6.
INSTITUTIONAL MIMESIS AND MIMETIC NORMATIVE IMPOSSIBILITY

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CONTENTS: 1. Introduction – 2. Institutional mimesis – 2.1. States – 2.2. Corporations – 2.3. Kingship – 2.4. Marriages – 2.5. Contracts – 2.6. Trials – 3. Mimetic impossibility – References.

1. INTRODUCTION

I take it for granted that legal institutions are artifacts. In general, this can very well be considered a trivial thesis in legal philosophy. As Brian Leiter writes, "Those who might want to deny that law is an artefact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation" [1]. In providing a theory of legal institutions as artifacts, however, one could be led to the conclusion that law is essentially an artificial phenomenon, something which does not bear any significant relationship to the natural domain. However, I think that such a conclusion would be mistaken. Even though legal institutions are artifacts, they can be artifacts which in some sense "mirror", or imitate, some descriptions of the natural, pre-social reality we live in. Thus, the relationship between the artifactuality of law, on the one hand, and whatever we call "natural" or also "factual" as opposed to "normative", on the other hand, is much more complex than may seem at first sight. What I would like to show is not that legal institutions are "natural" in the sense that they have some feature which is not human-dependent, as some natural law theorists would say, but rather that their conceptual content can depend on our conceptualization of the natural domain despite being entirely artifactual. This is what I will call the "institutional mimesis" behind several important instances of legal institutions. More specifically, I will trace to institutional mimesis all those cases in which one or more constitutive rules of a legal institution imitate or are at least structurally homologous to some descriptions of a

[1] B. Leiter 2011, p. 666.

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natural reality which is supposed to exist before and independently of the construction of that institution. In what follows, I will provide the reader with six separate examples of institutional mimesis, and in discussing these examples I will introduce some important distinctions (§ 2.). Then, in § 3. I will briefly present a kind of normative impossibility that can be conjectured to arise from mimetic considerations under certain conditions.

2. Institutional mimesis

The six examples of institutional mimesis I will consider are relevant for the following legal institutions: (1) states, (2) corporations, (3) authoritative roles and kings in particular, (4) marriages, (5) contracts, and (6) trials. Let me consider these examples in turn.

2.1. States

Let me start with states, or rather, with what is usually called the "modern" concept of the state. It is a quite traditional view in legal and political history that the state in this sense emerged in the 17th century in Europe, progressively transforming the multi-centered, pluralistic legal settings typical of the Middle Ages into a single, hierarchical organization governed by its own logic, a logic which subsequently (after the French Revolution) concretized into the legal discipline we now call "administrative law" [2]. Now, according to Stephen Toulmin in his famous 1990 book *Cosmopolis*, the rise of such a new and unified political framework, organized according to an internal rationality and in a sense universal, should be viewed as inextricably intertwined with a specific conception of the natural world: the conception encapsulated in by the new, mathematical science which emerged in the same period and whose foremost champion was Isaac Newton. Writes Toulmin:

> Between 1660 and 1720, few thinkers were only interested in accounting for mechanical phenomena in the physical world. For most people, just as much intellectual underpinnings was required for the new patterns of social practice, and associated ideas about the polis. As a result, enticing new analogies entered social and political thought: if, from now on, "stability" was the chief virtue of social organization, was it not possible to organize political ideas about Society along the same lines as scientific ideas about Nature? [3]

[2] A classical statement of this view can be found in M. Weber 1978, chap. XI; see also M. Fioravanti 1990, § 2 for a critical assessment, and L. Mannori - B. Sordi 2009, p. 234 on the rise of administrative law after the French Revolution.

[3] S. Toulmin 1992, p. 107.

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Elsewhere in the same work he adds:

> From 1700 on, social relations within the nation-state were defined in horizontal terms of superordination and subordination, based on class affiliation: the "lower orders" as a whole were seen as subordinate and inferior to the "better sort" as a whole. Each class had its place in the horizontal system that constituted a nation-state, and at the summit of the structure was the King. Social place was typically defined by the status of the men involved, and was applied to their wives and children by association. As a by-product of the nation-state, class distinction became, as never before, the crucial organizing principle of all society. In France especially, the key force in society was the monarch's "solar" power to control (and illuminate) the state's activities. […] Here, the planetary model of society was explicitly cosmopolitical. Without such a justification, the imposition of hierarchy on "the lower orders" by "the better sort" of people would be arbitrary and self-serving. To the extent that this hierarchy mirrored the structure of nature, its authority was self-explanatory, self-justifying, and seemingly rational. [4]

In the final part of this second passage, Toulmin's idea is put in remarkably clear terms: since the beginning of the 18th century, the hierarchical structure connected with the modern state could be seen as "mirroring" the structure of nature and thus could be justified by this analogy. But, conversely, the scientific conception of nature that underpinned this analogy was in its own turn strengthened *from its very birth* by its justificatory power: "[T]he world view of modern science – *as it actually came into existence* – won public support around 1700 for the legitimacy it apparently gave to the political system of nation-states as much as for its power to explain the motion of planets" [5]. We thus have to do with two possible "directions of mirroring", namely, from the modern conception of nature to the way we build the modern state's institutional structures and, conversely, from the latter to the former.

Interestingly enough, Hans Kelsen also had argued for a relation of dependence of the second type – from institutions to natural science – in his 1934 book *Society and Nature*. He did so, however, not in regard to modern science but to the concept of *archē* in pre-Socratic thought. This is how he explains his thesis:

> If Thales of Miletus, with whom Greek philosophy begins, if Anaximander and Anaximenes, seek a fundamental principle, archē, by which the universe may be uniformly explained, they are thinking of something that rules the world like a monarch. […] The law of the archē establishes here a monárchia and means not only "beginning" but also "government" or "rule". [6]

[4] S. Toulmin 1992, p. 133.
[5] S. Toulmin 1992, p. 128.
[6] H. Kelsen 1943, p. 234.

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The fundamental point of that book by Kelsen is indeed the idea that the basic categories of our conception of nature can be drawn from our political framework. I, however, am interested in the other phenomenon described by Toulmin, namely, the situation in which the fundamental structure of our social setting, and in particular of legal institutions, can "mirror" (in Toulmin's words) some shared description of the natural world. Toulmin's idea that the modern conception of the state mirrored the modern conception of nature is precisely an example of institutional mimesis, at least because the constitutive rules defining the mutual relations of hierarchy among normative roles within the state's structure imitated relations of dependence among natural entities described through nomological scientific statements.

One should distinguish between those cases in which institutional mimesis is only a way to legitimize or interpret that institution ex post, hence without having any role in its creation, on the one hand, and those cases in which we can at least hypothesize that institutional mimesis actually played a role in the process that had the institution as its outcome, on the other hand. Let me express this distinction by means of the dichotomy between hermeneutic and genetic institutional mimesis [7]. It is difficult to say whether, in *Cosmopolis*, Toulmin had in mind an example of hermeneutic or genetic mimesis. Certainly, one could argue that the modern conception of the state had arisen in virtue of its own political factors, first among which the struggle between absolute monarchy and the medieval landscape of scattered decision-making powers. Thus, proceeding in this direction, it would be easy to say that the modern conception of science simply justified a preexisting institution that was emerging for its own reasons. But it cannot be excluded that this ideology played a role in the subsequent moulding, modification, and development of the institution "state", and indeed I think this is something that Toulmin had in mind when he wrote of organizing "political ideas about *Society* along the same lines as scientific ideas about *Nature*", as in the passage quoted above.

2.2. Corporations

One could say that the previous example can be significant for the concept of the state but not for law in general. But I want to put forward the conjecture that this kind of institutional mimesis is not a byproduct of simple

[7] F. Makela 2011, pp. 402-404 has drawn a distinction between metaphors *of* law and metaphors *about* law which seems to be related to my distinction between genetic and hermeneutic institutional mimesis. In particular, according to Makela, it is necessary to keep distinct those cases in which legal concepts are inherently metaphoric from those in which metaphors are models imposed on law for explanatory purposes (see F. Makela 2011, p. 410).

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contingencies: it is rather something which has had a more profound impact on the creation of legal organizations. Consider the very genesis of this concept in Western legal thought, namely, the Roman idea that a *universitas* can be endowed with a legal personality separate from that of its members, as in the famous passage by Ulpian, "If a debt is owed to the *universitas*, it is not owed to the individual members, and what is owed by the *universitas* is not owed by the individual members" [8]. As Karl Olivecrona reminds us in the 1928 essay "Corporations as *universitates*",

> The Romans had, of course, no counterpart to the countless economic organizations which abound in our modern industrial community; but there existed a multitude of collegia or societies of many kinds: burial societies, trade gilds and public bodies such as the municipia (towns) with their governing curiae or decuriae. For these various organizations the Roman jurists laid down rules that have become fundamental in the modern law of corporations. [9]

In this essay Olivecrona maintains that, in Roman legal thought, the very idea of a corporation having a legal personality separate from that of its individual members depended on its being considered a separate entity, something which can exist not simply as a mere collection of parts. This was possible in light of a specific distinction between three kinds of natural *corpora*, a distinction that can be found in the Stoic philosophers and that was accepted by the Roman jurists. According to this distinction, which is clearly formulated by Pomponius in a famous passage [10] and can be found in Seneca as well, there are three kinds of *corpora* to be found in nature: homogeneous objects of a given species whose parts are melted together and have no separate standing, for example, a statue; objects of a given species whose parts have their own separate species but are connected in a coherent way, for example, a ship (*corpus ex cohaerentibus*); and, finally, objects of a given species whose parts have their own separate species and are also physically independent, for example, a herd of sheep (*corpus ex distantibus*). According to Olivecrona, the *universitates* discussed by the Roman jurists were to be conceived as *corpora ex distantibus*:

> As corpora of the third class corporations were similar in nature to other corpora belonging to this class. The fundamental rules concerning their rights and duties are only applications of the general theory of corpora. The essential thing is that the entity is a corpus, distinct from the parts, with an individuality that remains unchanged despite changes in the parts. The rules are inferences drawn from these assumptions. [11]

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[8] *Digest*, 3, 4, 7, I.

[9] K. Olivecrona 1949, p. 5.

[10] *Digest*, 41, 3, 30, pr.

[11] K. Olivecrona 1949, p. 35. In Question XIII of his *Specimen quaestionum philosophicarum ex jure collectarum*, of 1664, Leibniz deals with a related question when treating the problem of identity, quoting "a famous passage from Alphenus [*Digest*, 5, 1, 76]

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A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
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As in the case of Toulmin's hypothesis on the rise of the modern state, here a legal organization is created in such a way that it mirrors natural reality according to a common – we would say "scientific", according to the standards of the period – conception of it:

> The classification of corpora refers to their objective nature; it is founded on natural science without consideration of social convenience. In their arguments the jurists assume that the classification is scientifically correct; this is the reason why they use it in their interpretation of law. [12]

This is therefore another example of institutional mimesis – and of genetic institutional mimesis, too, because it is not possible to deny the impact that the Roman jurists' doctrines and conceptions has had on the subsequent creative and development process of legal corporations in the European context. Hence, if Olivecrona's and Toulmin's theses are correct, institutional mimesis has played a role both in the emergence of the very concept of a legal organization in ancient Western legal thought and in the development of the paradigmatic case of a legal organization in Western public law of the modern era. It seems safe to assume that if these were contingencies, they were nevertheless of crucial importance for the history of legal thought.

2.3. Kingship

The fundamental elements of legal organizations are roles connected with a form of empowerment. Now consider kingship, broadly conceived as the highest power within a given political organization. It has been observed in the anthropological literature that in many cultures the normative powers of a king – in essence, his authority – were originally connected with that king's actual ability to produce effects in nature. James George Frazer provides us with many examples of this connection in the chapters of *The Golden Bough* devoted to "magicians as kings". Consider the case of kings as "rainmakers" in African culture:

> [T]he evidence for the evolution of the chief out of the magician, and especially out of the rain-maker, is comparatively plentiful. Thus among the Wambugwe, a Bantu people of East Africa, the original form of government was a family republic, but the enormous power of the sorcerers, transmitted by inheritance, soon raised them to the rank of petty lords or chiefs. Of the three chiefs living in the country in 1894 two were much dreaded as magicians, and the wealth of cattle they possessed came to them almost wholly

where it is asked: does changing individual judges change a court? The answer is that, even if all had been changed, the court would remain the same; and also a legion, a people, a boat" (see G.W. von Leibniz 2013, p. 32).

[12] K. Olivecrona 1949, p. 29.

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
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> in the shape of presents bestowed for their services in that capacity. Their principal art was that of rain-making. The chiefs of the Wataturu, another people of East Africa, are said to be nothing but sorcerers destitute of any direct political influence. Again, among the Wagogo of East Africa the main power of the chiefs, we are told, is derived from their art of rain-making. If a chief cannot make rain himself, he must procure it from some one who can. Again, among the tribes of the Upper Nile the medicine-men are generally the chiefs. Their authority rests above all upon their supposed power of making rain, for "rain is the one thing which matters to the people in those districts, as if it does not come down at the right time it means untold hardships for the community. It is therefore small wonder that men more cunning than their fellows should arrogate to themselves the power of producing it, or that having gained such a reputation, they should trade on the credulity of their simpler neighbours". Hence "most of the chiefs of these tribes are rain-makers, and enjoy a popularity in proportion to their powers to give rain to their people at the proper season […]". The Banyoro also have a great respect for the dispensers of rain, whom they load with a profusion of gifts. The great dispenser, he who has absolute and uncontrollable power over the rain, is the king […]. In Ussukuma, a great district on the southern bank of the Victoria Nyanza, "the rain and locust question is part and parcel of the Sultan's government. He, too, must know how to make rain and drive away the locusts. If he and his medicine-men are unable to accomplish this, his whole existence is at stake in times of distress. On a certain occasion, when the rain so greatly desired by the people did not come, the Sultan was simply driven out (in Ututwa, near Nassa). The people, in fact, hold that rulers must have power over Nature and her phenomena […]". [13]

Now, even though Frazer regards these examples as cases of magic transmuted into normative authority, it is clear that what we call "magic" amounts to nothing else than a specific conception of the natural world shared within those cultures. So here, too, we are looking at an example of institutional mimesis, because rainmakers are individuals whose normative powers (their capacity to produce binding obligations on individuals, for example) derive from, and thus mirror, their effective ability to produce actual effects in the natural world. This mimetic connection between a king's normative powers and his effective capacities can be found at the root of European culture as well. In *Le vocabulaire des institutions indo-européennes*, of 1969, Émile Benveniste notes, for example, that the verb most used in Greek Homeric tragedy for "rule", namely, *kraínō* (in the Homeric form), is connected with the idea of executing and realizing and signifies an actual effect in the world [14]. Moreover, Pietro De Francisci has

[13] J.G. Frazer 2009, pp. 204-209.

[14] E. Benveniste 1969, p. 35. I am leaving aside here the question of how the concept of authority in Western legal thought has been intertwined with that of force, namely, with the concept of a physical quality of a given person. The reader can find some interesting remarks in this regard in E. Fittipaldi 2012, pp. 259-260. Moreover, it is

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A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
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described in great detail, and with specific reference to ancient Roman culture, the passage from the recognition of different kinds of actual abilities (among which technical abilities, brute force, and courage) to the attribution of normative powers [15]. Clearly, such an ability to produce effects in the natural world is ultimately connected with the idea that kings must be able to bring about natural effects which are in some sense "good" for their people: an example would be a plentiful harvest. This idea is almost ubiquitous. It can be found in Asian culture:

> Thus the ancient Hindoo law-book called The Laws of Manu describes as follows the effects of a good king's reign: "In that country where the king avoids taking the property of mortal sinners, men are born in due time and are long-lived. And the crops of the husbandmen spring up, each as it was sown, and the children die not, and no misshaped offspring is born". [16]

But the same connection can be found in the *Odyssey*, XIX, 110 [17] and, again according to Benveniste, at the etymological roots of the English word *lord*, which is thought to derive from the ancient compound *hlāford*, whose first element is *hlaf*, namely, "bread". Hence, the lord would be "he who can bring bread to his people" [18]. Moreover, as Marc Bloch writes in his 1924 *Les Rois Thaumaturges*, this connection eventually produced the idea, widely shared in the Middle Ages and instrumental to the construction of kingly authority in Europe, that "real" kings must have thaumaturgical powers. Bloch provides us with an accurate description of the birth and death of this idea. In particular, he shows in detail how the supposed thaumaturgical power attributed to the kings of the Capetian dynasty is a result of a conceptual blending between the ancient German conception according to which kings must have an effective ability to manipulate nature and the Christian translation of this idea in terms of the king's "holy powers", akin to those of king-priests such as Melchisedec in *Genesis* [19].

Kings have powers over the world; hence they have powers over people: they can control the natural world; hence they have the normative power to rule. Institutional mimesis seems to lie at the core of the conceptual genesis of legal and political authority in many cultures. In claiming

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worth noting that in many Nordic languages, even the term for the judge is etymologically related with the idea of "doing something": this is so in the Swedish *domare*, the Icelandic *dómari*, the Danish and Norvegian *dommer*, and in the Finnish *tuomari* (see in this regard A.G. Conte 2009, pp. 90-91).

[15] P. De Francisci 1959, p. 361.

[16] J.G. Frazer 2009, p. 215.

[17] "Your fame rises to high heaven, like the fame of a peerless king, who, fearing the gods, rules many brave men and upholds the law. The people prosper under his leadership, and the dark soil yields wheat and barley, the trees are heavy with fruit, the ewes never fail to bear, and the sea is full of fish".

[18] E. Benveniste 1969, pp. 26-27.

[19] M. Bloch 1961, p. 57.

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that this is a kind of institutional mimesis, however, I am using the term *nature* in a slightly different sense from the one used above when speaking of a possible mimesis between institutional organizations and the natural order of things: there I was speaking of a parallelism between institutional structures defined through constitutive rules and nomological generalizations about nature; here the parallelism is rather between normative powers connected to a given role and the ability to control nature. *Nature* in the former sense is nothing else than the cosmic order and its law: it is nature in a "cosmological" sense. In the latter sense, *nature* is instead conceived as the context of existence of human beings: it focuses on these beings' actual abilities to interact with their context. This second conception I will call "ecological".

It is worth noting that institutional mimesis can influence not only the way we define the normative effects connected with a legal institutions but also the way we formulate the conditions under which that institutions can produce those effects. The first kind of institutional mimesis I will call "normative"; the second, "performative". The reason behind the term *normative* is quite straightforward, for in this case, institutional mimesis is connected with the normative duties, rights, and powers that are the normal outcome of a legal institutional act or fact. I have instead chosen the term *performative* for the second case under consideration because, in this case, institutional mimesis has to do not with an institution's normative effects but with the actual interaction we must have (what we must "perform", in a very broad sense of this term) with the institution in order for it to produce those effects. Performative mimesis is of course strictly intertwined with normative mimesis. For example, legal anthropology shows not only that in many cultures the normative powers of kings mirror their factual powers over nature, but also that as a consequence of this fact kings *had to* be chosen just by evaluating their actual abilities. According to Frazer, Latin kings were originally chosen on an annual basis by way of a race or a fight, this in order to ensure that the candidate did in fact have the actual natural abilities required for the normative powers of a king. This original procedure survived in symbolic form in later ceremonies:

> A relic of that test perhaps survived in the ceremony known as the Flight of the King (regifugium), which continued to be annually observed at Rome down to imperial times. On the twenty-fourth day of February a sacrifice used to be offered in the Comitium, and when it was over the King of the Sacred Rites fled from the Forum. We may conjecture that the Flight of the King was originally a race for an annual kingship, which may have been awarded as a prize to the fleetest runner. At the end of the year the king might run again for a second term of office; and so on, until he was defeated and deposed or perhaps slain. In this way what had once been a race would tend to assume the character of a flight and a pursuit. The king would be given a start; he ran and his competitors ran after him, and if he were overtaken he had to yield the crown and perhaps his life to the lightest of foot

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A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
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> among them. In time a man of masterful character might succeed in seating himself permanently on the throne and reducing the annual race or flight to the empty form which it seems always to have been within historical times. [20]

2.4. Marriages

Frazer's foregoing example makes it possible to connect institutional mimesis regarding legal authoritative roles with that regarding legal transactions. In fact, he notes that the Latin selection of kings on the basis of actual abilities very likely had a precise parallelism with the way in which marriages were celebrated, namely, by selecting candidates on the basis of their ability to actually reach their bride in a sort of race. As Frazer notes, this custom was common to many cultures:

> These traditions may very well reflect a real custom of racing for a bride, for such a custom appears to have prevailed among various peoples, though in practice it has degenerated into a mere form or pretence. Thus "there is one race, called the 'Love Chase', which may be considered a part of the form of marriage among the Kirghiz. In this the bride, armed with a formidable whip, mounts a fleet horse, and is pursued by all the young men who make any pretensions to her hand. She will be given as a prize to the one who catches her, but she has the right, besides urging on her horse to the utmost, to use her whip, often with no mean force, to keep off those lovers who are unwelcome to her, and she will probably favour the one whom she has already chosen in her heart". The race for the bride is found also among the Koryaks of North-eastern Asia. It takes place in a large tent, round which many separate compartments called pologs are arranged in a continuous circle. The girl gets a start and is clear of the marriage if she can run through all the compartments without being caught by the bridegroom. The women of the encampment place every obstacle in the man's way, tripping him up, belabouring him with switches, and so forth, so that he has little chance of succeeding unless the girl wishes it and waits for him. Similar customs appear to have been practised by all the Teutonic peoples; for the German, Anglo-Saxon, and Norse languages possess in common a word for marriage which means simply bride-race. Moreover, traces of the custom survived into modern times. [21]

A curious confirmation of this practice can be found in the Greek myth of Atalanta (who agreed to marry only the man who could outrun her in a footrace), as well as in Willem Van Rubruk's *Itinerarium* in the lands of the Mongols, a report written in the 13th century. In this last description, it is quite clear that the procedure through which marriage was celebrated in the Mongolian culture at that time mirrored some sort of brutal act similar to kidnapping:

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[20] J.G. Frazer 2009, pp. 375-376.
[21] J.G. Frazer 2009, 372-373.

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A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

> Once a marriage has been arranged, the bride's father organizes a banquet and she flees, hiding with her parents. At which point the father will say: "My daughter is yours – find her and take her". And so the bridegroom sets out to search for her with his friends until he finds her. He must then take her by force and bring her home, pretending that he is forcing her to do so. [22]

These forms of marriage are examples of institutional mimesis. The idea is that the way in which a woman "binds herself" from a normative point of view, thus entering into a relationship of mutual rights and duties with a man, had to mirror the way in which a woman can be bound in a brutal, merely factual sense. This is in particular an example of performative mimesis, because it concerns not so much the normative effects of marriage as its conditions of performance: the way in which you can marry someone, not the outcome of this procedure. Such a mimetic relation between marriage and kidnap, though also traceable to the roots of European legal culture, is particularly unacceptable from a modern legal perspective, and indeed we could debate about how much of the original "capture model" still lingers in contemporary theories of marriage. But even if we concluded that this kind of mimesis plays no such role any longer in contemporary Western legal culture, the mimetic relation here described can become relevant when comparing our legal conceptions with that of other cultures. In the quite famous case *People vs. Moua* [23], for example, institutional mimesis is fundamental in understanding how something which is seen as abduction and rape from our legal perspective can become a marriage from another, and clearly this can have a direct impact on the way we interpret the intentional element of illicit behaviour. In a 2002 work on "cultural defense", Martin Golding shows how, in this case,

> cultural evidence was used to reduce a charge of kidnapping and rape to the lesser offense of false imprisonment. Moua belonged to a Hmong tribe from Laos which practices marriage-by-capture. In this ritual a man abducts a woman to his family's home, where the marriage is consummated. The practice calls for the woman to show her virtuousness by protesting the man's advances. Defendant Moua abducted a woman of Laotian descent from the Fresno City College campus, where she was employed, and had sexual relations with her despite her protests. She filed a criminal complaint, charging Moua with kidnapping and rape. At trial, Moua maintained that he did not force sexual relations on the victim because he believed that her protests were in line with the marriage-by-capture ritual. The judge accepted Moua's claim but he also held that the victim had not genuinely consented. Moua's mistake of fact defense was successful in overcoming the kidnapping and rape charges, but he was held guilty of the lesser offense of false imprisonment. [24]

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[22] William of Rubruk 1255, VII, 5.

[23] Fresno County California Super. Ct. Feb. 7, 1985.

[24] M.P. Golding 2002, p. 148. The same question is considered under a legal-anthropological point of view for example in J.M. Donovan 2008, chap. 18.

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A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

What sense of *nature* is at work in this example of institutional mimesis? I previously introduced a distinction between institutional mimesis grounded in nature in both a cosmological and an ecological sense. The example of marriage, however, does not quite fit either of those two categories. On the one hand, the meaning of *nature* I am using here cannot be traced to the cosmological sense, because in this case institutional mimesis derives a normative entitlement to marry a woman from a man's actual ability to reach and kidnap her: it is not simply a matter of cosmic order, but of what humans can and cannot do in a brute factual sense. On the other hand, the ecological sense is too broad to capture the specific features of this example, because nature is conceived here not simply as the context in which human beings interact with natural phenomena – the conception at work in the case of kings – but as the context where they interact with other human beings in brutal, non-normative interactions: this is, in other words, a sort of pre-social situation in which human beings are conceived as animals governed by relations of brute force. Let me call this sense of *nature* "ethological".

2.5. Contracts

In considering that institutional mimesis can be grounded in nature conceived in these three different senses – cosmological, ecological, and ethological – we should not make the mistake of thinking that all mimetic legal transactions, because they involve relationships among humans, are thereby mimetic in the ethological sense. An important counterexample to this thesis can be found in the Roman concept of *promissio*, an ancestor of our concept of contract. A *promissio* in Roman law was a legal transaction through which persons could undertake an obligation under *ius gentium*, that is, even if they were not Roman citizens [25]. Now, in the second volume of his 1941 *Der römische Obligationsbegriff* (the first volume was written in 1927), Axel Hägerström argues that a *promissio* could take place only by offering (literally "putting forward", *pro-mittere*) the right hand, which had to be accepted by the promisee in order for the transaction to be validly performed. In his view, however, such a contact between right hands was necessary for the transaction to happen because some sort of "fluid" or "force" was thought to be transmitted in nature upon contact, and this force in a sense entailed a communion framed in normative terms. Hägerström says:

> In the dextra there is a particular internal force through which a person's objectives can be achieved. By way of a dextrarum iunctio, the respective

[25] The corresponding transaction for Roman citizens was instead the *sponsio*, as described, for example, by Gaius in *Digest*, 1, 3, 93.

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

> forces are supernaturally merged [*vereinigt*], and in this way a mystic community is created in what concerns the sources of those forces. Compare this idea with the primitive conceptions about forces enclosed in external objects mystically transmitted by physical contact or more generally by external contiguity [*äusseres Zusammensein*]. These forces are conceived as fluida, which are transmitted from one object to another. If the original connection has been organic, a supernatural communion of destinies also arises. [26]

As already noted with regard to Frazer, what Hägerström is calling *supernatural* and *mystic* here was instead clearly part of the primitive conception of the natural world he is describing, a conception governed by animism. Thus, if Hägerström's interpretation is correct, the transmission of rights and duties entailed by a *promissio* mirrored the actual transmission of forces which was thought to happen in nature upon contact. That is another example of institutional mimesis. But this mimesis is based on a specific dynamic of forces conceived as part of the natural order. Thus, *promissio* as a mimetic legal transaction presupposes a cosmological and not an ethological sense of *nature*, despite the fact that what is involved in a *promissio* is a relation between two human beings.

2.6. Trials

Let us finally turn to legal procedures. Consider trials, for example. The legal institution "trial" can be interpreted as a mimetic institution from the beginning of its development in Western legal culture. More to the point, at the origin of Roman law some trial procedures seem to mirror brutal fights decided by the gods. Consider in this regard the role of force in the *legis actiones*, by which the defendant who was unwilling to go to court had to be forced by the plaintiff for the trial to begin [27]. What seems striking, however – and indeed this is another clue to the relevance that institutional mimesis can have not only in legal history but also in legal theory – is that trials can be interpreted as mimetic even in the contemporary legal setting. Here I will make an example drawn from the current debate on constitutional law in the United States, namely, the idea of one's "standing" before a court. This idea, which incidentally has many parallels in other legal cultures (*l'interesse ad agire* in Italy and *die Klagebefugnis* in Germany, among others), means that the plaintiff in a lawsuit must be able to demonstrate that he or she has a sufficiently concrete and personal interest in a dispute as a formal condition for being entitled to have the

[26] A. Hägerström 1941, p. 162. A presentation of Hägerström's Romanistic studies in English can be found in C. Faralli 1986.

[27] See in this regard D. Dalla - R. Lambertini 1996, p. 144.

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

courts decide the merits of that dispute. Now, according to Steven Winter, this idea is essentially metaphoric: it basically evokes the several common meanings of "standing" by which we can describe an individual's ordinary behaviour:

> The metaphor of "standing" is a myth that has become "the literal truth" and shaped – or misshaped – our thinking about adjudication. It has shaped our thinking about adjudication to conform to two separate "truths" embedded in the metaphor, and to think about them as one. The first is the "truth" of individualism: one stands alone; one stands up; one stands apart; one stands out; one stands head and shoulders above the crowd. […] The second "truth" embodied in the metaphor is that the individual must have a particular kind of relationship to the court whose power he or she is seeking to invoke: a court will only consider what a party has to say if he or she is standing (read: has "standing"). [28]

This is, again, a sort of institutional mimesis – and a performative one in particular. Indeed, on this interpretation, one of the conditions for accessing the legal institution "trial" in the United States tacitly mirrors the way in which we can "stand" in ordinary life. And this gives rise to what Winter calls a "private-rights" model of procedural justice, which in its own turn is metaphoric:

> Modern standing law defines this relationship between the individual and the process in terms of a particular cognitive model: the private rights model. We structure this model by means of two metaphors premised on the source-path-goal schema: a causal source-path-goal metaphor and a remedial source-path-goal metaphor. We identify the subject matter of a lawsuit through the elements of the causal schema. The defendant's act is the source, the causal chain is the path, and the plaintiff's injury is the goal. The remedial source-path-goal metaphor is virtually a mirror image of the causal one: the individual's injury is the source of a process that has as its goal an order from the court redressing that injury; the path that connects them is the plaintiff's proof that the acts of the defendant caused the injury. The mirror image quality of these two source-path-goal metaphors gives rise to the conception of damages and other forms of legal redress as designed "to put the plaintiff back in the position he occupied" (or as near as possible) before occurrence of the legal wrong. [29]

Another metaphor thus emerges here: the idea that a legal trial mimics a causal chain having a source, a path, and a goal [30]. While the previous mimesis, that of standing, was performative in the sense that it involved only the conditions under which a case could be decided by a given court, according to this "private-rights" model the whole structure of the legal

[28] S. Winter 1988, pp. 1387-1378.

[29] S. Winter 1988, p. 1388.

[30] In this sense, it is no coincidence that, for example, the Italian word for a lawsuit – namely, '*causa*' – also means "cause".

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

institution is conceived as being essentially mimetic, thus involving both performative and normative mimesis. And while the metaphor of "standing" mirrored a person's actual ability (the ability to stand up or stand apart) by means of a normative entitlement (the right to have his or her case decided by a court), thus presupposing an ecological sense of nature, the "private rights" model is described here to mirror the very structure of causal connections in nature or in human behaviour oriented toward a goal, thus presupposing a cosmological conception: in Winter's words, "[o]ur use of the causal source-path-goal metaphor to conceptualize the subject matter of a lawsuit overlaps with our use of source-path-goal metaphors to structure our view of both purposes and causation" [31]. And this complex example of institutional mimesis has far-reaching consequences on the way in which the scope of the judicial process is thought of and described in current American legal doctrine.

With the "standing" metaphor I have concluded my presentation of examples of institutional mimesis [32]. Let me briefly resume the different kinds of institutional mimesis I have introduced in the discussion made so far.

(a) Hermeneutic vs. genetic institutional mimesis

As the example of Toulmin's description of the rise of modern states made clear, institutional mimesis can be either genetic, when mimetic considerations actually had a role in the construction and subsequent moulding of the institution's conceptual structure, or hermeneutic, when institutional mimesis is simply a tool to justify and/or criticize an institutional structure which has already evolved its features independently.

(b) Performative vs. normative institutional mimesis

While the first distinction concerns the question *whether* institutional mimesis was in fact creative of a given institution, the second distinction depends on *which feature* of that institution institutional mimesis did shape. This is the distinction between performative and normative institutional mimesis I have discussed when presenting the example of Latin kings according to Frazer. Normative institutional mimesis moulds the normative effects connected with a given institutional fact or act, whereas

[31] S. Winter 1988, p. 1390.

[32] Other examples I have found that I will not discuss here are the following: the concept of organization as a physical structure and the analysis of property in M. Johnson 2007, pp. 861-865; the concept of property in M. Bjerre 1999, p. 357; the whole discussion about the detachability of debts in E. Fittipaldi 2012, § 4.6; the concept of abrogation as material destruction in E. Fittipaldi 2013, p. 187; the concept of contract as an idealized "meeting of minds" in J.M. Lipshaw 2012, p. 1003; the idea of a legal system as a tree in M.-C. Prémont 2003, p. 26; the ancient Roman concept of borders as delimitating the locations of *numina* in P. De Francisci 1959, p. 253; and the concept of equity as an example of "deontic iconism" in A.G. Conte 2009, pp. 77-79.

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

performative institutional mimesis influences the way that fact or act can take place or be performed.

(c) *Institutional mimesis based on a cosmological vs. ecological vs. ethological sense of "nature"*

When discussing the example of kingship according to Frazer and comparing it to the example of state according to Toulmin, I have introduced the distinction between an institutional mimesis based on nature in a cosmological vs. ecological sense. When what is mimicked is nature in a cosmological sense, then the institutional structure mirrors some kind of nomological generalization or perceived regularity; instead, in the case of institutional mimesis based on nature in an ecological sense, the institutional structure mirrors some kind of ability or capacity that human beings have when dealing with their natural context. Finally, when discussing Frazer's example of marriage-by-kidnapping, I have added the ethological sense of nature as a possible root for institutional mimesis: here, what is mimicked are not the abilities of human beings when dealing with their natural context, but rather their abilities when dealing with other human beings in a sort of brute, pre-social situation. It should be clear from this trichotomy that the degree of socialization of nature that is at the root of institutional mimesis progressively increases when passing from the cosmological, ecological, and finally ethological sense of nature.

3. Mimetic impossibility

I will now turn to the question of normative impossibility. Consider this simple example of normative deduction concerning a contract:

(1) If two parties have a definite intention (X) and make an agreement, write it down, and sign the document, then they have formed a contract (Y) and thus are bound by a set of mutual rights and obligations.
(2) John intends to sell his house, and Luke intends to buy it.
(3) John and Luke write a contract of sale, and they sign it.
(4) John is entitled to receive payment. Luke must pay. After the payment is made, Luke is entitled to come into possession of John's house: John must act so as to ensure Luke's right.

This is a rather trivial example of normative deduction. Concluding (4) from (2) and (3) does not raise problems for the is/ought question, because (1) is a constitutive rule and hence an already normative assumption that ensures that the conclusion is valid. Thus, in this normal case, every deduction of a normative conclusion from factual assumptions is ensured by a normative constitutive rule connecting the latter with the former: if (X) a certain act is performed or a certain fact occurs, this counts

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

as a given institutional act or fact (Y) and some normative consequences (Z) follow.

Under these circumstances, the question of normative impossibility can depend on constitutive rule (1) in at least three respects. It could be a normative impossibility depending on *ontological* considerations: if, for example, the constitutive rule dictated an act (X) that cannot be performed by human beings under any circumstance – if for example human beings could not have any intention or reach any agreement – then this would amount to a factual impossibility entailing that normative consequences (Z) cannot follow.

On the other hand, constitutive rule (1) could entail normative impossibility for *structural* reasons. The institutional elements created by a constitutive rule are of course connected with other institutional elements, either in the form of conditions (the instantiation of one or more institutional elements are necessary conditions for the element constituted by the rule to take place) or in the form of consequences (the instantiation of the element constituted by the rule entails that another institutional element can be instantiated). Now, if constitutive rule (1) specified conditions or consequences that cannot hold consistently with other institutional elements conceptually connected with (1), then a sort of normative impossibility could occur depending on the conceptual inconsistency of the whole system of constitutive rules.

Finally, constitutive rule (1) could entail a sort of normative impossibility for *pragmatic* reasons. Constitutive rules are not only included within a system that includes other constitutive rules, but the system is itself inscribed within a given social pratice with a specific meaning and point which constitutive rules cannot contradict, at least explicitly. Hence, if constitutive rule (1) stated that intentions and agreement are necessary for a contract, but also that one of the contractors must be a serial liar, this would defeat the very point of private legal negotiation for which contracts exist: contracts would be normatively impossible institutions because conceptually inconsistent with the legal practice within which they are inscribed.

Structural (or systematic) considerations are quite standard in the legal domain, but also ontological and pragmatic considerations have already been discussed with regard to constitutive rules [33]. Hence, I will set apart these kinds of normative impossibility for the purposes of the present work. Here, instead, I put forward the conjecture that some sort of *mimetic* normative impossibility could be relevant for the legal domain under certain circumstances. Let me thus apply the example given above to a mimetic institution and suppose that John's and Luke's contract is an

[33] I refer the reader to C. Roversi 2010; 2012, chap. 4 and to the bibliographic references included there.

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

instance of *promissio* as discussed by Hägerström. The deduction could then be reframed as follows:

(1) If two parties have a definite intention (X) and make an agreement, and one party offers his or her right hand and the other accepts it, then they have formed a promissio (Y) and thus are bound by a set of mutual rights and obligations.
(2) John says he will do a certain thing for Luke, and he offers his right hand.
(3) Luke accepts John's right hand.
(4) John must do what he has promised. Luke is entitled to receive from John what he has promised.

This, too, is *prima facie* a quite straightforward example. Here, too, there is no problem for the is/ought question, because (4) is derived from (2) and (3) under constitutive rule (1); and, like in the previous example, normative impossibility can arise here for ontological, structural, and pragmatic reasons. But what if a further premise occurred which on a factual, non-normative level contrasted the transmission of forces in that particular case even if Luke and John shook hands? Suppose for example that under moonlight the transmission of fluids upon contact were thought to be contrasted by force of gravity, and that Luke and John performed that *promissio* in the moonlight. Now the deduction would become as follows:

(1) If two parties have a definite intention (X) and make an agreement, and one party offers his or her right hand and the other accepts it, then they have formed a promissio (Y) and are thus bound by a set of mutual rights and obligations.
(2) John says he will do a certain thing for Luke, and he offers his right hand.
(3) Luke accepts John's right hand.
(4) John must do what he has promised. Luke is entitled to receive from John what he has promised.
(5) But they are under the moonlight.
(6) Under the moonlight, the transmission of fluids upon contact is contrasted by force of gravity.

What happens here? What conclusion would Luke and John draw? On the one hand, if we just go by the constitutive rules of a *promissio*, that institution has strictly speaking been correctly performed. And we assume that the conditions under which *promissiones* can be performed are not ontologically impossible (human beings can have intentions, can reach an agreement, and can shake hands), that they are structurally consistent with the rest of institutional acts and facts, and that they are pragmatically coherent with the point of private negotiation in the legal domain: hence there is no kind of normative impossibility connected with a constitutive rule arising here, at least if we limit ourselves to the kinds of impossibility considered above. However, if we look at the mimetic grounds of a *promis-*

L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html

sio, something significant has happened that can hinder the derivation of normative conclusion (4) without being part of the institution's constitutive rule (1). Under the moonlight fluids cannot be transmitted, and hence, if the institutional concept of *promissio* is mimetic of a transmission of fluids, this could end up entailing some sort of normative impossibility: no rights and obligations can be transmitted because no fluid can be transmitted. In this case, a normative conclusion – that John is not obligated to do anything, and Luke is not entitled to receive anything from John – would be derivable from the factual statements (5) and (6) without any constitutive rule making this derivation possible under normative assumptions, because institutional mimesis is very often an underlying, tacit presupposition. The problem, here, is how much Luke and John are aware of the mimetic character of their concept of *promissio* and how much they can detach themselves from the institution's supposed "naturality" by simply considering a *promissio* a normative artifact, thus ignoring those kinds of mimetic impossibilities. Under this reading, even though the concept of *promissio* originally emerged out of our conception of transmission of fluids and forces, by reframing that concept in normative terms we set it apart and make it independent from the factual realm that originated it. This problem was certainly not unknown to Roman jurists. In fact, they developed Roman law exactly in that direction. The question is whether we are still aware of it, and whether mimetic impossibility can still, at least tacitly, play a role in our categorization of normative impossibility.

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L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
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L'impossibilità normativa. Atti del Seminario internazionale Nomologics 2 - Pavia, Collegio Golgi, 10-11 luglio 2013
A cura di S. Colloca e P. Di Lucia - Milano, LED, 2015
http://www.ledonline.it/ledonline/761-impossibilita-normativa.html