

Being (Un-)Reasonable: Rationalization and Rationality in Law and Legal Theory

Svenja Behrendt

I.	Introduction.....	443
II.	The meaning of the term “rationalization”.....	444
III.	Autonomy, culpability and normatively relevant behaviour	446
	A. (In-)Determinism and normatively relevant behaviour	447
	B. Legal accountability and normatively relevant decision	449
	C. (Ir-)rational attempts and the need to respond	452
IV.	Rationalization within the legal system.....	454
	A. Rationality, the law and the legal system	455
	B. Rationality, law and reality.....	457
	C. Rationality, rationalization and accountability	458
V.	Summary.....	459

I. Introduction

When I approached the essay “Rationalization in Legal Theory”, I expected it to be mostly about issues of coherence and sense-making with respect to enacting and applying the law – maybe as an interdisciplinary study of law and logic mixed with insights from psychology. Instead, the author focuses mostly on rationalization as a potential for explaining and understanding the behaviour of fellow human beings. He distinguishes *causally* from *rationally* effected events, addresses human decision-making and rationality, and applies rationalization to what he describes as concepts of law. *Łukasz Kurek’s* essay is situated at the interdisciplinary crossroads between philosophy (especially the philosophy of mind), cognitive and social psychology, neuroscience and law. These crossroads and the issues explored in the essay have long since been under discussion in legal philosophy and legal theory. However, *Kurek* frames and connects them in a somewhat unusual way.

In this (commenting) paper, I address some of the phenomena that *Kurek’s* essay focuses on and offer a different perspective, mostly on what role human behaviour plays within the law. I begin by addressing the meaning of rationalization and the two different modes of explanation (causal and rational). I elaborate on the connection between human reasoning and law and on *Kurek’s* notion of connecting intentional with rationalizable behaviour and of contrasting

it with only causally explainable events. The essay also touches upon highly selective issues of rationality in law and legal theory – these topics and their conceptual entanglement are, however, simply too big to fully cover them in a short commenting paper.

II. The meaning of the term “rationalization”

The term rationalization is often used to describe a (self-)deceptive process: Whenever somebody convinces him- or herself that there were good reasons for harmful behaviour, this is considered to be rationalizing behaviour. The American Psychological Association states that rationalization is

“an ego defense in which apparently logical reasons are given to justify unacceptable behavior that is motivated by unconscious instinctual impulses. In psychoanalytic theory, such behavior is considered to be a defense mechanism. [...] Rationalizations are used to defend against feelings of guilt, maintain self-respect, and protect oneself from criticism.”¹

People act for certain reasons, but they try to convince themselves and/or others that they were acting for *other* reasons – reasons which make the behaviour look good because it would have been guided by goals that the agent considers to be good or that he perceives to be valued as good by others. Insofar, rationalization is mostly addressed as a *post hoc* phenomenon. According to *Fiery Cushman*, “[r]ationalization takes an action that has already been performed and then concocts the beliefs or desires that would have made it rational. It is, therefore, exactly the opposite of rational action”.² Rationalization would thus have to be separated from the question of whether an action was *actually* rational.³ If we look at it like this, rationalization is simply a means to cope with epistemic limitations with respect to factual rationality. First and foremost, rationalization produces plausible narratives; it is strongly connected with the concept of *coherence* and *consistence*. To make sense of complex, ambiguous and contradictory information, coherent stories are developed. Information in support of the narrative is accepted while contradicting information is rejected.⁴ Rationalization is about creating sound narratives – whether they align with the truth is a completely different question.

¹ See <https://dictionary.apa.org/rationalization> (last accessed on 23 February 2023).

² *F. Cushman*, Rationalization is rational, *Behavioral and Brain Sciences* 43 (2020), 1–59, 1.

³ Rationalization is a phenomenon that is connected to a variety of cognitive biases and dissonances. For an overview and sources, see *Cushman* (n. 2), 2.

⁴ In relation to juror decision-making, see e.g. *J. Nadler/P. Mueller*, *Social Psychology and the Law*, in: F. Parisi (ed.), *The Oxford Handbook of Law and Economics*, vol. 1 (2017), 124–160, 126, with further references. *J.M. Balkin*, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, *Yale Law Journal* 103 (1993), 105–

Insofar as the actual reasoning for one's behaviour is crucial, (post hoc) rationalization poses problems. In order to establish criminal wrongdoing on the conceptual basis of *personal misconduct*,⁵ we would need to be able to determine what actually motivated someone and to separate antecedent reasoning from any post hoc rationalization. Since criminal proceedings are *post hoc* by nature, asking people about their prior mental events (e.g. past decisions, witnessed events) generally involves rationalization. *Introspection* – i.e., exploring one's prior mental events – pressures the agent to rationalize his own behaviour.⁶ This cannot be avoided because it is simply how the brain works. What can be influenced is how we deal with the information people give us about their prior mental events: We would have to try to avoid cognitive biases and dissonances (e.g. the anchor effect) that could be caused by receiving an account of past events that might have been highly influenced by rationalization.

In his essay, *Kurek* mostly addresses rationalization as a sense-making process of the *onlooker*. He uses the term rationalization in a very specific and somewhat different way than defined above: he defines rationalization as “the human cognitive capacity to explain and predict the behaviour of other persons in terms of reasons for action”. Insofar, rationalization is a social phenomenon: It is about processing information about others, making sense of their past behaviour and predicting their future conduct. He attempts to perceive it as an endeavour to gain insight into the *true* reasoning of an agent – otherwise it could not be an attempt to forecast future behaviour. In this respect, it does not suffice to attribute any sound reason which can explain an agent's behaviour. To predict an agent's future behaviour by analysing his past behaviour would require the analysis to be correct – past behaviour would have had to be based on exactly those reasons. Predicting future behaviour by logically inferring it from reasons attributed for past behaviour seems highly fallible. In addition, people can behave inconsistently: An agent's behaviour on one occasion might be soundly explainable by certain reasons but those reasons might not provide a sound explanation for the agent's behaviour in another setting (even if the parameters are the same).⁷ However, people *do* anticipate behaviour of other

176, 114 ff., distinguishes three types of coherence: The first pertains to factual beliefs, the second refers to normative systems like the law and the third to making sense of the world around us.

⁵ Since modern criminal law is based on culpability, this idea is core to most modern concepts of criminal law.

⁶ E. Schwitzgebel, *Introspection*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2019 edn.), <https://plato.stanford.edu/archives/win2019/entries/introspection/> (last accessed 12 February 2023).

⁷ J. Bernacer/I. Martinez-Valbuena/M. Martinez/N. Pujol/E. Luis/D. Ramirez-Cas-tillo/M.A. Pastor, *Neural correlates of effort-based behavioral inconsistency*, *Cortex* 113 (2019), 96–110.

human beings, and the anticipation of other people's behaviour influences one's own behaviour.⁸ It is only because people anticipate behaviour that they can be confused, maybe even irritated, if the other person behaves differently.⁹ It seems plausible that forecasting future behaviour is done by a simulation mechanism that takes into account the informational basis of the targeted agent (whose future behaviour is in question). It seems to be a coping mechanism for dealing with uncertainty and epistemic limitations: We do not know how the other agent will behave because we do not yet have the knowledge of all the causal factors at play in human decision-making processes, nor do we know what, for example, the agent's biochemical and neurological determinants will look like at the respective time nor do we know all the data that is going to be processed by the individual in order to make the concrete decision. So, we derive our prognosis from knowledge of human behaviour and of their needs in general as well as from knowledge about the concrete agent (including his preferences). Some of this knowledge may be acquired by rationalizing people's behaviour: People usually eat something when they are hungry (or when they find themselves in a situation in which the social convention dictates to share food) and drive to a shopping mall if they need something that can be bought there (or if they work there). As an observer, we can attribute reasons for every behavioural decision, and we therefore engage in rationalization. It also seems to be accurate that rationalization leads to good predictions of future behaviour in some simple cases. It is hardly an unwarranted assumption that a person will consume food again once he gets hungry and that he will shop at the mall again at some point if he needs something. To predict a *concrete* behaviour of an agent at a *certain* point of time would be much more difficult: When exactly will he be driving to the mall? Which food will he choose? The aptitude of rationalization as a tool to predict future behaviour depends on whether the target agent's reasons for behaving in a certain way mirror the "normal" or common reasons for the behaviour and the accuracy of the observer's knowledge about the agent's circumstances. Rationalization enables an agent to come up with behavioural expectations despite a multi-faceted lack of knowledge but, to conclude, there are certain limits.

III. Autonomy, culpability and normatively relevant behaviour

Kurek constructs his essay on the premise that events can be explained either by *causal explanation* or by *rationalization* and that those modes of explanation are categorically and qualitatively different from one another. He describes it as a dichotomy; there is no overlap. Furthermore, *Kurek* connects *rationality*

⁸ N. Luhmann, *Die Wissenschaft der Gesellschaft* (1992), 33.

⁹ Luhmann (n. 8), 40.

with *intentionality*. Due to the aforementioned distinction, intentionality can only be perceived as part of events that are explainable by rationalization.

On some level, rationality and intentionality are connected: An event is intended if the agent wanted it to happen, i.e., if he strives to achieve it. It is certainly true that rationalizing – and not causal – explanation is required here: Rationality comes into play when the acting agent's behaviour is *observed* by a different agent and when the observer interprets this behaviour to be goal-driven, i.e., intentional. However, this does not mean that setting the goal and deciding to follow that goal by performing a certain action cannot be understood by causal explanations. We do not have the necessary knowledge yet, but if we knew exactly and in full detail how the brain works and could determine all the criteria that drive the *concrete* decision-making process of the individual in question, then it would be explainable causally – *if* there is truly nothing metaphysical about human decision-making.

A. (In-)Determinism and normatively relevant behaviour

Kurek's two categories of *causal* and *rational* modes of explanation touch on the old controversy between determinist and indeterminist world views in a somewhat complex way. Nowadays, the determinist world view is widely accepted, but with one remaining battlefield: the debate about the existence of free will and the related question of whether human decision-making processes fall within the scope of the determinism paradigm.¹⁰

Human behaviour can be understood as being generally autonomous by nature only if human behaviour is the result of an autonomous decision. According to the indeterminist paradigm, human agents are understood as beings capable of causing events *without being caused*. The human being is setting his or her goals freely and independently, and his or her action can be measured against those goals by referring to rationality.¹¹ Whenever a behaviour *cannot* be understood as being guided by an autonomous decision, the agent does not behave in a normatively relevant fashion; his behaviour cannot be understood as infringing upon or complying with legal obligations. The event is attributed to the “causal” world.¹² In that sense, the football player who is pushed by his opponent and crashes into someone else (*Kurek's* example) does not perform a

¹⁰ Cf. e.g. *G. Caruso*, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice* (2021), 14 f.; *D. Dennett/G. Caruso*, *Just Deserts: Debating Free Will* (2021), *passim*, and *R. Kane*, *Rethinking Free Will: New Perspectives on an Ancient Problem*, in: *idem* (ed.), *The Oxford Handbook on Free Will* (2nd edn., 2011), 381–401; *B. Bröckers*, *Strafrechtliche Verantwortung ohne Willensfreiheit* (2015), 98.

¹¹ See *Kane* (n. 10), 384 f.

¹² Günther Jakobs attributes these normatively non-relevant events to nature, cf. *G. Jakobs*, *System der strafrechtlichen Zurechnung* (2012), 59 f.

normatively relevant behaviour. He is not culpable for the event; it is not the result of *his* decision.

The legal concepts of autonomy, responsibility and guilt seem to require the existence of free will. From the face of it, this seems to suggest that only the indeterminist paradigm could support rationalization as an explanatory mode. However, according to *compatibilist* stances,¹³ this is not the case: It is possible to conceive responsibility and guilt even if one understands human decisions as events that are (fully) explainable by causal dynamics.¹⁴ This has consequences for *Kurek's* dichotomy of distinguishing two modes of explanations (rationalization and causal explanation). Rationalization would not be qualifiable as a mode of explanation genuinely different than causality – everything would be explainable by causal parameters. This does not mean that rationalization would lose its relevance as a problem-solving method. Just because there would be a causal explanation for any event does not mean that an event cannot also be analysed by asking for the *reasons* that drove the agent to undertake the action and cause the event. The individual's reasoning can – if he or she

¹³ Whether moral and legal accountability is compatible with determinism is debated, see e.g. *Dennett/Caruso* (n. 10), *passim*. Proponents of compatibilist stances argue that moral accountability is compatible with determinism; proponents of incompatibilist stances argue the opposite, see e.g. *Bröckers* (n. 10), 23, 98 f. This descriptive meaning of an (in-)compatibilist stance needs to be distinguished from the descriptive meaning of an (in-)compatibilist stance in the discussion on whether free will is compatible with determinism, see e.g. *Caruso* (n. 10), 13 f. The categorization of an account as (in-)compatibilist refers to how it answers the question of compatibility of one thing/concept with another. To avoid confusion, it is important to pay attention to what the account refers to when discussing compatibility. The question of whether free will is compatible with determinism is *different* than the one of whether determinism is compatible with moral/legal accountability. If you take a compatibilist stance in one discussion it does not necessarily follow that you need to take a compatibilist stance in the other.

¹⁴ See *Kane* (n. 10), 381; *G. Caruso/D. Pereboom*, *Moral Responsibility Reconsidered* (2022); *T. Hörnle*, *Kriminalstrafe ohne Schuldvorwurf: Ein Plädoyer für Änderungen in der strafrechtlichen Verbrechenlehre* (2013), 51 ff.; *B. Bröckers* (n. 10); *R.D. Herzberg*, *Willensfreiheit und Schuldvorwurf* (2010), 265 ff.; *idem*, *Das Anderskönnen in der strafrechtlichen Schuldlehre*, in: J.C. Bublitz et al. (eds.), *Recht – Philosophie – Literatur: Festschrift für Reinhard Merkel zum 70. Geburtstag* (2020), 371–393, 387 ff.; *S. Behrendt*, *Entzauberung des Rechts auf informationelle Selbstbestimmung: Eine Untersuchung zu den Grundlagen der Grundrechte* (2023), ch. 19 B. Mostly, the discussion revolves around the practice and/or the legitimacy of ascribing responsibility and accountability, cf. *Bröckers* (n. 10), 259 ff.; *Hörnle*, *op.cit.*, 51 ff. Additionally, there is a discussion on whether believing in (causal) determinism is compatible with rational deliberation, see e.g., *G. Caruso*, *On the Compatibility of Rational Deliberation and Determinism: Why Deterministic Manipulation is not a Counterexample*, *The Philosophical Quarterly* 71 (2021), 524–543, 524. Deliberation-incompatibilists argue against the compatibility of a person believing in determinism and being rational and engaging in deliberation. Deliberation-compatibilists argue in favour of it.

acted upon it – call for a response.¹⁵ Because we cannot determine the necessity of a response by referring to the actual reasoning of another agent (due to epistemic limitations), we need to refer to rationalization.

B. Legal accountability and normatively relevant decision

Insofar as *Kurek's* approach aims at differentiating between events for which an agent can be held *accountable* and events for which he could not be, the concept seems to leave a gap.

Legal accountability can be established even if the cognitive processes of the acting agent lack rationality from the perspective of the observer. The observer's judgment about the acting agent's behaviour in terms of *rationality* can be separated from the question of whether the agent's behaviour was actually based on a *normatively relevant decision*. A normatively relevant decision requires that the concrete cognitive processes have taken sufficient data into account to arrive at a rational decision and be sufficiently complex.¹⁶ It does not necessarily meet the observer's understanding of a rational decision – if that were the case, there could be no criminal liability for an “irrational attempt”. Whether *Kurek's* approach roughly matches the existing differentiation is not clear. His approach *could* entail that those cases commonly classified as irrational attempts would be qualifiable as rational attempts by way of thorough mental simulation. The common classification refers to the judgement of an “objective third party” in terms of the rationality of the attempt but, according to *Kurek*, mental simulation requires putting yourself in the shoes of the acting agent and acknowledging the difference between yourself and the person whose behaviour is rationalized. Whether *Kurek's* approach leaves room for irrational attempts depends on how far he would take the idea of mental simulation.

Normatively relevant behaviour is not limited to *intentional* – and thus rationalizable – behaviour: Not every act of human behaviour is perceivable as goal-oriented and non-intentional behaviour may still be normatively relevant. An agent might cause an event by being negligent even though he did not arrive at a sufficiently reasonable decision about creating the risk as long as he could and should have. Negligent behaviour can thus be normatively relevant if it is based on cognitive processes with which the agent *could* have arrived at a

¹⁵ Cf. *R.A. Duff*, Guiding Commitments and Criminal Liability for Attempts, *Criminal Law and Philosophy* 3 (2012), 411–427, 417 f.; *idem*, Responsibility and Reciprocity, *Ethical Theory and Moral Practice* 21 (2018), 775–787, 776 ff.

¹⁶ *H. Frister*, Die Struktur des “voluntativen Schuldelements” – zugleich eine Analyse des Verhältnisses von Schuld und positiver Generalprävention (1993), 120; *Behrendt* (n. 14), ch. 19 B.; *eadem*, Die beiden Säulen der Rechtssubjektivität: Autonomie und Anerkennung eines grundrechtstheoretischen Rechtsverhältnisses als Fundamente für die Entstehung von Rechtssubjektivität, *Rechtstheorie* 52 (2021), 45–68, 51, 54 ff.

normatively relevant decision but did not due to his/her negligence. The behaviour in question does not have to be specifically goal-driven to be normatively relevant negligent behaviour in this sense. However, negligence can also be a *by-product* of intentional behaviour: When you want event *x* to occur and intend to achieve it by performing a certain task, you might be unaware that this will also lead to event *y*. The occurrence of this event would not be explainable by rationalization; the agent would *not* have made a sufficiently reasonable decision about creating the risk – if such a decision had occurred, he would have wilfully created the risk. Insofar as negligence occurs as a by-product of intentional behaviour, it might fall within *Kurek's* definition of rational – and therefore normatively relevant – behaviour. However, not all cases of negligence can be understood in this manner.

As a consequence, the observer does not necessarily have to perceive the behaviour of the other agent as rational to consider the behaviour as normatively relevant. He only needs to perceive that person as being *capable* of making rational decisions.¹⁷ Whether the behaviour can normatively trigger a response (e.g. punishment) depends on whether it was truly based on a normatively relevant decision (or could have been but was not due to negligent behaviour).¹⁸ It is important to differentiate between the *attribution of rationality* and the *ontological substrate* which is required for a normatively relevant decision.¹⁹ The fact that the observer calls the rationality of the attempt into question does not necessarily mean that there is no normatively relevant behaviour. The existence of normatively relevant behaviour does not depend on whether or not the observer thinks that the behaviour is explainable by rationalization.

Human beings have limited insight into the real world. They perceive the world not as it is; it is always a hermeneutic endeavour.²⁰ People are limited by the constraints of their physical senses, their cognitive capacities, the limitations of biological data processing and so forth. This means that a normatively relevant decision cannot require that the cognitive results have led to an objectively correct result – even if it would only need to be “objectively correct” in relation to the goals set by the individual. To be clear: I am not stating that it

¹⁷ Cf. *M. Pawlik*, Normbestätigung und Identitätsbalance: Über die Legitimation staatlichen Strafans (2017), 10 f.; *T. Scanlon*, Moral Dimensions: Permissibility, Meaning, Blame (2008), 139 f.

¹⁸ *Frister* (n. 16), 126 ff.; *idem*, Überlegungen zu einem agnostischen Begriff der Schuldfähigkeit, in: G. Freund et al. (eds.), Grundlagen und Dogmatik des gesamten Strafrechtssystems: Festschrift für Wolfgang Frisch zum 70. Geburtstag (2013), 533–554, 546 ff.; *idem*, Strafrecht Allgemeiner Teil (9th edn., 2020), ch. 18 paras. 12–14.

¹⁹ *Behrendt* (n. 14), ch. 19 B.

²⁰ Hermeneutics is the study of interpretation in general; it is not only about understanding texts, see e.g. *T. George*, Hermeneutics, in: E.N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (2021 edn.), <https://plato.stanford.edu/archives/win2021/entries/hermeneutics/> (last accessed 12 February 2023).

is always impossible to get it right when it comes to perceiving the world. Determining whether there are three apples on the table in front of oneself is a task most adults would master effortlessly. Being brought up in an environment in which apples are available everywhere and are commonly described with that term, the agent has simply learned all he needed to learn to make sense of the world insofar as he can reliably perceive an object that is described as an apple and distinguish it from other objects. However, normatively relevant decisions are not only about perceiving the world, they are about concretizing interests and about understanding and accepting or creating risks or chances. The decision to pick one of the apples up and eat it seems to be perceivable as a normatively relevant decision without any difficulties. However, whether and to what extent there are normatively relevant decisions requires more substance than that: It would be about understanding what eating that apple would mean regarding one's own interests and the interests of others. Usually, eating an apple does not cause any problems in that respect either, but what if the person eating the apple is a diabetic and eating that apple would cause him/her bodily harm? What if someone else would need that apple to stay alive? If we conceptualize normatively relevant decisions in this manner, the question would be whether the agent (1) has processed data that is deemed to be sufficient to decide about the risk/the chance in a normatively relevant fashion and (2) whether the cognitive processes were sufficiently complex.²¹ This would be an unavoidably interdisciplinary issue: Drawing the line between sufficiently and non-sufficiently complex cognitive processes would be a *normative* issue, but the law does not provide the necessary insight into the *ontology* of cognitive processes.

If the behaviour of the acting agent is based on a decision that meets these criteria, it will qualify as a normatively relevant behaviour. At first glance, neuroscientific research casts doubt on the thesis that behaviour can actually be *based* on a decision: If the decision is made *after* the action has already been performed, the behaviour cannot be based on the decision. Consequently, it would not qualify as normatively relevant behaviour. The famous experiments

²¹ If the circumstances of eating an apple are unproblematic, we do not have a problem with perceiving that decision as normatively relevant – we might even find it hard to argue why we should describe it like this in light of the banality of the decision. The conceptual necessity only becomes visible if we back away from only trying to solve problematic cases and try to see the big picture instead.

by Benjamin Libet²² seem to suggest this.²³ However, the experiments have only shown that the *awareness* of making the decision took place after the initiation of the act – and even that is called into question because these findings relied on the recording of the participant and the measured readiness potential could be connected to other cognitive processes.²⁴ Furthermore, awareness cannot be a necessary element if negligent behaviour can qualify as normatively relevant. Even if awareness only took place after an action was initiated, it does not necessarily mean that there could not be any normatively relevant behaviour which is based on a wilful decision to create the risk or chance: The action might not be fully determined by the initiation but might occur only in the absence of a neural stopping sequence. If we set aside the question of whether the action was initiated by a decision that was (partially) consciously deliberated on in that particular decisive moment, we might want to consider that the factors involved in initiating that action were previously “formed” by cognitive processes. For example: Choosing and applying for a university program is behaviour which is obviously preceded by a significant amount of reflection.

C. (Ir-)rational attempts and the need to respond

The term “rationalization” does not seem to be a good fit for the differentiation of rational and irrational attempts. The *acting agent* will usually qualify his behaviour as rational and thus assume to undertake a rational attempt to achieve the goal – otherwise he would not have opted for said action. The *observer* can qualify action x as being a *rational* or an *irrational* means to achieve the goal (event y). If one adopted mental simulation to determine whether a rational attempt took place, it would depend on the depth and success of the endeavour to simulate the agent’s mindset. In order to differentiate between rational and irrational attempts, one would have to determine what should not be considered within this process of mental simulation (otherwise every intentional behaviour would have to qualify as rational). The observer would have to engage in mental simulation (which might be somewhat superficial due to epistemic limitations) and then measure it against an abstract threshold used for labelling decision-making processes as rational.

²² In reference to these experiments, see *B.W. Libet*, Do We Have Free Will?, *Journal of Consciousness Studies* 6 (1999), 47–57, 47 ff. For recent developments in neuroscientific research on the subject, see e.g. *I. Fried/P. Haggard/B.J. He/A. Schurger*, Volition and Action in the Human Brain: Processes, Pathologies, and Reasons, *Journal of Neuroscience* 37 (2017), 10842–10847; *K. Fifel*, Readiness Potential and Neuronal Determinism: New Insights on Libet Experiment, *Journal of Neuroscience* 38 (2018), 784–786.

²³ The experiments have been discussed thoroughly (and vigorously) mostly with regard to their implications on free will, but they also impact the related question of whether behaviour can be the result of a decision.

²⁴ See e.g. *Fifel* (n. 22), 784.

Whether the means are deemed (a) rational or (b) irrational by the observer can make a difference with regard to criminal law. This question touches upon the discussion about *factual* and *legal* impossibility and the controversy between *subjectivist* and *objectivist* accounts of (criminal) wrongdoing,²⁵ which – in turn – touch upon the challenging problem of the unavoidable subjective perception of the ontological world. A verdict of irrationality does not dismiss criminal liability, but – to simplify a very complicated discourse – the less rational the attempt, the better are the chances of criminal liability being called into question.²⁶ Whether criminal liability is actually called into question depends on the stance the observer takes on these conceptual matters.²⁷

Additionally, we could also discuss the rationality of the reaction towards an agent's behaviour. Whether the acting agent is held criminally liable and how the state formally reacts can be subject to an analysis of rationality. Here, it is not the perpetrator's behaviour that is under scrutiny – it is about the rationality of the reaction. This relates to the academic disagreement as to whether *retributivism* or *consequentialism* is the proper justification for punishment.²⁸ Retributivism argues that punishment is justified simply because of the criminal wrongdoing; punishment would be in no need of further justification.²⁹ In contrast to this stance, consequentialism argues that punishment is justifiable only because such a response is required by a *further* reason, e.g. deterrence, norm stability (and/or trust in the validity of the behavioural norm), public safety. Consequently, the response to an agent's behaviour can also be

²⁵ For an overview, see e.g. R.A. Duff, Subjectivism, Objectivism and Criminal Attempts, in: A.P. Simester/A.T.H. Smith (eds.), *Harm and Culpability* (1996), 18–44; S. Mathis, Criminal Attempts and the Subjectivism/Objectivism Debate, *Ratio Juris* 17 (2004), 328–345, 330–333, and – with a slightly different perspective on the discourse – S. Behrendt, Attempting the Impossible: Impossibility in Criminal Law Theory and the Constructivist Discourse-Theoretical Concept of Law, *Zeitschrift für Internationale Strafrechtswissenschaft* 2023, 20–32, passim.

²⁶ Cf. J. Hasnas, Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible, *Hastings Law Review* 54 (2002), 1–77, 74; Mathis (n. 25), 340 ff.; A. Ashworth, Attempts, in: J. Deigh/D. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law* (2011), 125–144, 136 f.; G.P. Fletcher, *Rethinking Criminal Law* (1978), 160 f.

²⁷ In my opinion, it would be more prudent to link the issue of rationality to the question of whether it is necessary to formally respond to the behaviour (by a declaration of guilt and possibly by imposing punishment) – it is not a matter of criminal liability because a breach of a behavioural norm is conceivable. If the agent has attempted to commit a crime by use of *reasonable* means, there is cause to respond to it.

²⁸ For an overview, see e.g. D. Dolinko, Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment, *Law and Philosophy* 16 (1997), 507–528; G.P. Fletcher, Punishment and Responsibility, in: D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (2nd edn., 2010), 504–512, 506; M.N. Berman, Two Kinds of Retributivism, in: R.A. Duff/S. Green (eds.), *Philosophical Foundations of Criminal Law* (2011), 433–458.

²⁹ Caruso (n. 10), 11 f.

analysed with respect to its rationality in this regard. Furthermore, these question about the rationality of the response also touch upon the discussion about the relevance of moral luck (or more precisely outcome luck)³⁰ for criminal wrongdoing and blameworthiness: These issues matter with respect to the question of whether there was any criminal wrong-doing in the first place and if so, to what extent. According to some, the outcome is more than just an event that triggers the investigation of possible wrongful behaviour influence – it influences blameworthiness.

IV. Rationalization within the legal system

(Post hoc) rationalization is not privy to accountability in the realm of criminal law. The phenomenon is linked to *decisions* and is, therefore, observable everywhere. Decisions within the legal system – i.e., verdicts and judgments, legislative decisions – are not exempt since they are also human decisions. However, some decisions are made only after a long process of deliberation: Thoughts are outlined in writing, discussed in fora, and so forth. *Antecedent* rationalization is strong in those cases.³¹ Making the final decision can be up to one person or a collective (e.g. parliament, panels, court senates/chambers). Collective decision-making processes work differently than those of an individual.³² This needs to be taken into account when the rationality of a decision is in question.

Once a decision – be it an individual or a collective decision – is communicated in society, it gains its own footing. Others attribute a claim to correctness to the decision insofar as they understand the decision to be based on reason. From then on, the decider's task is to explain the decision, rationalize it, argue why it was reasonable to decide in this manner and not in another. In those

³⁰ Cf. *J.P. Manalich*, The structure of criminal attempts: An analytic approach, *Revus* 34 (2018), paras. 50 ff., <https://journals.openedition.org/revus/4118> (last accessed 12 February 2023).

³¹ Whether antecedent rationalization is conceptually possible depends on one's understanding of the term. If it were restricted to post hoc processes, it might be more prudent to describe it as strong reasoning.

³² *W. Hoffmann-Riem*, Die Klugheit der Entscheidung ruht in ihrer Herstellung – selbst bei der Anwendung von Recht, in: A. Scherzberg et al. (eds.), *Kluges Entscheiden: Disziplinäre Grundlagen und interdisziplinäre Verknüpfungen* (2006), 3–23, 20. Cf. the literature on collective intentionality, collective decision-making and human rationality from a sociological stance (e.g. “discursive dilemma”, “doctrinal paradox”): e.g. *L.A. Kornhauser/L.G. Sager*, Unpacking the Court, *Yale Law Journal* 96 (1986), 82–117; *P. Pettit*, Deliberative Democracy and the Discursive Dilemma, *Philosophical Issues* 11 (2001), 268–299; *C. List/P. Pettit*, Group Agency: The Possibility, Design, and Status of Corporate Agents (2011), 42 ff.

situations, additional information might come to light or the agent might understand the relevant issues more thoroughly than before. Maybe the new information/perspective would cause the agent to decide differently. How the agent deals with this dilemma (either argue for the old decision even though one does no longer believe it to be right or correct the decision even though it has already been made and communicated to others) seems to have something to do with whether the decision already had some real impact and to depend on personality traits of the agent himself (e.g. does he avoid correcting himself because he fears it would make him look weak or unreliable?). *Post-hoc rationalization* on the part of the decider in these scenarios seems to be highly influenced by socio-psychological factors.

When it comes to decisions within the legal system – a judgment, enacting a law, issuing an administrative act – an agent is bound by his own (communicated) decisions much more profoundly than by informal decisions in the social sphere. If a friend changes his mind about being free for dinner, we might be disappointed, and if it was an important event, we might expect him to have and provide a valid reason. That is, we might hold him accountable. There might even be some form of “social sanction”, but the agent is generally free to change his mind. This is different if it is about a decision attributable to the state. Once made, the decision is generally out of the state’s hand. After having delivered the verdict, the judge is generally bound by his decision. A post hoc written reasoning needs to support the verdict otherwise the decision may be overturned simply on the basis that the decision is unsupported by adequate reasoning. Therefore, the pressure to rationalize one’s prior decision is higher than in common, non-intimate social relationships.

A. Rationality, the law and the legal system

Law as a social construct serves as a means to organize society (inter alia by setting/stabilizing behavioural expectations and thus enabling people to anticipate the behaviour of other people). According to *Jürgen Habermas*, the function of law is to relieve the individual of having to engage in communicative action in order to reach consensus because the matter is already settled by the law.³³ However, there is much more uncertainty and ambiguity to law than most of us like to believe. Disagreement and the necessity for discourse is not removed simply because there are norm texts (statutes and regulations).³⁴ Norm texts leave substantial room for interpretation. There is not “one right answer”

³³ *J. Habermas*, *Faktizität und Geltung* (2016), 110. See also *A. Engländer*, *Grundrechte als Kompensation diskursethischer Defizite? Kritische Anmerkungen zu Jürgen Habermas’ Diskurstheorie des Rechts*, *Archiv für Rechts- und Sozialphilosophie* 81 (1995), 482–495, 484; *idem*, *Diskurs als Rechtsquelle* (2002), 18.

³⁴ Discourse theory acknowledges this fact because it acknowledges that the requirements of an ideal discourse can never be met in reality.

to the question of what the law dictates.³⁵ In addition, norm texts need to be seen as part of the “bigger picture”: Preconceptions and other (especially higher ranking) texts impact the interpretation. Insofar as rationalization takes place in these contexts, it would seem to be about developing a plausible narrative for a certain text (norm text, decision and so forth). However, conflicting decisions can be reasoned for with equal claim to professional standards.³⁶ Insofar as rationalization has a (self-)deceptive element, rationalization would only take place when a decision was made for some reasons and the rationalizer explains it with *different* reasons and/or sounder reasoning.

This ambiguity and openness of law³⁷ does not conflict with the assumption that the law provides considerable guidance. If it did not, we would see far more chaos, conflict and legal disputes.³⁸ The search for consensus, the establishment of relatively stable and counterfactual behavioural expectations by means of law,³⁹ and the search for rationality in law and the application of law have always been core issues of legal theory. This essay does not, however, leave enough room to even sketch the discourse on this issue and the connected topics (objectivity, legitimacy etc.).

Another problem is the grander setting of decisions, and legislative decisions are no exemption. A decision might have effects that do not have anything to do with the rationality of the decision with regard to the subject matter and the axioms the decider believes to be true. If a problem is perceived from only an isolated, siloed perspective, the rational solution might cause problems elsewhere. If a member of parliament votes against the party line, for example,

³⁵ The “one-right-answer”-thesis is ascribed, inter alia, to Ronald Dworkin. Most scholars refute it, see *T. Herbst*, Die These der einzig richtigen Entscheidung: Überlegungen zu ihrer Überzeugungskraft insbesondere in den Theorien von Ronald Dworkin und Jürgen Habermas, *Juristenzeitung* 2012, 891–900; *C. Bäcker*, Die diskurstheoretische Notwendigkeit der Flexibilität im Recht, in: idem/S. Baufeld (eds.), *Objektivität und Flexibilität im Recht* (2005), 96–110, 97.

³⁶ See e.g. *C. Becker*, Was Bleibt? Recht und Postmoderne: Ein rechtstheoretischer Essay (2014), 74, 111.

³⁷ *Hoffmann-Riem* (n. 32), 4, 14; *Bäcker* (n. 35), passim.

³⁸ To elaborate on the basis of the constructivist discourse-theoretical concept of law: In light of the uncertainty about normative contents, the interpreter is challenged with the task of generating an understanding of what the law dictates with reference to the concrete circumstances by engaging with the norm texts and communicative acts he perceives to be relevant. Creating a concrete “ought” pressures the interpreter to be reasonable, especially if it is the lawfulness of his behaviour that is in question. If another interpreter is not convinced, reasons differently and comes to a different assessment of the law, he will judge the acting agent’s behaviour according to his own perception of what the law dictates. On the basis of the constructivist discourse-theoretical view, the rationality of legal interpretation is therefore enriched with a socio-psychological element.

³⁹ See e.g. *N. Luhmann*, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), 17; *idem*, *Rechtssoziologie* (1983), 342.

this might lead to a loss of influence within the party and thus weaken one's ability to support other valuable causes within the party later on. If these socio-legal and political issues are so grave that a siloed, materially rational decision would cause more harm than good, then it might be rational to decide differently.⁴⁰ The rationality of a decision therefore depends on the goal the decision is measured against.

Additionally, a politician's stance on *one* matter can be influenced by *another*, giving room for political trade-offs. The German constitution has built-in provisions to avoid this (Art. 38 (1)(2) *Grundgesetz* – GG), but some decisions are subject to party discipline. Additionally, no one can have expert knowledge on all of the subject matters that he/she has to vote on. Consequently, the party line has a big influence on some of the voting behaviour even when there is no party discipline.⁴¹ Additionally, informal social arrangements could still take place. Whether they do take place, and to what extent, would be a matter of empirical research. Arrangements according to which a member of parliament would be obliged to vote a certain way are illegal (but would be difficult to detect). However, though policy compromises might not suit our ideals, they are to some extent necessary and well-accepted practice. Coalitions would not be possible otherwise.

Insofar as the public explanation of legislative decisions does not account for political and strategic issues (to the extent they have played a role) or the complexity of parliamentary and political processes, such explanation reduces complexity and argues a siloed material reasoning. Deploying the understanding that rationalization is a practice by which an event is explained by a plausible narrative which is expected to be more acceptable to others than the real reasoning, public explanations of legislative decisions are not exempt from rationalization.

B. Rationality, law and reality

The core function of the law is to shape society by guiding the behaviour of state and non-state actors. The law should tell them what to do and what not to do in order to achieve some sort of goal.⁴² This implies a connection between law and reality because one can only meet an objective if the means – i.e., the norms or, to be more precise, the norm texts – are apt. Under the assumption that the state is fully accountable to its members, every state action needs to serve a goal. Therefore, every state action would need to be rational. What that entails depends on the subject matter and the time-sensitivity of a decision, but,

⁴⁰ *Hoffmann-Riem* (n. 32), 19.

⁴¹ *M. Morlok/C. Hientzsch*, Das Parlament als Zentralorgan der Demokratie – Eine Zusammenschau der einschlägigen parlamentsschützenden Normen, *Juristische Schulung* 2011, 1–9, 4.

⁴² See e.g. *A. Steinbach*, *Rationale Gesetzgebung* (2017), 10, 132 ff.

generally speaking, this means that the circumstances which determine the reality and the effectiveness of potential measures would need to be investigated before a decision is made.⁴³ Such an approach to legislation is often called naïve due to political realities.⁴⁴ There is some truth to this characterization. Mainly, there are two issues that impact the connection between legislative decisions and reality: (1) Parliament cannot investigate all relevant circumstances or it would never get anything done. Moreover, the necessary knowledge base is limited not only by what can possibly be investigated within a certain period of time but also by the availability of resources (some epistemic obstacles may be impossible to overcome with the methods and resources available in the present). If the state approached every task in an ideal fashion, he would most likely require more resources than are available. If this is true, then we should perceive legislation and government as a form of managing limited resources; political debates can sometimes also be framed as differences of opinion regarding prioritization. (2) Furthermore, parliamentary voting decisions are often influenced by factors that have little to do with the subject matter at hand (party line and political recognizability; the desire to be re-elected, to gain power or to stay in power). While those issues point to the problems of an idealised understanding of legislation and a siloed focus on the concrete decision – they are separable from the necessity of basing a decision on sufficient knowledge about the reality.

C. Rationality, rationalization and accountability

Whether the rationality of a decision can be reviewed depends on whether the objective was communicated truthfully.⁴⁵ A decision can be rational even if no other agent can determine the rationality. However, if no review is possible, the acting agent exempts himself from accountability. Under the assumption that the state is fully accountable to its members, giving reasons would therefore be a requirement of legitimate state action. Making rational decisions does not require the communication of reasons, but accountability does – and communicating one's reasons typically implies rationalization.

⁴³ See e.g. *A. Gromitsaris*, *Rationalität und Recht*, *Rechtstheorie* 50 (2019), 307–328, 323 f.; *A. Steinbach*, *Gesetzgebung und Empirie*, *Der Staat* 54 (2015), 267–289; *idem* (n. 42), 132 ff. For a critical perspective, see e.g. *P. Dann*, *Verfassungsgerichtliche Kontrolle gesetzgeberischer Rationalität*, *Der Staat* 49 (2010), 630–646, 640 f.

⁴⁴ Cf. e.g. *Dann* (n. 43), 641.

⁴⁵ The differences between the production and the portrayal of a decision have been worked out most prominently by *N. Luhmann*, *Legitimation durch Verfahren* (1969).

V. Summary

Rationalization and rationality in law and legal theory is a scintillating and conceptually demanding topic. *Kurek* has made some intriguing and thought-provoking points. I hope to have hinted to additional and associated matters and to have insinuated their complexity. In the end, we seem to be only at the beginning of true interdisciplinary work on the topic.