

LEGALITY AND THE EU  
(Note: All Capital Letters)

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By MAX LEONOV, B.A.  
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**ABSTRACT:**

In this work I address a number of important theoretical questions that the institutional order of the European Union (EU) poses for legal theory. I examine Raz's approach to theorizing legality and several elements of his theory of law, arguing that the institutional structures of the EU resist the Razian theoretical framework. I also explore the inter-institutional theory of law developed by Culver and Giudice, arguing that its conceptual framework needs further development but that the conception of the ordinary law subject it employs is more robust than Raz's. A significant portion of my work relies on the framework of *the indirectly evaluative approach* for evaluation of these theories, which was developed by Julie Dickson.

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## Section 2

## INTRODUCTION

The EU poses an interesting challenge for legal theory. Can we treat EU norms as legal norms or are they political, customary or some other type of norms? Is the EU a legal structure or some other kind of structure or organization? Can we call the EU a legal order? What would it mean for us in practice if we discover legality in the institutional structures of the EU or if we determine that an institutional order of the EU cannot be legal? Answering these questions requires extensive arguments and analyses, and I entertain no hope of completing this task in this work. However, I intend to lay some groundwork for answering these questions. The goal of my project is to sort these questions in a coherent way and examine two legal theories that can be used to build this foundation. I will look at some elements of Raz's theory as well as the theory of Culver and Giudice (hereafter C&G). By examining, comparing, and evaluating these accounts in relation to the EU I hope to develop a deeper understanding of the issues surrounding the nature of legality.

My general strategy in this project is to focus on the structural and functional aspects of legality. I deliberately use the term "legality" as opposed to "law" because I want to avoid using a term that may be understood through the lens of a theoretical bias. When I use the term 'legality' I intend it to be understood neutrally, that is, without presupposing any account of law (neither Raz's nor C&G's). By "legality" I mean institutions, institutional orders, and norms that are commonly thought of as legal or suspected to be legal for a variety of reasons. Examples of such elements of legality include courts, state laws, as well as other possible institutions and norms. There is also a distinction that will become particularly important in the third chapter – the distinction

between legal features and law-like features of legality, but more on this at the appropriate time. To get a sense of what I mean by structural aspects of legality consider a legal institution like a court. The way in which a court conducts its business (the kind of norms it uses and the way it uses them) is an example of a functional aspect of legality. As I examine Raz's and C&G's theories these terms will be refined. I introduce them here only to set the stage for my future discussions.

My project consists of three chapters. Because I am evaluating the adjudicative and inter-institutional theories in relation to each other and in relation to the EU, I think it is necessary to begin with a chapter where I lay out the criteria for this evaluation. My main focus will be on Julie Dickson's work *Evaluation And Legal Theory*. I will lay out several considerations about the nature of theories in general and legal theories in particular. On the basis of these considerations I will evaluate the adjudicative and inter-institutional theories. Also, I will spend some time examining Dickson's criticisms of Dworkin's approach to understanding law. The type of mistake that Dworkin makes when he sets off to develop a theory of law will be relevant for my evaluation of the adjudicative and inter-institutional theories. And so this discussion will resonate throughout the following chapters.

The focus of the second chapter will be Joseph Raz's theory, or *the adjudicative theory* as I call it. Raz's ideas about law are extensive and complex. I will only deal with selected aspects of his theory, which I consider to be the most important for the project of understanding legality and the nature of the EU. Raz's views on the nature of authority will hardly play any role in the course of my analyses. The omission of this aspect, as well as some other ones, should not be taken to indicate that I do not think that it has no



bearing on my project. In examining Raz's theory of law my strategy is to focus on a few elements but examine them in depth. For this reason, some aspects of his account will be left out. Also I will only be looking at a few of Raz's works as I analyze and attempt to fit his theory to EU facts. I hope that these remarks will excuse me in case I leave some relevant parts of Raz's theory out of my discussions. I will, however, argue that the aspects that I am focusing on bear on the capacity of his theory to deal with the institutional order of the EU. His theory, as I will argue in the course of the second chapter, does not fit the facts of the EU all that well. If my arguments to that effect hold, we are faced with a choice of 1) denying that the EU is a legal system, or 2) adjusting Raz's theory to fit the facts, or 3) looking for other approaches to understanding legality.

In the third chapter, where I examine C&G's criticisms of the primacy of state based theories of law, I will argue that the first option – denying that the EU is a legal system – should be rejected if the basis for this claim is that the only home legality can have is a law-state. I will also set aside the suggestion of trying to adjust Raz's theory to the facts of the EU. Instead, in the third chapter I will examine C&G's inter-institutional theory as an alternative to understanding legality. The conclusion of my analyses will reveal that the inter-institutional theory, in the way it is developed in *Legality's Borders*, cannot be taken as a viable alternative to understanding legality, although the strategy that C&G adopted in building their account is certainly promising. I understand that the sequel to *Legality's Borders* is nearing completion at the time of my writing this work, and so it may so happen that the concerns that I raise about this theory will find proper responses in the upcoming publications. That said, I still think that it is important to

examine the positive and negative aspects of the initial version of the inter-institutional theory in order to better appreciate the task of understanding legality.

I will conclude my dissertation by summarizing the results of analyses and arguments I advance throughout these three chapters. My goal is to better understand the tasks of legal theory as well as the inner workings of two particular theories I am focusing on. I will consider my arguments and analyses successful if I can show the nature of the challenges that the adjudicative and inter-institutional theories face when we attempt to use these theories for understanding the nature of legality, and in particular, when we attempt to develop a coherent understanding of the EU and municipal legal orders.

## CHAPTER 1 PICKING SIDES

### 1.1 INTRODUCTION

In the course of my dissertation I compare two approaches to legal theory, examining their advantages and disadvantages. Examination of main elements of these two approaches takes place in the following two chapters while this one is meant to elucidate the criteria that are used to evaluate them. What I will be focusing on in this portion of my dissertation is the nature of evaluation of theories of law. I will analyze the approach that Julie Dickson proposes in her book *Evaluation and Legal Theory*. I find the insight of her theory valuable and I analyze some of her arguments to show how we can ensure that the methodology we adopt in theorizing legality produces an explanatorily adequate theory. As I analyze her arguments, I will emphasize the insights that I find particularly relevant for the evaluation of the adjudicative and inter-institutional theories.

One of the main arguments of my dissertation is that these theories employ conceptions of ordinary law subjects – more specifically, the interests those persons have in understanding law – that pull them in different directions. In other words, the authors of the two theories under consideration treat intuitions of the ordinary law subject differently. This, in turn, explains some of the differences between these two theories and their elements discussed in the following two chapters. Also, I will examine the relation between the conceptions of the interests and needs of the ordinary person employed in each theory. In this chapter, I only want to explore the significance of the conception of the ordinary person or law subject (I use these terms interchangeably) for the project of developing a theory of law.

Before introducing Dickson’s “indirectly evaluative approach”, which captures her views on legal methodology, I want to set up a proper stage for and say a few words about the enterprise of legal evaluation in general. The question “what makes one legal theory better than another?” is one of the most general and complicated questions that I deal with in my project. To answer it one should be aware of the consequences of commitments to principles and ideas one holds, one should be aware of one’s reasons for choosing to hold these particular views, and finally, one should be aware of one’s tendency to gravitate toward some types and kinds of ideas as opposed to other ones. Looking at this initial sketch of conditions for giving the answer to the question, “What makes one legal theory better than another?”, it is readily apparent that a lot is involved in producing an answer, if it is to be a responsible and an insightful one. One has to explain why one thinks what one thinks and why one values what one values. Having done that, one needs to be able to produce convincing reasons for accepting her way of thinking and valuating. Needless to say, I cannot exhaustively address all these questions and follow all these steps. But I will do my best to give clear explanations for the arguments that I make and my motivations for making them. I also cannot provide a detailed survey of all positions on the nature of evaluation in the course of this chapter. Because of this, my strategy will be to introduce the main aspects of Dickson’s position, which she develops in her book *Evaluation and Legal Theory*, and then I will argue for an interpretation of her theory which I take to be most suited for the purposes of evaluating the adjudicative and inter-institutional theories.

## 1.2 METATHEORETICAL VIRTUES

Theories can be said to have two components: substantive and metatheoretical ones. By ‘substantive component’, I mean the content of the theory, that is, its subject matter. By ‘metatheoretical component’, I mean the organization of the substantive component with the view to make the subject matter of the theory explanatory or more understandable. The substantive component refers to what the theory is about and the metatheoretical one refers to how the explanation of the subject matter is organized and whether this organization makes the substance of the theory comprehensible. The theories I will be looking at in the next chapters certainly can be said to have both these components and the task of this chapter is to set out the criteria by means of which we can evaluate these theories by evaluating these two components in each theory.

Because it is impossible to attempt an explanation of something without thereby organizing this explanation in a certain way, metatheoretical and substantive components are intricately tied together. That said, I think it is important to make the distinction between these two components, even if it is only a rough one, to better understand the strengths and weaknesses of a theory and to propose avenues for its improvement.

Regarding the metatheoretical component, Dickson says, “it seems a commonplace to point out that theories seek to make and communicate arguments coherently and effectively; that they aim to put their message across in a way which will allow those encountering the theory to understand as fully as possible what the theory is trying to convey.”<sup>1</sup> If the purpose of a theory is to produce a conceptual framework or develop an understanding of some phenomena, it certainly makes sense that it must be intelligible to its potential users. “This being so,” Dickson continues, “there are several

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<sup>1</sup> Julie Dickson, *Evaluation and Legal Theory*, 32.

virtues which a theory ought to have and to strive toward possessing, such as simplicity, clarity, elegance, comprehensiveness and coherence.”<sup>2</sup> These virtues Dickson terms “meta-theoretical virtues” and they must be distinguished from the substantive insights that any given theory attempts to provide. More precisely, the explanatory adequacy of a theory depends on the simple, clear, elegant, comprehensive, and coherent presentation of the substantive component, according to Dickson.

The reason why I am drawing the reader’s attention to metatheoretical virtues is because they pertain to any theory, regardless whether it is descriptive or prescriptive. This means that we cannot always appeal to these “virtues” to differentiate theories based on such types. I think it is possible to have a theory that explains a phenomenon in a simple and elegant way and another theory that explains the same phenomenon in a less simple but a more coherent way. So the first theory is more simple and elegant but less coherent; conversely, the second theory is more coherent but less simple and elegant. Depending on what we need the theory for – developing a detailed understanding of the phenomenon or sketching a quick and basic picture of it (both legitimate goals) – we will favor one theory or the other. For this reason, it may not always be enough to focus on the metatheoretical component when evaluating theories.

That said, Dickson is right when she argues that we can look at the metatheoretical component in order to differentiate a more explanatory theory from a less explanatory one. As the later chapters will show, it is on this account that the adjudicative theory is preferable to the inter-institutional one. However, in order to show why I remain sympathetic to the inter-institutional approach to studying legality, I will try to show that certain commitments on the metatheoretical level may produce significant effects on the

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<sup>2</sup> Julie Dickson, *Evaluation and Legal Theory*, 32.

substantive component. The conception of the ordinary person, whose interests in the phenomenon the theory is meant to satisfy, is a theoretical feature that plays a crucial role in legal theory. In light of its importance, we may need to introduce it into the discussion of metatheoretical virtues to make better sense of various criteria on the basis of which one can evaluate a theory. I will not argue for any one of these alternatives, but will concentrate on showing why the conception of the ordinary person plays this important role in legal theory.

### 1.3 ANALYTICITY

The adjudicative and the inter-institutional theories are analytical theories of law according to their respective authors. What does it mean for a theory to be an analytical one? According to Dickson, analytical theories of law attempt to explain the nature of law by identifying its features. Some of these features could be presumed to be necessary, some sufficient, some contingent. The basic point is that analytical theorists of law attempt to determine, possibly in diverse and incompatible ways, these features. Even though the theorists in both camps that I am examining are most likely to be considered analytical, especially Raz, it might not be obvious why this is so given Dickson's understanding of analyticity.

In the second chapter, we will see that such elements as primary norm-applying institutions or the criteria for identification of legal systems seem to support the claim that Raz's theory is analytical, according to Dickson's understanding of analyticity. However, at times, Raz explicitly distances his theory from the project of trying to identify necessary and sufficient conditions of legal systems. He tells us, "...it is possible to find [legal] systems in which all or some [features] are present only to a lesser degree

or in which one or two are absent altogether.”<sup>3</sup> I think that such cautionary remarks can be taken to indicate Raz’s ambivalence about the possibility of arriving at a set of necessary and/or sufficient features of legal systems. If we accept this argument, we need a better account that would show how Raz’s theory and his vision of it fit Dickson’s understanding of analyticity. As I will argue in the second chapter, Raz’s wish to recognize legality in forms that are not captured by some of the central elements of his theory threatens its coherence and explanatory adequacy. But I will say more about this in the second chapter.

In the introduction to the *Legality’s Borders*, Culver and Giudice place themselves in the analytical camp quite explicitly. “We do not take ourselves to be offering fatal criticisms of the analytical approach; rather we aim to contribute to the cycles of improvement running from Bentham to Austin, to Hart...”<sup>4</sup> However, this explicit commitment to the analytical camp may not be defensible given some of the elements of the inter-institutional theory. For example, Culver and Giudice’s idea that we should conceive of institutional ties by measuring their intensity and mutual reference seems to contradict their commitment to analyticity.<sup>5</sup> These considerations may be taken to undermine the status of both adjudicative and inter-institutional theories as analytical ones. Even if that were the case, however, we cannot take these criticisms as the bases for rejecting or endorsing these theories.

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<sup>3</sup> Raz, *Authority of Law*, 116. This claim can be contrasted with his other commitment to seeing law as performing the guiding function, that is, by creating exclusionary reasons for action. See, Dickson *Evaluation and Legal Theory*, 58-9. In the quoted passage Raz talks about legal systems, whereas the term “exclusionary reasons for action” refers to norms. I leave until the second chapter the examination of the relation between legal systems and legal norms in Raz’s theory.

<sup>4</sup> Culver and Giudice, *Legality’s Borders*, xxvii.

<sup>5</sup> See Chapter 3, Section 3.5.1



Dickson is aware of such ambivalences and explains them by telling us that we have no reason to think that law must be the kind of phenomenon that has essential features. Instead, it can constantly be in the process of change, and so it may not be possible to identify any such essential features. It can turn out that their identification is impossible on the general level of theory. Dickson thinks that a legal theorist must be open to all such possibilities, and so the methodology that he or she uses in theorizing legality must take this into account. In light of this, Dickson explains, “what makes a theory as falling within the ambit of analytical jurisprudence is not *which* essential properties it claims the law to possess, but *that* it regards law as having such properties, and that it conceives of the task of a legal theory as being to identify and explain what they are.”<sup>6</sup> According to this view, analytical methodology is about looking for essential features of the phenomenon it studies, in this particular context, of law.

The analytical approach, then, does not commit us to seeing law as the kind of phenomenon that must possess essential features. For example, an analytical theorist does not assume prior to investigation that law is necessarily good, or that it is meant to promote justice or social organization. It may turn out that legality cannot be satisfactorily explained through identification of such features at all.<sup>7</sup> If that is the case, then the methodology of analytical jurisprudence will prove to be inadequate for understanding law, apart from showing that law is the kind of phenomenon that escapes analytical analysis. This still, I think, would be a valuable insight into the nature of legality, although only a negative one.

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<sup>6</sup> Julie Dickson, *Evaluation and Legal Theory*, 21.

<sup>7</sup> Julie Dickson, *Evaluation and legal Theory*, 91.

However, the fact that law is a widespread social phenomenon pulls me toward thinking that some of its features may be essential. When I say that law is a widespread social phenomenon, I do not mean that it is everywhere the same or that one can observe that law subjects expect law to function or be structured in the same or similar ways everywhere. Instead, it is widespread in the sense that it figures into the lives of people in societies. Given this pervasiveness, I agree with Dickson's argument that there is

something special about certain forms of social organisation which we account as legal, and given that we recognize that, throughout history, some forms of social organisation have amounted to legal systems and some have not, the only way in which we can begin to investigate what this peculiar form of social organisation is like, and how it differs from other types of social organisation, is by attempting to isolate and explain those features which are constitutive of it, and which make it into what it is.<sup>8</sup>

If we make such historical and cultural observations, we are justified in exploring legal phenomena analytically. These observations suggest that there is something distinctive about legality. And so we should attempt to develop an account of these potentially essential features. We should, however, also keep in mind that such observations only warrant us in employing analytical methodology but do not guarantee that we will end up with an analytical theory, that is, with a theory that would clearly identify essential conditions of legality.

If we adopt this methodology, we also should keep in mind that our investigation began with these historical and cultural observations. Doing this, however, may not be enough for a rigorous and careful analyst because our approach is still vulnerable to a relativist type of objection of the following sort: by focusing on the historical and cultural roots of law, we are not paying enough attention to other possible roots of it. And because of this we might end up missing or ignoring some of its important features, or we might

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<sup>8</sup> Julie Dickson, *Evaluation and Legal Theory*, 19.

pick up on those features that are widespread, but which would on the final analysis prove to be insignificant.

I concede that an analytical approach to law that privileges historical and cultural – in short, sociological – roots is vulnerable to this type of objection but I think that this is not sufficient to reject analytical methodology. First, we are interested in understanding law in relation to individuals and communities. If this is our goal, we must look at the way different people and communities experience law. If we ignore or underestimate these experiences, we are running the risk of developing an account that may have little to do with law as it actually exists in practice. Even though we may develop a new, a more useful, or a better concept of law if we set aside the sociological roots of legality, we will not be explaining the role that law plays in our world. So, we can say that the sociological approach to theorizing legality is subject to relativist objection but it seems to be the only way to explain the nature of law as it exists and is experienced by actual people. We can certainly try to allay this worry (and this is the second point) by making sure that we are aware of our historical and cultural biases. We should be open to adopting insights from theories that do not make our kinds of assumptions and we should be ready to revise our explanations. Nothing in our methodological commitments should prevent us from such adoptions and revisions. Given the significance of the sociological roots for developing the understanding that we are after and given our willingness to revise our explanations if we are presented with good reasons to do so, I think that the approach to theorizing legality that we take is justified.

#### 1.4 THE INDIRECTLY EVALUATIVE APPROACH

In *Evaluation and Legal Theory*, Dickson explores various possible ways of evaluating legal theories. The most general theme of her work is disambiguation of the is/ought distinction that she takes to be traditionally central in mapping out the methodological camps in the legal philosophy field. Even though I will not be working with this theme extensively, it is important to say a few words about the is/ought distinction because it is against this background that Dickson pitches her indirectly evaluative approach.

The idea that serves as the starting point for Dickson is that the is/ought distinction that stands at the foundation of many legal theories, especially the positivist ones, is too ambiguous. It divides legal theorists too crudely into two camps: on the one hand, there are those theorists who separate law as it is from the way it ought to be. On the other hand, we have those who think that such separation is inadequate for a variety of reasons. Throughout *Evaluation and Legal Theory*, Dickson analyzes theories that challenge this overly simplistic view of the legal theoretical spectrum. Four theorists who play important parts in her analyses are Raz, Finnis, Schauer, and Dworkin. Dickson places her own view on the nature of legal evaluation together with Raz's and against the other three theorists. In the interest of space I will have to omit Dickson's analyses of Schauer's methodological approach to legality and will only focus on Raz, Finnis, and Dworkin.

Before looking at some of these theorists and their methodologies, it is useful to situate the indirectly evaluative approach to legality among the descriptive and prescriptive approaches. Roughly, the distinction between descriptive and prescriptive theories corresponds to the is/ought distinction. So, a descriptive legal theory would

describe what legality is, whereas a prescriptive one would tell us what it ought to be.

Dickson challenges this picture with her approach and it is important to understand how she does it.

### 1.5 INDIRECT EVALUATIONS

The first thing we need to do is to distinguish between direct and indirect evaluations. When I directly evaluate a phenomenon or one of its features, the explanation that I give of it is at least in part normative. When I indirectly evaluate a phenomenon or one of its features, the explanation that I give of it refers to the relevant normative aspect of the phenomenon but the explanation itself is not normative. Even though these evaluations are different and can be found in different types of theories, these evaluations may be compatible. After I examine a few examples of direct and indirect evaluations, I will explain how they can be compatible.

Dickson explains, “if I claim that leaving his native land was the most important thing that happened to John in his life and is hence important to explain in understanding his life, my claim does not entail that the event in question was a good or bad, wonderful or terrible thing.”<sup>9</sup> In order for us to understand John’s life (or how he has come to his current state of affairs), it is necessary, according to this explanation, to know that John left his native land. Notice that this explanation attempts to describe John’s life to us, but makes no normative claims about his life or the particular event of leaving his native land. This event is singled out and its importance for understanding John’s life is highlighted. We are only told that it is relevant but we are not told to take it as a negative or positive event. An explanation that is based on the direct evaluation, in contrast, would describe the fact that John left his homeland as a positive or a negative event. An

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<sup>9</sup> Julie Dickson, *Evaluation and Legal Theory*, 53.

example of direct evaluation would be, “leaving his native land was a terrible thing for John”.

In his book *Inclusive Legal Positivism*, Wil Waluchow works with the same distinction and provides another example that shows how indirect evaluations work.<sup>10</sup> He tells us,

It is obviously morally relevant to the abortion debate that a living entity which, if allowed to develop naturally could become a fully-fledged human being, is killed when abortions are performed. One can know this killing is a morally relevant feature of abortion without knowing whether abortions are ever justified. ...All participants in the debates would find totally inadequate any theory which neglects even to mention or account for the fact that killing does take place.<sup>11</sup>

It is possible to develop an explanation of abortion without having to make any direct normative claims about it. Such an account would not be normative or prescriptive if it were to identify the features of abortion that fuel abortion debates. Saying that “a fetus dies as the result of abortion” does not make this explanation normative, even if we noted that it is this specific aspect that is responsible for much of the abortions debates, which are thoroughly normative. Simply put, Waluchow’s and Dickson’s argument is that emphasizing the normative importance of a feature of a phenomenon does not make any part of the explanation of this phenomenon normative.

It seems to me that descriptive explanations that make references to the normatively important aspects of phenomena are preferable to those that do not make such references. These references make the explanation more insightful by providing a more extensive picture of the phenomenon in question. If that is true, it supports the argument I made in the previous section – that Dickson’s indirectly evaluative approach is not just another example of descriptive jurisprudence but it offers us an insight into the

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<sup>10</sup> Waluchow does not use the term “indirect evaluations”, but I have it on good authority that he and Dickson are talking about the same kind of evaluation.

<sup>11</sup> Wil Waluchow, *Inclusive Legal Positivism*, 23.

kinds of descriptive theories out there. To demonstrate the usefulness of making this distinction in the legal context, Dickson explains, “the distinction between indirectly evaluative and directly evaluative propositions can assist in emphasising the way in which judgments regarding the importance or significance of certain features of the law do not yet involve, although they may be an important precursor to, direct evaluations of the law.”<sup>12</sup> Thus, a theorist that uses the indirectly evaluative approach can be thought of as paving the way for a theorist who will use the directly evaluative approach on the basis of the former’s results.

This does not mean that a descriptive theory that makes no references to normatively important aspects cannot serve as a basis for a normative evaluation of the phenomenon in question. But in the case of legal theory, where our primary aim is to understand the nature of law, which is certainly constituted by normative in addition to non-normative aspects, we are unlikely to benefit from an account of legality that leaves normativity outside its purview. Leslie Green demonstrates this point quite forcefully:

...legal theory must be value-relevant. Any concept of law can have no deeper ground than the complex set of interests and purposes to which legal... theory responds. Should law be distinguished from custom? From morality? Does canon law count as a legal system? Does international law? Abstracted from [such] concerns, there are no answers to these questions.<sup>13</sup>

If legal theory is to explain to us the nature of law and the ways it affects our lives, it must identify the normative aspects of legality because it is true that normativity plays a fundamental role in our lives. So even setting aside more specific questions about the status of canon or international law that Green raises, we have strong reasons to agree that theorizing legality in general is a value-relevant enterprise. Because of this, the

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<sup>12</sup> Julie Dickson, *Evaluation and Legal Theory*, 63.

<sup>13</sup> Leslie Green, *The Political Content of Legal Theory*, *Philosophy of the Social Sciences* (March 1987), 17 (1), 15.

indirectly evaluative approach to legality is preferable to the descriptive approaches that ignore the normative dimension.

It is also important to emphasize that the methodology of the theorist who uses the indirectly evaluative approach is in no way inferior to the theorist who uses the directly evaluative one. Just because the follower of the indirect evaluative approach does not make normative explanations does not mean that her theory is automatically less adequate compared to the theory that would make normative explanations. It may seem strange that when the indirectly evaluative approach is contrasted with descriptive theories that make no references to normatively important aspects, we defend it on the grounds that its insights are more extensive, since it accounts for normatively important aspects in addition to the other ones. But when we compare the indirectly evaluative approach to prescriptive approaches, which include a normative dimension in addition to the descriptive one, we argue that this is going too far and we should stick with the indirectly evaluate approach.

It may seem that a theory, which in addition to describing law's normative and non-normative aspects directly evaluates these aspects, is better than a theory that makes no direct judgments about law within its framework. To show why we are still better off in the descriptive camp, Dickson argues,

we need to know quite a lot about the nature of institutions and procedures via which law operates even to be able to ask the directly evaluative questions about it which we wish to, for, at least in some cases, we cannot even formulate those questions with any degree of precision or accuracy until we know quite a bit about the distinctive character of law.<sup>14</sup>

One reason why Dickson rejects prescriptive approaches is because she thinks it is important to make sure that we develop a solid descriptive account of the phenomenon in

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<sup>14</sup> Julie Dickson, *Evaluation and Legal Theory*, 135-6.



question first. This is needed to understand all the relevant aspects of it, including the normative ones. In contrast, normative explanations may ignore certain aspects of the phenomenon because of the commitment to present this phenomenon in a given normative light. (When I discuss Finnis' and Dworkin's approaches to legality in the following sections, this point will be demonstrated). In this way a normative explanation may mischaracterize the phenomenon. By sticking with the indirectly evaluative approach, we avoid this danger as well as the danger of wishful thinking<sup>15</sup>, that is, of accepting the normative explanation that is most agreeable with our prior normative commitments (what we consider just, good, reasonable, etc.).

I think that for these reasons we should adopt Dickson's indirectly evaluative approach. It is particularly suited to the enterprise of understanding the nature of legality because it urges us to build a descriptive account of it, which neither discounts the importance of the normative dimension of law nor imports normative bias in the explanations of its nature. In the next section I will briefly take up Leiter's objection to Dickson's indirectly evaluative approach.

## 1.6 LEITER'S OBJECTION

It may be thought that all legal theories can be captured within the descriptive/prescriptive spectrum. If this is how we conceive the theoretical spectrum, we may think that Dickson challenges it by demarcating an area in this spectrum, somewhere in between descriptive and prescriptive accounts, and shows how her indirectly evaluative approach fits there. This seems to be the view of Brian Leiter who argues against Dickson that there is "no conceptual space [for Dickson's position] between

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<sup>15</sup> I am indebted to Wil Waluchow for bringing this point to my attention.

descriptive jurisprudence... and the normative conception of jurisprudence.”<sup>16</sup> Leiter distinguishes between epistemic and moral values, that is, between values of “evidentiary adequacy, simplicity, minimum mutilation of well-established theoretical frameworks and methods, explanatory consilience, and so forth” on the one hand, and values that “bear on the questions of practical reasonableness” on the other hand.<sup>17</sup> In Leiter’s view, Dickson situates her approach to studying law somewhere between descriptive and prescriptive jurisprudence, and so challenges the theoretical legal spectrum by introducing a new dimension. I think that Leiter’s criticism is misguided because Dickson’s intention is not to set up a new camp but to emphasize the importance of indirect evaluations in theorizing legality.

If I understood Leiter’s argument correctly, it seems to mischaracterize Dickson’s position. To evaluate his stance, we need to examine another distinction he uses. Leiter distinguishes between two types of concepts: “Natural Kind Concepts” and “Hermeneutic Concepts”.<sup>18</sup> He gives us three examples of a natural kind concept: gold, water and wolverine. What makes each of these examples belong to the “natural kind concept” category is that the extension of each “is fixed solely by whatever well-confirmed scientific (lawful) generalizations employ the concept.”<sup>19</sup> I have to admit that I do not understand this definition all that well, but I think that Leiter’s idea is that there are clear examples of concepts which correspond to natural phenomena and which are verifiable by sciences (like physics, chemistry or biology). So ‘water’, as a natural kind concept, can be used in explanations of some chemical and biological processes.

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<sup>16</sup> Brian Leiter, *Naturalizing Jurisprudence*, 172.

<sup>17</sup> Brian Leiter, *Naturalizing Jurisprudence*, 168.

<sup>18</sup> Brian Leiter, *Naturalizing Jurisprudence*, 173.

<sup>19</sup> Brian Leiter, *Naturalizing Jurisprudence*, 172-3.

Perhaps a better way to understand what Leiter is after is to contrast natural kind concepts with hermeneutic ones. According to Leiter's understanding, these have two conditions: 1) they "figure in how humans make themselves and their practices intelligible to themselves", and 2) the extension of these concepts is fixed by their hermeneutic role.<sup>20</sup> Leiter tells us that "gold", "water" and "wolverine" can also be considered hermeneutic concepts if by "gold" we mean gold in the context of bourgeois societies, if we understand "water" in the context of baptismal rituals, and if we understand "wolverine" as the mascot of the University of Michigan.<sup>21</sup> So a concept like water can be understood as a Natural Kind Concept; this is when we would describe the phenomenon of water as H<sub>2</sub>O, liquid, etc. The fact that water is H<sub>2</sub>O or that it is liquid, however, has little to do with the hermeneutic concept 'water'. So even though we use the term 'water' in the chemistry lab, when we discuss its molecular makeup, and in a religious context, when we discuss its role in the baptismal rituals, this term refers to two different concepts: natural kind and hermeneutic ones.

Leiter's argument, if I understood it correctly, is that the methodology of scientific theories – theories that focus on natural phenomena, like water, and so are concerned with constructing natural kind concepts – is appropriate for working with hermeneutic concepts like law. So, just like chemistry explains the concept of water entirely in descriptive terms, so legal theory can and should explain law in entirely descriptive, or more "scientific"<sup>22</sup>, terms. Leiter thinks that it goes without saying that a descriptive theory of law must engage with evaluative practices of agents. This means

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<sup>20</sup> Brian Leiter, *Naturalizing Jurisprudence*, 173.

<sup>21</sup> Brian Leiter, *Naturalizing Jurisprudence*, 173.

<sup>22</sup> Brian Leiter, *Naturalizing Jurisprudence*, 175.

that a good legal theory can only describe elements of legality in non-prescriptive ways.

As Leiter puts it,

*Everyone... acknowledges that the theorist must employ epistemic values in demarcating the object of theoretical inquiry. The only question is whether the theorist must also engage in moral evaluation in order to have a theory of the object in question. Dickson, like every descriptivist, denies that. So her “indirectly evaluative theory” does not stand in any competition with the Moral Evaluation Thesis, since it agrees wholly with the descriptivist that the answer to the last question is negative. The confusion results from the fact that Dickson... thinks epistemic values in scientific theory-construction cannot accommodate the distinctive features of Hermeneutic Concepts. But that assumption is motivated by bad philosophy... and it is thus insufficient to motivate a kind of legal theory distinct from both descriptive jurisprudence and the Moral Evaluation Thesis.*<sup>23</sup>

I think that Leiter is right to say that Dickson is in the descriptivist camp. But I also think that it is true that her analyses illuminate the differences in descriptivist approaches to legal theory. Namely, they highlight the necessity of describing and explaining normative aspects of legality while emphasizing the importance of staying clear from direct evaluations. So, I agree with Leiter’s conclusion that indirectly evaluative approach is “an instance of descriptive jurisprudence”<sup>24</sup> but I do not think that for this reason Dickson’s theory has nothing important to tell us about evaluation in legal theory. Her analyses give us reasons to stay within the descriptivist camp and to appreciate normative aspects of legality.

In the following two sections I will examine Dickson’s criticisms of Finnis’ and Dworkin’s methodologies, which will reveal more advantages of indirect evaluations.

## 1.7 RAZ AND FINNIS

Dickson contrasts Raz with Finnis and argues that for Finnis the question of the moral merit of law is inseparable from the enterprise of understanding law. For Raz, it is

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<sup>23</sup> Brian Leiter, *Naturalizing Jurisprudence*, 175.

<sup>24</sup> Brian Leiter, *Naturalizing Jurisprudence*, 172.

possible to make progress in understanding the nature of law without producing any normative explanations of it, including moral ones. According to Dickson, Finnis thinks that it is impossible for a legal theorist “to do the job that he must do in order for his theory to be explanatory adequate without himself entering into the business of morally evaluating the law”.<sup>25</sup> So, once we begin the study of law, we necessarily begin moral evaluation of it, and we have to continue to do so for as long as we are engaged in this study.<sup>26</sup> Because of this Dickson refers to Finnis’ position as the “no place to stop” approach to highlight the peculiar slippery slope that characterizes Finnis’ position.

That said, Finnis’ view regarding the significance of metatheoretical virtues coincides with Dickson’s. He says, “there is no escaping the theoretical requirement that a judgment of significance and importance must be made if a theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.”<sup>27</sup> It must be borne in mind that the significance and importance that characterize judgments that Finnis refers to here are not the same as the indirectly evaluative ones that are peculiar to the approach Dickson explicates. Instead, Finnis’ argument is about metatheoretical judgments, or to use Leiter’s language, epistemic values. Regarding the substantive aspect of legal theory, Finnis argues,

The evaluations of the theorist himself are indispensable and decisive component in the selection or formation of any concepts for use in the description of such aspects of human affairs as law or legal order... the theorist cannot identify the central case of that practical viewpoint which he uses to identify the central case of his subject-matter unless he decides what the requirements of practical reasonableness really are.<sup>28</sup>

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<sup>25</sup> Julie Dickson, *Evaluation and Legal Theory*, 49.

<sup>26</sup> Throughout the book Dickson makes various references *Natural Law and Natural Right* from where she extracts Finnis’ position. She also relies on her recollection of lectures that Finnis gave at some time in Oxford.

<sup>27</sup> John Finnis, *Natural Law and Natural Rights*, 17.

<sup>28</sup> John Finnis, *Natural Law and Natural Rights*, 16-17.

Because the construction of legal theory must be guided by the requirements of practical reasonableness and because these requirements are normative, the resulting explanation of the nature of law is prescriptive. Dickson explains,

For Finnis, then, a legal theorist must inevitably wade deep into the waters of moral evaluation, for a legal theory will be successful to the extent that it correctly identifies what the requirements of human practical reasonableness truly are, and to the extent that it understands law as having the function of helping us to realize those requirements, such as to create a moral obligation to obey it.<sup>29</sup>

Law, for Finnis, must reflect the requirements of practical reasonableness. Law's function is to help us to organize our lives according to these requirements. So, law has an organizational function. This can be considered a more or less accurate description of how people tend to understand one of law's functions (for example, consider laws that direct traffic). But because law must embody the requirements of practical reasonableness – which are without doubt normative requirements – Finnis' explanation of law's function is normative.

While Finnis needs to convince us that the study of law necessarily requires a normative component – the challenge that Finnis does not meet, according Dickson – Raz faces the challenge of showing us that no such requirement is necessary. The way Raz prepares to meet this challenge is by arguing that it is one thing to morally evaluate something and quite another to appreciate its importance. Dickson quotes Raz's reasoning,

It is crucial to remember, however, that we often can and often do know that a feature of a scheme or institution is relevant to its evaluation without knowing whether that makes it good or bad. The fact that primary education is compulsory is recognized by all as important to its evaluation, regardless of whether they take it to be one of the strengths or rather weaknesses of our educational arrangements.<sup>30</sup>

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<sup>29</sup> Julie Dickson, *Evaluation and Legal Theory*, 47.

<sup>30</sup> Julie Dickson, *Evaluation and Legal Theory*, 62.

Raz thinks that it is possible to understand the idea of compulsory education as well as the normative aspects of this idea (such as whether it is widely believed in our society that compulsory education is right or wrong) without producing any normative explanations. The fact that a theorist who claims that ordinary people recognize some feature as important certainly means that he is making an evaluative judgment. However, such judgments are not normative (more specifically, not moral) and this is the point that Raz needs to establish. Raz's reasoning in the example about education is analogous to his approach to the study of law. So, just as we can recognize the importance of education being compulsory or not without judging the practice morally, we can recognize the importance of some legal practices, institutions, in short, elements of legality, without issuing judgments as to whether they make them morally good or bad.

The strategy for studying legality that Raz adopts, then, is in line with Dickson's account of indirectly evaluative approach. We develop a descriptive account of law and identify law's normative aspects, taking precautions not to develop normative explanations of law as we describe it. It goes without saying that the account needs to be understandable, so it must exhibit the metatheoretical virtues, which were discussed earlier in the chapter. Lastly, the account should cater to the interests of the inquirers. This means that the theory that we develop should clarify what law is to those persons who try to develop a better understanding of their experiences with law.

Legal theory contributes... to an improved understanding of society. But it would be wrong to conclude... that one judges the success of an analysis of the concept of law by its theoretical social fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves.<sup>31</sup>

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<sup>31</sup> Joseph Raz, *Ethics in the Public Domain*, 237. In Chapter 3, and in particular in Section 7.1 of it, I will challenge this argument.

Because we develop legal theories to improve the understanding of the phenomenon that figures so prominently in our lives, we must maintain a proper balance of descriptive and normative elements in our accounts. The indirectly evaluative approach is an important tool in achieving this goal.

## 1.8 DWORKIN'S METHODOLOGY AND AN ORDINARY PERSON

Dickson argues that her view on the best philosophical approach to studying law is in line with Raz's understanding of this study, and so they share the challenge of showing how their approaches possess greater explanatory capacity compared to their alternatives. We have already surveyed the reasons for preferring the indirectly evaluative approach to descriptive approaches that make no reference to normative aspects of law and to normative approaches like the one offered by Finnis. In this section I will discuss Dworkin's methodology and will show how his interpretive theory presents another alternative for theorizing legality. Dickson rejects Dworkin's method but the reasons she sites for doing so are worth considering in detail to better appreciate the strengths of the indirectly evaluative approach. Understanding these reasons will also help us with evaluations of the adjudicative and inter-institutional theories that I will present in the following chapters.

Dickson tells us that, "In order for Raz's legal theory to be explanatorily adequate... it must pick out and explain the important and significant features of law, and, moreover, must do so in ways which reflect what those subject to the law regard as important about it..."<sup>32</sup> Explanatory adequacy, then, is not only dependent on the

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<sup>32</sup> Julie Dickson, *Evaluation and Legal Theory*, 65-6.



identification of law's peculiar features, including normative ones, but also on the way law and its features are experienced by those who deal with law. (Recall Raz's argument that the task of legal theory is to help people to understand their practices and Green's argument that legal theory must be value-relevant so that it can satisfy our interests and needs in understanding law and its relation with other aspects of our lives.) We should be open to the possibility that law is experienced differently by law subjects, that it may raise different normative concerns for them depending on their experiences with law and their life projects, and that in virtue of these variables, the interests that different law subjects have regarding the nature of law also vary.

These observations, especially the last one, are very important but should not be surprising given our point of departure into the study of law. As it was stated earlier, we are looking at societies and their history. We are looking at a pool of sociological data to acquire materials for our study: law subjects' experiences with and their interests in law. But if these are guiding considerations for the development of legal theory, our theory will be in need of revisions for as long as law subjects' experience with law will change and their interests in it will evolve as the result of this change. For this reason, it would be correct to say that regarding the experiences that our theory aims to explain and the interests it caters to, it runs the risk of always having a limited scope. Perhaps, we can devise a theory that could satisfy everyone at present, but by no means can we be sure that everyone will remain satisfied with it in light of new experiences. With this point in mind, let us examine Dickson's views on Dworkin's methodology.

The final portion of her book Dickson dedicates to the analysis of his understanding of the task of jurisprudence. Dickson attacks Dworkin for employing an

overly narrow approach to studying law. The problem that Dickson sees with Dworkin is different from the one she found with the approach offered by Finnis. Finnis thought that once we begin the inquiry into the nature of law, we would have to be making moral evaluations of law for as long as we are engaged in the study. In contrast to his view that “it just makes no sense to conceive of two different types of evaluation concerning features of law”<sup>33</sup>, Dworkin’s starting point is different “in that Dworkin claims that it is necessary for a legal theorist to engage in moral and political argument in order to understand law properly.”<sup>34</sup> So for Dworkin, it is necessary to engage with morality in order to understand the nature of law because law must be understood through the best interpretation of legal practices. Dworkin, then, suggest and emphasizes the importance of the moral theorizing of law. On the face of it, his approach is similar to the one Finnis advocates: they both argue that direct evaluations are indispensable for understanding law. However, their reasons for claiming this are different.

To understand Dworkin’s position we need to examine his views on the function of law. We need to understand what purpose law is meant to serve. In the previous section we have seen that for Finnis the function of law is to organize a society according to the principles of practical reasonableness. Because of this understanding of law’s function, Finnis is committed to understand the nature of law through the normative framework of these requirements. Dworkin’s understanding of the functional aspect is different from Finnis’. The function of law, according to Dworkin, is to restrict government’s use of coercion.<sup>35</sup> This means that the fundamental characteristic of law, according to Dworkin, is to place *moral* constraints on the government’s use of coercion,

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<sup>33</sup> Julie Dickson, *Evaluation and Legal Theory*, 48.

<sup>34</sup> Julie Dickson, *Evaluation and Legal Theory*, 103.

<sup>35</sup> Julie Dickson, *Evaluation and Legal Theory*, 104.

and so to understand what law is in general and in specific cases, we need to keep in mind this fundamental function that law performs.

According to Dickson, it is because Dworkin has this view about the function of law that his general theory falls short of the needed explanatory adequacy. She explains,

The general thrust of my argument is that the view of law's function which Dworkin advocates defines in a fairly concrete sense the limits of and possibilities for theoretical understanding of the law, and that it does so in a way which closes down many of the most important questions which can be asked within jurisprudence before they can be properly raised. In short, Dworkin's view of law's function does not just get us all into the same interpretive ballpark, but rather defines the composition, strategy and stance of one particular jurisprudential team.<sup>36</sup>

Dworkin's approach to studying law is too restrictive at the outset. This does not mean that his explanation of law is completely off base in virtue of his view of the function of law, but it does mean that his theory cannot explain everything there is to explain in virtue of this commitment to moralizing law. More specifically, Dworkin goes wrong in conceiving some of the ordinary law subjects' expectation of law's function. It is certainly possible to imagine a society where the attitudes of law subjects towards and their experiences with law are not based on the idea that a fundamental function of law is to restrict government coercion. Dworkin's view may capture fairly well law subjects' experiences with law in modern liberal societies, but this does not seem to be true of law on a more general level.

As Dickson remarks, not everybody who theorizes about law is in the same ballpark as Dworkin. One prime example is Raz, whose focus is on legal institutions and procedures, and not on interpretation of legal practice in the best light with the view to Dworkin's vision of law's fundamental function. Raz's claim is that "the existence of [legal] institutions and the particular way in which they function, is of importance in

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<sup>36</sup> Julie Dickson, *Evaluation and Legal Theory*, 108.

understanding the law, and in understanding how our social world is shaped by its presence.”<sup>37</sup> It is not that Raz and Dworkin, in virtue of their methodological commitments, work with completely different phenomena and, because of this, arrive at different views about what law is. In part, the difference in their views can be explained by their different conceptions of the interests and experiences of law subjects with law. Dworkin focuses on the specific set of law subjects, which seem to be citizens of modern liberal states, whereas Raz makes a commitment to understand law beyond these limitations. (In the third chapter we will explore the limitations of Raz’s conception of the ordinary law subject).

I think that Dickson is right to criticize Dworkin for employing an overly restrictive methodology regarding the function of law. My argument is that just as Dworkin’s method is too restrictive regarding the function of law, any legal theory can run the risk of imposing some such restrictions either on law’s functions, or on the structure of possible legal systems or legal institutions, etc. If we agree that the purpose of legal theory is to cater to the interests and needs of law subjects, and if we agree that these can change in light of new experiences these subjects have with law, a good legal theory must always remain open for revisions. This does not mean that a legal theory cannot be analytical, that is, consisting of an account of essential features of legality. I think that we should look for these features. But we must be very careful if we make universal claims about legality, especially if they are based on the experiences with legality of a limited pool of ordinary persons, especially those who share ideological beliefs, like Dworkin’s ordinary persons seem to do.

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<sup>37</sup> Julie Dickson, *Evaluation and Legal Theory*, 120.

If a legal theory employs a restricted conception of the interests and needs of law subjects, the interests and concerns of some of them may not be resolved if their experiences with law are not reflected in the conception that serves as the foundation of this theory. If, for example, a legal theory focuses exclusively on the experiences with municipal legal systems, it may not be possible to adequately address the needs and interests of those whose experiences extend beyond municipal systems. To remedy this situation, the conception of ordinary person needs to be always explicit in the framework of the theory. The theory should also be open to incorporating or merging with other accounts of legality. The best theory, then, would be the one that explain the most extensive range of experiences of legality, while at the same time satisfying such metatheoretical standards as clarity, comprehensiveness and coherence.

This completes my discussion of the virtues of the indirectly evaluative approach that Dickson offers. One of its central advantages is that it helps us to avoid producing normative accounts of law. The danger of such accounts is that they may not pick out all the relevant features of legality, in virtue of a normative bias or an instance of wishful thinking on behalf of the theorist. In addition, it allows us to engage with normative aspects of legality without thereby forcing us to produce normative explanations of it. Lastly, the indirectly evaluative approach allows us to appreciate the importance of the conception of the law subjects to whose interests and needs we cater in constructing our theory. In the following two chapters I will be returning to these analyses and applying them to the metatheoretical and substantive accounts of Raz's adjudicative theory and C&G's inter-institutional theory as I examine how well they capture legality in different contexts.

## CHAPTER 2 THE ADJUDICATIVE THEORY

### 2.1 INTRODUCTION

In this chapter I will present three elements of Raz's theory of law. By analyzing these elements I prepare for the analysis of advantages and disadvantages of his theory on the basis of evaluative criteria developed in the previous chapter. Apart from laying the groundwork for this analysis, I will make several arguments about Raz's theory. The argument of the first section, where I present what Raz calls "norm-applying institutions", will be that Raz places a strong emphasis on the adjudicative aspect of law in his theory. In the second section I will sketch out the main idea behind rules of recognition, which I take to be the second main element of Raz's theory, one which enables the project of individuation of norms. In the final, and most lengthy section of this chapter, I will present the triumvirate of criteria (supremacy, comprehensiveness, and openness) that form the concept of legal system for Raz. In the following sections I will analyze three possible alternative ways of conceiving the EU's legal order developed by Julie Dickson in her paper *How Many Legal Systems?*. I will approach these alternatives as the possible outcomes of the commitment to the triumvirate criteria. I will argue that adopting the Razian conception of legal system creates difficulties for making sense of the EU as a legal order.

I want to emphasize from the outset that the arguments of this chapter are not meant to establish that Raz's theory cannot explain the EU as a legal order. It is possible that the elements of his theory I discuss can be adjusted or some other elements can be added to the theory in such a way that we can capture legality in the context of the EU. My project in this chapter is not to engage with these arguments or to show what needs to

be added and what needs to be omitted for such a portrayal of the EU. My goal is only to show that Raz's theory, as it stands, runs into trouble when we try to make sense of the EU as a legal order on its basis. If I succeed in this task, the question of whether the theory needs to be adjusted can be tackled, but I will not pursue this question in this work. Instead, I will focus on the questions that I consider more interesting. If Raz's theory does not capture the EU, then perhaps the EU is not a legal system and its norms are not legal norms? Why should we think that there is a place for legality in the EU after Raz's theory pronounced its negative verdict in this regard?

In the third chapter, as I analyze C&G's criticisms of Raz's theory, I will give reasons why I think we cannot rely on the result of applying Raz's theory to the EU. This and the previous chapters lay the foundation for answering these questions. But for now I set them aside.

## 2.2 NORM-APPLYING INSTITUTIONS

It is uncontroversial that legal systems are institutional systems. We commonly think that legal systems have parliaments, police departments, prisons, tribunals and other such institutions. These institutions can serve various functions with varying degrees of efficacy. Even though most of these institutions can be found in every developed contemporary legal system, most of them are not essential for the existence of a legal system qua legal system, according to Raz. The only kind of institution that is necessary for legal systems to exist is norm-applying institutions "which combine norm-making and

norm-applying in a special way.”<sup>38</sup> Let me begin my explanation of this relation by saying a few words about the concept of norm-applying institutions.

The term “norm-applying institution” is deceptively straightforward. This term captures the positive function of the institutions that Raz is trying to describe. The problem is that many institutions perform this kind of function. Simply put, a norm-applying institution is an institution that applies norms to specific cases. Understood in this way, we have a very wide variety of institutions whose function fits this description. Parliaments, police departments, universities, FIFA – all can be said to be institutions that apply norms to specific cases. All institutions that were listed in the previous paragraph and which are commonly thought to be parts of the legal system also apply norms to specific cases. So, we need to understand the special way in which norm-applying institutions apply norms.

The way Raz demonstrates the peculiarity of their function is through the distinction among norm-creating, norm-applying and norm-enforcing institutions. The best way to get a sense of these distinctions is by examples. Two examples of norm-creating institutions that Raz gives are constitutional assemblies and parliaments.<sup>39</sup> So, what Raz calls norm-creating institutions are those that create norms. Notice, however, that such institutions as parliaments, for example, while fulfilling their norm-creating functions can and often must comply with already existing norms for creating new norms. For instance, generally speaking, the process for passing a legislature encompasses specific procedural rules and parliament, or any similar legislative authority, needs to comply with these rules. Because of this, it may be difficult to contrast the norm-creating

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<sup>38</sup> Joseph Raz, *The Authority of Law*, 108.

<sup>39</sup> Joseph Raz, *The Authority of Law*, 105.



function with the norm-applying one, since it is (only) possible in some cases to create norms by complying with other norms. It is also unclear what counts as “norm-creating”. It seems that any institution can develop a standard or criterion for evaluation of something. If that is true, then any institutions can create norms. A more detailed account of the norm-creating function is needed to answer these questions. However, we need not worry about them because our primary goal is to understand the nature of norm-applying institutions. The account of norm-creating institutions needs only to be sufficiently clear for us to reach this goal. Taking the examples of constitutional assemblies and parliaments as central cases of norm-creating institutions should suffice for our purposes.

“The prison service or public officials instructed to pull down a house against which a demolition order has been issued physically enforce the law.”<sup>40</sup> The enforcement of laws, the task of altering reality in accordance with laws, is what norm-enforcing institutions are about. It is important to understand that according to this distinction between norm-applying and norm-enforcing institutions, a police officer that issues a speeding ticket or a custom’s officer that denies an entry of a certain cargo into the state are not applying norms. According to Raz, these are instances of norm enforcement. It can be asked, does not the enforcement of norms imply their application? The commonsensical answer to this question seems to be yes. But the conceptual distinction that Raz is making is designed to filter out the implementation of norms from the distinctive function of norm-applying institutions.

In order for us to get a sense of what norm-applying institutions are, we need, according to Raz, to focus on the way they fulfill their functions rather than on their

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<sup>40</sup> Joseph Raz, *The Authority of Law*, 107.

functions themselves.<sup>41</sup> An example of a norm-applying institution is a court. Raz calls such institutions as courts “primary norm-applying organs” in order to distinguish them from other institutions that also apply norms to specific cases. (As we have seen, other institutions can also be thought of as applying norms to cases.) It is also important to emphasize that these institutions *in fact* must serve their function. So an institution, which is meant to serve this function but fails to do so for some reason, would not qualify to be a primary norm-applying institution in the way Raz defines them. “Primary organs are concerned with *the authoritative determination* of normative situations in accordance with pre-existing norms.”<sup>42</sup> Put another way, “the defining feature of primary norm-applying organs [is this]: they are institutions with power to determine the normative situations of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong.”<sup>43</sup> Most institutions of legal systems, such as correctional departments, immigration offices, parliaments, etc, apply pre-existing norms as they go about fulfilling their functions and pursuing their goals. But the norm-applying institutions that are necessary for the existence of legal systems, according to Raz, are those that issue authoritative determinations.<sup>44</sup>

According to Raz, the ability to authoritatively settle disputes is the distinctive mark of norm-applying institutions and these institutions are necessary components of all legal systems. It is important to emphasize that these institutions must be able to settle disputes *in fact*. Raz tells us that there are different functions that norm-applying

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<sup>41</sup> Joseph Raz, *The Authority of Law*, 106.

<sup>42</sup> Joseph Raz, *The Authority of Law*, 108. My emphasis.

<sup>43</sup> Joseph Raz, *The Authority of Law*, 110.

<sup>44</sup> From now on “authoritative determinations” and “binding even when wrong” will be used interchangeably.

institutions of many actual legal systems serve. Different kinds of institutions, not just courts, can fulfill many of these functions.<sup>45</sup> An example of a function that such institutions as courts tend to fulfill but which other institutions could also fulfill are determinations of fact. In most developed legal systems courts have resources to investigate matters of fact which other institutions and individuals cannot afford or do not have access to. Thus, it can be argued, if public or other institutions had access to the same resources, these determinations of fact would not be a unique function of the courts or norm-applying institutions. But if an institution cannot authoritatively settle disputes in fact, it stops fitting the definition of a norm-applying institution, and so, we cannot look to it to identify a legal system.<sup>46</sup>

It may be objected that many decisions of courts can be overruled by the decisions of higher courts, and if that is the case, we have to accept that not every court can authoritatively settle disputes in the way Raz defines settling. This objection urges us to restrict the use of the term ‘primary norm-applying institutions’ to a very limited pool of examples. Thus, it seems that only institutions like the Supreme Court or the final tribunal fit Raz’s definition. If that is the case, then Raz’s theory can be viewed as overly restrictive, since it forces us to deny the existence of legal systems in states which do not have such supreme authoritative dispute settling institutions. Such states, however, are easily imaginable, and so Raz’s restrictive view stands in need of justification.

One possible way to respond to such an objection is to argue that states without the equivalents of supreme courts are rare or imaginable only, and so the theory of law

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<sup>45</sup> Joseph Raz, *The Authority of Law*, 106.

<sup>46</sup> The authoritative determination of disputes is an aspect of norm-applying institutions. This will become important when we turn, in the following sections, to my analyses of the EU on the basis of Dickson’s alternatives.

that Raz develops needs not worry about such cases because, as Raz points out, legal theory must aim at helping people to understand themselves and the world in which they actually live. (Raz's position in this regard is explained in Ch 1, Section 1.6) Even if this argument is accepted, the fact that in many familiar legal systems decisions of lower courts can be overridden by decisions of higher courts still poses a problem for Raz's conception. This is so because even though decisions of lower courts can be overridden, it often happens that they are not overridden, and so they are in fact final. So, in such cases, we have courts whose decisions are final, yet they could be overruled by higher courts.

Without resolution of this problem we do not only have very few examples of primary norm-applying institutions but we are also faced with cases when an official of a law-enforcing institution, such as a prison warden<sup>47</sup>, or an official of a non-governmental institution, such as a university professor,<sup>48</sup> have power to authoritatively settle disputes by issuing determinations that fit Raz's concept. If a court is a paradigm example of a norm-applying institution because courts have power to authoritatively settle disputes, we need to account for the power to authoritatively settle disputes by such officials as prison wardens and university professors. These seem to be rather far from the paradigm; yet, they certainly seem to have the capacity to authoritatively settle disputes.

Perhaps, the force of these objections can be diminished if we accept the assumptions that Raz makes before developing his theory, namely the assumption of the primacy of the social, the assumption of the importance of municipal law, as well as the assumption of universality. Very briefly, the assumption of the primacy of the social

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<sup>47</sup> I'm indebted to Wil Waluchow for this example.

<sup>48</sup> See *Legality's Borders*, Chapter 2, particularly section 2.2 and page 47.

“brings out that normative systems are existing legal systems because of their impact on the behavior of individuals, because of their role in organization of social life.”<sup>49</sup> In Chapter 1 we have already examined reasons for accepting this assumption when we postulated that legal theories should look at the social field and help people to understand their lives better. The assumption of the importance of municipal law “reflects our... intuitive perception that municipal legal systems are sufficiently important and sufficiently different from most other normative systems to deserve being studied for their own sake.”<sup>50</sup> The last of Raz’s assumptions – the assumption of universality – is closely related to the assumption of the importance of municipal law and highlights Raz’s commitment to analytical style of jurisprudence, which Dickson outlines in *Evaluation and Legal Theory* (see Chapter 1, Section 1.3). Raz explains that he assumes that there is “a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems. Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract.”<sup>51</sup> The reason why the assumptions of the importance of municipal and of universality are closely related is because Raz is after the most general and abstract (in other words, universal) features of law. Raz focuses on municipal legal systems as paradigm cases of legal systems because he takes them to be important and different enough from other kinds of systems and forms of organization to merit the attention of legal theory. On the basis of these assumptions he is presuming that the experience of ordinary law subjects with municipal law is central for understanding legality.

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<sup>49</sup> Joseph Raz, *The Authority of Law*, 104.

<sup>50</sup> Joseph Raz, *The Authority of Law*, 105.

<sup>51</sup> Joseph Raz, *The Authority of Law*, 104.

As we will see in the third chapter, there are good reasons to question these assumptions. My primary goal in this part of my project, however, is not to expose difficulties with Raz's conception of the ordinary law subject but to outline the main features of his theory of law. In light of that, I will only make the following argument. Because Raz emphasizes that the distinctive feature of primary norm-applying institutions is to authoritatively settle disputes, that is, to have the capacity to make decisions which are binding even if wrong, and because Raz claims that these institutions are necessary for the existence of legal systems, we are justified in calling his theory adjudicative. When I turn to the discussions of the role that rule of recognition and the triumvirate of comprehensiveness, supremacy and openness play in Raz's theory, I will give further reasons why Raz's theory is adjudicative. But the importance of norm-applying institutions and their unique function are sufficient on their own to establish this point. We should also remember that there are difficulties with establishing clear distinctions among norm-creating, norm-enforcing, and norm-applying institutions. When I turn to the discussion of Dickson's alternative ways of understanding the EU, this lack of clarity in these distinctions will be felt.

## 2.3 RULE OF RECOGNITION

### 2.3.1 HART

The idea of the rule of recognition that Raz uses in his theory is similar to Hart's. The most notable difference between Hart and Raz in this regard is that Raz's theory allows for multiple rules of recognition while Hart's theory allows for only one. In what follows, I will explain the idea of the rule of recognition and say a few words about its significance for this project. Because of the complexity of the idea of the rule of

recognition my analysis can only amount to a rough outline of a few aspects of it. The goal of this analysis is to provide only a sufficient basis for understanding how this idea causes problems when we extrapolate it to the context of European legality. In particular, we need to understand the benefits that this theoretical tool promises us in legal theory in general and in the enterprise of theorizing the EU in particular.

According to Hart, there can be two general kinds of legal orders: primitive (pre-legal) and developed ones. The difference between the two is that while primitive legal orders have only primary rules – rules that impose duties (such as do not murder or steal; obey the elder), - the developed orders (or legal systems) have also secondary rules. It is the development and existence of secondary rules that allows for the existence of legal systems as opposed to primitive legal orders. These secondary or master rules are needed in order to remedy various problems with the system of primary rules.<sup>52</sup> There are three types of secondary rules only one of which is going to be analyzed here. This is the rule of recognition.<sup>53</sup> Hart explains the idea of the rule of recognition by making an analogy to a class of rules in games, “the rule of recognition of a legal system is like a scoring rule of a game. In the course of the game the general rule defining activities which constitute scoring (runs, goals, &c.) is seldom formulated; instead it is *used* by officials and players in identifying the peculiar phases which count towards winning.”<sup>54</sup> The fact that that the rule of recognition is “seldom formulated” but is constantly used (or relied upon) is what

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<sup>52</sup> For more detailed discussion of the problems with primitive or pre-legal orders, see Chapter 5 of Hart’s *The Concept of Law* and in particular pp. 91-6.

<sup>53</sup> The idea of the rule of recognition is a complicated and a controversial one. I will do my best to avoid the controversies surrounding it as much as possible unless these controversies have a direct bearing on the problematic of my project.

<sup>54</sup> H.L.A Hart, *The Concept of Law*, 99.

makes this rule distinctive and difficult to understand. Let me explain these aspects in more detail.

The function of the idea of the rule of recognition in legal theory is to provide “the criteria by which the validity of other rules of the system is assessed”.<sup>55</sup> In other words, the rule of recognition allows us to determine whether a given norm is a part of the legal system.<sup>56</sup> Such determinations are possible because legal norms can be organized in a hierarchical fashion, by means of which their legal validity is established. So, in a legal system, an answer to the question “why should I not murder?” has a reply in the form of “because there is a law prohibiting murder”. To the type of question “why is that law?” the type of the answer is “because the parliament made that norm into a law”. Further questions regarding the ability/authority/legitimacy of these institutions and officials can be asked. In pursuing this line of questioning, we are examining the legal hierarchy of a legal system. According to Hart, there will have to be a point when we reach the summit of this hierarchy. At that point we will ask the final question about the validity of a norm/institution (depending on which system we question and how we choose to do it).

According to Hart, in giving an answer to this final question we are utilizing the rule of recognition. That is, we are pointing to a certain social fact that serves as a mark of legality. Looking at the analogy with sports, we may get a better idea of the nature of this final answer and the peculiarity of the rule of recognition as the tool by means of

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<sup>55</sup> H.L.A Hart, *The Concept of Law*, 102.

<sup>56</sup> H.L.A Hart, *The Concept of Law*, 102-3. To do even minimal justice to the idea of the rule of recognition it is necessary to introduce the distinction between internal and external points of view, explain how the rule of recognition is different from the rule of change, discuss the way to distinguish between ultimate rules of the system (constitutional rules for example) and the rule of recognition. In the interest of space I will not explore any of these important and controversial aspects of Hart’s theory.



which we can tell which norms count as legal. Consider the rules for scoring a goal in a soccer game. In order for a goal to be legitimate, the player who scores it must be onside, no fouls must be committed, the ball has to completely cross the goal line, etc. If one is to ask while watching, say, EURO CUP 2012 match between England and Ukraine, “what makes these rules valid?”, we can answer “they are valid because they are rules outlined by FIFA”. The person can persist, “and what makes FIFA rules valid in this soccer game?” The answer to this question, the final answer, can be that the officials refereeing the game are the ones who follow these rules and regulations. It is up to them to determine whether a goal was scored. (Raz’s idea that instead of Hart’s category of “officials” it is norm-applying institutions, whose decisions are binding even when wrong, explains quite well why Ukraine lost that match to England.)

Unlike in municipal legal system with complex hierarchies of norms, in this example the hierarchy is fairly straightforward, and the most important part of it for our purposes is when officials recognize FIFA rules. It is because they do so that these rules in fact are valid. The same goes for the case of legal systems: it is because legal officials recognize some norms as legal that makes these norms legal.<sup>57</sup> Of course, it is necessary to have an account of officials – who counts as the relevant official? – in order for us to give the answer for the final question about the legitimacy and membership of a given norm in a legal system. In the third chapter, when we examine the problems of circularity and indeterminacy, we will work on this question. For now, I set it aside.

It is crucial to understand that the rule of recognition is unlike any other rule of a legal system. The rule of recognition is not a written rule, and so its existence cannot be

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<sup>57</sup> Non-officials must also generally comply with the results of the use of these norms by the officials, according to Hart.

verified by checking some legal document. "...A subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."<sup>58</sup> It is because legal officials act in a certain way that there can be a legal system on Hart's view.<sup>59</sup> The practice of officials is the pattern of how officials act. The existence of the rule of recognition, then, is a fact in the sense that there is a practice in place in a legal system. Examining this practice or this tendency of how officials act is crucial for identification of all types of legal norms in a given legal system. This is so because not all legal norms in a legal system are primary rules. There are also secondary rules, such as the rule of recognition, which can only be discovered if we analyze the convergent behavior of officials.<sup>60</sup>

The way officials behave can certainly be described in some legal document or an academic text, and so, to some extent, it may be the case that the existence of the rule of recognition can be established by appealing to these texts or documents. However, it is crucial to understand that such a description of the rule of recognition is a *description of fact*, but not the fact itself. And it is the fact, i.e., the usual and convergent way the officials of the legal system act, that should be understood as constituting the conditions

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<sup>58</sup> H.L.A. Hart, *The Concept of Law*, 107.

<sup>59</sup> The rule of recognition can also be interpreted to mean a norm as opposed to a practice. I will not discuss this interpretation at this point. See Jules Coleman, *The Practice of Principle*, Part 2, in particular Lectures 7-9.

<sup>60</sup> It is important to distinguish two types of secondary rules. There are fundamental secondary rules, like the rule of recognition, the rule of change, and the rule of adjudication. And there are other secondary rules that are meant to govern the application of primary rules, e.g., rules about how to make a valid will. Both types are secondary rules because they tell us how to work with other rules, but it is fundamental or secondary rules that lie at the base of legal systems.

for the existence of the rule of recognition. In short, the rule of recognition's existence is established by a social practice itself and not a description of it.

In my dissertation I will focus primarily on one function of the rule of recognition. I take this idea as a theoretical tool that can be used for individuation of norms. In other words, I am using it to tell the difference between laws and other kinds of norms. The reasons for focusing on this aspect will become obvious when I turn to the analysis of Dickson's alternatives for understanding legality within the EU. For now, I will proceed to explain how the rule of recognition can be used to tell apart legal from non-legal norms.

Hart gives us the necessary basics for understanding how we can individuate laws. If we return to the example where we climbed the legal hierarchy all the way up to the summit, we can see that the rule of recognition plays a very important role by authorizing all other norms falling within its scope because it depends for its existence and content on the patterns of practice of officials. By behaving the way they tend to, the officials can be taken to determine which norms count as the norms of the system and which norms do not. In other words, in making their decisions they identify which norms count as laws. Put yet another way, legal officials place marks of legality on certain norms as they exercise their official capacities, and so by looking at the way officials act we can identify primary and secondary rules of the system, according to Hart's theory.

### 2.3.2 RAZ

Raz endorses Hart's idea that the rule of recognition is the fundamental rule of legal systems without which there cannot be a legal system. Raz agrees with Hart about the importance of this rule for individuating laws. Raz also makes an interesting claim:

“the rule of recognition imposes a duty to apply all the laws of the system.”<sup>61</sup> This commitment is significant for Raz’s theory because by claiming that it is a duty of officials to apply all laws of their system, Raz establishes an important connection between the functions of officials, including that of individuating laws, with the scope of the legal system that they officiate.<sup>62</sup>

Before I explain the importance of this connection, I want to make several remarks about the distinction between Hart and Raz regarding the rule of recognition. Hart’s division of rules into the primary and secondary ones is the division between the rules that impose duties and obligations on the one hand and rules that grant and regulate legal powers on the other.

Under the rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones... Rules of the first type impose duties; rules of the second type confer powers...<sup>63</sup>

When Raz takes the rule of recognition, which is an example of a secondary rule on Hart’s view, as a rule that imposes duties on officials, he thereby views the rule of recognition as the one that grants and regulates legal powers as well as imposes obligations. In other words, he challenges the distinction between primary and secondary rules.

Coleman tries to sort out this issue between Hart’s and Raz’s understanding of the rule of recognition. In *The Practice of Principle* he suggests that Hart, contrary to the distinction that he explicitly makes, thinks that the secondary rules impose duties on officials to act in accordance with the standards established by the practice of officials.

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<sup>61</sup> Joseph Raz, *The Authority of Law*, 95.

<sup>62</sup> In *The Practice of Principle* Coleman argues along the similar lines.

<sup>63</sup> H.L.A Hart, *The Concept of Law*, 78-9.

The reasons why he suggests that have to do with the distinction between exclusive and inclusive types of positivism. Coleman argues that the rule of recognition is “a rule that purports to impose a duty on officials: specifically, the duty to evaluate conduct by appealing to all and only those norms that are valid under the rule [of recognition]”<sup>64</sup> Coleman suggest that the existence of the pattern of practice is what imposes duty on officials to conform to the practice, and Hart is committed to this position in virtue of the internal point of view, which officials of the legal system must take.<sup>65</sup> Coleman notes that Hart was not consistent with the use of the term “internal point of view”, which led to a number of confusions. For his defense of inclusive legal positivism, Coleman adopts the definition that “the internal point of view is an attitude of the [officials] toward a pattern of convergent behavior.”<sup>66</sup> Coleman argues that this interpretation of the rule of recognition is in line with how Hart understood this idea in light of Hart’s sympathies towards inclusive as opposed to exclusive positivism.

Both inclusive and exclusive camps agree that the practice of officials is important for determining whether a norm counts as a legal one. However, inclusive legal positivists “maintain that there is no inconsistency between the core commitments of positivism and the existence of moral criteria of legality.”<sup>67</sup> In other words, the criteria by means of which the legal status of a norm is established can be moral. Exclusive legal positivists, like Raz, deny this. Coleman tells us,

the Razian view is that wherever there is law there must be, as an analytical matter, criteria that constitute a test of the legality of any norm. These criteria can in principle be articulated in propositional form, and that proposition may be called the “rule of recognition”. Understood thus, however, the “rule” is not part of community’s law; it

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<sup>64</sup> See Jules Coleman, *The Practice of Principle*, 85.

<sup>65</sup> See Jules Coleman, *The Practice of Principle*, See Part 2 for the argument about the relation between the internal point of view and the duty imposing aspect of the rule of recognition.

<sup>66</sup> Jules Coleman, *The Practice of Principle*, 81.

<sup>67</sup> Jules Coleman, *The Practice of Principle*, 67.

simply states what the criteria of legality in a given community are. In doing so, it guides no one's conduct and imposes no duties. It is just a conceptual tool that helps those of us who think about law to organize our thinking about it.<sup>68</sup>

I think that it is because Raz treats the rule of recognition in this “semantic”<sup>69</sup> way that explains why he disagrees with the inclusive legal positivists. Coleman does not think that the rule of recognition, in Razian understanding, imposes duties on officials. So, we need to understand why makes this argument and thinks that Hart would agree with it despite the evidence to the contrary.

Wil Waluchow further clarifies Raz's position in regard to the inclusive / exclusive positivism divide. “Raz's intention”, he tells us,

is not to deny that legislation can be both motivated and justified by moral principles and values. Nor does he wish to deny that judges sometimes engage in substantive moral reasoning when they decide cases, or that the law often contains reference to concepts and values which are recognizably moral in nature. His point is that once the appropriate social facts have been established, e.g. that a duly constituted legislature enacted such and such a statute and this is what it means... the limits of the existing law have been reached. Anything beyond the concern to establish social facts of the appropriate kind... amounts to the creation of new law not the determination of the existence or content of what is already law.<sup>70</sup>

So Raz treats the rule of recognition as a theoretical device that must capture all the currently existing norms in the legal system, even those ones that are not explicitly made yet but are implicit in the rest of the norms. The imposition of the duty on officials to apply all laws of the legal system, then, is not the obligation in the same sense as imperative obligations of the primary rules in Hart's formulation of the distinction or Coleman's interpretation of Hart's rule of recognition. Instead, the obligation is more of a logical necessity in the process of explanation of the way legal systems function. This is one of the ways I think we can make sense of Raz's position. It is, of course, left unexplained on my interpretation why Raz uses the particular word “obligation” in

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<sup>68</sup> Jules Coleman, *The Practice of Principle*, 85.

<sup>69</sup> This is Coleman's characterization of Raz's position, See Jules Coleman, *The Practice of Principle*, 84.

<sup>70</sup> Wil Waluchow, *Inclusive Legal Positivism*, 83.

making his claim. But I will have to set this difficulty aside, along with a number of other ones that my analyses raised in order to address more immediate concerns for my project.

It is worth summarizing what we have established in the preceding few paragraphs. We have seen that the relation between primary and secondary rules, which according to Hart defines legal systems, comes into question when we consider the interpretation of the rule of recognition as a practice that imposes a duty on officials. If the rule of recognition is a secondary rule and if it imposes obligations, we need a better account of the difference between primary and secondary rules because both types seem to impose obligations in some sense of this term. We need a better explanation of what we mean by the term “obligation”. One possible way for Raz to deal with these issues is to claim that the obligation that he is talking about is more of a conceptual obligation in the sense I described above. If that argument does not hold, Raz may get away from this difficulty altogether if he does not define legal systems the way Hart does, i.e., the union of primary and secondary rules. As we will see in the following section, Raz in fact defines legal systems differently from Hart. Omitting the distinction, however, still might leave Raz without a full account of the rule of recognition, because he does take this type of rule to be different in kind from other norms of the legal system. These questions, however, will not be addressed in my project.

This brief and superficial discussion of the elements related to the definitions of legal systems, understanding of the rule of recognition, and the differences between inclusive and exclusive types of positivism, is meant to show that the distinction between Hart’s and Raz’s theories is riddled with complexities that require careful and detailed analyses. The distinction between primary and secondary rules, for example, is not nearly

as straightforward as it may appear once we introduce the role of moral considerations in the formation of the practice of officials that is reflected in the rule of recognition, and once we notice that the rule of recognition can be used in different senses: Raz's "semantic" interpretation of this practice versus Coleman's (and perhaps, Hart's) "convergent practice" interpretation.

A more apparent difference between Hart and Raz is that for Hart there can only be one rule of recognition while Raz allows for the possibility that there can be more than one. This is because Raz thinks that the duty that the rule of recognition imposes on officials of the legal system can have different sources. "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."<sup>71</sup> This means that some sources of law can be appropriate for different contexts in one legal system. In other words, Raz thinks that it is possible to divide the practice of officials of the whole legal system into contexts. The patterns of behavior in some contexts (for example, when customary rules are involved) are not the same as the patterns of behavior in other contexts (for example, when precedent rules are involved). In contrast, In *The Concept of Law* Hart treats the practice that constitutes the rule of recognition as a single pattern of behavior of all the relevant officials. For Raz there may be different practices, in which case each one of these practices constitutes corresponding rule of recognition.

In introducing the idea of multiple rules of recognition my purpose is not to undermine its theoretical foundations or argue for or against Hartian or Razian accounts of it. Instead, my intention is to show how the rule of recognition functions. More

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<sup>71</sup> Joseph Raz, *The Authority of Law*, 96.



specifically, I am interested in the way it can be used to individuate norms that belong to a legal system. In the final chapter, when I compare Raz's adjudicative theory to the inter-institutional theory and analyze the explanatory capacity of both these accounts, the fact that the adjudicative theory provides us with tools to individuate laws while the inter-institutional theory does not will become very important.

For now, let me summarize what has been said so far in this chapter. We have looked at two important elements of Raz's theory: primary norm-applying institutions and rules of recognition. Primary norm-applying institutions are essential for the existence of legal systems. Their distinct function is to make authoritative determinations in such a way that these determinations are binding even if they are wrong. The clearest examples of primary norm-applying institutions are courts. Because Raz thinks that the presence of such institutions is necessary for the existence of legal systems and because these institutions have the capacity to make authoritative determinations, we can claim that the adjudicative aspect is essential for Raz, and because of it, we can call his theory adjudicative. The second element of Raz's theory – the possibility of multiple rules of recognition – also draws our attention to legal officials such as judges. By observing their practices we can construct the hierarchy of legal norms in a legal system as well as differentiate among legal and non-legal norms. As I have hinted, this will become a very important element of the adjudicative theory when the time comes to race it against the advantages and drawbacks of the inter-institutional one.

Now, I will be turning to Raz's conception of legal systems. The rule of recognition, as a tool for individuating legal norms, can only work, for Raz, within the scope of a legal system. In other words, we need to have criteria by means of which we

can determine the scope of legal system or its jurisdiction before we can begin to sort out the non-legal norms from the legal ones. In the remaining sections of this chapter I will analyze Raz's concept of legal systems, while making an argument that the application of this concept to the European legal order (the EU and its member-states) creates difficulties either for Raz's theory or for what I take to be uncontroversial facts about the EU.

#### 2.4 RAZIAN LEGAL SYSTEMS AND DICKSON'S ALTERNATIVES

In this part of the chapter I analyze three alternative ways of thinking about the legal structure of the EU. Julie Dickson suggested these alternatives in her paper *How Many Legal Systems*<sup>72</sup> and I analyze them on the basis of three elements of Raz's theory – comprehensiveness, supremacy and openness. I argue that the understanding of legal systems according to these elements precludes us from endorsing any one of Dickson's alternatives. I do not wish to suggest that these are the only possible alternatives of thinking about the EU's legal order. However, based on the theoretical elements that are discussed in this chapter, these three ways seem to capture the three most basic directions which one can take when thinking about the EU from the Razian perspective. My argument is not meant to show that Raz's conceptual machinery cannot possibly be tweaked to construct a picture of European legality that would answer some or most explanatory demands that one may be in need of regarding the EU. I will consider that my argument is successful if the reader will agree that some element or a number of them

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<sup>72</sup> Julie Dickson, *How Many Legal Systems?: Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union* (2008) 2 Problema 9.

will need to be sacrificed or altered in order for the adjudicative model to work coherently in the context of the EU.

Also, I would like to make it known that I am aware that Raz has qualified the significance of the triumvirate for identification of legal systems in some of his writing where he said that it is unlikely that we can always find the necessary and sufficient conditions for the concept of legal system.<sup>73</sup> Despite this qualification, I will analyze the triumvirate, which presents these kinds of features of legal systems, as if Raz had never made such qualification. The purpose for doing this is twofold. First, this method of understanding legal orders forms a stark contrast with the method that will be discussed in the next chapter when I analyze C&G's inter-institutional theory. So, it is important to analyze the differences between the two methodologies to better appreciate the differences between the two accounts of legality. Second, I think that, within the Razian framework, the task of the individuation of legal norms can only be pursued against the background of clearly identifiable legal systems. So if we were to omit the concept of legal system from Raz's theory, we will struggle to identify the relevant norm-applying institutions. We will also have difficulties determining the rule of recognition because we would have no way of telling which courts and which sets of officials we need to look to in order to make this determination. Because one of the main advantages of the adjudicative theory is its capacity to individuate laws, I will present Raz's view of legal systems in a more categorical fashion than some of his writing suggests. I also do not deny the possibility of adjusting the features of the concept of legal system so that the difficulties it will cause us in analyses of the EU may be resolved, while the conceptual machinery for individuation of norms is retained. However, I do think that any

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<sup>73</sup> For references, See Chapter 1 Section 1.3

adjustment of the triumvirate criteria must ensure that the theory's capacity to individuate laws is not threatened.

## 2.5 THE TRIUMVIRATE: SUPREMACY, COMPREHENSIVENESS, OPENNESS

Raz thinks that, unlike other institutional orders, legal systems play the most important roles in communities. “We would regard an institutionalized system as a legal one only if it is necessarily in some respect the most important institutionalized system which can exist in that society.”<sup>74</sup> Raz does not explain why we have these (intuitive?) expectations of legal systems but only assumes that we do and builds his theory around them. According to him, each legal system must satisfy three requirements or criteria – comprehensiveness, supremacy and openness – in order for an institutional order to be a legal one. I will refer to these criteria as the triumvirate.

Legal systems must be comprehensive. This means that they claim to have authority to regulate any aspect of its subjects' lives.<sup>75</sup> This claim needs to be clarified in several ways. First, it is important to note that, according to Raz, legal systems only *claim* the authority to regulate their subjects but it may be the case that a legal system leaves certain aspects of their lives unregulated for whatever reason. For example, certain types of activities in the private or public spheres may be left up to the discretion of law subjects. For example, if a state decides that it has no place in the bedrooms of the nation, it permits its subjects a degree of freedom in this regard.<sup>76</sup> It also must be noted that a legal system may claim the authority to regulate some aspects of its subjects' lives but be

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<sup>74</sup> Joseph Raz, *The Authority of Law*, 116.

<sup>75</sup> Raz, *The Authority of Law*, 117.

<sup>76</sup> By permitting subjects to regulate their affairs as they see fit, legal systems still satisfy the comprehensive requirement because it is only in virtue of this permission that the freedom that subjects have is legal.

in fact unable to do so. For example, this can be the case if the subjects ignore legal regulations because they have no confidence in their legal system.<sup>77</sup> What these remarks and examples are meant to show is that it is important to contrast factual and claimed comprehensive authority. Also, it is important to keep in mind that the question of efficacy – whether and to what extent a given community obeys its legal norms – cannot reveal to us the whole nature of legal systems on Raz’s account. Other formal criteria, such as comprehensiveness, are essential for understanding their nature.

Importantly, Raz claims that legal systems are not the only systems that claim comprehensive authority. He notices, for example, that religions, as institutional orders, claim comprehensive authority and that there could be other institutional orders that make this claim.<sup>78</sup> It is important to keep this in mind because, according to Raz, the fact that there can be other comprehensive authorities means that the criterion of comprehensiveness is not sufficient to identify a legal system. It is only necessary.<sup>79</sup>

The second aspect of the triumvirate – the supremacy criterion – is related to the first. Raz says, “All legal systems claim to be supreme with respect to their subject-community”.<sup>80</sup> If legal systems claim comprehensive authority, we should, theoretically speaking, have only one legal system per subject-community.<sup>81</sup> Otherwise, there will be conflicts because of the competing claims to authority. In order to avoid these conflicts we can posit the requirement of supremacy. Thus, we can further ground the

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<sup>77</sup> This is an important aspect of Raz’s theory – the question of efficacy of legal systems. I will not be discussing this question here in the interest of space and because I am more concerned with conceptual aspects in this project. However, a more systematic and in depth treatment of this topic will certainly require the analysis of efficacy.

<sup>78</sup> Raz, *The Authority of Law*, 118.

<sup>79</sup> Raz, *The Authority of Law*, 117.

<sup>80</sup> Raz, *The Authority of Law*, 119.

<sup>81</sup> This claim does not seem to be true as a matter of fact. But conceptually and logically it must be true if the comprehensiveness and supremacy criteria are related the way Raz describes them.

comprehensiveness criterion, which in turn is founded on our expectations of legal systems being “the most important institutionalized systems”. It follows then that the supremacy and comprehensiveness criteria are like the two sides of the same coin when we talk about legal systems. In principle, a legal system must be supreme if it is comprehensive.

If we move away from legal systems and consider the relation between the comprehensiveness and supremacy requirements as conceptual elements of authority in general, they may not be as closely related. For example, a wife can claim that she is in charge of all aspects of her husband’s life – thereby claiming comprehensive authority over him – but in cases when law compels her husband to do or refrain from doing something, she may respect law’s authority, or in other words, accept its superiority over hers. For example, she may ask her husband to change his last name to hers and not expect his compliance if there are legal reasons preventing him from doing so. This shows that the wife claims a comprehensive authority but does not claim supreme authority over her husband.<sup>82</sup> Because Raz develops his account of comprehensiveness and supremacy in relation to legal systems, relying on our intuitive understanding of these systems, I think it is fair to say that for legal systems comprehensiveness and supremacy criteria are closely related.

Raz notices, however, that there are facts that contradict this conception. An example of a religious institution is a case in point. For example, it is possible for a subject of the Canadian legal system to be also subject to some religious order. Both legal and religious orders can make claims to regulate the same set of aspects of personal life in conflicting ways. Similarly, there can be two legal systems governing over the same

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<sup>82</sup> I am indebted to Wil Waluchow for this example and insight.

subject-community. As undesirable and unstable as such situations are they are nevertheless possible, according to Raz.<sup>83</sup>

One way to address these difficulties is to point out that they arise only when two or more comprehensive orders exist side by side over a significant period of time. This is not to say that if conflicts exist only for a relatively short period of time they are not important for individuals who are governed by the conflicting orders. These cases certainly merit the attention of theorists. However, in my analysis I am working with a more general conceptual picture and so I set aside this difficulty. If it is the case that two or more comprehensive and supreme orders govern the same community, then they are likely to regulate their subjects' lives with norms whose content is similar. For example, legal and religious norms tend to converge in respect to the norms about murder. So, a fairly convincing argument can be made to show that the co-existence of institutional systems that both claim comprehensive and supreme authority, such as religious and legal institutions, is possible if there are no major conflicts in the way these orders regulate their subjects' lives in practice. This argument can be strengthened if we can show that it makes no sense to speak about subject-*community* unless we have this kind of convergence of normative content in two institutional orders. Putting this in negative terms, if there is no such normative convergence, there may not be a community. Instead, there may be several separate communities.

More importantly for my purposes is the case of co-existence of two legal systems in one community. Raz tells us that this scenario is possible but he also tells us that legal systems must be comprehensive and supreme. How are we to understand these seemingly contradictory claims? One way to make sense of this is through the final element of the

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<sup>83</sup> Raz, *The Authority of Law*, 118.

triumvirate – openness. “A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it.”<sup>84</sup> So, one legal system may recognize the authority of another legal system over the same subject-community. The extent of this recognition can range. For example, a colony can be governed by a legal system that is authorized by the colonizers’ legal system. In this case the norms of both legal systems may be very different. Alternatively, there could be a legal system that recognizes the authority of another legal system over a narrow range of issues. For example, colonizers can subsume the colony within their domestic legal system but recognize the authority of some of the officials of the previously existing order in the newly colonized land to set up procedures for election of representatives, for example. In this case the colonizers’ legal system is supreme because it is only in virtue of its recognition of the system on the territory of the new colony that the legal system of the colony has authority over the colonized territory.

It is important to keep separate the openness criterion from the idea of the multiple rules of recognition. One legal system can have several rules of recognition on Raz’s account but we must think of these multiple rules of recognition as a set that is meant to reflect the convergent pattern of behavior in a single legal system. From the idea of the rule of recognition we are supposed to be able to get all the norms of one legal system. The idea of openness, in contrast, serves to show that officials of one legal system may defer to the officials, rules, or institutions of other legal systems. If this is what officials generally do, then their deference to external sources constitutes their general practice, and so this practice is reflected in the rule of recognition. In this way we

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<sup>84</sup> Raz, *The Authority of Law*, 119.



can see that the criterion of openness is related to the rule of recognition but the two concepts are very different.

A very important qualification about the openness criterion that needs to be kept in mind is that legal systems, according to Raz, are open at their pleasure.<sup>85</sup> This point is not immediately obvious from Raz's discussion of the three criteria. To the best of my knowledge, Raz never explicitly states this. But the reason why this point deserves attention is because the openness criterion initially appears to be neither a necessary nor a sufficient feature of legal systems<sup>86</sup>; yet, Raz includes it in his conceptual analysis of them. To see why he does it we need to see how all three criteria work together.

My understanding is that we cannot say that legal systems are necessarily open because that would contradict our commitment to the requirement of comprehensiveness. If it is true that a legal system claims to have authority over all aspects of its subjects' lives, it must be the case that all legal norms can be changed. If legal systems regulate all aspects of their subjects' lives, they must have freedom to do it, which means that all norms can be altered. If it was impossible to change certain legal norms that would mean that the legal system does not have the authority to change them. This, in turn, means that the system is not comprehensive. Now, if a legal system can change any of its norms, then it can stop being open to normative orders it was open to before and it can start being open to the ones it did not recognize. In light of this, the requirement of openness

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<sup>85</sup> I am indebted to Stephan Sciaraffa for this qualification, although I am not sure if he would agree with my reasons for making this qualification.

<sup>86</sup> Joseph Raz, *The Authority of Law*, 120. This is where Raz discusses openness and makes no explicit claims in this regard.

should be understood as a right to be open or, in other words, to adopt norms of other institutional orders.<sup>87</sup>

This argument shows that legal systems are open to other normative orders at their pleasure. This means that it is a matter of choice of the legal system<sup>88</sup> which orders it recognizes and when. If this is accepted, we are in a position to explain how two comprehensive legal systems can co-exist. One thing that they will certainly need is to be open to each other. In contrast, if two systems claim comprehensive and supreme authority over one and the same subject-community and if both of them are closed to each other<sup>89</sup>, we have to conclude that either these two systems are in jurisdictional conflict or one of these systems is not in fact a legal one (perhaps, because it does not meet comprehensiveness and/or supremacy requirements in the final analysis). Openness, understood as a right to adopt external norms, is a necessary conceptual feature of legal system but actual legal systems do not have to rely on external normative sources at all times. But for an institutional order to be a legal system it must necessarily be “openable”.

The triumvirate is an important aspect of Raz’s theory because it furnishes us with tools to examine interactions among legal systems. The openness element is very important for these tasks and it will play a central role in the following sections when I

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<sup>87</sup> I think it is plausible to interpret Raz’s discussion of openness to amount to nothing but the claim that legal systems are open to the extent that they in fact recognize external norms. See, Raz, *The Authority of Law*, 119-21. However, I think that understanding openness as a right or an intrinsic feature of every legal system to be open is more insightful and congruent with other elements of Raz’s concept of legal system. This is so because examples of legal systems that are not open to any external norms are readily imaginable. If that is the case, then we cannot say that openness is a necessary feature of legal systems and it becomes unclear why Raz included it in his discussion along with other necessary features.

<sup>88</sup> The reason why I personify legal systems here is because I want to avoid making claims about officials of legal systems and its subjects, so that my analysis pertains to the concept of legal system.

<sup>89</sup> “Closed” is not one of Raz’s terms. When I use it I mean to say, “not open”.

analyze some of Dickson's alternative ways of conceiving EU legality.

Comprehensiveness and supremacy criteria, however, will present us with challenges that in my view cannot be overcome unless relevant adjustments are made.

## 2.6 THE FIRST ALTERNATIVE

The first alternative<sup>90</sup> that Dickson proposes is the following. Let's think that we have only the EU legal system. All the legal systems of individual states, like Germany, France and Spain, are parts of this grander, overarching legal system.<sup>91</sup> Dickson refers to this alternative as "One Big Legal System" model. Conceiving of the EU in this way is somewhat similar to the way we think about federations.<sup>92</sup> We have a number of parts, or some kind of constitutive districts, that enjoy some independence from other parts and from the overarching federal system. On this picture we do not think of any constitutive district as independent from the other ones and from the federation in the same sense as, say, we think that Japan is independent from Argentina. Each individual part in the federal system has close ties to the federal government, and through it, to other parts of the state. So, the first alternative that Dickson offers is the view that member-states of the EU, like Spain and Germany, stand in the same relation to the legal system of the EU as federal parts stand in relation to the federation as a whole.<sup>93</sup>

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<sup>90</sup> I am not presenting the alternatives in the same order as Dickson did in her paper. Instead, I present them in the most convenient order for my purposes.

<sup>91</sup> Julie Dickson, *HMLS*. The discussion in section 3 of her paper (pp 8-14) is focused on this alternative.

<sup>92</sup> This is the way I understand the idea that Dickson is after. The way I flesh it out is my own.

<sup>93</sup> I do not want to overemphasize the similarity between federal and the EU legal orders. There are certainly many obvious differences between them and so this analogy should be taken with a grain of salt. However, I think it has explanatory value. I also think that it is this *kind* of framework that Dickson has in mind when she discusses the One Big Legal System model.

According to this picture, the 27 member states of the EU, which once were independent of each other, are now tied together. As Dickson suggests, if EU law has primacy and supremacy over member states' national law, then maybe we have a "reason to think in terms of there being just a single EU legal system, with the legal systems of its constituent Member States merely as sub-systems operating under the auspices of, and largely regulated by, that EU legal system..."<sup>94</sup> If this is the picture that we get on this model, then we need to understand what happens to the member states once they become the constituting parts of the EU. There are different ways to tell this story. For example, with MacCormick, we can talk about the transformation of sovereignty.<sup>95</sup> We can talk about new kinds of legal systems as well as the loss of sovereignty and obsolescence of state-based models of legality.<sup>96</sup> I will not examine any of these routes at this point. Because the underlying reason for examining Dickson's alternatives is to test out Raz's theory of law, I will understand the One Big Legal System model (as well as her other alternatives) in terms of the Razian triumvirate. In what follows I will examine what the triumvirate does for our understanding of the EU legal order as one overarching legal system with complicated relations among member states as well as member states and the EU institutions.

If the relation between member states under the EU is sufficiently similar to the relation of the constitutive parts of the federation under the federal umbrella, then we can expect that Raz's theory will be able to explain the legality of the EU legal system, since

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<sup>94</sup> Julie Dickson, *HMLS*, 8.

<sup>95</sup> Neil MacCormick, *Questioning Sovereignty*, Oxford University Press: New York. 2008. Particularly Chapter 8 "On Sovereignty and Post-Sovereignty".

<sup>96</sup> Culver and Giudice, *Legality's Borders*, Oxford University Press: Toronto. 2010. Particularly Chapter 4 "An Inter-Institutional Theory" and Chapter 5 "An Inter-Institutional Account of Non-State Legality".

his theory's primary focus is on municipal legal systems. So thinking about the EU as one big legal system could be possible if we can identify the Razian triumvirate criteria of legal systems and the legal hierarchy in the context of the EU.<sup>97</sup> However, identification of these elements is problematic.

First, the EU does not make any claim to comprehensiveness. In the *Preamble to the Charter of Fundamental Rights of the European Union* it is stated, "The Union [respects] the diversity of the cultures and traditions of the peoples of Europe as well as national identities of the Member States and organization of their public authorities at national, regional and local levels..."<sup>98</sup> This claim is a clear commitment on behalf of the EU to allow member states to regulate some (if not most) of their domestic legal affairs as they see fit. This, of course, does not mean that at the national, regional or local levels the constitutive members are free to act in any way they like. It is certainly true of the motivation behind EU that it should be possible to implement EU norms on all these levels. The question is whether these norms can be considered legal because the EU, as a legal system, issued them. If we are operating with the conceptual machinery of Raz's adjudicative theory, however, we have reasons to deny legal status to the EU and its norms because the EU system does not claim comprehensiveness, which must be claimed by any legal system, according to Raz's understanding.

A quick objection can be made that the EU should be thought of as a system that permits its member states to regulate their affairs as they see fit, for example, by means of

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<sup>97</sup> In the footnote 46 of her paper, Dickson cites several cases that problematize some aspects of the triumvirate. Dickson does not present these cases in terms of the Razian framework but I think that her discussion that precedes these references on pages 9-10 can be put in these terms.

<sup>98</sup> The Charter of the Fundamental Right of the European Union, Preamble, <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm> (last checked July 14, 2012).

the openness criterion. So, the objector would claim that the EU is a legal system and it does claim comprehensive authority over all its subjects, but it allows a lot of discretion to its subjects on national, regional, and local levels. In my view, this objection seems to give too much discretion to member states. Even though Raz never set any limits in this regard, it seems to me that given his initial assumptions that municipal systems are paradigm examples of legal systems and that we should rely on our common knowledge of legal systems as we experience them, we should not accept this objection. Federations, as examples of municipal systems, do not seem to give as much discretion to the federal districts as the EU does to the member states on this interpretation. It seems that member states have more autonomy from the overarching institutional order of the EU than provinces or federations of a state.

Another reason why I doubt this objection is because it pretends that the EU has teeth to revoke freedom from its constitutive members and regulate their lives directly. I do not deny that in certain contexts EU norms can in fact prevail over the municipal ones, but it seems that there are plenty of contexts where the authority of the EU would not be a viable contender compared to the authority of national legal systems to govern the subject community.<sup>99</sup> This may not be a good argument on its own, but if we agree with Raz that legal systems are the most important institutional systems in our communities, then the EU as an overarching order does not seem to be that important compared to the municipal systems that are tasked with criminal, tort and other kinds of legal practices. So, it seems

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<sup>99</sup> The sentiment of my position is nicely expressed by Nietzsche “We laugh at him who steps out of his room at the moment when the sun steps out of its room, and then says: ‘I will that the sun shall rise’; and at him who cannot stop a wheel, and says: ‘I will that it shall roll’...” Frederic Nietzsche, *Daybreak*, aphorism 124. In this aphorism Nietzsche discusses the power(lessness) of individual to influence the world. In contrast, I doubt in the same fashion the comprehensive power of EU to influence the member states.

that a judge of a supreme court of a member state corresponds much better to the official of the primary norm-applying institution than a judge of the European Court of Justice (ECJ).

It is also worth emphasizing that member states seem to satisfy the requirements of the triumvirate much better than the EU legal system that is presumed to possess overarching legal authority over the member states. The fact that member states satisfy the triumvirate criteria is not surprising since Raz took municipal legal systems as prime examples of legal systems. But if we look at the EU as a one big legal system, member states should not meet these requirements so well because it is the overarching system that must meet them. Think about the analogy to the federation I explained earlier. It would be strange, according to the common understanding on which Raz relies, to think of federal districts as meeting the triumvirate criteria better than the whole federation. If we accept this common (according to Raz) understanding, we should reject the One Big Legal System model. This alternative gives us the picture that the whole must claim supreme and comprehensive authority *ex hypothesi* but the parts appear to be claiming it much more convincingly in fact. This leads me to reject the One Big Legal System model.

It also might be argued that we can justify the One Big Legal System model by claiming that EU is only a developing legal system and even though it does not lay any claim to comprehensiveness, the system must or should evolve in that direction. So, what we now call the “EU legal system” is only an embryonic form of a legal system. I find this implausible because this way of arguing mistakes the motivation behind unification of European countries. The purpose behind it is not to develop one large state but rather

to harmonize the existing ones.<sup>100</sup> Arguments like “integration of European communities is most viable under a single legal system”, as reasonable as they may be (or can be made), misconstrue the project of unification as it is put forth in the above quoted document. In light of that, to claim that the absence of the claim to comprehensiveness is indicative of the nascence of EU’s legal system is to mistake one of the central purposes behind its creation and this project as a whole.

There is yet another more peripheral argument against this alternative. Raz thinks that the existence of legal systems is made possible by the existence of states. “A state” he observes “is the political organization of society, it is a political system that is a subsystem of a more comprehensive social system... The legal system is only part of the norms constituting the political system...”<sup>101</sup> In this way, Raz sketches a diagram of normative orders where legal order falls within the umbrella of political order, which in turn falls within the umbrella of “a more comprehensive social” order. We need not flesh out what Raz means by “more comprehensive social order”. But, if we accept this sketch, we cannot but reject the One Big Legal System model. On Raz’s diagram, this most comprehensive normative order is the one that includes states as political entities, which in turn include their individual legal systems. But on the One Big Legal System model, we are committed to looking for a legal system on this general normative level, the one that Raz calls “comprehensive social system”. I doubt that anyone would deny that the EU is an attempt at the establishment of normative order that goes beyond states, and so it is meant to be a more general social order than, say, a political or legal order of a single

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<sup>100</sup> The extract from the preamble quoted above seems to indicate this kind of reasoning as the motivation.

<sup>101</sup> Joseph Raz, *The Authority of Law*, 100.



state. But if we accept Raz's diagram, it is impossible to find legality on this general normative level, where the EU as an overarching institutional order is located.

For these reasons, I think we should reject One Big Legal System model. It might be possible to duck some of my arguments against this model by tweaking the comprehensiveness criterion. But I will set aside the possible routes of adjusting this criterion for now and move on to consider other models.

## 2.7 THE SECOND ALTERNATIVE

The second of Dickson's three alternative ways of looking at the legal map of Europe seems more promising in meeting the requirement of comprehensiveness. On this picture we do not think about the EU legal system as a distinct and overarching system. Instead, we have a number of states the municipal systems of which contain EU law. Dickson refers to this alternative as "Part of Member States" model.<sup>102</sup> So, for example, just like the municipal legal systems of Germany, France and Spain have criminal law, so the member states of the EU have EU law. The fact that states have laws which can be grouped under the category "criminal law" does not mean that criminal law exists above and beyond municipal legal systems. Also, this fact does not mean that all states that have criminal law have identical laws and adhere to identical norms under that category.<sup>103</sup> So, EU law is like that too. Twenty seven European states have the EU laws in their legal systems. So when we refer to EU legal system what in fact we are referring to is the

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<sup>102</sup> Julie Dickson, *HMLS*. Section 4, particularly pp24-6.

<sup>103</sup> This point can give the advocate of this view some room to explain why there may be discrepancies in application of the EU law in one member state in contrast to other ones.

states that have EU laws as parts of their municipal legal systems.<sup>104</sup> Hence the name: Part of Member States model.

Each municipal legal system that includes EU law claims comprehensiveness because EU law is only a part of a municipal legal system. This is why the issues with comprehensiveness do not arise on the state level. For the same reason we may think that we meet the requirement of supremacy on this picture: it is the municipal legal system that is supreme and what we call the “EU” is an aspect of it. Also, the requirement of openness does not seem to pose any problems on this picture because states that have EU laws, it can be argued, have accepted them at their pleasure. In sum, because on the Part of Member States model we attempt to conceive of EU legality on the municipal level, we are in a good position to satisfy all the requirements of the triumvirate. Raz intended his theory to account for the paradigm cases of municipal legal systems, and so the hierarchical nature of legality does not seem to cause problems on the second alternative, which places EU law in the framework of municipal legal systems of member states. The viability of this model, however, does not withstand scrutiny. The ECJ appears to claim “authority to regulate the operations of Member States legal systems insofar as they conflict with enforceable EC norms, and in resisting claims by some national constitutional courts that ultimate authority to decide the operation of national legal norms vis-à-vis EC legal norms rests with them.”<sup>105</sup> In short, the glaring problem with this way of conceiving EU legality is that it commits us to a position where we have no sensible account of the institutions that are distinctly EU institutions. To be more precise,

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<sup>104</sup> Again, just like with the analogy I made when I was explaining the first alternative, I must caution the reader. The analogy is only meant to present Dickson’s ideas in simpler terms. A thorough and systematic comparison between criminal and EU law can easily undermine this analogy.

<sup>105</sup> Julie Dickson, *HMLS*. 6. (original footnotes are omitted).

there is no way we can recognize EU institutions as legal ones on this alternative. This means that we end up with a picture where a municipal legal system corresponds to each member state, but no legal system corresponds to the distinct institutions of the EU. This means that EU institutions are not legal. Such a result may be welcomed by the skeptics of the EU project. However, on this position we cannot explain cases of prevalence of EU norms over the domestic ones, for example, in the case of *Factortame*.<sup>106</sup> The Parts of Member States model, then, does well to preserve the municipal legal theory but remains unduly conservative by leaving unexplained the attitudes of the supporters of the European project.

One of the reasons why Raz's adjudicative theory is incompatible with the attitudes of the supporters of the EU is because of the requirements of the triumvirate. Neil MacCormick in *Questioning Sovereignty*, while analyzing the controversy surrounding the case of *Factortame*, concluded that there was a change in the legal framework of the UK when it joined the EU. He explains, "sovereign power [of the UK] has effectively been transferred in relation to *certain matters* to the European Community and its organs."<sup>107</sup> If we understand the talk about sovereignty in terms of the triumvirate requirements, the fact that integration into the EU changed the balance of legal forces in the UK is significant. Regardless of whether we take the position that the case of *Factortame* is a clear indication of the shift in the balance of legal power and may signify the forfeiture of legal supremacy, or if we argue that we can make sense of the case by

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<sup>106</sup> Due to space restrictions, I cannot give a detailed account of this case but I will provide some references to get acquainted with it. See, United Kingdom House of Lords Decisions, <http://www.bailii.org/uk/cases/UKHL/1989/1.html>. Last checked, Jan 3, 2012. Also for useful discussions and other references see, N. MacCormick, *Questioning Sovereignty*, pp 79-81, 88-98.

<sup>107</sup> Neil MacCormick, *Questioning Sovereignty*, 94. My emphasis.

sticking to the pre-EU layout of the UK legal system<sup>108</sup>, I do not see a way for us to avoid acknowledging the existence of external sources of normativity. It seems very plausible to claim that there must be distinctly EU institutions outside the legal boundaries of the UK that have authority (even if a limited one) over the legal system of the UK. If this is the case, then the UK legal system no longer satisfies the requirements of comprehensiveness and supremacy. The same applies to all other member states whose domestic norms can be overridden by EU norms.

Because *ex hypothesis* we are committed to the view that EU law falls within the umbrella of municipal law, we cannot utilize the openness criterion. If we were not committed to this hypothesis, we could have said that member states voluntarily adopt EU norms from the external sources. But because we are committed to the view that everything there is to EU norms is found within municipal systems of member states, we are precluded from appealing to the external sources of normativity.

If this analysis is correct, we are in a position to make the following observations. First, there appear to be distinctly EU institutions. Second, these institutions produce norms that can override norms of municipal legal systems, like in the case of Factortame. Ignoring these observations becomes highly costly and gives us good reasons to reject this alternative. The comprehensiveness and supremacy requirements for municipal legal systems cannot be met because a strong case can be made for the existence of EU institutions external to municipal legal systems of the member states whose norms can interfere and override legal norms of municipal legal systems. Thus, it turns out that municipal legal systems of member states are not supreme, since there are other

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<sup>108</sup> MacCormick's discussion of the difference between the rule of change and rule of recognition and the analysis of an interpretation that attempts to tell the story of UK's joining EU without losing sovereignty is an example of accounts that I am referring to.

institutions outside their legal borders whose norms at least in some cases are hierarchically superior to domestic legal norms. The municipal legal systems of member states are also not comprehensive because they have to comply with the norms of the external institutions and thus cannot claim to regulate all spheres of their subjects' lives. As a result, the Parts of Member States model is flawed because it ignores the elephant in the room – the distinctly EU institutions that produce norms, adjudicate and at times have significant impacts on the member states.

Now, let us sum up where the analysis of the first two alternatives got us. We have good reasons to reject both models that we have examined. However, some aspects of both models are worth keeping in mind. For example, the One Big Legal System model accounted for the distinctly EU institutions. The Parts of Member States model places the right emphasis on the diversity of the union by acknowledging the individuality of member states. We should not forget these points and attempt to retain the aspects of the conceptual framework on the basis of which those models allowed for these interpretations.

## 2.8 THE THIRD ALTERNATIVE

It is now time to turn to the last of Dickson's alternatives. On this view, we have municipal legal systems of member states and a distinct EU legal system. Dickson refers to this alternative as the Distinct EU Legal System model.<sup>109</sup> On the face of it, and in light of the criticisms of the previous two alternatives, this is an attractive option. On the one hand, by acknowledging the existence of municipal and EU systems, we can do justice to a number of facts that were troublesome for the previous alternatives. There is a

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<sup>109</sup> Julie Dickson, *HMLS*. Section 2.

place for the distinctly EU institutions and this way of looking at the EU seems to fall in line with our expectations: the EU is a project of unification of European states for the purposes of peace, justice and greater social cohesiveness.<sup>110</sup> These are all positive promises of this approach.

This alternative, however, is not without problems. The point of particular interest and most serious difficulty for this model is the interaction of member states legal systems with the EU legal system. In order to explicate the problem of interaction, let us recall some of the difficulties we encountered with previous models. The first and most general one concerns Raz's vision for his theory. He explicitly claimed that his theory was only applicable to municipal legal systems, that is, to those systems that can be found in states. Extrapolation to other domains, Raz warned, may be inappropriate and pointless.

The attempt to characterize [non-municipal] legal systems by the spheres of activity which they regulate or claim authority to regulate cannot be a very precise one. The general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees... It would be arbitrary and pointless to try to fix a precise borderline between normative systems which are legal systems and those which are not.<sup>111</sup>

So, the first difficulty with the third alternative is reminiscent of the difficulties we have already encountered: can we make sense of the EU as a legal system on Raz's theory when, in fact, the EU seems to be very dissimilar from states and their municipal legal systems? We must also keep in mind that this dissimilarity is far from incidental but is a product and a result of unification. Putting this question in a different way, we can ask

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<sup>110</sup> See the Preamble to the CFREU for statements to this extent.

<sup>111</sup> Joseph Raz, *The Authority of Law*, 116. The discussion of the difference between legal systems and "systems of absolute discretion" (in *Practical Reason and Norms* pp137-41) tends toward the same conclusion: the legal systems, those which rely on primary institutions and that satisfy the requirements of the triumvirate, are distinct from other (including very similar) normative orders that do not satisfy the theoretical requirements and which are not the focus of Raz's attention.

whether Raz's theory can provide us with theoretical tools to make sense of the EU as a standalone legal system and explain interactions among systems involved in this legal order.

To start, let us look at the difficulties that this alternative shares with the previous ones. For Raz legal systems must necessarily exist in states because only in this way can we account for the continuity of legal systems.<sup>112</sup> The solution of the continuity problem outside of the statist framework is complicated by the fact that it is not clear who the proper subjects of the EU are. It may be argued that the citizens of member states are the proper subjects. Some theorists, however, challenge this view by claiming that the proper subjects of EU laws and regulations are legal and political officials of member-states.<sup>113</sup> Regardless which side we favor in this debate, we still face a general problem of the subject identity that resonates with the interaction problem. How does being a subject to EU modify your status as a subject to your domestic legal system? This is a conceptual issue that must be addressed on the Distinct EU Legal System model.

The problem of interaction can also be thought of as a problem of jurisdiction or scope of legal systems. "The problem of scope is the search for the criteria of identity of momentary legal systems..."<sup>114</sup> In conjunction with the aspect of continuity, the aspect of scope should give us a complete account of the identity of legal systems in Raz's adjudicative theory. "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

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<sup>112</sup> See Raz's discussion in *The Authority of Law*, pp 99-101.

<sup>113</sup> For an insightful discussion of these alternatives see Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, *The European Journal of International Law* Vol 22. n. 2. 2011.

<sup>114</sup> Joseph Raz, *The Authority of Law*, 81.

union, for example, are part of the legal system.”<sup>115</sup> Building a solid account of scope for all legal systems that are within the umbrella of the EU is an essential task for the Distinct EU Legal System model because we need to be able to provide tools for the resolution of conflicts between municipal and the EU legal systems. We are committed to this task because we cannot ignore the motivations behind unification, and our answer must be in compliance with the demands of Raz’s theory. The challenge consists in producing an account that will give us specific enough methods for the resolution of conflicts but will not threaten the integrity and distinctness of each legal system. This task appears very daunting given the difficulties of the previous alternatives that we have already surveyed.

In short, our problem is the following. According to the hypothesis under consideration, we have twenty seven municipal legal systems and one EU legal system. The adjudicative model tells us that all of these systems must be supreme and claim comprehensive authority. But these systems are also supposed to be interacting with each other. This means that all legal systems involved in this picture must be open and be relatively independent of each other. If we are committed to the adjudicative theory and the Distinct EU Legal System model, and if the outcome of our theory must be a picture that will do at least minimal justice to the motives behind the unification, how can we meet the requirements of comprehensiveness and supremacy for each legal system in Europe?

The results we get from the analyses of the previous two of Dickson’s alternatives tell us that the strategy of ascribing supreme and comprehensive authority either to the EU or to member states is inadequate. So, while the Distinct EU Legal System model has

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<sup>115</sup> Joseph Raz, *The Authority of Law*, 81.



all the positive aspects of the previously rejected approaches, it also inherits all the difficulties, which led to the rejection of those models.

It is possible to eliminate some of the problems with this particular model by modifying the openness criterion. First we can capitalize on the idea that if states become members of the EU at their pleasure, then they voluntarily commit to EU norms by exercising their right to be open. If prior to joining the EU they satisfy the requirements of comprehensiveness and supremacy, they can commit to external norms without a right to disobey them at whim. We can further support this argument by saying that while committed to this external source of normativity they can be thought to be claiming comprehensiveness and supremacy as long as they can secede from the union. However convincing this argument can be made, we are still left, *ex hypothesis*, with the distinct EU legal system, which does not claim comprehensiveness or supremacy and does not have a state. So, this way of interpreting precludes us from portraying the EU as having a legal system, if we understand legal systems as Raz does.

If these are the only three models for conceiving EU legality, then the institutional structure of the EU is not a legal one. Even though this conclusion may be accepted or even welcomed by some, its implications are significant. If Raz is right that legal systems are the most important institutional structures in societies, and if the goals that EU is set to achieve cannot get a proper legal backing, then our legal theory commits us to a position where certain social contexts cannot be regulated by law simply because legality cannot live in those contexts in virtue of our (Razian) theoretical commitments. Such a state of affairs, in my view, is not desirable, and as the arguments in the following chapter will try to establish, it is not all that warranted either.

## 2.9 CONCLUSION

In this chapter we have analyzed three prominent elements of Raz's legal theory. We have explored the concept of primary norm-applying institutions, such as courts, which according to Raz are necessary for the existence of legal systems. We have also looked at the officials of these institutions – the judges – and examined the significance of their practices for the existence of legal systems. We have also seen that the rule of recognition, which is the theoretical tool designed to capture these practices, produces many complexities and controversies, which are also magnified by the ambiguity of the concept of norm-applying institutions. We have chosen to acknowledge and accept these difficulties without trying to resolve them or to reject Raz's theory because we indulged Raz's assumptions of the importance, primacy, and universality of municipal law. These assumptions also helped us to accept the triumvirate criteria by means of which Raz identifies legal systems.

When we tried to apply these theoretical elements to the EU, however, we ran into difficulties. When we looked at the EU as one big legal system, we concluded that it does not meet the requirements of comprehensiveness or supremacy. When we tried to identify the EU as a subspecies of municipal law, we discovered the distinctly EU institutions and found no feasible way to justify their legal status by using Raz's theory. Finally, when we attempted to retain the municipal legal systems of member states and introduce a distinctly EU legal system into the picture at the same time, we established that this account inherited all the difficulties of the previous two alternatives and raised some problems of its own.

Throughout these analyses I hinted as to how Raz's theory can be made more accommodating to the EU context. Adjusting or omitting the comprehensiveness and

supremacy criteria promises to produce the desirable results. However, I have also raised a concern with modifying Razian account, namely, that it is important to ensure that however we tweak the triumvirate criteria, or other elements of Raz's theory, the ability of the adjudicative theory to individuate laws should remain intact. The reason for this is the methodological argument about the importance behind producing a theory of law that would satisfy the needs and interests of law subjects, who are interested in being able to tell the difference between a legal and a non-legal norm.

In the following chapter I will examine several criticisms of the adjudicative approach to legality as well as examine the inter-institutional theory of law that aims to remedy the drawbacks of its predecessors. In doing this, I will continue to examine Raz's theory, although it will not be my primary focus. I will compare his theory to the inter-institutional one, using the criteria outlined and developed in the first chapter to identify strengths and weaknesses of both these theories of law.

## CHAPTER 3 INTER-INSTITUTIONAL THEORY

### 3.1 INTRODUCTION

In this chapter I switch my focus to C&G's inter-institutional theory. The chapter addresses four general themes, which intersect in various ways throughout all sections. First, I am focusing on the criticisms of state based theories of legality. It might be urged that for the sake of more detailed and focused analyses it is best to concentrate on C&G's criticisms of the Razian position exclusively. I think, however, that prior to examining the disagreements between Raz and the authors of the inter-institutional theory it is best to get a sense of C&G's take on the wider issues with theories of law which take law-state as the central point of focus. By proceeding in this way, we can get a better sense of the extent of C&G's disagreement with law-state approaches to legal theory and, thereby, we can gain a more penetrating insight into the distinctive nature of the inter-institutional theory and the extent of the gulf between it and the adjudicative theory.

Second, I focus on C&G's vision of legality. Namely, I will examine the reasons motivating their project, and in particular, the ambition to capture legality on the general inter-institutional level. I will argue that in light of the criticisms of the state-based models of legality and the realities of the present day social contexts, it is a good idea to develop a theory of law that does not take municipal legal system as the sole paradigm of legality. Third, I will introduce and analyze what I take to be one of the central conceptions that explain inter-institutional interactions – the idea of intensity and mutual reference of norms in institutional orders. As my analyses will reveal, this aspect of the theory does not do a good job of explaining how legality emerges and how are we to identify it in inter-institutional interactions. Lastly, I will address the issue of the

individuation of laws. As I have already argued, a legal theory that has the capacity to tell apart legal from non-legal norms is preferable to the one that does not have this capacity. As I will argue, the price that the inter-institutional theory pays for its general account of legality, i.e., an account that goes beyond the borders of law-states, is the loss of this capacity. I will not argue that it is impossible to develop an account of individuation of norms within the framework of the inter-institutional theory, but as matters stand now, the theory requires further development of its conceptual machinery.

I will conclude this chapter by comparing the advantages and disadvantages of the inter-institutional and the adjudicative theories in application to the EU. As I will argue, both of these theories struggle to capture legality in this context. As I review the reasons for the failures to produce a satisfactory account of legality within the EU, I will end the chapter and my dissertation by arguing that it is important to develop a theory of law that can capture legality on this level. Even if one were willing to interpret the results of the adjudicative and the inter-institutional theories, not as failures, but as warranted reasons for denying the EU and its norms an appropriate legal status, it is still important to capture legality beyond the borders of states. This is so because the social dimension of our lives is not limited to the state; and if it is not, then we should develop a way to conceive of regulating those areas by means of law.

## 3.2 LAW-STATE AND LEGAL THEORY

### 3.2.1 PRIMA FACIE LEGALITY

Regardless of how one evaluates the conceptual framework of the inter-institutional theory, one of the central arguments and motivations behind C&G's project as a whole – the emergence of novel legal phenomena – deserves attention in its own

right. The fact that a number of prominent legal theorists, including Raz, focus their attention on the law-state is not a secret. However, if it is true that state-centered theories of law are “very likely to distort the nature of emerging forms of prima facie legality, forcing as they do all experience of legality through understanding of state-law”<sup>116</sup>, then we need to recognize that our understanding of the world in which ordinary law subjects live their everyday lives needs to be supplemented by a theory that goes beyond the law-state. If this diagnosis is correct, then we need to develop an understanding of legality that would be responsive to the “emerging forms of prima facie legality”.

To explore this issue we must begin by unpacking the idea of prima facie legality. We need to analyze how it is different from legality as such. In the introduction to their work C&G identify four types of prima facie legality. These are *intra-state*, *trans-state*, *supra-state*, and *super-state* legality. By intra-state legality C&G mean institutional organizations such as distributed or shared governance. An example of this form of legality is, they suggest, captured in the relation between Canada’s federal and provincial governments to the First Nations governance. These different types and levels of governance are involved in matters of taxation.<sup>117</sup> Trans-state legality, according to Culver and Giudice, occurs when “non-state agents function like state agents in making general agreements outside the state which nonetheless bind citizens within the state.”<sup>118</sup> The Greenland Conservation Agreement is, they claim, the product of this type of legality.<sup>119</sup> The best example of the supra-state legality is the EU. The unifying feature of the phenomena that fall within this category of legality is the international agreement of a

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<sup>116</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, xxvii.

<sup>117</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, xviii-xx, also see 149-155.

<sup>118</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, xx.

<sup>119</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, xx-xxii, also see 155-159.

number of states to pursue some goal or policy within their sovereign borders.<sup>120</sup> Lastly, the super-state category of legality attempts to capture norms that apply to all states (such norms as *jus cogens* and *erga omnes*).<sup>121</sup> On this scheme my dissertation is concerned with the kind of challenges that the EU, that is, supra-state legality, brings to legal theory.

The reason why I am explicating all four categories is so that we can better understand what C&G mean by *prima facie* legality. Their idea is that these four categories of legal orders are significantly distinct from municipal legal orders and therefore merit separate analyses. In order for us to understand C&G's motivating reasons for criticizing state-based approaches and developing their inter-institutional theory we need to understand why they think that these four categories of normative orders point us to *prima facie* instances of legality. Why do C&G think that international or EU norms and systems can be considered legal, for example? What do we gain by recognizing them as legal or lose by denying them legal status? More generally, why should we take the examples of *prima-facie* legality as challenges to prominent legal theories and as reasons to revise them?

One may wonder: if it is true that our legal theories focus on law-states and for that reason are inadequate in any other context, why do we recognize the similarity, for this is how we can understand the term “*prima facie*”, between municipal legal orders and orders in the four categories that C&G offer us? It seems that the very fact that we notice law-like phenomena means that the theories of law that form our understanding invite or allow these kinds of suppositions. Alternatively, it may mean that our pre-theoretical intuitions about legality respond to the four types of contexts that C&G outlined. These

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<sup>120</sup> Keith Culver and Michael Giudice, *Legality's Borders*, xxii, also see 160-169.

<sup>121</sup> Keith Culver and Michael Giudice, *Legality's Borders*, xxiii, also see 169-171.

intuitions prompt our suspicions about the legal nature of the interactions and institutions in those contexts. In either case, we do seem to have enough basis, theoretical and intuitive, to understand and appreciate these categories and examples. If that is the case, then the state of affairs in legal philosophy is not as dire as C&G seem to suggest. Perhaps, we can agree that we need to emphasize, contrary to what Raz has claimed, that it is not only municipal orders that are the most important institutional orders that we have in society today but that other normative orders, like the order found within the EU, also play significant roles in our lives. But, an objector would conclude, we certainly do not need a new approach to theorizing legality based on the arguments that the authors of the inter-institutional theory put forth.

C&G's answer to this objection amounts to two lines of reasoning. The first one is about the significance of borderline cases. According to C&G, state-based theories underrate the significance of these cases. Hart, for example, thought that international law did not live up to the requirements of his legal theory; Raz too warned against applying his theory indiscriminately to all law-like phenomena out there. He also developed the account of systems of absolute discretion – systems that bear high resemblance to legal systems but do not actually satisfy all the requirements to qualify as legal systems. This shows that the borderline cases of legality have not been ignored in the past. C&G, however, argue that despite the treatment that such borderline cases received, their significance is not fully appreciated.

In our view, the presence of borderline cases may be evidence that analytical legal theory has devoted too much effort to attempts to mitigate consignment of particular cases to the category of “inexplicable borderline instances”, failing to recognize that theoretical victory might lie in finding ways to account for these apparently borderline cases, even at the cost of the changed conception of what counts as the core experience to be explained.<sup>122</sup>

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<sup>122</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 61.



C&G's argument, then, is that the existence of borderline cases cannot be marginalized, but instead must take an equal priority with more central phenomena, as all these phenomena furnish us with data that is crucial for understanding the nature of legality. An adequate approach to legal theory, then, must aim at accounting for all instances of legality and as theorists we can only be satisfied when we manage to succeed in this task.

The second line of reasoning that C&G put forth is that state-based legal theories are only inadequate if they are expanded in such a way as to represent theories of legality in general. These theories, however, are well suited for understanding law in the context of law states. As Culver and Giudice put it,

In the era of increased interrelation, the systemic law-state as one order amongst others can of course be explained to some extent via a single- or multiple-rule of recognition approach... Yet a more apt explanation... is one which accepts the contingency of the law-state, and its constituent elements, as a form of legality, and recognizes the place of the law-state in changing social circumstances...<sup>123</sup>

Thus, state-based approaches to law can only form one chapter in understanding the nature of law and must be supplemented with the analyses of other phenomena for a complete picture.

For these two reasons, C&G argue, we need to adopt a new approach for theorizing legality and develop theories of law that would not rely so heavily on the law-state model.

### 3.2.2 BOOTSTRAPPING

In developing their approach to studying legality, C&G do not make a complete break with their predecessors. The types of prima-facie legality they outline are separated

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<sup>123</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 137.

into four categories; these categories are not as much distinguished amongst each other as they are described in contrast with the description of law-state – the central point of focus of all traditional jurisprudence. Hence, these categories are named *inter-*, *trans-*, *supra-*, and *super- state* phenomena. The significance of borderline cases can also only be appreciated against the background of the central case of legality. For these reasons, we should not think that C&G begin their theory of law from a blank slate and dismiss all theorizing that took place before them.

In order for us to understand the difference of their approach from the previous ones we need to look at the issue of bootstrapping in legal philosophy and consider the following question: how are we to tell the difference between a borderline case of legality and a case that has nothing to do with it? According to C&G, the first step in establishing this difference is to engage with our common pre-theoretical understanding of law. It might be urged that if this is our methodology it is surely a faulty one because our theory could only reaffirm our pre-theoretical intuitions. In a sense, we are begging the question: we begin theorizing because we want to find out the nature of legality. By accepting the common intuitions about legality, we import them into the theory. So the worry is that by using this strategy we only waste our time because our theory will only confirm what we already know.

According to C&G, this kind of circularity is unavoidable in all descriptive theories of law. To get the process of theorizing started we need to use, or “bootstrap”, our existing knowledge to begin developing the theory. Moreover, C&G argue, “bootstrapping is arguably a superior way to begin to generate general conceptual

accounts of... complex social phenomena”<sup>124</sup> like law. This is so because we already have some understanding of our practices and experiences of legality, however unclear, incoherent, or biased they may be. One of the purposes of legal theory, then, is to refine this understanding, make it more coherent, and filter out all the biases. However, in order for us to begin theorizing about law, we need to use our intuitions to carve out the relevant normative contexts out of the most general normative social domain. Having done that, we can begin to develop our theory by testing our intuitions in various ways. In this way, we can turn our bootstrapped assumptions into justified theoretical elements. C&G observe that bootstrapping cannot be unconstrained; the resulting theory will only be plausible to the extent of the plausibility of the initial intuitions.<sup>125</sup> They still maintain, however, that this strategy is adequate as long as we are ready to revise our initial, pre-theoretical intuitions in light of the theory we will have developed. So, for example, if for the sake of coherence of our theory some of our initial assumptions need to be abandoned or modified, we should do so. Because of these views, we can say that C&G’s approach to theorizing legality is revisionist.<sup>126</sup>

The role of bootstrapping in legal theory is an important issue, which will become more relevant once we turn to the analyses of the conception of the ordinary person in the inter-institutional theory. When we examined Dickson’s criticisms of Dworkin in the first chapter we touched upon the same theme: “the same ballpark mistake” that Dworkin committed was the result of inappropriate bootstrapping, to put Dickson’s argument in C&G’s terms. We can also begin to notice differences between Raz’s and C&G’s

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<sup>124</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 91.

<sup>125</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 92.

<sup>126</sup> For more evidence of C&G’s sympathies to revisionism, see Keith Culver and Michael Giudice, *Legality of the EU*, particularly section 4 “An Inter-Institutional View for the Foundations of Law” forthcoming.

methodologies if we examine their respective “bootstraps”. Raz’s assumptions concerning the primacy and universality of municipal law commit his theory to focusing on states and their legal systems. Cautionary remarks regarding the possible lack of some of the features of legality in certain cases and supplementary accounts of the systems of absolute discretion are offered by Raz, but only to allay worries about certain borderline cases. The assumptions of the primacy and universality of municipal law are firmly bootstrapped to Raz’s adjudicative theory, and in particular to his conception of the legal system as the order that claims to satisfy the requirements of the triumvirate. In contrast, C&G assume that all law-like phenomena need to be accounted for by legal theory. Right from the start, they preclude the possibility of one type of legal order from becoming the sole paradigm.

At this stage, I am only drawing a contrast between Raz’s and C&G’s bootstraps or assumptions. I do not wish to make an argument that C&G’s methodology in this regard is superior to Raz’s. After all, Raz never tried to hide his assumptions, and he explicitly analyzed all of them for us. Raz clearly stated that he wanted his theory to address the needs and interests of people who experience municipal law as their most familiar form of legality. These explanations can certainly make Raz’s assumptions appear innocuous as long as we remember them as we use his theory. Also, nothing compels Raz to stick to these assumptions: he has qualified them already and he can qualify them further in the face of arguments of the sort that C&G offer against the primacy of law-state theorizing.

In the previous chapter I expressed concerns about modifying several elements of Raz’s theory. If it turns out that the assumptions that Raz bootstrapped to his account are

unjustified for whatever reason, these modifications may be needed. Even though I do not deny the possibility of adjusting Raz's theory to accommodate for C&G's concerns, I suspect that certain modifications can undermine the account of individuation of norms if, for example, we have to give up the idea of legal system as defined by the triumvirate criteria. If that is the case, we can see how bootstrapping – the first stage of theorizing – can have profound ramifications for the theory.

Because of the importance of this first stage of theorizing, I think there are important benefits in the revisionist approach to theorizing legality, especially if C&G are right about the impossibility of developing a descriptive theory without bootstrapping. Designing the theory from the outset with the understanding that all of our initial intuitions, pre-theoretical understandings, and common knowledge that go into its formation can in principle be revisable is going to orient our theory towards the most general and permanent features of legality. The more borderline cases we will try to include in our theory, the more general our account of legality will have to be. And if we want to develop an analytical theory of law, in Dickson's understanding of it, we must strive for such generality.<sup>127</sup>

That said, I do not think that a legal theorist who dogmatically clings to some assumptions is precluded from developing an insight into the nature of legality in virtue of her bias. If the assumptions one holds are plausible, the resulting theory will be adequate, although this theory may not do justice to the borderline cases. Thus, I think that the manner in which one bootstraps is important. But this does not mean that the level of theoretical insight directly depends on the manner of bootstrapping – revisionist or not. The revisionist approach promises a more general account of legality, which is a

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<sup>127</sup> See Chapter 1, Section 1.3

positive promise, but it risks being abstract or incoherent precisely because it aims to be general. A theory that is firmly bootstrapped to the initial assumptions, on the other hand, may produce a clearer picture of limited cases of legality, such as law-state, if the framework and content of this theory is satisfactorily developed. But it risks ignoring other domains and contexts where legality may also exist. The reason why I am sympathetic to the revisionist approach is because it is more in line with Dickson's understanding of analytic theorizing. Namely, it is more in line with the principle that in understanding legality we should look for its most general features. This strategy is also appealing if we value, as I think we should, theoretical humility and open-mindedness.

Towards the end of this chapter, when we have surveyed the ambitions of the inter-institutional theory, we will examine the concept of the ordinary law subject with which C&G work. At that stage, we will be in a better position to evaluate C&G's and Razian bootstraps. At this point, I only want to show the benefits and difficulties of the revisionist approach as well as describe Raz's and C&G's manners of bootstrapping.

### 3.2.3 INDETERMINACY AND CIRCULARITY

Apart from adopting the assumption of the primacy and universality of municipal law, C&G criticize state based approaches, in particular Hart's and Raz's, for indeterminacy and circularity of their accounts of legality.

...the problem of circularity refers to the burden of identifying legal officials without presupposing the notion of legal validity, which is simply the set of criteria of membership in a legal system practiced by its officials, whereas the problem of indeterminacy refers to the burden of identifying which sorts of activities and exercises of power in a legal system distinguish officials from non-officials, and so determine the border of legal systems.<sup>128</sup>

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<sup>128</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 2.

The state-based accounts suffer from circularity and indeterminacy because we need to know who the legal officials are before we can begin to identify their pattern of convergent behavior, which constitutes the rule of recognition. We need to know what the rule of recognition is because it is necessary for identifying valid legal norms and the legal system. The problems of circularity and indeterminacy begin to arise because we need to identify the correct set of officials to begin working with the rule of recognition. But C&G observe, “just as a rule requires recognition by officials for its validity, so too officials require official recognition to validate their membership in the body of officials.”<sup>129</sup> C&G argue that, because an official can only be an official in the relevant for us sense if he is recognized as an official by other officials, we are stuck in a vicious cycle: to know who officials are we need to look at who officials recognize as officials.

C&G observe that several theorists attempted to resolve the circularity problem. Among the theorists they examine are Coleman, Greenawalt, and Tamanaha. The general strategy of these theorists, in which they deal with the circularity charge, is to appeal to social facts. They try to identify the least controversial set of officials based on intuitions and common understanding.<sup>130</sup> The problem with responding to the charge of circularity in this way is that it results in the problem of indeterminacy. The worry is that even though we can probably agree on the paradigm examples of law-state officials (for example, we can all agree that a judge is a legal official), there are also cases when we will disagree about who does and who does not count as a legal official. C&G highlight this worry by asking, “which sorts of activities demarcate legal officials from private

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<sup>129</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 10.

<sup>130</sup> For more detailed analyses of these positions, see Keith Culver and Michael Giudice, *Legality's Borders*, 11-14.

citizens and other social actors?”<sup>131</sup> In their view, this question is troubling because there are many types of social agents who exhibit the same or similar characteristics as quintessential legal officials. Particularly, this is a worry for Hart’s account because he did not think it is only judges who qualify to be legal officials. Throughout *Legality’s Borders*, C&G work with a number of examples that also raise doubts about the concept of legal officials (international courts and tribunals, university presidents, etc).

In the second chapter, when we examined Raz’s notion of primary norm-applying institutions, we have touched upon indeterminacy in his account. His understanding that the decisions of the primary norm-applying institutions are binding even if wrong was insufficient to pick out a conclusive set of social agents that are legal officials (for example, recall the case of a prison warden). Knowing who does and who does not count as a legal official is not only important for the identification of the practice of the rule of recognition but also for identification of the borders of the legal system. These difficulties, according to C&G, “suggest that the problem of indeterminacy is to elucidate the philosophical concept of a legal official in a way which provides the means to identify legal officials in actual legal systems... it is a problem which runs deeper than the problem of circularity.”<sup>132</sup> In order for us to save such state-based accounts as Hart’s or Raz’s we need to provide a non-circular way of identifying the relevant set of legal officials in such a way that we do not fall into a more fundamental problem of indeterminacy.

I do not think that C&G’s arguments about the circularity and indeterminacy problems in state-based accounts are sufficient to warrant the dismissal of these accounts.

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<sup>131</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 14.

<sup>132</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 14.



For as long as we stay within the borders of municipal legal systems, these issues are not very pressing for our understanding of law. I think that we can certainly agree on the core set of quintessential officials. Raz's theory, for example, does not ask us to recognize any other social agents than judges, who populate primary norm-applying institutions. This seems to be a reasonable request that falls in line with the way we pre-theoretically understand our legal experiences. If we can agree on who does and does not count as a judge, we can continue to identify the borders or the jurisdiction of the legal system. Thus, we can also identify the laws that are valid within on the basis of what judges recognize. In short, even though C&G are right that state-based accounts, Raz's included, suffer from circularity and indeterminacy, these difficulties are marginal in the contexts where they are meant to be employed.

However, once we move away from the standard cases of municipal legal systems, these problems become more pressing. Consider for example a state that is undergoing a revolution, an emergency situation, or some form of social upheaval. In those circumstances, for example when the country is war torn, it may be very difficult to identify a set of officials, or to identify only a single set of officials when there is a struggle for political and legal power. The case of the EU also presents us with a problem in identifying legal officials. On One Big Legal System model it was unclear whether municipal judges are relevant set of officials; on the Distinct EU and Member States model it was unclear whether municipal judges and ECJ judges, for example, formed the same set of officials; in the Part of Member States model we could not have the category of officials that belong only to distinctly EU institutions.

In light of these considerations, I think that C&G's criticisms are important. They expose limitations of these accounts and explain why they are limited to the boundaries of law-state. We certainly must improve these accounts with the view to solving the circularity and indeterminacy problems if we intend these accounts to be usable beyond municipal legal systems. Alternatively, we can attempt a different approach to theorizing legality in the non-state contexts.

### 3.2.4 TWO INTERPRETATIONS

Having examined the problems of circularity and indeterminacy that C&G see in the state-based accounts, we need to determine what we are to do with them. I think that there are two ways for us to understand them. The first option is to reject the state-based accounts that suffer from the problems of circularity and indeterminacy. An argument in favor of this interpretation is that state-based theories, like Hart's and Raz's, are founded on the account of legal officials. Without being able to identify the appropriate set of legal officials, none of the other tools, such as the rule of recognition, can be utilized. Because of the importance of the account of officials, we cannot ignore the criticisms of circularity and indeterminacy. Having found flaws with the procedure to identify the correct set of officials, we thereby undermined the rest of the account, which means that it should be rejected.

The second option is to take these criticisms as reasons to be cautious in applying the state-based accounts to contexts where the identification of the appropriate set of officials is complicated. We can still use these accounts in working with legality within the law-state, for example, because we can identify the needed set of officials (in judges) without much controversy. However, once we start to analyze states that are undergoing

revolutions or international orders, for example, we cannot rely on the state-based accounts. Similarly, we cannot move beyond the municipal borders when we use these accounts.

In light of what C&G tell us in introducing their project in *Legality's Borders* and in light of the contexts and the borderline cases they focus on throughout their project, I think that the second interpretation is more reasonable. C&G tell us that they “aim to re-balance the analytical approach by building a better institutional account of legality and legal system, supported by improved descriptive-explanatory elements of analytical legal theory that aims at continuity between theoretical and empirical accounts of life under law.”<sup>133</sup> In re-balancing the approach to theorizing legality, then, their theory aims to add to the understanding of legality that has been developed in such state-based accounts as Hart’s and Raz’s. The fact that C&G focus on *trans-*, *inter-*, *supra-*, and *super-* state contexts also tells us that the state-based accounts that focus on the law state are the foundation upon which they build the theory of legality that extends beyond the state’s borders. The problem that inter-institutional account aims to remedy, then, is not the complete absence of reliable state-based theories of law, but the exclusiveness of these accounts in understanding of legality in general. The goal of the inter-institutional account is to construct a more general understanding.

### 3.3 INSTITUTIONALITY

From this section on I switch my attention from C&G’s criticisms of law state models of legality to the inter-institutional theory they put forward as an alternative. The criticisms of law state are still relevant for these sections as they form the background for

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<sup>133</sup> Keith Culver and Michael Giudice, *Legality's Borders*, xxvii.

the analysis of the inter-institutional theory. Even though I cannot analyze the conceptual machinery of the inter-institutional theory in its entirety, I will focus on several main aspects of it. I will look at institutions as the building blocks of legality, the structural and functional dimensions of legality, and the conception of the ordinary person presupposed by the model. These themes are the bases upon which the inter-institutional account of legality rests; and as I touch upon them I will try to explain and interpret more specific concepts peculiar to the inter-institutional theory.

In order for us to understand how the inter-institutional account is meant to work, we need to examine the nature of institutions and compare C&G's conception of them to the Razian account. We also need to understand what C&G mean by the structural and functional dimensions of law and what role these dimensions play in their approach to theorizing legality. This theme has already been introduced in the beginning of this work, and we engaged with it in the second chapter when we examined conceptual elements of Raz's theory. Now, we will explore this theme in the framework of the inter-institutional theory. After that, we will examine C&G's conception of the ordinary person. The criticisms of law-state models of legality, as well as the particular ways in which C&G develop their theory, depend on their conception of the ordinary person, and so its analysis is crucial for evaluation of the inter-institutional theory.

One prominent theme that I will not touch upon in the course of my exposition of the inter-institutional theory is what C&G call "the narrative concept of law". The reason for this is simple: I do not understand what this term is supposed to capture. However, I suspect that the terms and ideas that C&G use in laying out their account, if grouped together, form the narrative concept of law. If that is all this term is supposed to

designate, then I can only shed light on this idea to the extent that I explore the elements of the theory. However, I do not think that things are that simple. It seems to me that the narrative concept of law must be different from other concepts or approaches to understanding legality. It is very likely that the distinction between the narrative concept of law and the concepts of law that are based on law-state jurisprudence is of significance. Unfortunately, I do not know how to cash this difference out beyond the criticisms of the law-state models of legality that I have analyzed and the several elements of the inter-institutional theory that I am about to analyze. I think the closest I will come to the narrative concept is when I examine C&G's conception of the ordinary person and the schoolyard example, but I cannot be sure. Still, I think that other aspects of the theory are worth our attention as they reveal interesting and exciting avenues for theorizing legality.

### 3.3.1 INSTITUTIONS OF LAW AND LEGAL INSTITUTIONS

The focus on institutions is not peculiar to the inter-institutional theory. As we saw in Chapter 2, Raz also thought of legal systems as institutional systems. He identified several kinds of institutions, arguing that primary norm-applying institutions are necessary for the existence of legal systems. In contrast, the inter-institutional theory does not look for a paradigm of a legal institution. C&G do not deny that such institutions as municipal courts are clear examples of legal institutions. Their contention is that many other kinds of institutions within and outside municipal legal systems can also be legal institutions.

In developing their account, C&G rely on the institutional theory of law developed by Neil MacCormick and Ota Weinberger in their book *An Institutional*

*Theory of Law*. It is worth examining MacCormick's & Weinberger's understanding of institutions, which is primarily laid out in Chapter 3 of their book and is written by MacCormick. There he makes the following demarcation that can help to shed some light on the nature of institutions that are relevant to the study of legality. Law, says MacCormick, is an institutional phenomenon in two senses:

It is, in sociological sense, institutional in that it is in various ways made, sustained, enforced and elaborated by an interacting set of social institutions. In another sense, of course, a sense more current in academic circles, 'the law' means the set of rules and other norms by which these social institutions are supposed to be regulated and which they are supposed to put in effect.<sup>134</sup>

MacCormick can be taken to make a distinction between two kinds of institutions: legal institutions and institutions of law. An example of a legal institution would be a court, a police department or a parliament. In contrast, when we refer to institutions of law, we refer to legal rules, or more generally, legal normativity. There does not appear to be any clear criteria by means of which we can demarcate legal institutions from institutions of law. Even with the absence of such criteria MacCormick's explanation can be taken as a rough guideline for differentiating between the two senses of legal institutions. The distinction between legal institutions and institutions of law roughly corresponds to the structural and functional dimensions of law, where legal institutions form the structures of legal orders and institutions of law refer to the ways these structures function by means of institutional norms.

MacCormick also uses the idea of institutional facts. These facts point us to the state of affairs in the social world that can be explained, at least in part, by the existence of legal institutions and institutions of law. He explains in more detail,

The fact that two people having made a certain agreement, there is now legal contract; the fact that, two people have gone through a certain ceremony there is now a marriage

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<sup>134</sup> Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law*, 56.

between them which subsists until death or divorce; the fact that certain politicians having reached certain agreements and signed certain documents there is now a 'treaty' between various 'states' they represent, and as a result all manner of acts may now be performed by and in the name of 'The Commission of the European Economic Community'; the fact that a series of 'games' of 'football' to take place constitute a competition for 'the World Cup'; - all these are 'institutional facts'.<sup>135</sup>

By looking at institutional facts we can appreciate how institutional orders construct social reality. It would be good if we were given a tool to distinguish institutional facts from other kinds of social facts. I presume that not all social facts are institutional facts. MacCormick, unfortunately, does not give us any formal criteria by means of which we could distinguish an institutional fact from other types of social facts, just as he did not give us any such criteria for separation between legal institutions and institutions of law. As the result, we can encounter cases and examples when we will not be able to make clear demarcations. Even though I struggle to come up with an example of a social fact, which has no or a minimal relation to social institutions, I appreciate the importance of the distinction between institutional and other kinds of social facts. If we could make that distinction, we would have a good point of focus for the development of a theory that explains legality on the basis of interactions among institutions of all kinds, not just the primary norm-applying ones.

However, in the absence of concrete criteria to make this distinction, we only have a rough and ambiguous guideline for focusing our theoretical efforts. These ambiguities are the cost of the generality to which MacCormick's and Weinberger's institutional theory aspires. On their view, we do not necessarily need to have specific types of institutions in order to have a legal order or a legal system, as opposed to Razian view, according to which primary norm-applying institutions are necessary for the

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<sup>135</sup> Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law*, 10.

existence of legal systems. Unlike Raz, who demands that we weed out norm-creating and norm-enforcing along with all the other types of institution, the institutional approach is open to the possibility that any kind of institution in the structural and functional sense can be an element of a legal order. I think that it is for this reason that C&G are sympathetic to MacCormick & Weinberger's institutional theory.

I will not compare their theory to the inter-institutional theory of C&G. I touched on the ideas of legal institutions, institutions of law, and institutional facts in order to prepare the ground for the examination of the conceptual machinery of the inter-institutional theory. I think that the conceptual machinery of the inter-institutional theory borrows the above-mentioned elements from the institutional theory. In any case, I think that the peculiarities of the inter-institutional theory can be better explained if we have examined these elements.

My secondary goal in engaging with MacCormick & Weinberger's theory is to draw some distinctions between the institutional and the Razian approaches to theorizing legality. Namely, I wanted to present an alternative way of thinking about institutions in relation to theorizing law. According to the institutional view, we do not need to focus on the adjudicative institutions like primary norm-applying ones in looking for the basic building blocks of legal systems. Instead, we may take the route set out by MacCormick & Weinberger and followed by C&G – we can attempt to capture legality on the institutional level in general, not just with the particular types of institutions cited by Raz. It still remains to be seen whether this is possible, but the general strategy for capturing legality and the differences between it and the Razian approach should become evident.



### 3.3.2 STRUCTURAL AND FUNCTIONAL DIMENSIONS OF LEGALITY

Like Raz, C&G attempt to build a theory that captures structural and functional dimensions of legality. The idea common to both camps is that an adequate account of law has to provide proper theoretical tools to identify and to analyze building blocks of legality as well as to capture and to show these blocks at work. In explaining their vision, C&G say that the proper understanding of law must go beyond its structural elements and on to its, perhaps distinctive, functions “much as an understanding of human biology must go beyond the structure or anatomy of the body, and on to its function and physiology.”<sup>136</sup> This analogy between the relations anatomy/physiology in biology and structure/function in law requires clarification. For example, C&G can be saying that just like in a human body where only the heart can pump blood or only legs can perform the action of running, so in the case of legality only certain organs or institutions can perform specific legal functions. Alternatively, they can be saying that just as there is a certain set of organs that is essential for the performance of any function in a human body (the heart must circulate the blood, the lungs must breathe necessarily if one is to run, for which one also needs working legs), so in a legal order there must be a core set of organs or institutions that enables the core functions as well as possibly other secondary functions.

Unfortunately, C&G do not explain what this analogy is meant to show in a lot of detail. However, I hesitate to claim that any one of the interpretations offered above is true of C&G’s theory. Once we turn to the idea of “mutual intensity and reference” in application to the inter-institutional interactions, we will see that C&G do not think that there is a core set of institutions that are necessary for the existence of legality. They also do not hold the view that legality can only exist in specific institutional settings.

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<sup>136</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 5.

In explaining their vision for the inter-institutional theory, C&G tell us that they are after a more “thick” account that would explain and describe legality.<sup>137</sup> But it is not immediately obvious what they mean by this term. In what follows I will try to interpret the analogy between structures and functions in human biology and structures and functions in the case of law in the best possible light, so that we can better appreciate the aspirations of the inter-institutional theory.

First, I think that MacCormick’s distinction between legal institutions and institutions of law can be of some use in understanding this analogy. This distinction, as I mentioned in the previous section, roughly maps on to the distinction between the structural and functional dimensions of legality. So on one interpretation, we can say that the organs of the body form the structure of it and they can perform certain functions; institutions form the structure of legality and they perform certain functions, for example, they can be said to generate legal norms. So the analogy between the biology and law is just that. If this is how we are supposed to understand it, C&G want to develop a theory that would give an account of legal institutions and legal norms. I think that if this is how we are expected to understand this analogy, C&G hardly tell us anything interesting about their approach to studying legality.

On the basis of one of Jules Coleman’s arguments, that has nothing to do with C&G’s inter-institutional theory, I came up with a more interesting interpretation of the analogy that they draw. In the first portion of *The Practice of Principle*, Coleman examines the economic explanation of tort law.<sup>138</sup> He argues that if we were to explain tort law from the economic point of view, ignoring the corrective justice interpretation,

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<sup>137</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 5.

<sup>138</sup> Jules Coleman, *The Practice of Principle*, 1-65.

we would not get to the heart of tort law as a social practice. Economic analysis only pretends to give us a complete explanation of tort law – the reasons why we have tort institutions and the reasons why they perform the functions that they do. In fact, we only get a superficial account that does not explain everything that needs to be explained about this practice. As Coleman puts it,

We are familiar with causal-functional explanations from evolutionary biology. For example, the function of the heart is to pump blood, and this explains certain characteristic features of that organ; similarly, the fact that leopards have spots is to be explained by their serving the function of making the leopard a more effective hunter. In a standard explanation of this kind, the function may be said to explain the existence, persistence, and shape of a system only in so far as there is an appropriate causal mechanism that links the explanans to the explanandum. Without the causal mechanism, a putative functional explanation of this sort is merely a “Just So Story”. I argue that if it is to be understood as a causal-functional account, the economic analysis of tort law has not risen beyond being a “Just So Story”.<sup>139</sup>

According to Coleman, if we are to explain the nature of tort law successfully, our theory needs to give reasons as to why the institutions of tort law developed in the ways they did, and why they function in the society in the ways they do. In explaining the nature of leopards as much as in explaining tort practices, we must go deeper than the features and functions that we see. If our theory would only give an account of leopards as hunters who have spots and ignore the evolutionary dimension, it would not be a good theory because we would not have the link that establishes the relation between the spots and being a hunter. Similarly, in the case of torts, the economic account cannot capture all the necessary relations between society and tort institutions because it ignores the corrective justice dimension, as Coleman argues. The economic account only captures what does take place – the money flow – but does not reveal the full extent and significance of tort practices in society. The basic idea is that in order to explain a phenomenon it is not enough to just pick out all the features of it. We must also produce an explanation that

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<sup>139</sup> Jules Coleman, *The Practice of Principle*, xv.

ties everything together. Unless we do that, our theory will not be a good one. We will only get the account that tells us that things are the way they are, which, according to Coleman, is a “Just so Story”. And we do not want to have that story because it does not explain to us the phenomenon in question as well as it can or needs to be explained.

I think that C&G have a similar idea when they make the analogy between physiology and law, insisting on the importance of the thick explanation. They want to build a theory of law that does not only pick out features of legality, but a theory that would be an equivalent of the evolutionary theory in biology. In going beyond the state borders and by looking at institutional interactions of various types they want to build a theory with a high degree of generality. They capture their expectations regarding this in the following ways,

A structurally and functionally balanced account of legality needs new analytical categories likely to capture without distortion the range of phenomena regarded and spoken of as legal, and those categories must be responsive to a changing set of evidence as legal orders wax and wane, changing interests on the part of the ordinary person to whom the explanation ought to be comprehensible, and developments in explanations of surrounding concepts.<sup>140</sup>

The conceptual machinery that C&G need to develop for their inter-institutional theory is supposed to pick out instances of legality across the board. To develop this theory, they cannot stay within the law-state because they identified four instances of non-state type legality, namely, *inter-*, *trans-*, *supra-*, and *super-* state orders. They also set out to find a way to tie the phenomena of the emergence and dissolution of legality to the accounts of stable legal orders. (Perhaps, the narrative concept of law is the story that we can tell about the birth, life, and death of a legal order.)

If the interpretation that I developed on the basis of Coleman’s argument about the theory of torts and its relation to economic analysis is plausible and true of C&G’s

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<sup>140</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 106.

intentions, I think we can understand why they have used the analogy between physiology and legality. One of the reasons why they focus on structures and functions is because they want to develop a very general picture of legality. The reason why they need to develop new conceptual machinery to capture legality on this general level is because the theories of their predecessors placed too much emphasis on the municipal legal system, and so they ignored or underrated law-like phenomena outside state borders. C&G must also think that their predecessors focused too much on the structures of legal orders and not enough on the functions of law. So, what they want to do is rebalance the approach of analytical jurisprudence by equating the importance of municipal law with other types of prima-facie instances of legality.

### 3.4 ORDINARY CITIZEN

In this section I look at the conception of the ordinary person with which C&G operate. We have already examined how Raz fleshes out this concept. He asks us to adopt the view that one of the main goals of legal theory is to explain municipal legal systems, which he takes to be the most important institutional orders. In the course of this chapter we saw that C&G criticize the strategy of privileging the law-state in legal theory. One of the main reasons why they make this criticism is because of their understanding of the needs and interests of ordinary law subjects. According to C&G, these subjects do not only experience legality in the municipal context but also encounter law-like phenomena in inter-, trans-, supra-, and super- state contexts. C&G aim at explaining these encounters with law-like phenomena, and they place the importance of this enterprise on the same level as the understanding of legality in the municipal context, to which, in their view, traditional jurisprudence has been limited. They see themselves as challenging the

law-state bias, and in particular, the view that municipal legal systems are the only homes of legality. Thus, they can also be said to be challenging the role of the distinction between central case of legality – the municipal legal system – and the law-like phenomena or prima-facie legality, the main types of which are captured in the four categories they developed.

The question that we need to ask, then, is this: why are not C&G content with treating prima-facie phenomena as borderline cases of legality or as interesting but insignificant quirks of intuitions of law subjects? Why not just keep the old picture: law talk is confined within the borders of law-states and outside these borders we can talk about politics, morality, humanism values, etc, but not about law? So what needs to be explained is not only how we are to make the general sense of these prima-facie contexts in conjunction with the law-state context (what needs to be done to produce this *general* account of legality), but we also need to explain what is at stake in bringing the prima-facie intuitions to the same level of significance in legal theory as experiences with municipal law.

The reason why C&G think that the ordinary citizen has all these prima-facie legal encounters is because human societies are, to a much greater extent than ever before, intricately connected across state borders in complicated ways. In the last chapter of *Legality's Borders*, C&G site technological advancements in transportation and communication as well as global politics as some of the causes of this increased interconnectedness. One of the ways to explain C&G's motivation for constructing the inter-institutional theory is that we need a legal theory that is up to date with the social world that is globalized in these ways. They write, "it is no longer a matter of

constructing tests to find homes for laws in established state-based legal systems, but rather a matter of constructing a theory capable of testing for the emergence of legality in the interactions between institutions.”<sup>141</sup> Because of globalization, the focus of legal theory must change. Legal theory must aim at capturing legality outside state borders; all kinds of institutions and orders they produce are crucial for this task. By looking at these orders we can capture legality, or so C&G argue, in other than municipal forms. The interests and needs of ordinary people who encounter and participate in these institutional orders are vital for identification of legality. It is by examining the intuitions, interests, and needs of these ordinary subjects that we can identify the potential instances of legality.

The goal of the inter-institutional theory, then, is to provide “an interpretation that makes sense of those citizens’ experiences in ways comprehensible to them as they experience upwellings of normative force in clusters of norms, in the familiar situation of law-state, and intra- and extra- state forms, often in systematic fashion, and sometimes in the form of what at least appear to be other [than municipal] kinds of legal order.”<sup>142</sup> In other words, the main goal of the inter-institutional theory is to develop a framework within which we can make sense out of non-municipal experiences, without, of course, forgetting that municipal experiences are also important for understanding the nature of legality. The ultimate goal for C&G is to develop conceptual machinery that would enable us to describe these experiences.

However, even at the point where they explain the vision for their theory, we are introduced to ideas and concepts that are mysterious. What does it mean to experience an

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<sup>141</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 174.

<sup>142</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 105.

upwelling of normative force? The way this question is asked, it seems that the answer has to be given in terms of psychology. So is legality a psychological phenomenon? How are we to tell apart an upwelling of normative force which is “produced” by or pertains to a legal order and an upwelling that is the result of some other normative pressure or order? For example, I feel an upwelling of normative force, or put differently, I certainly experience strong normative pressure when I sit at my parents’ dinner table wearing sunglasses. I do not experience normative pressure to the same extent when I jaywalk across a quiet street. Does this mean that my parents’ rules about wearing sunglasses at the dinner table are legal? It is also not very clear what the term “clusters of norms” refers to. Do norms form clusters when they refer to each other or are these clusters formed when a single source produces them? Without answering these questions, it is hard to make sense of the inter-institutional theory and even the experiences it aims to explain.

As C&G further explicate their understanding of the needs and interests of the ordinary person, their vocabulary grows increasingly complex,

What our ordinary person recognizes as familiar legal institutions are familiar in part because of their relative centrality to life under law. The most familiar legal institutions characteristically possess many points of intense mutual reference with other legal institutions, and the operation of legal powers by these institutions tends to have particularly significant institutional force whose actual efficacy results in a particular degree of intensity and inter-institutional interaction as legality’s claims are in fact practiced in various ways.<sup>143</sup>

It is not obvious what such terms as “points of intense mutual reference”, “institutional force”, or “degree of intensity and inter-institutional interaction” mean. It may be argued that the ambiguity of these terms is necessary in virtue of C&G’s intentions to develop a general account of legality. One can argue that if we are to bring up to the same level all

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<sup>143</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 125.



law-like phenomena and attempt to produce an explanation that connects all of them together, we must necessarily use terms that are ambiguous. The degree of terminological ambiguity is proportionate to the variety of law-like phenomena, and so we have no choice but to grapple with these terms, fleshing them out the best we can.

Even though this argument can hold some water, it cannot help those who are interested in understanding the general nature of legality. If we want our theory to be explanatory adequate, it must live up to the metatheoretical virtues such as clarity and comprehensiveness (recall the discussion in Chapter 1, Section 1.2). However, already in the descriptions of the experiences of ordinary persons with prima-facie instances of legality, we find that the inter-institutional theory is unable to meet these metatheoretical requirements. In no way does this mean that this account or C&G's approach to theorizing legality are doomed enterprises. But it does mean that we need better tools to deal with law-like phenomena on the level of generality we are operating than we are offered in *Legality's Borders*. In the following section I will examine in more detail the difficulties surrounding one of the central conceptual tools of the inter-institutional theory.

### 3.5 INTER-INSTITUTIONAL THEORY AND INDIVIDUATION OF LAWS

#### 3.5.1 INTENSITY AND MUTUAL REFERENCE

In the interest of space I cannot provide interpretations for all the terms the meanings of which are not obvious and explain how these interpretations affect the overall theoretical framework of the inter-institutional theory. My strategy in dealing with this issue is to interpret what C&G mean by “mutual reference and intensity”. My hope is that by analyzing this central idea we can get a better sense of how the inter-institutional

theory is meant to work. Also this analysis will be a good precursor to the discussion of the capacity of the inter-institutional theory to individuate legal norms that I will undertake towards the end of this chapter. I hope that we can bring some more clarity to other terms as we try to make sense out of the idea of intensity and mutual reference.

C&G write, “For our purpose in providing a contribution to the general part of a theory of law, it is useful to choose, as legality-tracking characteristics of legal institutions interacting over time, the fact that those institutions are typically part of the composition of inter-independent institutions related by *mutual reference* occurring at some level of *intensity*.”<sup>144</sup> So, the idea is that there are institutional structures that form institutional orders. These structures produce institutional norms and institutional facts. Presumably, these institutional orders can generate all kinds of norms: legal, political, or customary to name just a few possibilities. Ordinary citizens live amidst all these norms, and, according to C&G, need to understand their nature. For example, they may need to know if the institutional norms, which were created by EU institutions, are legal norms. Or putting this in a different way, the ordinary citizens need to know whether they are expected to treat these norms in the same way as they treat legal norms of municipal systems. Alternatively, they may be expected to treat these norms as norms of international law, or as the norms of some private firm or transnational corporation. The ordinary citizen is confused and does not know which norms are more important than others.

The way C&G propose to resolve this difficulty is by accessing how the institutions that produce these norms themselves treat these norms. In particular, they suggest that we access whether institutions within an institutional order make references

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<sup>144</sup> Keith Culver and Michael Giudice, *Legality's Borders*, 124.

to these norms, and if they do, how often and in what manner they do so. In short, the idea seems to be that we need to evaluate how significant these norms are for the institutions that produce them. So law, according to C&G, is the kind of a phenomenon that emerges as institutions begin to interact with other institutions by means of these norms with the right degree of intensity and mutual reference. Presumably, this means that these institutions expect compliance with these norms by other institutions within the institutional order; it could also mean that officials of these institutions criticize each other for failing to meet or comply with these norms.

Here is one way to think of the inter-institutional interaction. The more institution A interacts with institution B, the more likely is this interaction to produce law, presuming that these interactions are similar in character over a period of time. What does it mean for interactions to be similar? The idea is that institution A, for example, in cases of type X would make reference to institution B. If institution A sticks to this practice over a period of time without major exceptions, then one can say that there is an institutional tie between A and B. In some class of cases, institution B may refer to institution A, and as the result, there will be a mutual reference between A and B. The more A and B rely on each other in this way, the more law-like the products of their interaction become.

My interpretation certainly does not put to rest all the questions regarding the nature of inter-institutional interactions in C&G's understanding of them. Many questions remain. For example, how are we to evaluate the significance of these interactions? Are there any ways that are more suited for this task than other? More importantly, how are we to differentiate among institutional orders? If C&G are right, which I think they are,

that inter-institutional ties in the global village are highly complex and intricate, how are we to know where one institutional order ends and another begins? Without an answer to this question, an ordinary citizen will not know where her compliance is expected and where it is not. At this point, we can see the advantage of Raz's theory, i.e., of operating with the concept of legal system that is set out by the triumvirate criteria. Even though the triumvirate was an obstacle in conceiving the structure of the EU, it does give us the advantage of separating one municipal legal order from another. (For more detailed discussion of the triumvirate, see Chapter 2, Section 2.4.) The inter-institutional theory, however, does not seem to have this capacity.

Apart from questions that my interpretation does not answer, it raises some questions of its own. For example, ordinarily the status of a norm in the legal order is a binary matter: the norm is either legal or it is not. If we make sense of inter-institutional interactions on the basis of chains of intensity and mutual reference, whether a norm is a legal one or not is not a binary choice. Because the legal status of a norm depends on the mutual reference and the degree of intensity in the inter-institutional interactions, it seems that some norms will be more legal if the interaction that produced them is more intense and mutually referential. Conversely, the less intense and mutually referential is the interaction between institutions, the less legal the norm in question would be. If this is the consequence of the idea of mutual intensity and reference, then the inter-institutional theory, which aims to explain the nature of legality to ordinary citizens, must be ready to tackle these counter-intuitive and certainly uncommon implications about the nature of legal normativity. Is legality a matter of degree in general or just outside municipal legal systems? How does the fact that one norm is more legal in virtue of it being a product of

more intense interaction matter for practical conduct? Questions like these arise when we look at legality from the perspective that C&G urge us to accept; and these questions do not seem to have obvious answers.

Perhaps, we can be urged to adjust our expectations by being reminded that the nature of legality is not a clear and simple matter. The complexity of the picture that we get when we utilize such concepts as “intensity and mutual reference” reflects the complexity of inter-institutional interactions as they take place in society. However, even if we are willing to accept this argument, we still want our theory to clarify and sort out this complexity. If we do not demand of our theory this clarity, we risk ending up with a disappointing result: the inter-institutional interactions are complex and legality somehow emerges through these interactions. Recalling the discussion of Coleman’s criticisms of economic explanation of torts, we can say that the inter-institutional theory risks producing a “Just So Story”, unless it can produce an explanation that can take care of all these questions. In light of that, I think that the conceptual machinery of the inter-institutional theory needs improvement.

### 3.5.2 PEREMPTORY CONTENT-INDEPENDENT REASONS

It is not fair to say that C&G are unaware of these difficulties with their theory. What I want to focus on now is how they grapple with the counter-intuitive idea that legal norms, which are produced in the process of inter-institutional interactions, vary in degree of legality as the result of the process of their production. I am referring to my hypothesis that it is likely that if we determine the status of a norm as a legal norm on the basis of the degrees of intensity and mutual reference in inter-institutional practices, then some norms seem to be more legal than others. If the intensity in interactions of

institutions that gives rise to these norms is higher than the interaction that gives rise to others, then the former norms are more legal than the latter.

C&G tell us, “in the complex web of norms of various kinds encountered by citizens, legal norms represent a kind of upwelling of normative force, especially forceful standards clustered around particular kinds of life events, relatively stable normative reference points in a context of constant competition among norms.”<sup>145</sup> Overlooking the difficulties with understanding such terms as “competition among norms” and “stable normative reference points”, we can see that, according to C&G, it takes a special kind of upwelling of normative force, or in the terms that I understand it, it takes a special kind of institutional or social pressure, to give rise to legal norms. All norms can exact pressure on individuals, but legal norms exact it in a particular way. If we can find out what kind of pressure legal norms exact, it would be an important step in differentiating legal from non-legal norms. This, in turn, will be an important step in satisfying the interests of the ordinary citizen.

So, what is special about legal norms in the way they pressure citizens? The way I understand C&G’s idea is that legal norms are preemptory content-independent reasons for action, which makes them distinct from other kinds of norms. In identifying legal norms in this way, C&G claim to follow the Hartian understanding of laws very closely. They say,

we intend to keep a central place for Hart’s notion of a legal norm as a content-independent preemptory reason for action in understanding law. In Hart’s view, content-independent preemptory reasons for action are those norms requiring conduct that are capable of being identified and serving as reasons for action independently of consideration of their underlying purposes or justificatory reasons.<sup>146</sup>

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<sup>145</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 105.

<sup>146</sup> Keith Culver and Michael Giudice, *Legality’s Borders*, 114.

Hart tells us that “peremptory” means “cutting off deliberation, debate, or an argument”.<sup>147</sup> So, if a norm is peremptory, it comes before or overrides all other norms. If a norm is “a content-independent reason for action”, it means that it is “intended to function as a reason independently of the nature or character of the actions to be done. In this of course” Hart explains “it differs strikingly from the standard pragmatic cases of reasons for action where between the reason and the action there is a connection of content.”<sup>148</sup> Promising, according to Hart, is a good example of a peremptory content-independent reason for action. He explains the peremptory aspect of promising, “the giving of a promise is intended to be a reason not merely for the promisor doing the action when the time comes but for excluding normal free deliberation about the merits of doing it.” Because one can promise to do all kinds of things, and because the act of making the promise is the act of commitment to do the action promised, promising can also be considered a content-independent reason for action. According to Hart, legal norms and promises have the peremptoriness and content-independence features in common. We do not need to flesh out in further detail the similarities and differences between promising and legal normativity. However, it may be helpful to understand the nature of pressure that legal norms exact on us if we identify peremptoriness and content-independence features that are common between these two phenomena. So, it is likely true of C&G’s view that, when an ordinary citizen experiences the upwelling of normative force peculiar to legal normativity, they feel the same pressure as when they make a promise undertaking the burden of living up to it.

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<sup>147</sup> H.L.A Hart, *Essays On Bentham*, 253.

<sup>148</sup> H.L.A Hart, *Essays On Bentham*, 254-5.

According to the way we commonly think, there are certainly many differences between a situation in which one makes a promise and a situation when one encounters a legal norm. But these two features seem to fall in line with some of our common conceptions of laws. Legal norms claim to override if not all then at least most other normative considerations. And it also seems true to me, as a law subject, that law demands my compliance regardless of whether I agree or disagree with the content of its norms, excluding several noteworthy but rare exceptions, like dire circumstance when noncompliance with law can be justified by promoting a much more important value.<sup>149</sup> If we agree with these characterizations of legal norms, we can understand why C&G bootstrap a Hartian definition of law to their account of legal norms. This definition chimes in with our pre-theoretical understanding of law.

However, the basis for such bootstrapping in C&G's case is unclear. In light of their criticisms of Hartian-type theories of law, it is not immediately obvious how close they can follow Hart in understanding legal rules. In particular, it is unclear how they can adopt such an understanding of law beyond merely a bootstrapped definition. It seems that understanding legal rules in the Hartian way necessitates an account of officials who can institute and enforce these rules. However, the problems of circularity and indeterminacy were held to undermine Hartian account of officials. In moving away from the law-state paradigm and focusing on inter-institutional interactions, C&G tried to stay clear from relying on an account of officials – the strategy that makes sense in light of their criticisms. However, by adopting a Hartian understanding of laws, they seem to be

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<sup>149</sup> For example, it seems justifiable to exceed the speed limit when driving a badly hurt person to the hospital.



returning not only to the law-state understanding of legality, but to the aspect of it which, in their view, was one of the most problematic ones.

Also, C&G seem to ignore the fact that Hart's understanding was constructed on the basis of Bentham's and Hobbes' works, neither of which seemed to entertain anything remotely similar to the approach to studying legality that C&G develop. In taking clues to understanding legal normativity from Bentham and Hobbes, Hart does not appear to be moving away from his official- and hierarchy- based view of legal orders. There is no indication that he is contemplating this understanding of law to be applicable beyond the borders of municipal legal systems. In light of that, the adoption of Hart's understanding of laws as preemptory content-independent reasons for actions into the inter-institutional theory requires explanation and justification.

An attempt can be made to defend C&G from this charge. One can argue that they already laid the foundation for justifying this bootstrap. As it may be recalled, they aspire to satisfy the interests of ordinary citizens, who, they presume, are very familiar with the basic structures and functions of municipal legal systems. If the Hartian account adequately captures the nature of legality within state borders, as Culver and Giudice can be taken to believe, then they are warranted in exporting this state-based understanding of legal rules into non-state contexts. Since the ordinary persons have some understanding of state law, and since we, as legal theorists, are interested in developing an adequate explanation of legality outside state borders for these persons, we certainly can capitalize on what ordinary citizens are experienced with. This argument can certainly justify and explain why C&G bootstrap this understanding of law to their theory, but we still need to be shown how the inter-institutional theory can work with this bootstrap. I have not found

such an explanation in *Legality's Borders* and I do not think that there is an obvious one. For this reason, I think that if C&G want to keep this bootstrap, the onus is on them to meet the challenges I outlined above.

### 3.5.3 SCHOOLYARD LEGALITY

If C&G can explain how the understanding of laws as preemptory content-independent reasons for action can cohere with their picture of an institutional order constituted by interaction at various degrees of intensity and mutual reference among institutions, their theory will be in a good position to provide us with the necessary tools for individuating laws. In my view the task of individuation of legal norms is central for legal theory, especially if it aims at satisfying the interests and needs of ordinary law subjects who live in the global village. Unfortunately, I do not think that the inter-institutional theory, as it is laid out in *Legality's Borders*, can live up to this task. In this section I explore another obstacle that we meet with the inter-institutional theory in relation to the project of individuation of laws.

I will try to make my argument on the basis of an example that Michael Giudice used to show how the inter-institutional account works. I will call it the “schoolyard legality” example. To the best of my knowledge, this example has not made it to print at the time when I am writing this work. For this reason I need to warn the reader that the advantages and disadvantages that I attribute to the inter-institutional theory on the basis of this example are products of my interpretations of the arguments advanced in *Legality's Borders* and conversations that I had with Michael Giudice and my supervisors Wil Waluchow and Stefan Sciaraffa.

Imagine a schoolyard. It's recess time and a bunch of children from different grades come outside to play. All the boys from the fifth grade get together and decide that only they can play by the sandbox. Neither fifth grade girls nor any other student is allowed to play in the sandbox during the recess. Imagine further that most of the children in the schoolyard come to know about this rule.

This scenario provides us with an example of social organization. I do not think it is a stretch to say that if an ordinary law subject was asked whether the facts of this scenario lead her to suspect the existence of a legal order or a legal system in the schoolyard, or to suspect that social organization in the schoolyard during recess is governed by laws, that the answers to this questions would be “no”. I think that the common and ordinary understanding of legality can hardly prompt an investigation into this situation as a legal one.

According to the inter-institutional theory, however, one has good reasons to say that the above example exhibits characteristics of legality. The fact that legal norms come in varying degrees of intensity allows us to say that the interactions depicted in the schoolyard example, even though they are far from the most obvious or most familiar to us cases of legality, nevertheless can be considered legal. We have a group of boys from the fifth grade, which is a socially identifiable group and which issues a norm that restricts the use of the area around the sandbox. It can be argued that this norm exhibits peremptoriness and content-independence features of legal rules. Kids can take this norm as seriously as adults can take the norm that they are required to pay their taxes, or as seriously as Hart's promisor takes her promise to do something. Even though it is hard to identify institutions involved in this example, it is possible to argue that there is some

level of mutual reference and intensity among all the groups of children in the playground or maybe even in the school. If there are such groups, then the fact that this norm is generally adhered to, or at least demands to be considered in the choice of actions, can be taken as evidence for the existence of mutual reference among the groups. Thus, we can say that we have a case of institutional interaction that can be described in the vocabulary of intensity and mutual reference. If this prohibitive norm is generally adhered to, we can also say that the schoolchildren experience the upwelling of normative force as they move around, play, and do whatever they do in the area of the playground near the sandbox. The fact that this norm can change if a teacher or an adult forbids it, or simply if children lose interest in this norm, does not threaten the institutional order of the schoolyard, since, according to C&G, their theory is responsive to changes in institutional orders as these “wax and wane”. These are the reasons for thinking that the schoolyard example is, on the inter-institutional theory, a case of a legal order, however minimal and short-lived.

In my view, the fact that we have these reasons on this theory goes to show that the conceptual machinery of the inter-institutional theory has serious theoretical problems; and because of this it does not live up to its promises. We have problems on two fronts: by finding legality in the schoolyard, we seem to confuse rather than clarify the nature of legality to the ordinary law subject. If we tell her that she can disregard this case from her practical considerations, which she is likely to do if she indeed has law-state intuitions of legality, where exactly is she supposed to draw the line between such insignificant and minimal cases of legality and more prominent ones? We do not seem to have a threshold that could separate such cases as depicted in the schoolyard example and

instances of legality, even the borderline ones, which fall in line to a greater extent with our common understanding of law and which are relevant for our practical purposes in the global village.

Second, we are urged to develop an explanation of legality on the inter-institutional level because it promises to be on the most general level we can capture legality. We do so by bringing the borderline cases to the same level of significance as more prominent forms of legal orders, starting from the prima-facie types of legality all the way to the cases of municipal law. However, if we include the schoolyard example as a borderline case of legality, it seems we pay too high a price for the generality of our account. We sacrifice most of our common expectations of legal orders. I doubt that this is the kind of price that we want to pay because if we accept this insight, thereby dismissing our common understanding and intuitions of legality, we have no choice but to admit that the ordinary person knows virtually nothing about legality and most of her intuitions about it are wrong. Even if we are prepared to let go of some of our bootstraps, this situation requires us to let go of too many of them. We have to call a group of boys from the fifth grade a legal institution. This seems like a very big stretch in relation to the concept of legal institution as we use it in our daily lives. The norm “only the boys from the fifth grade are allowed to play near the sandbox during the recess” is also far removed from the common understanding of legal norm in common usage. Similarly, the fact that this norm can exist merely for the duration of a recess, and that it can be overridden by a teacher or an adult further undermines the idea that it is similar to the norms which we are used to calling laws.

The fact that the inter-institutional theory does not provide us with any concrete tools for differentiating laws from other norms significantly subtracts from that theory's explanatory capacity. The fact that we are supposed to understand laws as peremptory content-independent reasons for action creates further problems for the theory. It is understandable why C&G want to hold on to a Hartian understanding of laws: it corresponds well with how ordinary people who are accustomed to municipal experiences of legality understand laws. However, the fact that ordinary citizens are so accustomed does little to explain how we are supposed to keep to this understanding within the framework of the inter-institutional theory. Perhaps, these problems can be remedied if the conceptual machinery of this theory is refined. Perhaps, in looking at legality on a more general level, we need to focus on and examine other dimensions of legality. What I hope I have managed to show in my analyses of the inter-institutional theory is that it does not live up to the promises that C&G make in explaining their vision for their theory. Namely, we do not satisfy the interests and needs of the ordinary law subjects and we do not succeed in explaining legality on the most general level by examining inter-institutional interactions within the framework of the inter-institutional theory.

### 3.6 PERSPECTIVES FOR ORDINARY PERSPECTIVES

We can draw two conclusions from the discussions in this chapter. First, the conceptual machinery of the inter-institutional theory is problematic. Second, in light of the fact that the world is a global village, C&G's project for developing an account of legality that would go beyond state borders and attempt to capture legality on the inter-institutional level is properly motivated. Having spent the last few sections criticizing the

conceptual apparatuses of the inter-institutional theory, I want to spend some time analyzing the strengths of C&G's approach to studying legality in comparison to Raz's.

C&G's motivation for approaching the study of legality on the inter-institutional level is reflected in their profile of the ordinary law subject. Even though I argue that the theory itself cannot satisfy the needs and interests of this subject, it is to these that we must look in developing a theory of law. For C&G the ordinary law subject is a cosmopolitan citizen who encounters law-like phenomena in many contexts. For example, she suspects that the EU contains a legal order. The task of a legal theorist is to provide the ordinary citizen with tools to determine whether she should trust her intuitions about these matters and treat the norms and structures of such contexts as the EU as she would treat more familiar legal orders.

It can be retorted that the ordinary law subject should not trust such intuitions because the law-state is the proper home for legality. Beyond it, there are only law-like phenomena, which cannot be considered legal in the full sense of the term once we analyze them closely. The reason why we should disregard these phenomena is because we have a fairly solid theory of municipal law, Raz's, which can only work if we have accounts of officials, of rules of recognition, and of legal system. These accounts are tied together in such a way that if one element is dropped or modified, the rest of the theory will suffer. Raz's theory can satisfy the needs and interests of ordinary law subjects regarding legality within the law-state. In this context Raz's theory allows us to tell the difference between a legal norm and another kind of norm. One can go even further and argue that Razian and Hartian accounts gives reasons why prima-facie phenomena are not fully legal, why they resemble law, and why one can be tempted to regard these

phenomena as fully legal.<sup>150</sup> So, the best thing to do is to keep the account of legality that we have and ignore intuitions that challenge this understanding.

To evaluate this argument we should go back to Dickson's discussion of Dworkin's methodology. Dickson rejected Dworkin's idea concerning the function of law. Dworkin thought that the function of law is to morally justify government's use of coercion, and so all the aspects of law have to cohere with this functional aspect. Dickson thought that such a conception does not correspond to the ordinary citizens' expectations of law who do not live in western democracies as well as to those whose understanding of law is not informed by, what appears to be, liberal ideology. So, Dickson argued, Dworkin brings everyone who deals with law to the same ballpark and ignores the diversity of conceptions and expectations of legality we find among law subjects. For this reason, his theory reflects only an aspect of legality and it is neither as general as we want it to be nor is it free from ideological bias.

If we agree that the task of legal theory is to construct the most general and unbiased understanding of legality we can, we should adopt C&G's conception of the ordinary law subject and not Raz's. Raz's conception of the ordinary law subject is better than Dworkin's because Raz only makes the assumptions of primacy and universality of the municipal legal system. In other words, Raz makes a law-state assumption but not a western liberal law-state assumption as does Dworkin. As a result, Raz's theory is more general than Dworkin's. However, C&G's conception of the ordinary person's needs and interests is different than Raz's. They identify the four types of non-state contexts where law-like phenomena can be observed and argue that ordinary citizens encounter legality

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<sup>150</sup> I am indebted to Wil Waluchow for pointing out these further reasons for sticking with Hartian and Razian accounts of legality.



and law-like phenomena not only within the law-state but also beyond its borders.

Unfortunately, they do not give us a theory that can explain these encounters on the inter-institutional level.

However, we cannot reject their conception of the ordinary law subject on the basis that their theory of law does not satisfy the needs and interests of these persons. If Raz's theory did not satisfy the needs and interests of ordinary persons regarding the municipal legal system, we would not be warranted in favoring Dworkin's theory and his conception of law. One could show that Dworkin's conception of law's function is biased and narrow without providing a theory of law that would be more general and free from bias. In this sense, the task of constructing a proper concept of the ordinary citizen is separate from the task of constructing a theory that would satisfy the needs and interests of this citizen.

The argument that I presented in the case of Raz and Dworkin applies *mutatis mutandis* to Raz and C&G. C&G succeeded in producing a more general conception of the ordinary law subject whose experience with legality is not limited to municipal encounters. But they were not able to construct a theory that would satisfy the needs and interests of this subject. Their conceptual shortcoming does not mean that Raz's conception of the ordinary law subject is better or that the theory of law that he developed is as general as it needs to be. If C&G are right that legality can exist outside state borders, their conception of ordinary law subjects is better than Raz's.

If one objects to the possibility of finding legality outside state borders and appeals to Raz's account of systems of absolute discretion and other such accounts to explain law-like phenomena that C&G capture within the four categories, the facts that

the world is a global village and that it is useful to have legal orders outside the borders of law-states still give us reasons to stick with C&G's conception. If we recognize the importance of constructing legal orders outside municipal legal systems, we should take seriously the prima-facie legal phenomena. It is by looking at these phenomena and developing an explanation of their relation to more common experiences with municipal law that we can gain a deeper insight into the nature of legality, an insight that can help us to understand what needs to happen for a legal order to arise. C&G's conception of the ordinary person, which sets the stage for the inter-institutional approach to understanding legality, is an important tool for achieving this goal.

## CONCLUSION

As it stands, the inter-institutional account is not robust. Its theoretical framework is unclear and in need of further development. It is unclear, for example, what certain terms, such as “intense and mutual reference” means. Yet, this term and others like it are meant to get us to the heart of the inter-institutional interactions, which, in turn, are meant to give us a picture of legality in all possible contexts where it can find a home. Another problem with this theory is that it relies on the conception of laws as peremptory content-independent reasons for action and lacks the account that can explain how such an understanding can be adopted into the theory. Because this understanding of legal norms is borrowed from the state-based theory of Hart and because it relies on an account of legal systems, much like the one developed by Raz, it is unclear how this definition can work in a theory that rejects both the Hartian account of officials and the Razian account of legal systems as paradigms. Because of these problems we can say that the inter-institutional theory does not live up to the metatheoretical virtues that any theory should possess.

On the plus side, however, the inter-institutional approach offers us a new perspective on the nature of legality. With its conception of the interests and needs of the ordinary person who lives in the global village, the inter-institutional approach urges us to expand the study of legality beyond state borders. I argued that, apart from aiming to help an ordinary person make sense out of intricate and complex inter-institutional interactions, this approach promises us a pragmatic benefit by furnishing us with tools to understand the nature of legality on the inter-institutional level, so that we can not only detect it but can also set up legal orders in those contexts. So, I think that in developing

an account that can capture legality in such contexts as inter-, trans-, supra-, and super-state, we are making a significant step in understanding how to construct legal orders outside law-state frameworks. This, in turn, can prove to be highly valuable for advancements of Human Rights as well as many other global projects. For these reasons, the inter-institutional approach to understanding legality is a worthy contribution to legal theory.

Raz's approach to understanding the nature of legality does not give us such promises but the theory Raz develops is a better tool for capturing legality within the borders of law-states. Raz is explicit about his assumptions of universality and primacy of the municipal law when he sets out the triumvirate elements of legal systems. The conception of ordinary persons that he employs can be extracted from these assumptions. For him, an ordinary person is familiar with and primarily interested in operations of municipal legal systems. The claims to supremacy, comprehensiveness and openness, which according to Raz are necessarily made by legal systems, are derived in part from the expectations that regular persons have of legal systems. In part, these claims are also explained by other theoretical devices, such as the rule of recognition, which require the triumvirate in order to perform the function of individuating laws.

The adjudicative model is challenged by non-municipal contexts like the EU, as the analysis of Dickson's three alternatives showed. The main reason for this is that institutions that make up the EU do not sufficiently resemble the municipal legal systems. As I suggested in Chapter 2, it may be possible to tweak the triumvirate in order to create a more plausible conception of the EU as a legal order. For example, we can modify or eliminate the comprehensiveness and supremacy criteria. Alternatively, we can try to

develop an account of officials by means of which we can identify legal norms and which will be more reflective of EU institutions, and more generally, of the realities of the global village. To develop an account of the EU as a legal order we also need an account of officials that does not take the judges of municipal systems as the only or the most central cases of officials. As we develop this account, we should make sure that it is not vulnerable to the charges of circularity and indeterminacy that Culver & Giudice leveled against the accounts of officials in the Hartian type theories.

It is also important to emphasize one advantageous peculiarity of the adjudicative model – the individuation of legal norms. Since at least some, if not most, people who deal with law are concerned with the legitimacy and authority of legal norms, a legal theory that offers an account of distinguishing legal from non-legal norms is of value to these persons. Purchasing this account at the price of staying within the municipal context is more acceptable if we are not thereby forced to deny the existence of non-state legal contexts. If we accept that it is important to have a theory that furnishes us with tools for individuating laws, we need to accept the difficulties that this theory meets internally, such as problems of circularity and indeterminacy in the accounts of officials, and the difficulties we encounter when we extrapolate this theory outside its context. So, we should keep the adjudicative account because of its capacity to individuate norms.

However, we cannot afford to ignore the prima-facie legal phenomena that do not fit into the law-state framework. This is so not only because encounters of ordinary citizens with law-like phenomena outside this framework increase in the present day world, but also because it is an unjustified constraint on the nature and conception of legality that it can only exist within the boundaries of law-states. Given the realities of the

global village, it is important to have the tools for developing and identifying legality outside law-states, so that in principle human activities can be law governed in those contexts. For these reasons, we cannot be limited to law-state accounts, like the adjudicative one, when we theorize legality. As the result, and in the absence of a theory that would furnish us with tools to identify legal norms and provide us with a coherent explanation of legality in all contexts, we need to retain the adjudicative account as the most complete account we have, but always bear in mind that it provides only a single piece of the puzzle that is the nature of legality. The perspective that we need to adopt for working with other pieces should come from the inter-institutional approach.

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