SEEING PLACES. ON PREPOSITIONS IN LAW

by

BERT VAN ROERMUND
Tilburg University (NL)

1. Places, Prompts and Prepositions

This paper embarks on a provisional sketch of the role which prepositions can play in legal thinking. My claim will be that (some) prepositions in legal rules distribute places for legal actors, and that these places function as prompts of argumentation: they make you take a position from where you can say or argue (only) certain things, and from where you have to acknowledge the validity of (only) certain arguments; arguments which you could challenge, if only you were not at that particular place. Since they thus precede arguments, propositions, concepts and their ilk, prepositions will turn out to present the frame for what is considered to be a favourite image of thinking: representation. This framework allows one to note that there is also a different, but constitutive order of thinking beyond the order of propositions, and even presuppositions. This will allow us to acknowledge the role of speech acts without regarding them as the final analysans of propositions.

I will introduce my general points by a rather trivial example (which is already complicated enough): interpreting the symbols in a lift. I shall analyse them as icons for rules, but only to support the reverse hypothesis: that rules can or should be analysed taking into account their iconic aspect. Taking it into account entails understanding the rule as a mirror in which we can see (or rather: imagine) ourselves acting at different places. These places, however, are not just different; they are connected in the sense that being an actor at one place involves regarding the other place as marking the ground for justification of your actions, and vice versa. In other words, the relationship of these places is such that the source of reasonableness is at the place where you are not. It is never congruent with your place of acting. It is possible to adopt the other place as the site of action, but
that does not solve this healthy predicament. To put it in rather glamorous terms, reasonableness is indexical: once you move from here to there, there becomes here, and vice versa. This general idea allows us to explain why a pragmatic account of rationality is not tantamount to a pragmatic account of truth or validity.

Secondly, I shall turn to the law of obligations to give the hypothesis a specific legal edge. I shall try to discover the stands which some basic rules of the new Dutch Civil Code invite their readers to take. In this context, I shall explore a famous theoretical discussion on contractual obligations by Atiyah and Fried, which focusses on the prepositional distinction of external and internal. I will distinguish three shifts in the position which Atiyah takes on the intern-external axis which he presents as the framework of his discussion with Fried. In the final analysis, I shall suggest that the standpoints from which both of them argue have to account for the semantic ground of validity which the other defends, but which turns into a pragmatic standpoint as soon as one appeals to it.

2. Prompts. A Semiosis of Some Domestic Buttons

Most people can operate lift doors perfectly in accordance with their wish to have the door open or close, as the case may be, by pushing either one of two buttons. Not uncommonly, these buttons have the following icons: >||< and <||>. Perhaps you belong to that happy group of “most people” who see immediately which button to push to have the door open or close. I do not. In fact, I manipulate these buttons in exactly the opposite way to most people, feeling pretty sure that I do it right or that (this time) I’ll do it right. My colleagues — who are all normal — keep telling me that this is what the manufacturer had in mind:

```
<||>  >||<  
DOOR OPEN  DOOR CLOSED
```
On closer examination I even have to admit that these words are clearly written under the buttons. But the icons suggest that I can afford to skip the reading and to go by the simple drawings. That is, after all, what icons are for. However, every time I trust the suggestion, my hand goes to the button which will make the doors move in the direction I do not want.

To strengthen my self-confidence in the face of such an abnormality, I have framed an explanatory hypothesis, which allows both my colleagues and me to emerge as perfectly reasonable beings. Here it is. Normal people see these icons > and < as arrows. The power that should open or close the doors comes from the direction opposite to that in which the arrow points. For the happy majority this is the more adequate picture:

```
<--||--> and --||<--
```

Thus <||> pushes the doors away from each other, opening the door, while ||< pushes the doors towards each other, closing it. My handicap is that I have a different reading of the characters < and >. I happen to see them not as arrows, but as brackets, in more or less this way:

```
--||--> and -->||<--
```

And brackets include and exclude, don’t they? They hold together and separate, n’est ce pas? At least in logic they do. And if you do not like to see logic and operating lifts conflated, I have plenty of other pictures to read in > and <. One of my other favourites is to see them as the slightly curved lines of hands de profil. No doubt hands hold together and separate in a rather straightforward sense. Still another possibility for me is to read > and < as a stylized comic drawing of the impact of some force: they indicate the effect rather than the cause.

Whichever picture you prefer, it boils down to an image in which the power originates from the direction to which the points of < and > point. That is why I recognise <||> as a “pushing together of doors”; consequently, I operate the corresponding button in order to close the doors. With ||< it is the other way round: the “hands” separate the two half-doors, suggesting to me that they are capable of opening them.
Now the intriguing part of this explanation is not so much the difference between my colleagues and me. It is, rather, the striking similarity in the way we all seem to relate to these symbols and which is borne out only by the difference. The similarity is threefold.

(1) Both normal people and I work with the same category of “power” or “force”: the power that makes lift doors open and close. We believe that the symbols refer to such a phenomenon.

(2) Both of us localise the source and the orientation of this power, as coming from and going to different directions. When normal people are in the lift, they locate the source of power where the asterisks are in scheme [1]:

\[
[1] \langle * | \rangle \quad * | | < *
\]

Apparently, I myself localise it in the opposite way [2]:

\[
[2] * < | | > \quad > | | < *
\]

(3) We imagine ourselves at the place of the asterisks in [1] and [2]: it is our opening and closing the doors of the lift. If power is involved in these kinds of action, we see ourselves as the source of that power. Indeed, the icon seems to invoke our projecting ourselves onto that particular spot within its own framework. The icon is a mirror, and we are prompted to step “through the looking-glass”: from a place in front of and external to the icon to a place in the framework of or internal to the icon.

This triad of reference, localisation and identification is what I would like to call a prompt. It comes close to what Döpke and Schwarz called localisation actantiale.¹

There is still another amazing thing apart from the difference between normal people and me: on second thoughts, we cannot do without each other’s prompts. Depending on where we locate our respective standpoints, the other prompt gets a certain legitimacy, as it fills in for what our own standpoint is not able to account for. I may be perfectly right in seeing the icons as hands that push the doors together until they close; but since there are two hands in that case, that

takes for granted the different directions from where the forces come. Conversely, normal people may be right in seeing the icons as arrows indicating from where the forces come. But they, in turn, take for granted that these forces have to be guided or coordinated in order for the doors to meet at one certain point. One who favours “direction of forces” still has to account for coordination and one who is impressed by “coordination” still has to account for the different directions of forces. So we should all acknowledge that prompts do not replace or exhaust arguments; on the contrary, they allow us to see arguments and to discover that the validity of arguments is dependent on the prompt you are invited to follow up.\textsuperscript{2}

But that is not all there is to my puzzling buttons. I would like now to draw attention to the text printed underneath them, which is supposed to clarify their operative force: the phrases DOOR OPEN and DOOR CLOSED. With regard to these phrases, I can assure you, I’m normal: I have no hesitation as to what they mean and I am convinced that all reasonable people I know are willing to accept my interpretation. But that, I dare say, is quite astonishing, given the fact that the phrases are very elliptical indeed. They are short for some more complicated utterance. But we can be pretty confident that [3], [4], [5] and [6] — though possible readings in other contexts — are lousy candidates for clarifying DOOR OPEN when we stand in lifts:

\begin{itemize}
\item [3] The door is open.
\item [4] If the door is open, then push this button.
\item [5] Open the door!
\item [6] If the door is closed, then push this button.
\end{itemize}

Reading [3] misses the point by taking the text in the alethic mode, whereas it is deontic; [4] provides the opposite advice to what is meant, since you are expected to push the button in question when the door is not open; [5] is wrong in many ways, one of which is that it is categorical instead of conditional, and [6] is downright dangerous, especially when you are travelling in an antique lift, which may open its doors between two floors. What we want DOOR OPEN to mean is probably something long-winded like [7]:

\begin{itemize}
\item [7] If the door is open, then push this button.
\end{itemize}

\textsuperscript{2} I would have no objection if someone would point out to me that this was what Aristotle meant by the key term of his \textit{Topoi}. 
If the door is closed and you want it open, then push this button.

Though complicated [7] appears adequate, although I can think of some amendments. For present purposes, we may note that we have the following structure: a condition which conjoins a statement of fact with a wish, followed by a directive as to how to act. I submit that this is a good candidate for the general structure of what we call rules. Now if the meaning of the icon does not just entail, but is equivalent to, this rule [7], we may safely conclude that, inversely, the rule entails the iconic meaning. To put it in a Peircean/Wittgensteinian way: rules are iconic. To follow, indeed to interpret, a rule is not to apply a syllogism to one's intentions, but to step through the looking-glass, i.e. to project oneself from being an observer in front of the rule into the position of an actor behaving from the perspective towards which the rule is prompting him. In order to "interpret" the rule, one has to take the position which is the vanishing-point of that perspective. The lines converging in that point are indicated by prepositions.

This is not to say that all (spatial) prepositions in a text contribute to that effect. What we will be looking for are conceptual structures that are eventually built along axes like "before/beyond", "up/down", "on top of/underneath", "inside/outside", "from/to", etc. These can hide in perfectly non-prepositional terms like "fundamental rights" (up/down), or "access to justice" (inside/outside).

These would have to do with the fact that a lot of safety mechanisms are presupposed in the wiring of the buttons. These could be transformed into, or traced back to, elements of the wish to open the doors of the lift in a certain way (you don't want the doors to open at your wish in the middle of the lift's locomotion, do you?).

See Döpke/Schwarz, supra n.1, at 22: "(...) les indications [qui] signalent l'endroit où se trouvent un actant ou les actants (...)"; "(...) on peut, en principe, englober la localisation actantielle dans la localisation propositionnelle en dérivant l'information relative à la localisation des actants de l'information que le syntagme prépositionnel fournit au sujet de la localisation de l'état de choses considéré comme un tout."

3. **Places and Legal Rules**

Let us, however, not jump to theoretical conclusion, but patiently examine in what sense pictures, places, prepositions and prompts are involved in legal thinking. I concentrate on the law of obligations as it emerges from the first rules of the brand new Dutch Civil Code. The first article reads as follows:

\[\text{Art. 6:1 BW} \quad \text{Obligations can only arise if this flows from statutory law.}\]

Art. 6:1 can probably be dubbed as the mother of semiotic riddles in the legal history of the Netherlands. To unravel its secrets, I will look at it as an icon on a button in the lift. The article has triggered a jurisprudential discussion that I would describe as one about prompts. In my reconstruction it centers around the places which the prepositional structure indicated by FROM points to, in order to render the proper prompt or *localisation actantielle* towards the law of obligations. I want to point out that there are indeed two readings of it, one normal, one abnormal if you like. Both readings will turn out to be feasible from a certain standpoint. Problems arise when they leave the other standpoint unaccounted for. By broadening the scope of the argument in the next section, I will show that the two standpoints condition each other.

The first article of Book 6 BW (On Obligations) contains a very strong suggestion, right at the doorstep of the law of obligations, that there is an exclusive relationship between the arising of obligations and statutory law (or as the Dutch text gives, *de wet*, i.e. the law in the sense of *la loi*, *das Gesetz*). This relationship, whatever it may be, is

---

6 This and the following section are, to a large extent, based on my inaugural lecture: G. van Roermund, *Wet en belofte. Overdenkingen omtrent gebondenheid uit overeenkomst* (Nijmegen: Ars Aequi Libri, 1990).

7 In 1991 a major part of Dutch civil law, especially the law of obligations, was officially replaced by a new Code, within the framework of the great post-war legal project in the Netherlands of the parliamentary restatement of the entire statutory civil law.

8 These are unofficial translations, with little respect paid to the standards of comparative law. Note, in particular, that "reasonableness and equity" is more or less a set formula in Dutch law and is, in the context of obligations, more or less equivalent to "good faith" and "duties of care". Equity does not refer to a supplementary institution of the law.
expressed by the preposition FROM.

In a "normal" reading of the article, FROM is conceived of as indicating a relationship of validity. Indeed, in other places of this particular book of the Civil Code provisions are found to the effect that contracts, torts, etc. raise obligations. So at first sight, nothing is wrong: [Art. 6:1 BW] is a sort of meta-provision establishing a hierarchical order: first the law declares that it is, itself, the "source" of obligations; then it performs as it has declared, by ruling when it is apt to recognise obligations.

Let us savour this peace of mind, even if only for a moment. Art. 6:1 BW was supposed to put an end to the alleged ambiguities concealed in its predecessor, art. 1269 of the Old Civil Code. Those who are familiar with the French Code civil will recognise it:

[LOB.1] Obligations arise either from contract or from the law (la loi).

Instead of art. 6:1 BW's hierarchical model of object- and meta-levels with one token of FROM, [LOB.1] presents a juxtapositional one step model with two tokens of FROM. The reason for the "correction" seems to be clear: art. 1269 was believed to be a contamination of two ideas: the old idea of Roman law, formulated by Gaius, that obligations can arise either ex contractu or ex delicto, and the modern idea of Revolutionary law that only statutory law can be the source of legal consequences. The New Civil Code retains only the latter idea; consequently, it determines that obligations arise in the cases of (roughly) contract, tort, negotiorum gestio and non-indebted payments. Most lawyers think that this is a welcome improvement.

But not everybody was happy, as not everyone believed that art. 1269 of the Old Civil Code was a vicious contamination or otherwise an inadequate classification. There is, some lawyers say, a reading of the article which is faithful to tradition and is not contaminated by revolutionary ideology. They regard the distinction "either from contract or from the law" as rather adequate, since it expresses the idea that obligations may arise either from gettings-together which were intended to evoke legal consequences (contracts) or from more accidental harmful clashes of interests for which there should be remedies whether they are intended or not. They point out, for instance, that it does make a difference whether parties have wilfully decided to undertake an obligation or not — with regard, for instance, to questions
of liability, the kind of evidence required, the burden of proof, etc. Though statutory law may express the legal relevance of this distinction, in no way does the distinction become legally relevant because statutory law expresses it. Still more is to be said, though. These lawyers think that this distinction is not only adequate, but also very relevant (as Gaius had discovered already) once you come to see that these goings on are not just occasions to be subsumed under a statutory rule, but are themselves grounds or valid reasons for obligations. The rule could not have stated other (types of) occasions to which to attach obligations, so the source of validity is in these types of facts rather than in the rule.

Now the protagonists of art. 6:1 BW may say that the antagonists are slightly muddle-headed in not making a clear-cut distinction between grounds and criteria, or good reasons to ascribe obligations and good occasions for doing so. Indeed they are in good scholarly company. Aristotle taught us the difference between (i) the criteria for claiming truth and (ii) the grounds on which something is true. We should distinguish between types of occasions for claiming and grounds for testing, as we do in understanding a phrase like [8]:

[8] The dog howls; so my neighbour is ill.

The howling dog is, in all probability, a typical situation, a sign, which one has learned to interpret as sufficiently reliable to claim that the man next door is ill (pragmatic justification); usually, we do not mean that the dog’s howling is the cause of his illness (semantic justification). Now can we not make an analogy as to (valid) claims to obligatoriness and liability? Applied to the law of obligations, it comes down to this: contract, along with several other types of situations like unjust enrichment and tort, are mentioned in the law as providing sufficient reason to claim performance, liability, remedies and their ilk. For the protagonists the FROM in art. 6:1 BW suggests that statutory law is something quite different from (types of) facts in giving rise to obligations. It is the ground on which to found obligations, not the occasion to claim them. Facts are occasions, rules are grounds. So the former “give rise” to obligations in a way different

9 Cf. Analytica posterioral, 13: “(...) for it is not because the planets do not twinkle that they are near, but because they are near that they do not twinkle.”
But that will not do for the antagonists\textsuperscript{10} and the supporters of good old art. 1269. The deepest reason why they regret the loss of art. 1269 is not that the new law makes a distinction between grounds and occasions for obligations while the old one does not. The latter did, too, but in a much more adequate way: it acknowledged certain types of fact as both a proper occasion to claim and a ground to found obligations. The new law suggests that statutory law (being, as a system, the source of valid obligations) can enumerate the occasions for obligations, which it cannot. This is not because there are so many, or because they are unforeseeable, but because the source of validity of obligations is not in the system of formal statutory law. The most such a formal rule of law can do is to provide legal subjects with a guide-line of how to evaluate situations as to their consequences regarding legal obligations. Perhaps art. 1269 was a contamination, but at least it had the advantage of not closing what is necessarily open-ended: the set of types of situations where liability is in order. So the text is read as in [LOB.4]:

\begin{quote}
[LOB.4] Obligations arise either from situations like contracts or from whatever else the law as a whole requires us to evaluate in terms of civil liability.
\end{quote}

In the “normal” reading of art. 6:1 BW, contract may give rise to obligations as being a type of situation which allows one to claim liability; but it is the formal rule of law which gives rise to obligations as providing a reason or a ground by which this claim is to be tested and to be held valid (or not, as the case may be). The FROM in art. 6:1 BW is implicative: it transmits legal validity via semantic justification. This implicative FROM is to be distinguished from a merely consecutive FROM, which tells you on which type of occasion you may as-

sume obligations pragmatically. In the "abnormal" or at least old-fashioned reading it is the other way round: because obligations are founded in contracts, etc., the law cannot but state (consecutively) that this is the case. They see a different FROM in the law of obligations. Contracts or torts are not just types of obligation provoking situations. Better: if they are, it is because they are the very ground, the source, the reason of obligations. So why does the law claim that it is itself the source? Quite the opposite is true, and the law knows that. Yes, now we come to think of it: it is as if the Dutch Code is not quite sure whether it says something lawful. For isn't that a bit odd, this two staged hierarchical model of validity in which the law first says and then does? For in general it is typical of the law to speak in a performative way, that is to do what it says in saying what it does — in one fell swoop. The old art. 1269 acknowledged that obligations can arise FROM contracts on a par with the law, that is in the implicative sense, and not only the consecutive sense of FROM. Art. 6:1 BW kills legal thinking, and is therefore illegal (it has been enacted anyway).

To reconcile these two "rational" readings, we shall have to determine the standpoints from which they are formulated. That is the task of section 4.

4. The Atiyah-Fried Debate

Most students in jurisprudence are familiar with the Atiyah-Fried debate11 on the sources of contractual obligation, and they will probably agree that this is typically a debate in which every thesis can be infinitely reversed by the debaters, as they do not share the same paradigm of looking at the law. Both scholars are answering different, but perfectly legitimate questions from opposite standpoints. What I would like to do is to show that these standpoints are not just opposite, but also mutually necessary conditions. Thus, I hope to contribute to at least part of the solution of the riddle discussed in the

previous section about what art. 6:1 BW wants us to do when it declares that obligations only arise from formal statutory law. I will be very brief in sketching the explicit theses defended by Atiyah and Fried, in order to devote more (but not enough) space to the analysis of the shifts in focus. Atiyah advocates something close to the following:

\[
\text{[AT]} \quad \text{Contracts to do } x/y \text{ are not binding on the single ground that there have been promises to do } x/y \text{ from both sides. They are or become binding in virtue of unpaid for benefits (that should be repaid), detrimental reliances (that should be remedied), or (in rare cases) frustrated reasonable expectations (that should be fulfilled). So there is no gap between contracts on the one hand, torts etc. on the other.}^{12}
\]

In contrast and direct criticism to Atiyah, Fried has defended what looks like the following:

\[
\text{[FT]} \quad \text{Contracts to do } x/y \text{ are binding in virtue of the mutual promises to do } x/y, \text{ expressed by an appeal to a convention that is publicly acknowledged for constituting an obligation. Whether unpaid for benefits should be repaid, detrimental reliance should be remedied or frustrated expectation should be fulfilled, depends on whether this appeal may be made or not. This is not to say that contracts are the only source of liability; there are others, such as torts etc.}
\]

Theses [AT] and [FT] are, to a large extent, the Anglo-American counterparts of the two readings of FROM laid out in section 3. The fact that [AT] mentions material parameters instead of statutory law may seem to be a vast difference at first, but this gradually fades away once one comes to ask what it is that the formal rules of the law of obligations try to regulate. Some Dutch legal scholars would go so far as to hold that, indeed, the whole law of obligations comes down to regulating undue enrichment in society, which is very close indeed to

\[^{12} \text{"To do } x/y \text{" is my idiom for what is exchanged in a contract: A is to do } x \text{ in exchange for B's doing } y, \text{ and vice versa.}\]
Atiyah’s view. On the other hand, Atiyah comes close to the continental code when he explains, as we will find him doing, that his parameters amount to a basic legal rule of conferring property in a property owning society. Fried’s thesis [FT] is congruent with the position of those who read FROM in an implicative vein: the mutuality of promises itself is the primary reason as well as the authoritative semantic field for obligations. The inverse readings of FROM in art. 6:1 BW, as well as the inverse theses of [AT] and [FT], are to be seen as efforts to get hold on what is “undue” and what is not in some general sense.

At the risk of overstating my point, I am inclined to think of [AT] and [FT] as the two inverse readings of the puzzling buttons in the lift. There seems to be a cogent logic in both readings. But we cannot affirm them both at the same time. At least some coherence will be restored, once we detect the existence of several places in which we may stand within the picture drawn by [FT] and [AT]. In order to avoid this rather unorthodox exercise we may first try to make a nice synthesis out of [FT] and [AT], by using the same trick as was applied in the case of art. 6:1 BW. That is, we may want to distinguish, in an Aristotelian fashion, between the criteria for claiming liability and the grounds on which these claims are granted. What Atiyah says seems reducible to the thesis that a contract, a promise or, for that matter, any other form of voluntary behaviour, can only be a criterion for claiming liability, not a ground for granting it. Grounds are benefits, reliances and (sometimes) reasonable expectations. Fried seems (in Atiyah’s eyes) to confuse grounds and criteria.

However, this is too short a way around the problem. Apart from the fact that the distinction between criteria and grounds is not as undisputed as suggested, Fried would definitely not agree. Even if he would accept the distinction itself, he would stress that the act of promising to undertake some obligation is both: apart from being a criterion for claiming liability (appeal to a convention), it is also the very ground for being bound by the promise.

4.1 Internal-external

Atiyah bases his approach upon a distinction between an internal and an external perspective on contractual obligation. I want to show that the meaning of these prepositional terms shifts in the course of
his argument, until it comes close to something that Fried must have had in mind. On the other hand, to lay out what Fried had in mind we will have to appeal to something very close to Atiyah's concern. Thus, I will argue, the two perspectives evoke each other without ever converging into one.

In an explicit statement Atiyah affirms that the external perspective has to do with the function which the making of a contract or, for that matter, a promise, has in society, and with the social mechanisms which guarantee that one will usually comply with it. These functions and mechanisms can be referred to as reliability, both as a condition and as an effect of social cooperation. This social context has to be taken into account if we want to answer the question whether a certain promise is binding or not. Atiyah thinks that it is nonsense "... to discuss the source of the (...) obligation to perform a promise without having some regard to the question why promises are given, and why they are (normally) performed." The answer to these why's is: promises are usually given in order to encourage people to act in reliance on them, and they are usually performed because in the long run it is in the interest of the promisor to do so and to pose as a reliable co-person.

Atiyah distinguishes this external point of view from the internal one: the point of view of those who think that the point of moral reflection is to help people in finding guiding principles to answer the question "what is the right thing to do?", for instance whether and when it is right to keep one's promise. The internal point of view is that of "the moral sense of the individual", of individuals who asks themselves what they should do in order to act morally or legally. Atiyah is willing to concede that there is some truth in saying that conventions are not to be regarded externally from their own perspective: "They arise from the moral sense of individuals who make up society, and in that sense they can be said to have an internal element." But this truth cannot exempt us from referring to the global purpose and practice of the convention of promising, in giving an account of why and when promises or contracts are binding. In Atiyah's view, the law's perspective is primarily the external one.

13 Atiyah, supra n. 11, at 1981:122ff.
14 Ibid., at 143.
15 Ibid., at 124.
What Atiyah seems to aim at in opposing internal and external points of view is the (relative) opposition between the social and the individual. That is, at least, what the above quotations suggest. But then we should object that this opposition, even if relative, is not construed in a philosophically adequate way. It is not construed from one and the same point of view itself, nor is it applied in one and the same respect. From the very start, Atiyah conceives of the individual as practical, and of the social as theoretical: the individual person who asks “What should I do?”, in opposition to the functions and mechanisms that could be traced by a theory of society as a union “with more than one person”\textsuperscript{16} with regard to the causes and effects of social cooperation. That makes the distinction inadequate. In order to construe it consistently, Atiyah would have to make a choice as to how to conceive of both the individual and the social: either as practical or as theoretical. If we may presume that what he meant to analyse was the practical perspective of both the individual and society, then he should have conceived of society as a union “with more than the first person”.

Is this philosophical scholasticism? It is not. What is at stake is an impossible confusion of viewpoints. One may admit that in order to judge the binding force of a promise or a contract one has to take into account the effectivity and functionality of a certain convention which is used to express and to generate reliability. But not in the relationship between promisor and promisee. A promisor cannot mortgage his promise by stipulating that he will perform in virtue of the expectation that the convention which underlies his promising will have the effect that is ascribed to it by a theory of society: reliability in social cooperation. He who appeals to the convention of promising implies, and has (on demand) to give proof of, the presupposition that he does not do so for strategic reasons alone. By “strategic reasons” I mean reasons which acknowledge the convention precisely in so far as the rationale of the convention is or will be in force — i.e., in the case of promising, in so far as it is true that social cooperation will be furthered by the appeal to the convention. A person who made it clear (in advance) that the performance of his promise would be dependent on what the world (the promise-convention included) looked like at the time of the expected execution, would disqualify himself as

\textsuperscript{16} \textit{Ibid.}, at 126.
one who can be relied upon in social cooperation. Thus, the promisor cannot practically use in his promising what he himself theoretically knows about promising (although he can use it, for instance, in the choice to make a particular promise or not, or to make any promises at all, or not). For conventions and institutions there is a general rule that says: they are only useful if we don't ask about their use at the very moment we appeal to them. That is why there are conflicting points of view built into Atiyah's primary opposition between the internal and the external perspective. And that, by the way, is what Fried has emphasised in a different context when he wrote: "In general we can get the social, collective benefits of trust only if we are faithful for the sake of trust itself, not just for the sake of the resulting benefits." 17

It is not surprising, then, that we observe Atiyah gliding into a different idiom regarding the internal-external distinction. Indeed, his own distinction seems to "prompt" him to adopt a different standpoint, and he gradually assumes the practical approach for both terms: the individual and the social. At the outset, as we have seen, the external perspective regarded the preservation of society as the effect of certain mechanisms such as contract and promise. But not long after that announcement the meaning of the preposition "of" is changed from an objective to a subjective genitive, bringing the practical point of view into the open. Society is not only what is in fact preserved, it is also what does the preserving, perceiving self-preservation as the right thing to do. But that, remember, was the internal point of view! In spite of his belief that law takes the external standpoint, Atiyah is prompted to take the internal one in giving an account of society as an instance that is permitted to set the rules which it deems appropriate to its preservation. It is up to society (or the law in general) to set the conditions of behaviour that will generate obligations.

Obligations within the social group can just be created because the social group is in charge of the rules of the group, and does just create the rules. Since the rules are designed for regulating the relations between members of the group, it naturally is for the group to create the rules. The position of the individual thus differs from that of the group. He cannot just create moral rules and moral obligations by what he does, because he is not in charge of relations between himself and other members of the

17 Fried, supra n.11, at 83.
Atiyah leaves the shift of the theoretical into the practical viewpoint implicit until chapter 7 of his *Promises, Morals and Law*. Or so it seems. There he introduces the internal-external distinction once more, this time — as he himself points out — to take the internal point of view in Hart's sense. Hart used the term "internal" to indicate the practical perspective of those who participate in creating, obeying and applying the law, and who have to ask themselves constantly what would be (legally) the right thing to do? 19 But once we are under the firm impression that Atiyah has restored the coherence of his argument, the argument lapses into yet another distinction underneath "internal" and "external": this time he aims at the difference between an objective (i.e. valid) versus a subjective claim to being bound.

From this, internal viewpoint, we can see that the promise is not the reason for the obligation, any more than the judge's decision is to him a reason for the law which he declares. The oddity is that the promisor is himself the judge, but he also retains his character as a promisor. Thus, having in his capacity as judge conclusively determined what is beneficial, and how much it is worth, etc., he thereafter becomes bound, in his capacity as promisor, by his own decision as judge. Hence, the external viewpoint may become appropriate even for the promisor himself, once he has made a promise. 20

This last point, the objectifiability of intentions, may well be the point which it is all about.

4.2 Perspectivism

Globally, an intention is the first person perspective of practical thinking, i.e. the perspective of a person asking oneself: what am I to do? If one promises to do x, one does not only form and utter an intention to do x, one also claims the objectifiability of what one is to do. By objectifiability I mean to baptise a set of perhaps very different predicates such as "realisability", "desirability", "permissibility", "predictability", "reliability", etc. These are — at least in different cases — all aspects of what amounts to the promised acting being

18 Atiyah, supra n.11, at 1981:129.
20 Atiyah, supra n.11, at 1981:201.
right, apt, valid or justified.\textsuperscript{21} Now it is self-contradictory to make a claim to objectifiability and to intend, at the same time so to speak, to establish the standards that will be used in deciding whether the claim should be granted or not. Testing one’s own preferences against one’s own preferred standards is no testing at all. One who claims objectifiability for his intention has to acknowledge a certain authority from the point of view of a “third person” to decide on the validity of his intention. By “third person” I mean the perspective that a first person as an actor has to acknowledge if and when he makes a claim regarding the validity of his intention towards some other person, i.e. a second person. As soon as he makes that claim he acknowledges (i) that he himself does not determine the testing conditions and (ii) that these testing conditions are not even determined by a deal between him and a second person (as in the case of consensus). For the first person, this counter-perspective has the form of an instance of judging. The third person instance is recognised by the first person as one that holds the standards for what counts as an adequate practical interpretation, i.e. an adequate compliance with the promise.\textsuperscript{22} The promise may be the source for claiming validity from the first person perspective, but the third person standards are the source for testing and deciding on the claim, and for recognising or ascribing validity to what was promised (to return to our main line of argument).

Atiyah thus seems right so far as his primary thesis (AT) is concerned. But his luck is quickly reversed when we discover that the one who has to decide from the third person perspective, is — from his own perspective — a first person, too; that is, one who — by deciding on the claim — makes a claim himself, which, by necessity, has to be found valid by reference to standards he did not set himself. Indeed, “Society is in charge of the rules of society” — as Atiyah would like to have it — only up to a certain point. At least two problems emerge with this formula. First, there will only be rules of society if society takes on the form of a law-enacting body that can be “in

\textsuperscript{21} My use of the word “objectifiability” instead of justifiability is not justified in this paper but in a more embracing context where I relate alethic and deontic objectifiability.

\textsuperscript{22} That is why the analysis of a promise as an intention to do something plus the intention not to change that first intention, makes no sense: there is no third person perspective recognised.
charge". This requires a theory of representation, which we will neglect at this point. Secondly, and more importantly in this context, for this law-enacting body the question to answer in deciding on the claims before it is exactly the same question as that which Atiyah dubbed the internal-individual question: what is the right thing to do in a certain situation? The perspective of that question is surely internal, but by no means individual. That is to say, it is again — but this time at the moment of giving a ruling — the viewpoint of the first person, more particularly the first person-in-action, who asks himself what he is to do and has to find his way blindfoldly, without any guarantee given in advance.23 From the practical perspective of the legislator or the judge, the obligation that follows from certain types of facts is a normative ascription that cannot be justified merely from the point of view of the legislator or the judge. Even if society can be conceived of as a body that is "in charge", it cannot be conceived of as a body that can attach obligations to facts arbitrarily. This, I submit, is the reason that explains both why Fried's thesis [FT] has a plausibility which seems equal to that of [AT] and why Atiyah constantly shifts the ground of the argument in defending [AT].

Of course Atiyah could try to fight perspectivism by saying; "Right. To avoid arbitrariness in attaching obligations to certain types of fact, the criteria of unpaid for benefit and detrimental reliance come into play in the first place." But that seems a little too short as a defence. Why do benefit and reliance come into play as non-arbitrary criteria for being bound? We may answer as Atiyah would do: because there is a general rule of law in "property owning society" which says that a duty of care is in place where one actor has made, or tends to make, another actor dependent on him as far as the latter's property is concerned. Sometimes (not always) one is held liable, for instance when one has enriched oneself at the expense of another or has done harm to another; also when one has performed in exchange for the other to perform and the performance of the latter is still ex-

ecutory, or when one has relied in good faith on the promise of another that he would perform his part of the deal. But this is not enough. Unpaid for benefits and detrimental reliance are not always sufficient grounds to make someone liable, unless he is a party to a contract. To judge whether liability is in order, the law looks at these situations from specific points of view, especially what the parties wanted, what was performed already in exchange, but sometimes also what they can take. It monitors indications to the effect that parties have made it clear more or less explicitly that they wanted to be dependent in property on each other. The mere fact that parties wanted to be dependent on each other in this particular respect is for the law-enacting or law-applying authorities one of the very good reasons to say that a claim to obligation is really valid. From the perspective of the legal authority the wanted dependence is a sufficient ground for obligation and, indeed, a ground for ascribing validity, not just a criterion for claiming validity. Like Barnett and Atiyah I would think that this wanting phenomenologically amounts to different forms of assent and consent.

Now Fried may interrupt to cash his cheque and say: "Right. The promise and the consent of parties, the one towards the other, the meeting of wills, the consent to the offer, this is all not only a reason to claim obligation, but a ground for acknowledging the justifiability of the obligation in a contract, apart from unjust enrichments and torts." But that alleged victory is also a short one. I did not say that the will of the parties can create obligations from its own perspective as the will of the parties. It can only claim the validity of such an obligation, anticipating — to the best of its knowledge — the grounds of validity regarding (freely accepted) dependence of properties, which it, by necessity, is not to determine itself.

This is not to say that the obligations of the parties cannot be cancelled as long as the contract is wholly executory (as Fried and Atiyah both acknowledge). This is obvious, since in these cases the dependence on property will often not yet be heavy. Nor, on the other hand, is it to say that where the agreement of wills ends, the contract also has to end, and principles of tort and unjust enrichment have to come in to regulate legal consequences (as Fried believes) because there is no contract any more. That would amount to saying that the law of

contract by definition has to do with contracts that are valid without any problem. To repeat: making a contract is, from the perspective of the parties, to claim a specific, legal relationship, anticipating grounds of validity that, in the final analysis, it is not for the parties to determine. When that relationship is shipwrecked on certain grounds of validity that turn out not to be fulfilled (e.g. in the case of error or imprévision), this does not mean that the relationship was not claimed and that it is not still the primary perspective from where to look for a solution. That is exactly what the judge does.

4.3 Prompting

Now the ground is prepared to look at the law of obligations as an icon. It invites us to respond to a prompt asking where we are to locate ourselves with regard to obligations. Either we are one of the parties that wants to undertake an obligation; and then we start by appealing to the convention of promising or some equivalent form of social behaviour and anticipate society’s standards for the adequacy of our mutual performances. Or we are in the position of that judge; then we start with the rationale of the convention and anticipate the good reasons parties may have had to be mutually dependent in matters of property. Whatever position we take, the position we do not take is the one to which we must respond. It is like the indexical references of here and there: as soon as our position changes from here to there, there becomes here. And note that there is no middle ground between here and there! As a party to a contract we primarily have to act in response to the question what would be said by a judge who is in charge of upholding the societal standards of undue enrichment; as a judge we primarily have to decide in response to the question what have the parties involved consented to. I add “primarily”, because it is clear that this perspectivism entails an infinite reflection of mirror-images of hypotheses. To decide in response to what the parties involved have consented to is to decide in response to what these parties have consented to in an alleged effort to act in response to what a judge would say ... etc. This, I think, is fine: it grounds the view that, in the final analysis, law is a matter of a special sort of politics: one that is open to acknowledging in advance the standpoint of the other as counting against one.

The consequences of this view are perhaps rather shocking. Let
me just mention two of them, neither of which will be argued for in detail. The first is that, since making claims is a matter of discourse and speech acts, and justifying claims is a matter of practical thinking, the level of speech acts and the level of practical thinking become intertwined without either one losing its distinctive character. There is no once and for all distinction between what counts as criteria for making the claim and what as grounds to grant the claim: these two change places when we change places. The second consequence is that it becomes pointless to look for a conceptual “synthesis” between theses like [AT] and [FT]. There isn’t any. Their opposition is not of a propositional, but of a prepositional kind: it is a difference of places which is already decided on before any propositions are put forward.