratio Juris* 364, 368; Riccardo Guastini, *Teoria e dogmatica delle fonti* (Giuffrè 1998) 91-92; Guastini, *Le fonti del diritto* (n 16), 69.

believe that legal rules are the products of the interpretation of normative texts will choose the concept of sources as texts, since it allows them to eschew the idea that law-creating (f)acts directly posit valid legal norms before any interpretation of the text resulting from these acts. As Riccardo Guastini writes: ‘In the language of the sceptical theory the sources of law are normative texts, since normative acts simply produce texts worded in a natural language. Hence, if law is deemed to be a set of rules *stricto sensu*, normative acts are not sources of law at all – legal rules stem from normative texts by means of interpretation’<sup>28</sup>.

According to Guastini, then, normative acts do not directly give rise to valid norms, because they do not posit norms in the first place. All they do is produce a text. That text will be a source of law insofar as it contains a multiplicity of possible legal contents; the role of interpretation is to choose among these possible contents. In this respect, the normal order of things is not: first validity, then legal content (as ascertained by way of interpretation) – but the other way around: first interpretation picks out one of the possible contents of the text; then, insofar as the interpreter is an authentic interpreter,<sup>29</sup> a valid norm results from the process.

#### ***4. Sources as causal factors***

The last concept of sources covers all factors that causally influence the law-making and the law-applying processes. Among these factors one will find legal as well as extra-legal considerations, be they ideological, political, economic, etc. Kelsen for one was very well aware of this possible understanding of the concept of sources of law. He points out that the term ‘source of law’ is sometimes used to encompass ‘all those ideas which actually influence the law-creating organs,’ emphasising that unlike the others, this type of source of law is not legally binding:

The expression ‘source of law’ is finally used also in an entirely non-juristic sense. One thereby denotes also all those ideas which actually influence the law-creating organs, for instance, moral norms, political principles, legal doctrines, the opinions of juristic experts, etc. In contradistinction to the previously mentioned ‘sources’ of law, these ‘sources’ do not as such have any binding force. They are not – as are the true ‘sources of law’ – legal norms or a specific content of legal norms.<sup>30</sup>

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<sup>28</sup> Guastini, ‘Fragments of a Theory of Legal Sources’ (n 32) 368.

<sup>29</sup> A notion Guastini borrows from Kelsen. See Kelsen, *Pure Theory of Law* (n 18) 354.

<sup>30</sup> Kelsen, *General Theory of Law and State* (n 14) 132.

The extra-legal component of this concept of source leads Kelsen to discard it as useless for the purposes of the pure theory of law.

An interesting figure in this respect is Alf Ross, and mainly the way he approaches the concept of sources of law in his *magnum opus On Law and Justice*. As we saw earlier, Ross adhered to the idea that sources are (formal) determinants of legal validity; but he also asserted that sources are all the factors that influence a judge's decision and render it predictable. He maintains that if we wish to be able to predict how a judge will decide the case before him, we need to identify and clarify the *ideology* that judges (in the relevant jurisdiction) embrace and that tells them how to construct the legal norm they need to decide their case. Focusing on Danish law, he explains that

. . . the judge has to search in each individual case for the norm of conduct he needs as a basis for his decision. Since prediction [of how courts will decide cases] is nevertheless possible, it must have to do with the fact that the mental process through which the judge arrives at a stage where he can base his decision on one rule rather than another does not take place in a capricious and arbitrary way (varying from judge Peter to judge Paul), but is determined by attitudes and notions—by a common normative ideology which is present and operative in a uniform way within the minds of Danish judges when acting in their vocation as judges.<sup>31</sup>

The relevant ideology, he continues, is the topic of (what he calls) the theory (or the doctrine) of the sources of law, and it 'consists of directives . . . [which] point out to the judge how he should proceed in order to discover the directive or directives which are decisive in resolving the dispute.'<sup>32</sup> Ross also observes that the term 'source of law' suggests that the law flows from its sources in something like the way water flows from a well:

Traditionally, this theory is called 'the doctrine of the sources of law', because we are used to thinking that the ideology we are discussing consists of directives to the judge, ordering him to apply the rules which have been created according to certain methods of procedure. From there, it is only a short step to conceiving of such a method of procedure as a source. What comes to light in a certain way, what gushes forth from a certain procedure, this is the law the judge has to apply.<sup>33</sup>

In addition to the 'classical sources' (legislation, custom, precedent, etc.), Ross identifies another kind of source of law which he calls (somewhat infelicitously) 'the nature of the matter'

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<sup>31</sup> Alf Ross, *On Law and Justice* (Jakob v. H. Holtermann ed, Uta Bindreiter tr, OUP 2019) 89.

<sup>32</sup> *Ibid* 90.

<sup>33</sup> *Ibid* 90.

by which he means considerations that stem from the judge's cultural tradition, that is, considerations drawn from custom and from legal, religious, and social institutions.<sup>34</sup>

Ross is, however, careful to point out that the term 'source of law' is more apt in the case of legislation than in the case of precedent, custom, or (what he refers to as) the nature of the matter. For, he points out, whereas legislation delivers ready-made rules, precedent and custom deliver only half-finished rules, and the nature of the matter delivers nothing more than ideas or inspiration to the judge. Accordingly, he makes a distinction between three main types of sources of law, depending on the degree to which they present the judge with a ready-made rule: (i) the completely objectivised type of source, that is, legislation (in the widest sense), (ii) the partly objectivised type of source, that is, custom and precedent, and (iii) the non-objectivised, free type of sources, that is, 'the nature of the matter'.<sup>35</sup> Ross observes, however, that because these types of sources of law are so different, it is difficult to formulate a source of law concept that comprises them all. And he therefore maintains that if we nevertheless wish to formulate such a concept, we must be content with something rather indefinite, such as 'the sum total of the factors exercising influence on the judge's formulation of the rule on which he bases his decision'.<sup>36</sup> And such influence, he adds, can vary from one type of source to another.

We can now better appreciate the ambiguity that lies at the heart of Ross's discussion of sources of law in *On Law and Justice*.<sup>37</sup> First, whereas his typology of sources of law – legislation, precedent, custom, and the nature of the matter – suggests that he is concerned with sources of law conceived as law-creating facts, his attempt at formulating a source of law concept suggests rather that he thinks of sources of law as factors that causally influence the thinking of judges. For, as we have seen, the decisive property of sources of law, according to the view under consideration in this section, is that sources are factors 'exercising influence on the judge's formulation of the rule . . .' But these two senses of the term 'source of law' express two very different source of law concepts. Which one does Ross espouse?

We believe this ambiguity reflects a duality of Ross's concept of legal validity, which was recently brought to light by the new translation of *On Law and Justice*. As is now well known,<sup>38</sup> Ross uses two concepts of valid law: *gyldig* and *gæltende ret*. The first one describes the common use of 'validity' (by judges, lawyers, officials, and laypersons alike): if you ask a

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<sup>34</sup> Ibid., 115-118.

<sup>35</sup> Ibid., 91-2.

<sup>36</sup> Ibid., 92.

<sup>37</sup> For a good commentary, see Antonino Rotolo, 'Sources of Law in the Civil Law' in Roger Shiner, *Legal Institutions and the Sources of Law* (Springer 2005) 148-150.

<sup>38</sup> Jakob v. H. Holtermann, 'Introduction' in Ross, *On Law and Justice* (n 36) l-lv.

judge what is valid law in his legal system, he will most probably refer you to sources understood as law-creating facts, or as texts (meanings 1 and 3 above). So the idea of sources of law as formal criteria of validity defended by Ross reflects that ordinary use of the notion of valid law. The second notion (*gæltende ret*) is meant to be a concept of validity as conceived by the science of law – which Ross envisions as a resolutely empirical enterprise. This is why the translator, Uta Bindreiter, has chosen to render *gæltende ret* as *scientifically valid law*: what is valid law in the eyes of legal science differs from a legal insider’s understanding of validity. As Ross writes, ‘scientifically valid Danish law can be defined as the normative ideology which is actually operative, or must be thought operative, in the mind of the judge, because it is felt by him to be socially binding and is, therefore, complied with efficaciously’.<sup>39</sup> The concept of sources as causal factors reflects this concept of scientific validity.

Finally, it is worth noting that one who thinks of sources of law as causal factors will find it more difficult to maintain a clear distinction, as Ross wishes to do (see Section I.A.1 above), between determining whether a given norm is a legal norm, which is a matter of existence or legal validity, and determining the precise content of the relevant legal norm by way of interpretation. This suggests that Ross would have reason to prefer the view that sources of law are facts or law-creating acts.

## B. The Proposed Analysis

The idea we defend in this chapter is that a norm is a *legal* norm if, and only if, it can be traced back to a source of law of a legal order.<sup>40</sup> For example, a given norm is a French legal norm if, and only if, it can be traced back to a source of law recognised by the functionaries – aka officials – of the French legal order. The idea, then, is that, necessarily, a norm, *N*, is a legal norm if, and only if, (i) there is a legal order, (ii) there are one or more functionaries of this legal order, (iii) there are one or more sources of law, (iv) the sources are recognised by the functionaries, and (v) *N* can be traced back to one of the sources. We might express this idea more formally, in the language of modal quantificational logic, as follows (where  $\Box$  stands for ‘necessarily’;  $Nx$  stands for ‘*x* is a legal norm’;  $Oy$  stands for ‘*y* is a legal order’;  $Fz$  stands for

<sup>39</sup> Ross, *On Law and Justice* (n 36) 46.

<sup>40</sup> We have defended this idea in some of our separate writings: Torben Spaak, ‘The Scope of Legal Positivism: Validity or Interpretation?’ in Torben Spaak and Patricia Mindus, eds, *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021) 443-464; Mathieu Carpentier, ‘Sources and Validity’ in Pauline Westerman, Jaap Hage, Stephan Kirste and Anne Ruth Mackor eds, *Legal Validity and Soft Law* (Springer 2018).

‘z is a functionary of y’, Sw stands for ‘w is a source of law’; Rzw stands for ‘z recognises w’; and Txw stands for ‘x can be traced back to w.’):

$$\Box(\forall x)(Nx \equiv (\exists y)(Oy \& (\exists z)(Fz \& (\exists w)(Sw \& Rzw \& Txw))))$$

Note that, on this analysis, neither constitutions, statutes, or general principles of law, nor contracts, including collective agreements and standard contracts, nor preparatory works, nor doctrinal writings, nor foreign law, nor extra-legal considerations that actually influence the legal thinking of judges, qualify as sources of law, even though they may all, in different ways, be relevant to legal thinking and legal problem-solving. For example, although constitutions and statutes are (or include) legal norms, they are not sources of law; and they are legal norms because they can be traced back to a source of law, namely, legislation.

Note also that the proposed analysis does not specify what kind of necessity is in play here. As we see it, the necessity operator can plausibly be understood to express either conceptual or metaphysical necessity, and this means that the analysis, if correct, will express either a conceptual or a metaphysical truth. Our own preference is to think of the relevant type of necessity as conceptual necessity, though not everyone would agree.<sup>41</sup> The point of introducing the necessity operator is simply to emphasise that, given the proposed analysis of the concept of a source of law, this is not just what a legal norm is, but what it *must* be.

The reason why we defend this analysis of the concept of a source of law is that the concept thus conceived conveys an idea that is very important in ordinary legal thinking, and that needs to be preserved, namely, that a norm is a legal norm if, and only if, it can be traced back to a source of law of the relevant legal order – without the concept of a source of law thus conceived, our legal thinking would be impoverished. If we assume that a legal order comprises not only a court organisation, but also a system of norms (a legal system) that is (i) socially efficacious and (ii) includes those and only those norms that can be traced back to one of its sources of law, we may say that the concept of a source of law can facilitate investigations into the legal status of norms by laying down a necessary condition for membership of norms in the legal system – if a norm cannot be traced back to such a source of law, it is not a member of the system. The reason why it is not also a sufficient condition for being a member of the legal system is simply that the system must also be socially efficacious in order to qualify as a legal system.

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<sup>41</sup> See, e.g., Michael S. Moore, ‘Law as a Functional Kind’ in Robert P. George ed, *Natural Law Theory. Contemporary Essays* (OUP 1992) 188, 198-200.

Now, two caveats must be made about this analysis of the concept of a source of law. First, it is not a specifically ‘Continental’ analysis: it squares well with the idea of a rule of recognition, which picks out certain facts as criteria to be met in order for a norm to qualify as a legal norm; indeed the equation of sources of law and criteria of validity – understood as criteria for membership in a legal system – is the way Hart characterises the rule of recognition,<sup>42</sup> and so do many post-Hartian legal theorists in the Anglophone world. Second, as we saw in the first section, the concept of sources of law, such as it is dealt with by many a Continental legal theorist, reveals a wide array of meanings, so our proposed definition can be said to be explicative in Carnap’s sense. It must be clear by now that we view sources of law as law-creating facts, or, if you will, as acts or facts that determine legal validity.

### C. A Defence of the Proposed Analysis

#### 1. *Two levels of legal thinking*

The view advocated above, that sources of law are law-creating (f)acts, that is, methods for law-creation in the sense explained, gains support from what we consider to be a very natural distinction between two levels of legal thinking, namely, between the level of sources of law (validity, existence) and the level of interpretation and application of the law (content). The idea is simply that it is one question whether a given norm (rule, principle, standard, etc.) is legally valid, that is, exists as a legal norm, and another question just how this legally valid norm is to be interpreted and applied. To determine whether a norm is legally valid, one asks whether it can be traced back to the sources of law: legislation, custom, or precedent. And to determine how this legally valid norm is to be understood and applied, one makes use of the tools of the legal method (as it is called in the Nordic countries), such as the interpretive arguments (textual, systemic, intentionalist, or teleological interpretive arguments), the modalities of decision (plain application, *contra legem* decision, liberal interpretation, strict interpretation, analogy, *argumentum a contrario*), the rule of lenity, the principle of legality, interpretive presumptions, such as ‘courts should accept agency interpretations unless they are obviously wrong,’ conflict-solving maxims such as *lex superior*, *lex posterior*, and *lex specialis*, and more.<sup>43</sup>

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<sup>42</sup> See, e.g., HLA Hart, *The Concept of Law* (3rd ed, OUP 2012) 106.

<sup>43</sup> On this, see Torben Spaak, *Guidance and Constraint: The Action-Guiding Capacity of Theories of Legal Reasoning* (Iustus 2007), chap. 3; Mathieu Carpentier ‘Kelsen on Derogation and Normative Conflicts’ in Matthias

But, as we have seen, Ross points out that legislation, precedent, and custom, conceived as sources of law, differ in an important way: Whereas legislation provides us with ready-made legal norms (rules), precedent and custom provide us only with half-finished products, which will have to be completed by the judge.<sup>44</sup> The difference identified by Ross is of interest in this context, because it is clearly more natural to distinguish between validity and interpretation of legal norms when they come more or less ready-made from a source of law than when they have to be constructed in some fashion by the judge on the basis of a certain legal raw-material.<sup>45</sup> For in the former case, but not in the latter, one can plausibly maintain that there is something that in many cases can guide human behaviour as it stands, and the capacity to guide human behaviour is surely a central function of legal norms. The reason why ready-made legal norms in many cases can guide human behaviour as they stand is simply that law-appliers can typically (but not invariably) be relied on to respect their wording – if law-appliers did not reliably respect the wording of legal norms, the latter could not guide behaviour without having first been interpreted by the former, since the law-subjects would otherwise have no idea what the norms require of them. We see, then, that whereas the distinction between sources of law, conceived as methods for law-creation, on the one hand, and the methods and techniques for interpretation and application of the law, on the other, is unproblematic in the case of legislation, it is a bit problematic in the case of precedent and custom. What this means is that the concept of a source of law defended in this chapter, although it would be a bit problematic in systems of precedent and customary norms, will function very well in systems of enacted norms. However, as luck would have it, in all, or almost all, contemporary legal systems, the overwhelming majority of legal norms are precisely enacted norms. We will return to this problem in the last section of this paper.

The following are the reasons why we reject the above-mentioned senses 2-4. Sources of law are not *norms*, because validity is a matter of membership: whether a norm belongs to the legal system is to some extent independent of – or rather: more fundamental than – its conformity to a higher-ranking norm. As Kelsen himself was well aware, there are many laws that belong to a legal system (and are valid in the sense of membership) in spite of violating a higher norm. Indeed, if talk of a norm’s “invalidity” – or “contrariety to higher-ranking norms” – is to be meaningful in the first place, one has to presuppose that such norm is valid in the

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Jestaedt, Ralf Poscher, and Jörg Kammerhofer eds, *Die Reine Rechtslehre auf dem Prüfstand / Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions* (Steiner Verlag 2020) 136-140.

<sup>44</sup> Ross, *On Law and Justice* (n 36) 76-7.

<sup>45</sup> The text in this paragraph can be found, more or less verbatim, in Spaak, ‘The Scope of Legal Positivism’ (note 44).

sense of belonging to the legal system. Sources of law are not *texts*, because it is impossible to distinguish between authoritative sources and all other legally relevant materials without having recourse to sense 1 – authoritative texts are the products of law-creating (f)acts, which is why sense 1 has a conceptual priority over sense 3. And sources of law are not *causal factors*, at least if we wish to take seriously the concept of sources of law manifested in ordinary legal thinking.

In sum, we believe that sense 1 is more fundamental than the other three senses. If law is a system of norms, we need to know which norms belong and which do not belong to the system. Such is the proper job of sources of law.

## ***2. Legal Positivism, the Rule of Recognition, and Sources of law***

The analysis of the concept of a source of law that we defend in this chapter is in keeping with a view of the social thesis of legal positivism that we have defended elsewhere,<sup>46</sup> namely, that it applies to the level of the sources of law, but not to the level of interpretation and application of the law. We have also argued, more specifically, that H. L. A. Hart's rule of recognition is best understood as a rule that constitutes and identifies sources of law conceived as methods for law-creation. Hart conceives of the rule of recognition as a conventional rule, in the sense that part of the reason why the officials follow the rule is that other officials follow it. Hart's conventionalism thus presupposes that the officials, on the whole, agree about the content of the rule of recognition – if there were little or no agreement, there simply would be no convention and, therefore, no rule of recognition.<sup>47</sup> Now while there is considerable agreement in most legal orders about what the sources of law are, there is much less agreement about how to interpret and apply the norms of the system. If, however, there is little agreement about issues of interpretation and application of the law, there can be no convention – and thus no rule of recognition – about such matters; and this in turn means that the rule of recognition cannot plausibly be thought of as a rule about interpretation and application of the law. The natural conclusion, then, is that it is a rule about sources of law in the sense proposed in this chapter.

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<sup>46</sup> See Spaak, 'The Scope of Legal Positivism' (n 44).

<sup>47</sup> This is, of course, an adaptation of Ronald Dworkin's theoretical disagreement objection to Hart's theory of law. See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 4-11. On this, see Spaak, 'The Scope of Legal Positivism' (n 44).

## II. Types of Sources of Law

One of the main questions debated throughout the history of modern legal thought is ‘what counts as a source of law?’. Various sources have been recognised as such: legislation, custom, precedent, doctrinal scholarship, etc.<sup>48</sup> The question, however, is whether all those sources have the same status, and whether they are sources in the same sense and to the same extent. This kind of juristic debate emerged in civil law systems at the turn of the 19<sup>th</sup> century, when it became clear that legislation, understood *lato sensu* (covering not only ‘ordinary’ legislation but also constitution-making, EU law-making, and administrative law-making), was primed to become the primary source of law. Civil lawyers were therefore faced with a dilemma: on the one hand, legislation was meant to displace every other source of law, thus becoming the only ‘real’ source; on the other hand, there was no escaping the role still played by these displaced sources in the shaping of the law. For instance, in many civil law countries, precedent does not have binding force; even more to the point, judges are *barred* from creating general rules by way of precedent. However, almost all jurists accept that precedents create law to some extent: when law professors teach any legal field, when lawyers write their briefs, when judges write their opinions, they typically refer to the case-law of the apex courts. For the last two centuries jurists have gone out of their way to understand this problem and to solve it. In what follows, we aim to give a short primer<sup>49</sup> on this somewhat old-fashioned juristic debate and then show how legal philosophy can provide tools to dispel some of the confusions that seem to lie at the heart of it.

### A. The Centrality of Legislation

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<sup>48</sup> In what follows, we will focus mainly on the sources of law in municipal legal systems. We will (somewhat regrettably) ignore the question of sources in international law. There are four main reasons why we have chosen to proceed this way. First, we believe the general theory adumbrated in the first part applies to all legal systems. Secondly, what we just said notwithstanding, there is a certain degree of specificity to the way international lawyers and international law theorists conceive sources of law, and to the kind of questions the theory of sources in international law usually raises. For instance, the fragmentation of the international order, the duality of states as both subjects and ‘sources’ of law, the notion of relative normativity induced by, e.g., soft law and *jus cogens*, and whether or not the latter is a distinct source of law, etc. These questions are *sui generis* to some extent, and a whole section on them would take dozens of pages... The last two reasons are more closely linked with the general project of this book. Thirdly, International law theory is an autonomous field, where the Continental/Anglo-Saxon divide is not as strong as in general jurisprudence. Fourthly, in the last fifty years, it has shown some resistance to analytical jurisprudence, some notable exceptions notwithstanding.

<sup>49</sup> The object of this primer is to situate the debate, not to give exhaustive information on it, which would exceed the scope of the present paper.

As legislation, and specifically, codification rose up to become the dominant source of law at the turn of the 19<sup>th</sup> century, precedent, legal doctrine/scholarship and, to a lesser extent, custom were, on the Continent, relegated to the status of imperfect, lesser sources. There are many causes of this paradigm shift. The most obvious is the completion of the construction of the state as the inescapable political form of modern times.<sup>50</sup> If the state is the ultimate lawgiver, if every law must be grounded in the will of the state, then legislation appears as the easiest way to express the will of the state and to have it become law. In this sense, the juristic elevation of legislation as the source of law *par excellence* is but a consequence of two centuries of voluntarist philosophies of law and the state (Hobbes, Pufendorf, Rousseau).

The special status granted to legislation among the sources of law is by no means a Continental characteristic. Legislation has become the predominant source in most modern legal systems, including the common law world. However, what makes civil law a somewhat particular case is the relative devaluation of *other* sources of law, both in actual legal practice and in juristic thinking. Continental legal scholarship throughout the 19<sup>th</sup> century debated the respective merits of legislation and other sources, until it became commonplace that only legislation (progressively expanded in scope so as to cover constitution-making) exhibited the virtues of clarity, coherence, certainty and predictability essential to the very notion of *Etat de droit* or *Rechtsstaat*. In this respect, the ultimate form of legislation is codification, understood as the most rational and systematic exposition of the law in force at a given time. It started of course with the French Civil Code, but codification soon became an ever-expanding process so as to cover all legal fields.<sup>51</sup>

As we shall see, various ideological and legal-political factors explain the relative devaluation of other sources of law compared to legislation.

### ***1. Legislation and precedent***

Let us begin with precedent. The French case serves as a clear paradigm here. French revolutionaries were notoriously distrustful of judges. The activism of the *Parlements* – that is, the appellate courts of the *Ancien Régime* – served as an explicit foil: absent any supreme court, the *Parlements* (especially the Paris court) had sovereign jurisdiction over matters brought

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<sup>50</sup> On the link between legislation and the construction of the modern state in Europe, Alain Wijffels, *Introduction historique au droit* (2nd ed, Presses Universitaires de France 2014) 129-160; Damiano Canale, ‘The Many Faces of the Codification of Law in Modern Continental Europe’ in Damiano Canale, Paolo Grossi and Hasso Hoffmann eds, *A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Springer 2009).

<sup>51</sup> There are today 74 codes in force in France.

before them and judges routinely legislated from the bench (*arrêts de règlement*); they also did not hesitate to ‘strike down’ royal edicts whenever they deemed them contrary to the Basic Laws of the Realm. Moreover, liberal writers throughout the 18<sup>th</sup> century (Beccaria and Montesquieu, notably) denounced the arbitrary power, and the corruption, of judges, especially in criminal matters. For all those reasons, the submission of judges to the law was an integral part of French constitutionalism: as Montesquieu (himself a judge at the Bordeaux *Parlement*!) famously said: judges are ‘the mouth that pronounces the word of the law (*la loi*), inanimate beings who can moderate neither its force nor its rigor.’<sup>52</sup>

Hence Article 5 of the French Civil Code prohibits judges ‘to pronounce judgment by way of general and regulatory dispositions’. Nevertheless, it soon became obvious that judicial decisions still pretty much shaped the law – even more so since Article 4 of the Civil Code prohibits judges to ‘refuse to give judgment on the pretext of legislation being silent, obscure or insufficient’<sup>53</sup>. Absent any judicial reference to the legislature (*référé législatif*) – a mechanism briefly tried out during the French Revolution and soon enough abandoned – it was obvious that judges faced with an obscure or contradictory statute had no choice but to develop the law on their own. Whole parts of French law were thus shaped by judicially created rules: such is the case of administrative law, which was almost entirely developed by France’s top administrative court, the *Conseil d’Etat*. But, more interestingly, the same holds for private law, a field that was held to be exhaustively covered by the Civil Code. Even in the heyday of the *Ecole de l’Exégèse*, a doctrinal trend commonly – and somewhat exaggeratedly – associated with the idea that the Civil Code is self-sufficient, it was obvious that the rulings of the Court of Cassation had to be taken into account by whoever tried to describe the law faithfully. And by the beginning of the 20th century it was commonly accepted that Court of Cassation case law (*‘la jurisprudence’*) was ‘the true expression of the civil law (...). It has to be studied directly and scientifically as much as the Civil Code itself’.<sup>54</sup>

Soon the question was asked: what kind of source is precedent? Does the absence of a *stare decisis* rule mean that judicial decisions never create law? As we shall see in the next section, Continental jurists have been grappling with this question, and they have offered some

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<sup>52</sup> Charles de Montesquieu, *The Spirit of the Laws* (Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone tr, Cambridge University Press 1989) 163.

<sup>53</sup> The interaction between Articles 4 and 5 of the Civil Code are intricate, as judges are faced with an interesting dilemma: on the one hand, they are barred from issuing general rules by way of precedent; but on the other hand, whenever they encounter a hard case, they have a duty to rule on it – they cannot refer the matter to the legislature. The result is that interstitial legislation from the bench is inevitable. On this, see the classic article by Marcel Waline, ‘Le pouvoir normatif de la jurisprudence’ in *La Technique et les principes du droit public: études en l’honneur de Georges Scelle* (LGDJ 1950).

<sup>54</sup> Adhémar Esmein, ‘La jurisprudence et doctrine’ (1902) 1 *Revue trimestrielle de droit civil* 5, 12.

contrived workarounds. Nowadays, judges throughout the Continent cite their precedents in a routine fashion, and France, once a trailblazer, remained until very recently,<sup>55</sup> an outlier in this respect. Judges sometimes do not even try to conceal this law-creating function of theirs behind the veil of pre-existing principles or ‘brooding omnipresences’ waiting to be discovered by judges; they even regulate the entry into force of their *revirements de jurisprudence* (overriding precedents), just as a legislature would do. Therefore, as we noticed in the beginning of this second part, it seems increasingly unrealistic to keep treating precedent as a legal nonentity. We will try to show how legal philosophy can cope with this problem in the last section of this chapter.

## 2. *Legislation and custom*

Custom is a more complicated case. Its status as a source of law is not disputed, but, except in international law, it is a marginal feature of our legal systems nowadays.

The process of replacement of custom, once the main source of law (especially private law) throughout Europe, with legislation is an ancient one. It actually predates codification, as it started at the end of the Middle Ages, with the strengthening of royal power. For instance, in France, the ordinance of Montils-lez-Tours enacted by Charles VII in 1454 inaugurated a long process of writing customs down. Customs were at the time the source of law par excellence, but it was constantly moving and, more importantly, it was subject to very important variations from one part of the kingdom to another. In order to inject a dose of legal certainty into a custom both fragmented and in constant flux, Charles VII prescribed to all local practitioners and jurists that they put their local customs in writing, send them to Paris where, upon verification by both the High Council and the Paris *Parlement*, they would be promulgated by the King. Once promulgated, the formerly customary norm could be directly applied by the courts, without the litigants being obliged to prove its existence (as was the case with most customs, which required formal proof from litigants who invoked them). This process not only created more certainty for litigants and the general population more broadly, it also replaced one source of law with another, since once customary norms would thereafter derive their validity and their authority from their having been promulgated by the King, that is, from their legislative nature. The content of the norm remained unchanged, but the source of its validity did not.

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<sup>55</sup> See however, C. Cass., avis, 4 January 2016. The reluctance of French Courts to cite their precedents is also due to the *imperatoria brevitatis* of judicial reasoning and its syllogistic structure.

In that respect, codification did but amplify a pre-existing phenomenon of replacement of a source with another. It added both systematicity and uniformity to a process that remained until then decentralised. The drafters of the French Civil Code sought to create a uniform private law applicable to the whole country. But they wanted the Code to be as compatible as possible with the customs it would displace. In his Preliminary Address, Portalis wrote: ‘We have made, if one can express it this way, a compromise (*transaction*) between written law and customs whenever we were able to reconcile their provisions, or to modify some in light of others, without disrupting the unity of the system or offending the general spirit. It is useful to protect all that need not be destroyed: laws must show consideration for common practices, when such practices are not vices.’<sup>56</sup>

In other countries than France, codification did not go as smoothly. It was met with resistance in many places. The *locus classicus* of such a resistance in the German countries was the dispute concerning codification (*Kodifikationsstreit*) which was opposed in the 1810s by Savigny and Thibaut. According to Savigny, the primary source of law was the German *Volksgeist*, the spirit of the German people; the law flowing from it was essentially a set of customs infused with Roman Law. The authority of that body of law derived not only from its customary source, but also from its systematisation by the science of law: the jurist’s role was to interpret the spirit of the people in order to derive working rules from it. However desirable a German civil code would be in theory, Savigny argued that for various reasons the time was not yet ripe for there to be a true codification in Germany. First, the non-existence of a unified German nation at the time was an obstacle.<sup>57</sup> More importantly, a codification would require such a vast amount of knowledge that practically no jurist could master it; indeed, Savigny argued that the jurists of his time were simply not up to the task<sup>58</sup>. A botched codification would have disastrous effects; given the imperfections of legal science at the time, it would lead legal scholars to focus their attention on the exegesis of the code, thereby diverting them from trying to decipher the *Volksgeist*. The result would be a betrayal of the customs of the German people, rather than the ‘compromise’ desired by Portalis. For the codification process to be meaningful, a true legal science would first have to acquire knowledge of the custom itself.

The interaction of custom and legislation remained an important topic even after codification had established itself as the ultimate form of law-making. For instance, many

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<sup>56</sup> Jean-Etienne-Marie Portalis, *Preliminary Address on the First Draft of the Civil Code* <<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/civil.pdf>> accessed 5 March 2021.

<sup>57</sup> Friedrich Karl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer 1814) 151.

<sup>58</sup> *ibid* 58.

jurists agreed that custom played a residual role whenever gaps in the law occurred (custom *praeter legem*); some even claimed that sometimes custom could to some extent invalidate statutory rules (custom *contra legem*), such as in the case of *desuetudo*, analysed as a negative custom.<sup>59</sup> Nowadays these debates seem a bit old-fashioned, as custom is by all accounts a marginal source of law. But international law scholarship shows that it remains fascinating on many levels: for instance, the question of the exact nature of and relation between custom's two constitutive elements, general practice and *opinio iuris*,<sup>60</sup> whether custom can be regulated by secondary rules and can yield definitive rules.<sup>61</sup> From a jurisprudential point of view, custom is no less fascinating because of its 'free-floatingness'<sup>62</sup> and its being severed from authority-based processes of law-creation.

### 3. *What about legal scholarship?*

Legal scholarship (*la doctrine, die Rechtsdogmatik*) was once an important 'source' of law in the sense that its main function was to formulate norms (generally customary norms) which did not have any canonical formulation. So even if legal scholarship did not posit legal norms *stricto sensu* but formulated pre-existing legal norms, it served a role that went further than that of being a source of legal knowledge.<sup>63</sup> Since law was not fixed before its authoritative formulation, there was no clear line between the *lex lata* and the *lex ferenda*: formulating the law meant both interpreting it and changing it to some extent. This was especially true on the Continent, since in common-law countries judges did not hesitate to engage in doctrinal reasoning, therefore depriving legal scholars of their authority.<sup>64</sup> The development of legislation aimed to remove this uncertainty by creating fully formulated rules: thus legal scholars saw

<sup>59</sup> Kelsen, *Pure Theory of Law* (n 18) 213.

<sup>60</sup> René-Jean Dupuy, 'Coutume sage et coutume sauvage', in *La Communauté internationale. Mélanges offerts à Charles Rousseau* (Pedone 1974); Anthony D'Amato, 'Customary International Law: A Reformulation' (1998) 4 *International Legal Theory* 1. See also the recent report by the International Law Commission, *Report on the Work of Its Seventieth Session* (U.N. Doc. A/73/10, 2018).

<sup>61</sup> Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2011) 151-154; Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118(8) *Michigan Law Review* 1487.

<sup>62</sup> See Matthew Kramer, *Where Law and Morality Meet* (OUP 2004) 91-92; David Lefkowitz, 'Customary Law and the Case for Incorporationism' (2005) 11(4) *Legal Theory* 405.

<sup>63</sup> On the distinction between sources of law and epistemic sources, see Carpentier, 'Sources and Validity' (n 44) 78

<sup>64</sup> This picture is only partly true, and it is somewhat over-simplistic. See in France the case of the Conseil d'Etat (the supreme administrative court) which was always keen on developing its own *doctrine*: see Jean Rivero, 'Jurisprudence et doctrine dans l'élaboration du droit administratif', in André de Laubadère, André Mathiot, Jean Rivero and Georges Vedel (vol 1); Rivero « Apologie pour les faiseurs de systèmes »; Fabrice Melleray and Christophe Jamin, *Droit civil et droit administratif: Dialogue sur un modèle doctrinal* (Daloz 2020) 108-111. Conversely, Fabio Shecaira shows that in many common-law jurisdictions, judges often discuss, and sometimes defer to, legal scholarship: Shecaira, *Legal Scholarship as a Source of Law* (n 17) 35-60.

their role shrink to a somewhat exegetical function. The centralisation of the law-creating processes in the hands of state authorities meant that a sharper distinction had to be drawn between authentic interpretation (e.g., a judge's interpretation), which has legal effects, and scientific interpretation, which aims only at legal knowledge.<sup>65</sup>

This may be nuanced somewhat. Legal scholarship is perhaps not a source in the sense of a law-creating act, but it serves an important role in the process of law application; it is a source of law qua *text* used by judges within their reasoning. There is a phenomenon of authority and prestige at play, which grants authoritativeness to juristic writings.<sup>66</sup> The most famous illustration is Article 38 of the statute of the International Court of Justice, which is often considered, somewhat incorrectly,<sup>67</sup> to be stating the sources of the international legal order: it mentions 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. And many legal theorists have tried to re-evaluate the role of legal scholarship as a source of law. For instance, Aleksander Peczenik writes: 'Legal doctrine is a source of law that a jurist may take into account as an authority reason. In other words, one may pay attention to theses developed in legal writing not only because of the quality of the reasons proffered therein, but also because of the authoritative position that legal writers occupy'.<sup>68</sup>

Fabio Shecaira claims that scholarship is a source of content-independent reasons for action,<sup>69</sup> which he aims to demonstrate by showing that legal scholarship seeks to give practical solutions in cases in which otherwise established law is incomplete, and that in many instances judges and other legal officials not only use, but also defer to, legal scholarship. The problem with Shecaira's position (which we cannot fully do justice to here) is the following. When discussing the various meanings of the term 'sources of law', he rejects the idea that sources are criteria of validity (our sense 1 above), but also the notion of sources as 'interpretive materials that bear on the content of legal norms' such as legislative materials, *travaux préparatoires*, etc. (and he rightly chastises Joseph Raz for including such materials in the concept of sources of law).<sup>70</sup> According to Shecaira, sources are mainly 'the products resulting from the law-making activities', that is *texts* – and also the agents who make them. But this begs the question: what is the best explanation of the fact that that judges refer to legal

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<sup>65</sup> Kelsen, *Pure Theory of Law* (n 18) 355-356.

<sup>66</sup> As the French joke goes: "whenever a law student says something false about the law, it's an error. When a professor does the same, it is a scholarly opinion (*opinion doctrinale*)."

<sup>67</sup> See d'Aspremont, *Formalism and the Sources of International Law* (n 63) 71.

<sup>68</sup> Peczenik, *Scientia juris* (n 3) 17.

<sup>69</sup> Shecaira, *Legal Scholarship as a Source of Law* (n 17) 1.

<sup>70</sup> *ibid* 11.

scholarship in their decisions? Do they treat legal scholarship as the product of law-making activity, or as interpretive materials? It seems that from the point of view of Shecaira's own classification, it makes better sense to treat scholarship as one possible determinant of legal content, along with interpretive materials such as *travaux préparatoires*. After all, the business of legal scholarship is to interpret existing law. Of course, legal scholars make *de lege ferenda* arguments, but they do so within the process of interpreting existing law: they point out the way existing law, such as it is interpreted, ought to be reformed. Shecaira seems to presuppose that judges treat legal scholars as law-making agents; but do they really? Isn't the use of legal scholarship by judges closer to the use of interpretive materials, given that the job of legal scholars is to interpret authoritative legal texts in the first place? It seems to us that judges typically<sup>71</sup> resort to legal scholarship when the meaning of the law is indeterminate, or when the case is hard for whatever reason; they use legal scholars as epistemic authorities and not as practical authorities<sup>72</sup>. But this is a consequence of the notion of sources as texts. Indeed, legal texts can serve various functions: they can aim to serve as practical reasons, because they are created by law-creating facts (sources in sense 1); and they can serve an epistemic function, in which case they are tools for legal interpretation. Shecaira's argument illustrates (in spite of his best efforts to focus on 'formal' sources of law) the shortcomings of the notion of sources as texts which muddles the law-creation/law-interpretation distinction. If we use the notion of 'sources as facts', then it is obvious that legal scholarship is not a law-creating fact.

### **B. An Under-theorised Distinction: Formal *versus* Material Sources**

The upshot of the previous developments is that legislation, i.e. top-down, authority-based law-making, is deemed a central, if not the only, source of law, but that other law-making facts, such as precedent and, to a lesser extent, custom still play an important role in the way the law is shaped in many Continental legal systems.

In order to address such a difficulty, Continental jurists have devised a distinction between formal and material sources of law.<sup>73</sup> Almost every introductory law textbook

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<sup>71</sup> Of course, we can conceive of a possible legal system in which legal scholars are treated as law-making authorities. The point we are trying to make is about a 'typical' legal system.

<sup>72</sup> Shecaira addresses this very point in a subsequent article: see Fabio Shecaira, 'Legal Arguments from Scholarly Authority' 2017 30(3) *Ratio Juris* 305.

<sup>73</sup> This distinction should not be confused with the distinction between formal and material validity, on which see, e.g., Norberto Bobbio *Teoria generale del diritto* (Giapichelli 1993) 186; Riccardo Guastini, 'Rules, Validity and Statutory Construction' in Alessandro Pizzorusso ed, *Italian Studies in Law* (Nijhoff, 1992) 22; Giorgio Pino, 'Positivism, Legal Validity and the Separation of Law and Morals' 2014 27(2) *Ratio Juris* 190, 207-208.

mentions that distinction. However, it is under-theorised: it is often unclear what exactly is the criterion used to make the distinction. The concept of formal sources is clear enough: they are legally binding sources of law, that is, the authoritative sources that legal officials have an obligation to apply. The central case of a formal source is of course legislation, but many authors are willing to include custom as well among the formal sources. However, it is unclear what ‘material source’ actually means. The simplest, albeit the vaguest, characterisation is that according to which formal sources give laws their ‘form’, whereas material sources give them their content. On one definition, sources of law in the material sense are all the factors that weigh in on the law’s content (they are sources in sense 4 above): the ideological, socio-economic, political factors which explain why the law is the way it is. However, if precedent is not a formal source of law, it is not a causal factor either. When law students learn about landmark cases, they do not study, e.g., ideological or socio-economic factors. Another definition of material sources is negative: it includes all the sources of law that are not formal. Precedent is a material source of law thus understood, because it is not a formal source. One can easily see, however, that such a definition is unhelpful.

An interesting example of the limits of the formal v. material distinction can be found in the writings of French private law theorist François Gén<sup>74</sup>. In his treatise on the methods of interpretation and sources of private law, he criticised<sup>75</sup> the dominant school of legal interpretation (the so-called *Ecole de l’Exégèse*)<sup>76</sup> for giving exclusive consideration to the Civil Code as providing a solution to every legal problem. According to him, the Civil Code, and legislation in general, could only take lawyers and jurists so far, as it left an enormous swath of questions undecided. This is why he advocated the idea of a free scientific research,<sup>77</sup> which would be based on both the results of social sciences and judgements of equity and moral fairness. When it came to the theory of sources however, Geny showed himself to be surprisingly conservative. He never brought himself to accept that precedent (*la jurisprudence*) could be a formal source of law, as he maintained that precedent, contrary to legislation and custom, was *not* an ‘independent creative force of the law’.<sup>78</sup> One of the reasons for this apparent contradiction would be that Geny seems to think that the primary ‘free researcher’ is not the judge, but the legal scholar.

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<sup>74</sup> François Gén<sup>y</sup>, *Méthode d’interprétation et sources en droit privé positif: essai critique* (vol 1, LGDJ 1919).

<sup>75</sup> Gén<sup>y</sup>, *Méthode d’interprétation* (vol 1) (n 74) 70-123.

<sup>76</sup> See Benoît Frydman, *Le Sens des Lois* (Bruylant 2005), 343-399.

<sup>77</sup> The same general idea and method was endorsed around the same time in Germany by the *Freirechtsschule*.

<sup>78</sup> Gén<sup>y</sup>, *Méthode d’interprétation* (vol 2) (n 74) 49. In other passages he is much more nuanced, which shows his embarrassment regarding precedent.

Does this mean that the formal/material distinction is to be abandoned as a mere ideological tool designed to preserve the centrality of legislation as a source of law, even on the part of those theorists who otherwise aim to tone down the emphasis on legislation and its role in judicial interpretation? Many legal theorists have tried to salvage this distinction. For instance, Norberto Bobbio proposed replacing it with one between ‘recognised sources’ (*fonti riconosciute*) and ‘delegated sources’ (*fonti delegate*).<sup>79</sup> The first ones are those sources which create law without any lawmaker being authorised to make law: the norms deriving from these sources are received<sup>80</sup> into the legal system without being created by any authority of the system – typically sources from other legal systems, or from the past; custom is such a source, but we could say the same of the legislation of past political regimes (e.g., the French Civil Code). The second type of source concerns law-making acts empowered by the legal system itself: typically legislation or administrative law-making. Other new classifications have also been proposed, e.g., by Michel Virally, who distinguishes between direct and indirect sources,<sup>81</sup> and by Philippe Jestaz, who distinguishes between sources of law-making ‘from the top’ and sources of law-making ‘from the base’.<sup>82</sup>

A promising way out has been shown by Riccardo Guastini in his many works on the topic. His definition, in some respects close to Bobbio’s, is the following. The distinction between material and formal sources of law is not a distinction between two types of sources, but between two perspectives. Sources of law in the material sense are any law-creating (f)act (or text)<sup>83</sup> identified as such by legal theory: anything that creates law according to a given jurisprudential view is a source of law. It will be a source of law because of the very nature of the acts in question, which yield *legal rules* by their very nature. On the other hand, whether something is a formal source of law is a matter of positive law: in this perspective, ‘any act or text which is legally authorised to create new law by a (previously existing) secondary legal rule is a source of law, whatever its nature or meaning content may be’.<sup>84</sup> This distinction explains why most legal theorists on the Continent agree that, e.g., precedent creates law even

<sup>79</sup> Bobbio, *Teoria generale del diritto* (n 73) 173.

<sup>80</sup> Some have expressed doubts on the idea that ‘the reception of norms’ is a matter of legal validity (and whether it is, as such performed by sources); it may be more fruitful to understand it as a matter of applicability. See Jose Juan Moreso and Pablo E. Navarro, ‘The Reception of Norms and Open Legal Systems’ in Stanley L. Paulson, Bonnie Litschewsky Paulson eds., *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (OUP 1998).

<sup>81</sup> Michel Virally, *La Pensée juridique* (first published 1960, Editions Panthéon-Assas 2010) 148-171.

<sup>82</sup> Philippe Jestaz, *Les Sources du droit* (2nd ed, Dalloz 2015) 3-15.

<sup>83</sup> See above Section I.A.3.

<sup>84</sup> Guastini, ‘Fragments of a Theory of Legal Sources’ (n 32) 370; Guastini, *Teoria e dogmatica delle fonti* (n 32) 57-60; Guastini, *Le Fonti del diritto* (n 16) 45-49.

if it is not a formal source of law, since judges are not authorised by a positive secondary rule to create new law – and are often specifically barred from doing so.

Guastini's attempt to salvage the juristic distinction between formal and material sources reveals a growing gap between ordinary juristic discourse (that is, the discourse of black letter lawyers) and the discourse of legal philosophers, especially the practitioners of analytical jurisprudence. Indeed, there are many ways in which analytical legal philosophy can explain away the problem of sources like precedent, which are law-creating although they are not recognised as formal sources by positive law and ordinary jurists. As we will show in the next section, when legal scholars ask whether precedent is a source of law, their question is whether there is a norm that empowers (or authorises) judges to create general rules by way of precedent; it is not really whether rules created by precedent are valid, i.e. whether they belong to the legal system. Indeed, few people would deny it. In fact, we will try to show that the formal/material distinction is not really about sources – properly understood as law-creating (f)acts – but about the scope of power-conferring rules relating to various officials of a given legal system.

### **C. Dissolving the Problem**

We would now like to suggest that, as Guastini argues, the term 'source' encompasses different types of sources depending on whether one adopts a legal-philosophical or a juristic, positive law-based approach. Indeed, sources of law extend beyond the secondary rules which, in particular legal systems, empower such and such organs to create legal norms. In other words, even if judges – or other officials – are not formally empowered by the legal system to create legal norms, and even if precedents are not deemed binding by the rules of the system, they can still be a source of law according to a jurisprudential concept of sources. We will first review some examples of the way legal philosophers have attempted to provide an explanation of the role played by law-creating activities such as precedent in countries in which it is not deemed a binding source.

#### ***1. Jurisprudential attempts***

Without trying to be exhaustive, we can give a few examples. One such way of understanding the gap between 'formal' and 'real' sources is to elaborate a very broad concept

of sources of law. For instance, Aleksander Peczenik defines sources of law as ‘authority reasons’ (as opposed to substantive reasons), and his concept of sources of law is quite close to meaning 3 above (sources as texts): ‘All texts, practices, etc., a lawyer must, should or may proffer as authority reasons’<sup>85</sup> are sources of law. He introduces a distinction between (i) sources we must follow, such as legislation and ‘determinate’ custom, (ii) sources we ought to follow, such as precedents, preparatory works, and international conventions that underlie domestic legislation, and (iii) sources we may follow, such as institutional recommendations, decisions by courts and other organs, precedents in fields of law other than the one the judge is concerned with, doctrinal writings, and foreign law. Starting with a very broad definition of sources, Peczenik brings almost all possible legal materials under a typology which is wholly coherent, but which would sound queer to many a Continental jurist’s ear.

Many Continental legal theorists, however, proceed from a narrower concept of sources which still allows us to re-evaluate the role played, e.g., by precedent in many civil law systems, which do not count it among formal sources of law. If we adopt a Kelsenian perspective, for instance, we will readily accept that judges create law, at least insofar as they are empowered to create individual norms in the cases they decide. Kelsen argued at length<sup>86</sup> that judicial decisions had not a declaratory, but a constitutive, character: individual norms (e.g., ‘Smith ought to pay Jones 150£ in damages’) exist not as logical consequences of general norms, but because they have been posited by judges (and other law-applying organs). In what concerns judicially created general norms, i.e., precedent, Kelsen was of course more nuanced. He admitted that precedents create law (i.e., general norms) whenever a legal system empowers judges to create general norms in parallel with the legislature,<sup>87</sup> and he drew attention to the ‘essential difference between sources of law that are legally binding and those that are not’.<sup>88</sup> Does that mean that Kelsen did not have the conceptual tools to explain the role played by precedents in legal systems that do not, as a matter of law, recognise them as binding, as formal, sources? Not so. Remember that according to Kelsen, talk of ‘sources of law’ is often misleading: what lawyers call, ambiguously, a ‘source’ is nothing but a norm that regulates the creation of lower-ranking norms: for instance, the constitutional norm is the source of the

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<sup>85</sup> Aleksander Peczenik, *On Law and Reason* (2nd edn, Springer 2008) 261; see also Aulis Aarnio, *Essays in the Doctrinal Study of Law* (Springer 2011) 150-151.

<sup>86</sup> Kelsen, *Pure Theory of Law* (n 18) 237 ff.

<sup>87</sup> Let us not forget also that Kelsen described constitutional courts as negative legislatures (see Hans Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit. 2. Mitbericht von Professor Dr. Hans Kelsen in Wien’ in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (vol 5, de Gruyter 1929).

<sup>88</sup> Kelsen, *Pure Theory of Law* (n 18) 255.

validity of statutory norms.<sup>89</sup> What happens, then, when a norm conflicts with its source, that is, with the norm that regulates its validity? According to Kelsen, such a conflict (as in the case of, say, an unconstitutional statute) is a contradiction *in adjecto*: we have to presuppose that since the statute exists – since it is valid in the Kelsenian sense of the term – it has been created in accordance with the constitutional norm, even though it seems to conflict with it. This problem led Kelsen to develop a theory of *alternative clauses* (*Alternativbestimmungen*),<sup>90</sup> which implicitly empower a norm-giver to go against the provisions of the explicit clauses. Applied to judicial law-making, this framework allows us to explain in Kelsenian terms why judicial decisions create general legal norms even when judges are only empowered to create individual norms. Article 5 of the French Civil Code has an alternative character: a judicial decision which posits a general rule conflicts with its explicit clause, while conforming to its implicit, alternative clause.

Of course, one may be rebuffed by the radical consequences of this theory. Many other approaches have been attempted, such as interpretation-oriented conceptions (e.g., Riccardo Guastini's<sup>91</sup> or Michel Troper's<sup>92</sup>), according to which *any* legal norm is the product of interpretation, and the interpreter (typically, but not exclusively, the judge) is the true creator of the law – which conceptions render the whole debate over sources of law pointless, since in this perspective sources are normatively inert *texts*, not norm-creating (f)acts. Another way to cope with the law-creating character of non-binding sources amounts to toning down the concept of validity (as in 'precedent gives rise to valid legal norms'), for instance via Jerzy Wroblewski's concept of factual validity,<sup>93</sup> or Alf Ross's notion of 'scientifically valid law'.

## 2. *A last defence of the proposed analysis*

We believe that our own approach, which was defended in the first part of this paper, is also well-suited to this task. According to us, sources of law are law-creating facts, not

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<sup>89</sup> *ibid* 233.

<sup>90</sup> *ibid* 273

<sup>91</sup> Riccardo Guastini, 'Rule Scepticism Restated' in Brian Leiter and Leslie Green eds, *Oxford Studies in Philosophy of Law* (vol 1, OUP 2011).

<sup>92</sup> Michel Troper, 'Une théorie réaliste de l'interprétation' in Michel Troper, *La théorie du droit, le droit, l'Etat* (Presses Universitaires de France 2001).

<sup>93</sup> Jerzy Wroblewski distinguishes between three concepts of validity: systemic, moral and factual. Factual validity is mostly a matter of observance. According to Wroblewski, factual validity is akin to desuetude: laws that are systemically valid according to higher-ranking norms can be derogated by desuetude and cease to be factually valid. See Jerzy Wroblewski, *The Judicial Application of Law* (Springer 1992) 78. But we can use the notion of factual validity the other way around: norms that are not systematically valid can still be described as 'factually' valid. It bears noticing that Wroblewski ultimately rejects the notion of factual validity.

interpretive methods or directives for law-application. As we admitted earlier, legislation fits best our definition of a source of law since it delivers ready-made rules identifiable as valid laws by anybody, whereas precedent and custom have to some extent to be ascertained via an interpretive process. Finding the *ratio decidendi* of an earlier case, disentangling it from the *obiter dictum* it may contain, all this is part of the process of law-application. However, remember that to our mind, sources are determinants of legal validity, not determinants of legal content. So even if the content of a rule laid down by precedent is unclear, the facts which ground its validity are reasonably clear: for instance, the fact that an apex court has ruled in such-and-such a fashion. It may sometimes be difficult to ascertain which facts are relevant: this is because a rule of recognition which picks out custom and, to a lesser extent, precedent as sources of law is more likely to be open-textured than a rule of recognition which takes only legislation as a criterion of validity. But even such a rule may be open-textured: sometimes it is unclear whether a statute exists, that is, whether a certain set of facts can be described as legislation under the system's rule of recognition.

Our conception can explain why precedent can be a source of law in Continental legal systems, which deny it the status of a formal, binding source of law. Officials treat precedents as law, if only under the effect of *vertical stare decisis*, that is, the deference given by lower courts to the rules laid down by decisions of the apex courts. That is to say, they recognise precedent as a source of law because they apply the rules created by past decisions. Sometimes such precedential rules are only derived via concretisation or interpretation from a general or vague statutory or constitutional rule (*stare interpretatis*); sometimes they are the product of raw law-making (*stare decisis*). But in both cases, these rules are treated as law (as valid rules) because they can be traced back to law-creating (f)acts. This explains why the content of recognition is often much broader than what ordinary lawyers mean by 'formal sources of law'.

This reveals a further ambiguity in the way the term 'sources of law' is used by legal scholars. Most of the time, when legal scholars deny that precedent is a source of law, they only point to the fact that there is no norm which empowers judges to create law – and sometimes, there are norms which explicitly prohibit them from doing so. But the way we have defined sources of law as law-creating (f)acts, that is, as criteria of validity, is not about the scope of the powers of law-making or law-applying organs: it is about what officials treat as valid rules of law in their everyday proceedings. Another way to put it would be to use a Hartian framework: whether judges are authorised to make law is a matter for rules of *adjudication*

and/or *change*,<sup>94</sup> that is, power-conferring rules of the legal system (such as, e.g., Article 5 of the French Civil Code); whether precedent is a source of law, i.e., whether rules created by judges belong to the legal system and are *legal* rules is a matter for *the rule of recognition*. The rule of recognition is not a power-conferring rule,<sup>95</sup> but a rule that picks out the law-creating (f)acts in a given legal system. In order to ascertain the content of the rule of recognition, we need to look at the practice of officials: do officials treat precedent as law-creating facts? We think that in many civil law countries, they do. Therefore, precedent is a source of law, whatever the norms of the system (its rules of change or adjudication) say about it.

There may be a gap between the two sets of secondary rules, that is, between on the one hand rules of adjudication and change (such as Article 5 of the French Civil Code) and on the other hand the rule of recognition. If the rule of recognition is, ultimately, some kind of judicial custom, as Hart hinted in the Postscript to the *Concept of Law*,<sup>96</sup> then we have to admit that this custom too may be, on some occasions, *contra legem*: given the practice of officials, the rule of recognition may very well run counter to the power-conferring norms of the system, to the point that it becomes meaningful to ask whether these norms – sometimes very high-ranked norms – have fallen into desuetude.

### Conclusion

We have tried, in this chapter, to do two things. First, we have tried to provide a reasonably comprehensive, albeit by no means exhaustive, overview of the way analytical legal philosophers in the civil law tradition have conceived the concept of sources of law and the problems thereto related. Secondly, we have attempted to advance our own understanding of the concept of sources of law. In the first part, we distinguished between four possible concepts of sources of law and explained why sources are best understood as law-creating (f)acts, that is, as criteria of the validity of legal rules. And in the second part, we showed how the classic debates among jurists and lawyers concerning the various types of sources had been received

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<sup>94</sup> Hart, *Concept of Law* (n 46) 95-97.

<sup>95</sup> Some argue that the Rule of recognition is a power-conferring rule, at least in part: see, e.g., Philipp Mullock, 'Power-Confering Rules & The Rule of Recognition' (1975) 36 *University of Pittsburgh Law Review* 23; Wil Waluchow, 'Hart, Legal Rules and Palm Tree Justice' (1985) 4 *Law and Philosophy* 41, 43; Giorgio Pino, 'Farewell to the Rule of Recognition' (2011) 5 *Problema* 265, 282; Matthew Kramer, 'Power-Confering Laws and the Rule of Recognition' (2019) 19(1) *Jerusalem Review of Legal Studies* 87. If it is a power-conferring rule, then one wonders what makes it conceptually different from the rules of change and adjudication: see Raz, *Authority of Law* (n 9) 93.

<sup>96</sup> Hart, *Concept of Law* (n 46) 256.

by legal philosophers and to what extent a jurisprudential analysis of these debates could reveal some enduring confusions.

As we have seen, the term ‘source of law’ is ambiguous. Any attempt to define it with a reasonable degree of precision will, at the end of the day, be a matter of explication or, perhaps, even stipulation. And many are those (not least Kelsen) who have called for it to be discarded for that reason. We disagree. On our analysis, the concept of a source of law remains a central concept of both doctrinal scholarship and legal practice in many countries on the Continent; as such, it captures both the fixity of the law’s points of origin – i.e. law-creating (f)acts – and the fluidity of its outcome – i.e. the very content of the law thus created. This is why we can accept both that legal validity is fixed according to more or less determinate criteria picked out by a moderately open-textured rule of recognition, *and* that the precise content of the law is shaped by interpretive practices. For all its faults, the concept of a source of law serves a valuable function in legal thinking, as it reminds us that the creation of a legal rule is only the beginning of its life.