

1971

The Identity of Legal Systems

Joseph Raz

Columbia Law School, jr159@columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Law and Philosophy Commons](#)

Recommended Citation

Joseph Raz, *The Identity of Legal Systems*, 59 CALIF. L. REV. 795 (1971).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/761

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

The Identity of Legal Systems

Joseph Raz*

Laws are part of legal systems; a particular law is a law only if it is part of American law or French law or some other legal system. Legal philosophers have persistently attempted to explain why we think of laws as forming legal systems, to evaluate the merits of this way of thinking about the law and to make it more precise by explicating the features that account for the unity of legal systems. Various theories have been suggested but none has been accepted as completely satisfactory, and the continuing debate owes much to the intricacy of the problems involved. This intricacy is also due to a considerable cloudiness in the understanding of the problems themselves. I will attempt, through this Article, to clarify the nature of the problem of the unity of municipal legal systems. My primary aim is not to answer all the relevant questions, but rather to formulate them more precisely, for I believe that in philosophy a clear conception of a problem is half the way to its solution.

The term "a legal system" is not a technical legal term. It may occasionally figure in courts' decisions, but any term can appear there. Although it is occasionally used in legal argument, it has not the character of a technical legal term such as "floating charge" or "fee simple" or "consideration." Nor is the concept important to the day-to-day administration of law, as are the concepts of contract, ownership, right, duty, and the like. The term is primarily used in thinking about the law, not in the actual use and application of the law. It is commonly used in books of jurisprudence or comparative law, not in books about property law, torts, or copyright.

Therefore, when trying to clarify the notion of a legal system, the legal theorist does not aim at defining clearly the sense in which the term is employed by legislators, judges, or lawyers. He is, rather, attempting to forge a useful conceptual tool, one which will help him to a better understanding of the nature of law. This does not mean that he should not try to model the concept in a way that would be useful to the solution of certain legal problems. Rather, it means only that even

* Senior Research Fellow, Nuffield College, Oxford, England. M. Jr. 1964, Hebrew University, Jerusalem; D. Phil. 1967, Oxford. The author is indebted to Professor H.L.A. Hart, for many discussions on the problems dealt with in this Article, and for his illuminating comments on a first version of it.

if he does this, he will not be trying to elucidate the meaning of a technical legal term, but instead to provide the legal practitioner with a concept that may help him in tackling some nagging legal problems. But should it really be the goal of the legal theorist to help solve legal problems by inolding a precise concept of the identity of a legal system? To what kind of legal problems may such a concept be relevant? And if this is not his goal, what is? Providing an answer to these questions is the main purpose of this Article.

To try to answer these questions we should first distinguish between two possible concepts of the unity of a legal system, which I will call the material unity and the formal unity. The material unity of a legal system consists in its distinctive characteristics; it depends on the content of its laws and on the manner in which they are applied. When trying to explain the characteristic features of a legal system we are not, of course, looking for the detailed regulation of every legal institution. Rather, we are looking for the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend to it its distinctive character. To distinguish the problem of formal unity from that of material unity, I shall call the former the problem of the identity of legal systems.

I

THE PROBLEM ISOLATED

The identity of the system is found in the criterion or set of criteria that determines which laws are part of the system and which are not. Some proposed answers to the problem of identity are well known; perhaps the best known are: A law is part of a legal system if and only if it was enacted directly or indirectly by the sovereign of that system (Austin), or if and only if it is authorized by the basic norm of the system (Kelsen), or if and only if it ought to be recognized according to the rule of recognition of the system (Hart). These three philosophers were not concerned with the material unity of legal systems. They did not think that the unity of the system depends on the content or spirit of its laws, or on the traditions and practices of its most important legal institutions. Instead, they hoped to formulate a test that would enable them to determine whether any two laws belong to the same legal system or not.

A more or less clear concept of the identity of a legal system is presupposed by any investigation into its material unity. The investigator needs to know which laws and institutions form the system before he can inquire into its distinctive characteristics. He does not need, however, a complete and precise list of the laws of the system. It suffices for his

purposes to be able to identify the bulk of the laws. Indeed, the investigation into the material unity of a legal system may even help to decide some borderline cases concerning its identity. When all other indicators fail to provide an answer, it may be reasonable to decide that a norm is part of a certain legal system on the ground that it closely resembles in spirit and manner of application the rest of the laws in that system, or that since it is diametrically opposed to the character of the system it should not be regarded as a part of it.

In describing the problem of identity as a quest for criteria that determine which laws belong to a legal system, it is normally assumed that the notion of a law is clear and uncontroversial. In fact this is far from being the case. The problem of the individuation of laws—the question of what is one complete law—is one of the most controversial in jurisprudence. It would, therefore, be desirable to separate the problem of identity of legal systems from that of the individuation of laws. This can easily be achieved by reformulating the problem in the following way: The problem of identity of legal systems is the quest for a criterion or set of criteria that provides a method for determining whether any set of normative statements is, if true, a complete description of a legal system.

With the help of certain technical terminology, it is possible to sidestep the problem of individuation. A statement is a normative statement if and only if the existence of a norm is a necessary condition for its truth. A normative statement is pure if and only if the existence of certain norms is sufficient for its truth. The set of all the pure statements referring to one legal system is called the “total set” of that system, and every set of pure statements that is logically equivalent to the total set of a system is a complete description of that system. The problem of identity is a search for criteria for a complete description of any legal system, and it is irrelevant whether any statement in the description describes just one complete law or not. Therefore, a theory concerning the nature and principles of individuation of laws need not be presupposed in an examination of the problem of identity.

By stipulating that the criteria identify sets of statements that are complete descriptions *if true*, the problem of the existence of legal systems may be separated from the problem of identity. It is the business of criteria of existence of legal systems to provide a method for determining when a complete description is a true description—to determine whether the legal system described actually exists. This task should be clearly separated from that of formulating the criteria of identity.¹

The problem of identity has two quite distinct aspects: the aspect

1. Cf. J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 49, 70 (1970).

of the scope of a legal system and the aspect of its continuity. Questions of scope arise when we consider whether the conventions of the constitution, a valid contract, the regulations of a limited company or of a trade union, for example, are part of the legal system. Questions of continuity concern the various ways in which a legal system ceases to exist and is replaced by a new system. Does, for example, a revolution, or a coup d'état, or a declaration of independence, terminate the existence of one legal system and signal the emergence of a new system?

A momentary legal system is a legal system at a particular point of time. The problem of scope is the search for criteria of identity of momentary legal systems, whereas the problem of continuity is the search for criteria providing a method for determining whether two momentary legal systems are part of one, continuous, legal system. I will show that somewhat different considerations apply to each of these problems.

These preliminary clarifications make it clear that problems of identity are here considered as jurisprudential problems, the solution of which lies in providing sets of criteria of identity, which, if successful, provide methods of determining the identity of *all* municipal legal systems. Thus conceived, the problem is very different from that facing a legal practitioner looking for an answer in a *particular* legal system to a certain legal problem. Consider, for example, a judge who must render a decision in a particular case before him. Some answers that might satisfy the legal philosopher will not help the judge. A legal philosopher may say, and some philosophers have said, that what judges do about disputes is the law; but this is unlikely to be of much help to a judge wondering what he should do about a dispute. Does this prove that this jurisprudential criterion is false or pointless? The answer to this question depends on one's position on the fundamental problem posed above: What purpose do legal philosophers have in constructing theories concerning the identity of legal systems? They do not mean merely to elucidate the current meaning of a legal term; what, then, is their purpose?

One possible answer is that the goal is to forge a concept that will help the courts and other people concerned with the law find answers to certain legal problems. There is a sense in which this is trivially true of all jurisprudential problems. Jurisprudence strives to improve our understanding of the law, and in one way or another, however remotely or indirectly, an improved understanding of the law is bound to affect the operation of the law and to help legal practitioners. But the above-mentioned contention should not be taken in this sense, for its intent is to claim that there are certain specific legal problems the solution of which will directly benefit from a jurisprudential analysis of the identity of legal systems.

Several legal problems can be thought to be relevant to the concept of identity. Some relate to the scope of the legal system, that is, to the problem of the identity of momentary systems. Most legal systems distinguish between procedures of proving matters of fact and procedures of arguing about points of law before the courts. Many legal systems stipulate that ignorance of law is no excuse for committing an offense whereas (reasonable) mistake of facts is. Many legal systems include laws to the effect that a general law is valid only if published in a manner specified by law. All of these legal provisions can give rise to disputes turning on the question: Is some rule part of the legal system or not? Should the defense have proved the rule as a fact or is the rule part of the legal system? There are other doctrines that may also bring the question of the scope of the legal system before the courts. For example, are internationally binding treaties to which the state is a party part of the municipal law of that state? Are the rules of public international law part of the law of the land?

Questions pertaining to the continuity of legal systems may arise before the courts in different contexts. A successful coup d'état or the establishment of a new state may give rise to various problems: Are previous laws still in force? Do persons who previously held high office still hold it or should they be renominated? Can the new regime or state claim taxes and debts owed to the old one? Can a person who committed an offense before the change be prosecuted after it occurred? And so on.

Some, perhaps most, of the problems mentioned have obvious solutions and present no difficulty to the lawyer or judge. It is the nature of the question, the considerations relevant to a correct answer, that matter. Its degree of difficulty is immaterial. Nor is it part of the claim that such problems are always decided according to the courts' conception of the scope or continuity of a legal system. Other legal considerations may be involved, and the courts may explicitly or implicitly decide the issues on the other grounds.² It follows that even when faced with such problems, the courts' opinions on the question of identity are not always clear from the actual decision in the case. The arguments used to justify the decision are a much better indication and even they may be open to different interpretations.

It may be suggested that legal theorists, when dealing with the problem of identity, should aim to help formulate a systematic answer to legal problems of the kind mentioned. They should take account of existing legal solutions. They should, for example, regard the fact that

2. For example, the courts may decide that a certain law is part of the system and is valid, and the provision making validity dependent on publication should be construed to include an exception for laws of this kind.

foreign law, when applied by courts according to the rules of private international law, must be proved by expert witnesses as an indication that it is not part of the legal system under which these courts operate. Legal theorists should generalize such particular legal solutions, elucidate the reasons for their adoption and on this basis formulate a theory of identity that will help solve difficult and novel problems of this kind as well as provide guides for evaluating the merits of accepted solutions.

In pursuing such a task the theorist may find himself torn between two conflicting considerations. On the one hand, he is striving to reveal an underlying unity in the solutions, whether accepted or proposed, of many diverse legal problems. On the other hand, he must face the fact that each solution bears different legal consequences and arises in a different context, and therefore each solution might well be guided by different considerations. The purpose of making validity depend on publication may be different from the law's purpose of declaring that a mistake of law is no excuse. The theorist cannot take for granted that examination of the various legal problems relating to the identity of the legal system will lead to any unified criterion of identity. Still less can he assume that conclusions reached in the study of one legal system will be applicable to any other legal system. Different legal systems uphold different ideals of justice, maintain a different balance between conflicting interests, and pursue somewhat different goals. They exist in different societies living under different conditions. They are, therefore, likely to adopt different solutions to the problem of identity.

These remarks do not show that an investigation into the various legal criteria of identity accepted in a certain legal system and their underlying rationale is not worth pursuing. Rather, they merely warn against hasty generalizations and against uncritical application of accepted solutions to novel cases. They also draw attention to the fact that while pursuing such an investigation the theorist is engaged to a considerable extent in a critical task. He does not merely enumerate legal criteria, he rather inquires into their justifications and on this basis attempts to reach a sound generalization that will help solve new or difficult cases reasonably.

It is probably these features of this particular purpose of a doctrine of identity that account for the fact that none of the great positivist legal philosophers interested in problems of identity regarded their inquiries as designed to further this purpose. Positivist jurisprudence conceived the problem of identity as a descriptive problem of general jurisprudence. They wanted to find criteria for identifying the laws of any legal system, they were not interested in the correct or desirable

solution to any set of specific legal problems. Bentham, Austin, Gray, The American Realists, Kelsen, Hart—none of them had any great interest in any of the legal problems enumerated above. They did not regard them as relevant to their theories because they were pursuing a different goal. The attempt to achieve a reasonable and systematic solution to a set of related legal problems of the type enumerated is a possible aim of a legal theorist. It is not, however, an aim that was important in the history of jurisprudence.

II

THE PROBLEM CLARIFIED

What, then, were the aims of legal philosophers when dealing with problems of identity? There are three main issues that bear on the problem when considered as one of analytic jurisprudence:

- First, the relation between the existence of a law and its efficacy;
- second, the distinction between making a new law and applying an existing one; and
- third, the relation of law and the state.

Together these issues determine the answer to the problem of identity. Although each one of them engaged the mind of some of the legal philosophers who discussed the problem of identity, failure to consider all three partially accounts for the fact that no satisfactory solution to the problem has been found. This part is an examination of the three issues.

A. The Relation of Existence and Efficacy of Laws

The question of the relation of existence and efficacy of laws is one of the most fundamental questions concerning the nature of law. It concerns the conditions for the existence of laws, but since laws exist only in legal systems, to ask whether a law exists is to ask whether it is part of the legal system concerned: the question refers to the problem of identity. There are two extreme positions on this issue. On the one extreme is the claim that a law created in the appropriate manner exists and is valid; its efficacy or inefficacy does not affect its existence and validity unless another law of that system makes efficacy a condition of continued existence of laws. Diametrically opposed to this is the argument that laws exist because and to the extent that they are socially accepted and followed; social customs are laws even if not enacted, whereas enacted law is not valid if it has no roots in social practices. Some theorists offered various compromise solutions. Kelsen, for one, says:

A general legal norm is regarded as valid only if the human be-

haviour that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity.³

Lasswell and Kaplan also prefer a compromise solution, although placing a much heavier stress on efficacy than does Kelsen's solution. Lasswell and Kaplan argue: "Laws are not made by legislatures alone, but by the law-abiding as well: a statute ceases to embody a law (except in a formal sense . . .) in the degree that it is widely disregarded."⁴

There is an element of truth in both views. Laws guide human behavior, help people in planning and deciding on their future course of action, and provide standards for evaluating past or planned actions. A law, the existence of which is unknown, or that is never acted on by the police nor enforced by judges or juries, does not guide the behavior of most people, not even that of law-abiding people. There seems, therefore, to be no reason to regard it as part of the legal system, since its complete inefficacy has deprived it of the main characteristic of law, that of guiding behavior. Furthermore, not only do parliaments often modify the law in response to a change in social practice and to conform with prevailing opinions and customs, but some social practices that were not adopted by the legislature have characteristics of laws—they guide behavior and very often they affect courts' decisions, sometimes without the judges even being aware of this.

As against these arguments, proponents of the opposite view argue that although both laws and social practices guide behavior, this is no reason to coalesce the two. The concept "a law" was traditionally used to refer to norms that, whether or not they conform with social practices, have the characteristic of being part of a system of norms united by its relation to legal institutions. Social practices differ from laws because they are not institutionalized. The contention that laws are laws because they were enacted by legal institutions clarifies this basic fact about the law, focusing attention on its institutionalized nature. Even legal custom is not law until it is recognized and declared to be law by the courts. Efficacy, therefore, does not affect the validity and existence of laws. To claim otherwise is to confuse law with social customs and to disregard the basic fact about the law—that it is created by institutions. There is, no doubt, a relation between law and social practices, but it is at most a causal relation. Legislatures and courts may, consciously or unconsciously, be affected in making new laws by prevailing customs and practices; the existence of laws may also affect

3. H. KELSEN, *THE PURE THEORY OF LAW* 11 (1967).

4. H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 75 (1950).

social customs and habits and even modify opinions. There is, however, no logical connection between law and social practice.

Both arguments are attractive, and it is very tempting to accept a compromise solution, as Kelsen, Lasswell, Kaplan, and others did. There is, however, yet another possible solution to the problem, which is not a combination of the first two yet incorporates the sound elements of both. This solution shifts the emphasis onto the law-applying institutions, and makes recognition by law-applying organs a necessary condition of the existence of laws. This in turn makes the institutionalized nature of law an indispensable part of the criteria of identity: a law is part of the system only if it is recognized by legal institutions. The emphasis is, however, on the law-applying rather than the law-creating institutions.

Such an approach may be justified by three separate reasons. First, although law-creating institutions are of the greatest importance in modern societies, where law is conceived as the outcome of deliberate human decision as to what society should be like, they played a minor role or did not even exist in primitive societies, where the laws were conceived as immutable and were in fact changed mainly by slowly evolving customs. Law-applying institutions are, on the other hand, a constant feature of law in every type of society and their existence should be regarded as a defining characteristic of law.

Second, since most legal systems recognize diverse sources of law, the only way to determine which are the law-making institutions and procedures of a given legal system is to establish which sources of law are recognized by the courts. Hence only the courts of a legal system can provide the clue to its criteria of identity.

Third, it is an essential feature of legal systems that they are institutional, normative systems. It is, therefore, reasonable to take the law to consist of those norms, rules, and principles, that are presented to individuals and institutions as guides to their behavior by the body of legal institutions as a whole. When the actions of law-creating and law-applying organs conflict, the actions of the law-applying organs are those that affect the considerations of the law's subjects: the law guides behavior by stipulating consequences that ultimately are to be enforced by the law-applying organs.⁵

The third rationale also preserves the importance of efficacy to the definition of law. Efficacy, however, is relevant only insofar as it affects the practices of the law-applying institutions. If, for example, the courts consistently refuse to act on a law, that law is not part of the legal system the courts operate, despite the fact that it was lawfully

5. See generally J. RAZ, *supra* note 1, at 191-92, 201-02.

enacted and was never repealed. If the courts consistently interpret a statute in a way deviating from its original meaning, their reading of it, not its original sense, becomes the law. According to this approach, then, the existence of the law is logically related to the practice of the law-applying organs. The condition of a law's membership in a legal system is, however, a counterfactual: if presented with the appropriate case the courts would act on the law. This may be true even though they are never—or seldom—presented with the appropriate case. Prosecutions in criminal cases may seldom be made, and civil cases may always be settled out of court in a way contrary to the law. Therefore a law may be valid even though it is largely inefficacious.

These remarks do not spell out any solution to the problem of the relation between efficacy and existence of laws. Rather, they merely delineate an approach to the problem, defining a certain type of possible solution.⁶ A large number of authors—among them Holland, Gray, Salmond, Holmes, Llewellyn and Hart—opted for his approach and adopted some solution that comes within its scope, although they differed greatly in the details of their theories as well as in the reasons that led them to their adoption. The outline of an argument for some solution such as offered above does not represent the reasons of all of them; it may not even represent the reasons of anybody but myself. But what we all have in common is the emphasis on law-applying organs in our criteria of identity of legal systems.

Since the aim of this Article is to clarify problems rather than examine or propose detailed solutions, there is no need here to compare the various solutions to the problem of identity that fall within the delineated approach. Attention should, however, be drawn to two claims that, although made by some of the above-mentioned writers, were rejected by others, and are not a necessary concomitant of all theories of identity of this type. First, to claim that a law is part of a system only if it is acted on by the law-applying organs does not entail that these organs create the law. They may be, and on most occasions are, merely recognizing and enforcing laws previously created by legislation, precedent, or custom. Second, that a law is part of a system only if recognized by the courts does not entail that laws are descriptions or predictions of what the courts are doing or will do. Courts are composed of human beings and the causes of their actions are open to analysis and prediction by psychologists, sociologists, and other scientists just as much as are the causes of other people's actions. Their judg-

6. Various problems are not even mentioned here. What is a law-applying organ? What is a court? Are the actions of all law-applying organs relevant to the criteria of identity? I refer in the text sometimes to courts, sometimes to law-applying organs, but I do not wish to express any opinion on these questions here.

ments are, however, the fruits of deliberate decisions based on the evaluation of reasons for the various alternatives. Moreover, the courts write down the reasons that, in their opinions, justify their decisions, and it is by examining the courts' opinions that one finds the laws on which they act. The laws themselves are, therefore, normative. They guide the actions of the courts as much as that of ordinary people. Their existence is ultimately based on social practices, but this is common to all positive norms and does not detract from their normativity.

*B. The Distinction Between Making a New Law
and Applying an Existing One*

The statement that a law is part of a legal system only if it is recognized by the law-applying organs—the courts—of the system means only that it would have been acted on by the courts had they been presented with the appropriate problem. That a court would apply a law if faced with a case to which the law applies is an indication that either the law exists in the legal system or that the law will be made by the courts when they have an opportunity to do so. Recognition by the courts or other law-applying organs is not a complete criterion of identity because these organs often have power to make new laws, and often what law they are going to make can be determined in advance. As a first step towards completing the criterion,⁷ one must incorporate in it reference to the fact that the law would not only be recognized by the courts but would be recognized as a previously existing law. It is not a new law that they would make when faced with an appropriate case. For this reason the distinction between applying an existing law and creating and applying a new one is the second jurisprudential issue involved in the problem of identity. Of the major legal theorists Hart was the only one to face this problem, and a brief discussion of the relevant aspects of his theory will clarify the nature of the issue.

Hart argues that the distinction between the application of a new law and the application of a previously existing one turns on the existence or absence of a duty to apply the law. If and only if the court applies a law that it is under a duty to apply is it acting on a previously existing law; on the other hand, when it applies a rule that it has no duty to apply it is not acting on a previously existing law.⁸ This is a

7. Hypothetical recognition by the courts is not, strictly speaking, even a necessary condition for a law's membership in a legal system, for a law may belong to a legal system even if the courts have power to change it and it is known that they will do so, given an appropriate opportunity. The precise relation between the courts' practices and the identity of the legal system is clarified by the discussion in this part of Hart's theory of the rule of recognition. See text accompanying notes 9-28 *infra*.

8. In such cases the court transforms the rule into a law of the system if and only

consequence of Hart's doctrine of the rule of recognition. In every legal system, he argues, there is of necessity a rule of recognition that identifies the laws of the systems;⁹ the criterion of identity of legal systems can be formulated as follows: A legal system consists of a rule of recognition and all the laws identified by that rule. Hart's discussion of the rule of recognition falls short of the high standard of lucidity characterizing the rest of his book and requires interpretation, which will be limited to the doctrine's effects on the problem of identity.¹⁰

A rule of recognition is "a rule for conclusive identification of primary rules of behaviour."¹¹ Here, as occasionally elsewhere, Hart states that the rule identifies only primary rules. It is quite clear, however, that his rule of recognition is a rule for the identification of all the other rules of the system, and only them. It specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a *rule of the group*."¹² This means that the rule of recognition of a system constitutes its criterion of validity: "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a *rule of the system*."¹³ The rule of recognition provides also the means for the resolution of conflicts between laws.¹⁴ This is conceived by Hart as an essential part of the rule's function in identifying the laws of the system, for it is a condition of the validity of a rule that it does not conflict with a superior rule.

How does the rule of recognition fulfill its function? The rule is unique among the rules of the legal system.¹⁵ It is a necessary rule in the sense that every legal system necessarily has one and only one rule of recognition and a set of rules which does not include a rule of recognition is not a legal system.¹⁶ Furthermore, all the other laws exist and are part of the legal system only if they fulfill conditions laid down in the rule of recognition. The existence of the rule of recognition itself cannot, of course, be ascertained in this manner. "Its existence is a matter of fact [and] . . . must consist in an actual practice."¹⁷ Hart

if as a result of its recognition by the court in this case there arises a duty to apply it in other cases: that is, if the system has some rule of precedence.

9. H.L.A. HART, *THE CONCEPT OF LAW* 92-120 (1961).

10. The rule of recognition is also central to Hart's theory of the existence of legal systems. *Cf. id.* at 109-13. This aspect of the doctrine will be disregarded in the present discussion.

11. *Id.* at 92.

12. *Id.* (emphasis added).

13. *Id.* at 100 (emphasis added); *cf. id.* at 102, 106.

14. *See id.* at 92-93, 98, 103.

15. *Id.* at 107.

16. *Cf. id.* at 93.

17. *Id.* at 107-08; *cf. id.* at 245.

offers a detailed analysis earlier in his book of what it means for a rule to exist as a matter of fact—as a social practice;¹⁸ this analysis is quite clearly meant to apply to the rule of recognition.

Whose practice constitutes the conditions for the existence of the rule of recognition? Hart's answer is far from clear. Often he refers to "the practice of courts, legislatures, officials or private citizens."¹⁹ On occasion, while including reference to the behavior of private citizens, he attributes special importance to the practice of the courts.²⁰ Finally, we are told—and this should be regarded as Hart's position—that the behavior of the population is not part of the conditions for the existence of the rule of recognition. Its existence consists in the behavior of the "officials" of the system,²¹ by which he presumably means law-applying officials.²²

Hart holds that the conditions for the existence of social rules are practices of those people to whom the rules are addressed. It follows, then, that the rule of recognition is addressed to the officials of the legal system.²³ Furthermore, Hart's explanation of social rules is basically an explanation of duty-imposing rules. The only other type of rules Hart recognizes are power-conferring rules, but he does not consider what social practices constitute the existence of a customary power-conferring rule. Therefore, since the rule of recognition is a customary rule, it must be interpreted as duty-imposing. Besides, all the legal powers of officials are conferred on them by the rules of change and adjudication, authorizing them to make new laws and to settle disputes. To claim that the rule of recognition is a power-conferring rule is to confuse it with either rules of change or rules of adjudication.²⁴

18. *Cf. id.* at 54-56. For a discussion of Hart's explanation of a social rule, see J. RAZ, *supra* note 1, at 147 *et seq.*

19. H.L.A. HART, *supra* note 9, at 104. *See also id.* at 98, 106.

20. *Id.* at 105.

21. *Id.* at 110, 113.

22. This interpretation is confirmed by H.L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, in *ETHICS AND SOCIAL JUSTICE* (1970).

23. There is no clear statement in the book on this issue. The rule is often said to be used by officials and individuals [*Cf.* H.L.A. HART, *supra* note 9, at 97, 98, 104] but it is quite clear that it is addressed to officials and applies only to them. It follows that if every legal system has a rule of recognition it has also officials—rules of change and adjudication investing officials with legal powers. That is the reason for my claim above that Hart's theory should be counted with the theories which emphasize the institutional nature of law. Occasionally, however, Hart tends to deny that institutions are an essential part of every legal system. *Cf. id.* at 93; Hart, *supra* note 22, at 195.

24. It is commonly assumed that by secondary rules Hart means power-conferring rules. This interpretation is supported by some passages in Hart's writings. *Cf.* Hart, *Book Review*, 78 *HARV. L. REV.* 1281, 1292 (1965). This interpretation, however, conflicts with other aspects of his theory and does not represent Hart's present views. It is true that all the primary rules are duty-imposing, but not all the secondary rules are power-conferring. The rule of recognition is an exception. Rules of change,

The rule of recognition imposes an obligation on the law-applying officials to recognize and apply all and only those laws satisfying certain criteria of validity spelled out in the rule, which criteria include indications of how conflicts of laws are to be resolved.²⁵ From Hart's examples it would seem that although he thinks that the criteria of validity most commonly refer to the mode of origin of the laws, this is not always the case.²⁶

The jurisprudential criterion of identity implied by this theory is: A legal system consists of a rule of recognition and all the laws that ought to be applied according to it. When the courts apply a rule that they were not obliged to apply they may make it thereby into a law (if there is in the system a rule of precedent that will oblige all courts henceforth to apply it), but they do not apply an existing law and the rule was not part of the system before its application.

Hart's rule of recognition is subject to criticism on a few points and requires some clarification. One should remember that clear conceptual distinctions do not entail the existence of clear instances of the concepts involved. Therefore, the absence of clear instances should not deter one from striving to formulate clear conceptual distinctions. The courts, in most cases brought before them, probably neither merely apply an existing law nor do they merely initiate a new law. They may be doing a little of both. But this does not detract from the ability of a clear distinction between applying existing law and creating a new one to shed light on legal processes.

The application of the rule of recognition to concrete cases may be beset by similar problems. Hart makes it quite clear that the rule of recognition, like any other rule, is necessarily open-textured and vague to some extent. It may also be incomplete,²⁷ for it may not include an accepted answer to problems, such as the validity of rules of public international law within the municipal legal system. The existence of a rule of recognition does not entail that all the legal problems, the solution of which may depend on the nature of the criteria of validity, such as the problems mentioned above, have found their solution in the system. So long as the rule is incomplete some such problems

adjudication, and recognition are called secondary because they presuppose the existence of primary rules, whereas primary rules can exist without secondary ones, albeit not as a legal system. This is an explanation of the terminology, not a criterion for determining which rules are primary and which are secondary. This is determined by their social function—whether they are rules of change, adjudication, and recognition—not by their normative character.

25. The logical form of a rule of recognition is: All law-applying officials have a duty to apply all and only laws that satisfy the following criteria:

26. Cf. H.L.A. HART, *supra* note 9, at 92, 94, 97, 98.

27. *Id.* at 144-50.

will remain unanswered, but when the courts are faced with such unsolved problems and accept a certain solution they modify the rule of recognition. This should surprise no one. The rule of recognition, being a customary rule, is constantly open to change.

Asserting that there is in every legal system a rule of recognition does not involve one in the task of giving a systematic and reasonable account of the limits of a legal system based on accepted or proposed solutions to a whole host of legal problems, as described above. However, any attempt to articulate the details of the criteria of validity incorporated in any rule of recognition of any legal system means embarking on precisely this endeavor. Attempting to formulate criteria of validity based on complex court practices that are in a constant state of change and that are necessarily vague and almost certainly incomplete, involves not only legal perceptiveness and theoretical skill, it demands sound judgment and reasonable value decisions as well. Hart's theory leads one to the point where the boundaries between analytic and critical jurisprudence, between general and particular jurisprudence, begin to blur. But he himself does not cross the boundary. Rather, he provides conceptual tools for dealing with particular and critical problems, but he does not deal with those problems himself.

But there is no reason to suppose that the rule of recognition refers to all the criteria of validity of a legal system, and it is clearly wrong to think that it determines them all. A criterion of validity is a set of conditions set by law, satisfaction of which is sufficient for being a law of the system. All the laws of a legal system, except the rule of recognition the existence of which is a matter of social practice, are valid; they exist in the system because they satisfy some criterion of validity. Besides the rule of recognition, many laws can also set criteria of validity. All the laws conferring legislative powers, for example, determine criteria of validity, so also does a law stipulating conditions that a social custom must fulfill to be legally binding.²⁸

That the rule of recognition sets up some criteria of validity is clear. There must be in every system some criteria of validity that, although legally binding, are not legally valid, hence they must be set in the rule of recognition. There is, however, no reason to think that all the criteria must be stipulated in that rule. The fact that all the criteria of validity are determined in laws that, directly or indirectly, are valid

28. Because it is a condition for being a law of a legal system that the courts ought to apply it, it follows that criteria of validity are conditions for the duty of the courts to apply laws. Therefore, since the courts have a duty to apply lawfully enacted laws, laws conferring powers of legislation give rise to criteria of validity. They are not, however, the only type of law that does so. The rule of recognition is just one example of a law setting criteria of validity that is not a power-conferring law.

according to criteria determined in the rule of recognition, guarantees that by imposing a duty to apply the laws satisfying its criteria of validity, the rule of recognition imposes a duty to apply all the laws of the system.

Furthermore, there is no reason to suppose that every legal system has just one rule of recognition. It may have more. Imagine a legal system in which no valid law makes custom or precedent a source of law, but in which, nevertheless, both custom and precedent are sources of law. It follows that the criteria for the validity of laws created by custom or precedent is determined by rules of recognition imposing obligations on the courts to apply such laws. But we should not assume that there is just one rule of recognition rather than two—one relating to each source of law—simply because the system must contain means of resolving conflicts between laws of the various sources.²⁹ First, as was pointed out above, the rule of recognition, even if it is one rule, may be incomplete, which means that the system may not include any means of resolving conflicts. Perhaps the problem has never arisen and there is no generally accepted solution to it. Second, there may be two or more rules of recognition that provide methods of resolving conflicts; for example, the rule imposing an obligation to apply certain customs may indicate that it is supreme, whereas the rule relating to precedent may indicate that it is subordinate.³⁰

In most legal systems courts have authority to settle at least some of the disputes to which there is no clear solution in the laws of the system. Courts have a duty to apply the laws of the system when they are applicable and to exercise discretion in order to decide (partially) unregulated disputes—disputes to which the laws do not provide a clear answer or where the courts have power to change the law. By the rule of precedent this exercise of discretion often amounts to the creation of new laws. The courts' discretion to decide unregulated disputes may be absolute or guided. They may be guided by law as to the manner in which discretion should be exercised. The law may, for example, direct judges to act on the rule that they think best for such cases, or to render a decision that would be the best from the point of view of the parties to the present dispute, or direct the courts to consult their conscience or the writings of moralists. Such instructions may be given in a statute, but they may also exist only in the practice of the courts. Very often, however, they are not ordinary precedents but may instead derive their force from the continuing practice of the courts. When this happens, the legal system concerned contains two

29. Hart uses this argument. Hart, *supra* note 24, at 1293.

30. It is the fact that a set of laws of recognition are maintained by the practice of the same law-applying organs that indicates that they are all part of one legal system.

types of ultimate laws: laws of one type directing the courts which laws to apply, those of the other type guiding their discretion in deciding (partly) unregulated disputes. Laws of the first type are laws of recognition, laws of the second type are ultimate laws of discretion, and both impose duties on the courts. But laws of recognition oblige the courts to apply certain laws, leaving them no choice which laws to apply. Laws of discretion, on the other hand, whether ultimate or not, merely guide the courts' discretion in the choice of laws to adopt and apply; they limit the courts' freedom of choice but do not deprive them of it.

Laws of recognition are thus deprived of part of their uniqueness. They are still the only ultimate laws that necessarily exist in every legal system, but they are not the only ultimate laws that can exist in a system. Moreover, the distinction between applying an existing law and applying a new one is seen to be more a difference of degree than of kind. This fact, together with the fact that in practice it is often difficult to decide whether in a particular case a new law was created or an old one applied, does not mean that the distinction cannot be drawn or that it is unimportant. Every legal system rests on its ultimate laws, which commonly means on a set of ultimate laws of recognition and discretion. The first provides the ultimate criteria of validity of the laws of the system, the latter guides the courts in the exercise of their powers to modify the system when deciding unregulated disputes and creating precedents for the future. The difference may be one of degree, but it is indispensable for the formulation of criteria of identity.

C. *The Relation of Law and State*

If the theory of the rule of recognition is substantially correct, as I think it is, it forms part of the answer to the problem of identity. Although it sets necessary conditions for membership in a legal system, it does not provide all the sufficient conditions. Nothing is part of a legal system unless either it is a rule of recognition of the system, or the courts ought to recognize and apply it. To be a rule of recognition is sufficient to be counted as a law of the system, but to be a law that the courts are obliged to apply is not. Quite often the courts have an obligation to apply laws of other legal systems, rules of private associations, and so on, although these were not and do not become part of the legal system. Therefore, the rule of recognition provides no complete answer to the problem of the scope of a legal system—the problem of the identity of momentary legal systems.³¹

Nor does the rule of recognition solve the problem of the con-

31. Hart has become aware of these problems. Cf. H.L.A. HART, *supra* note 22, at 195 *et seq.*

tinuity of legal systems. That one legal system comes to an end and another takes its place manifests itself in a change of rule of recognition, for each legal system has a different rule of recognition. The rule of recognition, however, is a customary rule; hence it is constantly in a process of change. What changes are consistent with the continued existence of the same rule, and what changes compel the admission that a new rule has replaced the old one?³² It is easy to bring examples for either situation, as well as examples of borderline cases. However, it is not the existence of borderline cases, which are inevitable, that is disturbing. The disturbing fact is that Hart's theory provides no clue as to *how* to draw the conceptual distinction. Even more disturbing is that this is no mere oversight on the part of Hart that can be easily remedied. He did not provide the answer because he did not ask the question to which the distinction is an answer. His theory provides substantially complete answers (whether or not they are correct) to the problems with which he was concerned: the role of the courts in a legal system, the truth in rule skepticism, the variety of laws and their interrelation, the relation of efficacy and existence. If his theory fails to provide a complete solution to the problem of identity it is because he overlooked not only part of the answer but also a whole question: that of the relation of law and state.³³

The relation of law and state affects the two distinct aspects—scope and continuity—of the problem of identity. Every state—by which is meant a form of political system and not a juristic person—has one legal system that constitutes the law of that state, and every municipal legal system is the law of one state. Since, then, the identity of a legal system is bound up with that of the state the law of which it is, the relation between law and state necessarily affects the problem of scope. So too, since an end to the existence of a state is the end of its legal system, and since a law that is not a law of the state is not part of its legal system, the problem of continuity is similarly affected by the relation of state and law.

Two diametrically opposed views on the relation of law and state have been expressed by legal philosophers. Kelsen³⁴ claimed that the concept of the state can be explained only in legal terms. That is, the concept of a legal system must be explained first; from it naturally flows the explanation of the concept of a state, for a state is but a (municipal)

32. See generally J. FINNIS, *REVOLUTION AND CONTINUITY OF LAW* (forthcoming).

33. In many legal systems the term "state" or its equivalent is used to designate a certain legal person recognized in law as having certain duties, powers, and rights, and as acting through certain organs. This legal concept of the state should be clearly distinguished from the political concept of the state as a form of political system; only the latter is relevant to the problem of identity.

34. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 181-207 (1945).

legal system. No social facts, no social norms that are not relevant to the explanation of law have any relevance to the theory of the state. Bentham and Austin, on the other hand, held that law can only be explained after some theory of state has been established. First one must define the meaning of "an independent political society"—"a state." On the basis of this definition "law" can be defined. Bentham's and Austin's definitions of "an independent political society" are purely sociological, making use of no legal concepts, and the same is true of their definitions of sovereign and subject that are part of it.³⁵

Bentham and Austin have the better of this controversy. Because Kelsen lacks the concept of the state as a political system, he fails to account for the identity of a legal system. He is driven to rely on constitutional continuity as a sole mark of identity, disregarding the fact that new states can be created and new legal systems established without any break in the constitutional continuity taking place.³⁶ A theory of law must be based, at least partly, on a theory of state, and denying this has been one of Kelsen's gravest mistakes. A theory of state, however, is partly based on a theory of law—the two are intimately inter-related.

Since I am concerned with the nature of the problem of identity rather than its solution, there is no need to discuss the concept of a state beyond mentioning some truisms. A state is the political organization of a society, it is a political system that is a subsystem of a more comprehensive social system. The social system includes, of course, many other subsystems and the political system interacts with most if not all of them, as well as interacting with other political systems. These social and political systems are normative systems; in other words, at least part of the pattern of interrelations constituting the systems is norm governed.

The legal system is only part of the norms constituting the political system; most political systems include numerous non-legal norms. Some of these non-legal norms apply to society in general: however much the system is resented and hated, if it is viable at all, it is based, among other things, on some norms of respect to at least some of the laws and some authorities on the part of some important sections in the society. Some non-legal political norms are more limited, of which Dicey's conventions of the constitution can serve as an example.³⁷

35. Cf. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 192-215 (1954); J. BENTHAM, *A FRAGMENT ON GOVERNMENT* 38-46 (1960).

36. For a detailed criticism of Kelsen's theory of the identity of legal systems, see J. RAZ, *supra* note 1, at 95-109.

37. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1961).

It follows that since the continuity of a legal system is tied to the continuity of the political system, the former is affected by the fate of the non-legal norms that happen to form part of the political system concerned. However, emphasizing the importance of the fate of non-legal norms to the continuity of the legal system does not mean that these are the only factors affecting continuity. The substance of my contention is that whatever form one's ultimate account of continuity³⁸ takes, it must, in view of the relation of law and state, be based on the following two points: First, that continuity depends on the interaction of legal and non-legal norms, and the extent and manner of their change; and second, that among the legal norms concerned some are more relevant than others. Since the continuity of the legal system is fundamentally a function of the continuity of the political system, political laws are more relevant than others. Constitutional and administrative laws are, therefore, more relevant than, for example, the law of contract or torts.

The problem of scope is similarly affected, and can be subdivided into four subproblems: First, that of the dividing line between political norms that are part of the legal system and those that are not; second, that of the dividing line between legal norms and social norms of the social system of which the political system is a subsystem; third, that of the dividing line between the law and norms of other subsystems of the same society; and fourth, that of the dividing line between one legal system and coexisting laws of other legal systems.

The first of these subproblems of the problem of scope may be solved by insisting that the laws of a system are either the ultimate rules of its courts or the laws its courts ought to recognize and apply. Those political norms that are neither the courts' practice nor norms that the courts ought to apply are not part of the law of the state. The other three subproblems, though each involving somewhat different considerations, have this much in common: sometimes the courts are under an obligation to apply norms because those norms belong to these other social or political systems. The courts ought to enforce private contracts, the rules of some private associations within the state, the laws of foreign countries, and so on. Some theorists saw this as a reason for regarding those laws as part of the legal system, and Bentham maintained that all commands that are enforceable in law are laws of the sovereign.³⁹ Hart maintained in *The Concept of Law* that all the rules that the courts have a duty to apply are laws of the system.

38. It may, for example, be based on the conception of change of system as a result of a short and intense period of fundamental change, or it may allow for a slow and gradual transformation of one system into another.

39. J. BENTHAM, *OF LAWS IN GENERAL* 22 *et seq.* (1970).

As indicated above, the backing of the state power is a defining characteristic of municipal law,⁴⁰ but it is not the only one. Also characteristic of the state system is that one of its main functions is to maintain and support other forms of social grouping; it is, therefore, characteristic of the law that it upholds and enforces contracts, agreements, rules, and customs of private persons and associations. To obscure the distinction between norms recognized as part of the law and norms that, although not part of the law, are recognized and enforced because it is the function of the law to support various social groupings is to misunderstand the nature of the state and its relations to other social systems.

Admitting that not all the norms that the courts ought to apply are part of the law, where should one draw the line? This is not the place to attempt a solution. I wish, however, to conclude with one last remark bearing on the problem. That a norm is identified as one the courts ought to apply by the fact that it is a norm of a certain society, association, or state is no indication whether or not it is part of the system. Legislation by reference is a familiar technique; for example, a statute passed in one country adopting by reference the civil code of another country. No other formal distinction will succeed in drawing a reasonable dividing line. The reasons for enforcing the norm, and the attitude of the courts and the legislature to its enforcement, are the crucial factors. Formal distinctions may give some indication as to the nature of the reasons for enforcing, but are never in themselves conclusive. Ultimately the problem turns on an accumulation of evidence justifying a judgment whether the norm is enforced on the grounds that it is part of the law's function to support other social systems or because it is part of the law itself.

40. I have limited the discussion throughout to municipal law. Other types of legal systems are the law of other types of social organizations, be they tribes, churches, or the international community, and they bear similar relations to those organizations.