

Unities of Law and the State

A thesis submitted for the degree of

Doctor of Philosophy

by

Li-kung Chen

Trinity College

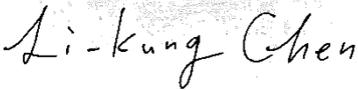
The University of Dublin

2021

Declaration

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the Library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.



Li-kung Chen

Li-kung Chen

30th September 2020

Summary

This thesis is a study of the composition of state and legal system and their relation, with a particular focus on their configuration as a group which can act as an agent. It seeks to contribute primarily to legal philosophy and constitutional theory by offering a new analytic framework based on the argument that state and law are each constituted by a distinct group agent, to improve the explanation of the ‘unity’ of the composite and dynamic realities that comprise respectively a state and a legal system. The thesis divides the analysis in four distinct and related parts: (1) the momentary unity of a state, (2) the momentary unity of a legal system, (3) the continuity of a state, and (4) the continuity of a legal system. The division tracks broadly the established debates in legal and constitutional theory to allow the thesis to formulate its distinctive arguments through engaging with existing theoretical accounts and frame its particular contributions accordingly, while integrating the diverse themes and standing debates into the structure of a sustained analysis of law and the state by way of group action.

The first part develops a new account of how a large complex group can act and applies the account to demonstrate that it is both possible and reasonable that a state acts as a group when carrying out some of its characteristic activities, namely legislation, executive acts, and election. Such an account helps rebut the sceptical charge that it is only fictitious or metaphorical to speak of a state as a distinct subject more than its particular components. Moreover, the particular setting helps test the theoretical models; against a recent line of functionalist argument, I find that unanimity, in the form of a joint intention or commitment, is indispensable, and serves as the basis for particular group acts which need not rely on unanimity.

The second part carries on the analysis of group action and formulates an account of legal officials’ integration into a group which acts jointly to maintain the operation of a legal system. The analysis finds that this model works better than others based on a weaker form of association to explain how legal officials distinguish their norms or practice from others’ when they live with multiple competing or overlapping municipal legal systems. Moreover, when applied to questions about the boundaries of a legal system, the analysis broadens the

existing explanations by explaining how a distinct legal system can share rules or law-applying organs with another legal system, while resisting the political sector's intention to determine the boundaries of the state's law, all by virtue of the law-applying officials' configuration as a group.

The third part contains an original analysis of the continuity of a state by extending the analysis of group action to a cross-temporal setting. It reveals that a state depends for its continuous identity on a standing group intention upheld by successive members, which is at no time disrupted by sudden radical change in membership. In opposition to major existing views, I demonstrate that a state can survive constitutional and legal discontinuities, and such capacity need not rely on a national community. The analysis also reveals that a state's discontinuity need not discontinue the fulfilment of its responsibility, when the membership of the new state (or states) much resembles the old.

The fourth part offers an analysis of the continuity of a legal system by way of legal officials' standing intention to maintain the continuous operation of a legal system. The discussion suggests that, in comparison with the reigning view in legal philosophy, which ties the continuity of a legal system to the continuity of the state whose legal system it is, my account better accords with such observations as that a legal system can be older than its state and that a state can implement a new legal system to terminate its past legal regime; I explain how the observed situations are possible by pointing to the legal officials' distinct joint self-understanding and practice.

The upshot of the series of analyses is that unity of law and unity of the state are grounded in the relevant people's capacity to act as a group agent. The group that constitutes the law and the group that constitutes the state are different. Sometimes the former is fully integrated into the latter, so that law is properly seen as an integral part of the state. But such complete integration is contingent. The relation of law and state permits different variations and degrees.

Word Count (footnotes and bibliography included): 77,794

Acknowledgements

For the development and completion of this thesis, I am grateful first and foremost to my doctoral supervisor Professor Oran Doyle, for his critical advice, tireless support, and model of scholarship. He always allowed me to explore different directions and make my own decisions, while spending countless hours discussing with me his thoughts on my drafts to ensure my exploration would not go astray. I am acutely aware how fortunate and privileged I was to have received such generous and caring supervision. For this, I could never overstate my gratitude. A part of the thesis was written also under the auspices of Professor Nick Barber during my visit to Oxford. His insightful comments on both details and the structure not only helped improve the arguments but also inspired many a new thought on the further development of the project. For his generous support and careful oversight, I register my gratitude. The thesis was finalised and completed during my visit to Academia Sinica. I thank Professor Cheng-yi Huang for his mentorship, not least throughout the year. For the examination of the thesis, I thank Professor Timothy Endicott and Professor David Kenny for their close engagement with my work and insightful comments which help sharpen some of the thesis's principal arguments.

The School of Law has been a supportive environment for my studies in Dublin, and generously awarded me a Postgraduate Studentship, which enabled me to continue my research with financial security and confidence. For such indispensable support I thank its faculty members and staff. I am also grateful to St Edmund Hall, Oxford, for facilitating my visit to Oxford and providing a wonderful community during the year, and to

Acknowledgements

Institutum Iurisprudentiae, Academia Sinica, for the PhD fellowship which supported me in completing the thesis.

I would like to express my gratitude for the opportunities I was given to present on and discuss my work at the Irish Jurisprudence Society, the Annual Conference of the International Society of Public Law, the Oxford Public Law Discussion Group, the Institutum Iurisprudentiae, Academia Sinica, and the Research Center for Humanities and Social Sciences, Academia Sinica. For the many invaluable comments and encouragements, I thank the convenors and participants. I am also grateful to the many people who read my drafts and gave me comments on various occasions; in particular, I thank David Campbell, Sonja Heppner, Ciara Molloy, and Leah Trueblood, for the feedback, conversations, and friendship.

I thank my wife Ruth Yunj-ju Chen for her scholarly advice, support, friendship, and wisdom over the years. I owe her untold gratitude in work and life.

Contents

Abbreviations	viii
Introduction: Unities of Law and the State	1
I. Unity and Unities	1
II. Law and the State	4
III. Momentary Identity and Continuity	9
IV. Group Agency	13
V. Outline	15
1. Momentary Unity of the State	23
I. Unity of Collective Actions	24
II. Integration of Large Complex Groups: Group Intention, Anonymity, and Representation	26
III. Explaining Group Actions of the State	46
IV. Unity in Legislation	48
V. Unity in the Executive Action	55
VI. Unity in Election	61
VII. Group Action's Dependence and Independence of Law	67
VIII. Strengths of the Combined Model of Group Action	68
2. Momentary Unity of a Legal System	71

Contents

I. Unity among Officials	72
II. Normative Self-Determination and Group Action	78
III. Unity of Laws	85
IV. Individuation of Legal Systems	97
V. Law's Territory	108
VI. The Relation of Law and the State	118
3. The Continuity of States	121
I. Aristotle's Solution and Its Problems	123
II. Variations on the Aristotelian Solution	129
III. Nationalism	143
IV. Continuity of a Political Group Agent	151
V. Succession and Continuous Responsibility	167
VI. Nearly Constitutional Identity	172
4. The Continuity of a Legal System	177
I. Old and New Problems with Kelsen's Account of Continuity	178
II. Continuation of Laws	190
III. Whether the Continuity of Law is a Function of the Continuity of the State	199
IV. Continuity of Law and Standing Group Intention	205
Conclusion	219
Bibliography	230

Abbreviations

AL	Raz J, <i>The Authority of Law: Essays on Law and Morality</i> (OUP 1979)
CL	Hart HLA, <i>The Concept of Law</i> (3rd edn, OUP 2012)
CLS	Raz J, <i>The Concept of a Legal System: An Introduction to the Theory of Legal System</i> (2nd edn, OUP 1980)
CEJF II	Finnis J, <i>Intention and Identity: Collected Essays Volume II</i> (OUP 2011)
CEJF IV	Finnis J, <i>Philosophy of Law: Collected Essays Volume IV</i> (OUP 2011) 431
CS	Barber N, <i>The Constitutional State</i> (OUP 2010)
GTLS	Kelsen H, <i>General Theory of Law and State</i> (A Wedberg tr, Harvard UP 1945)
JC	Gilbert M, <i>Joint Commitment: How We make the Social World</i> (OUP 2013)
LLF	Gardner J, <i>Law as a Leap of Faith</i> (OUP 2012)
NLNR	Finnis J, <i>Natural Law and Natural Rights</i> (2nd edn, OUP 2011)
NLI	Ekins R, <i>The Nature of Legislative Intent</i> (OUP 2012)
PO	Gilbert M, <i>A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society</i> (OUP 2006)
PRN	Raz J, <i>Practical Reason and Norms</i> (Princeton UP 1990)
PT	Kelsen H, <i>Pure Theory of Law</i> (M Knight tr, University of California Press 1967)

Introduction: Unities of Law and the State

I. Unity and Unities

The thesis seeks to contribute primarily to legal philosophy and constitutional theory by explaining how law and state are formed by groups which can act. The capacity to act, as in particular a singular agent, represents a kind of ‘unity’. This way of framing the question is helpfully suggested by Hans Kelsen, who writes,

Social community means unity of a plurality of individuals or of actions of individuals. The assertion that the State is not merely a juristic but a sociological entity, a social reality existing independently of its legal order, can be substantiated only by showing that the individuals belonging to the same State form a unity and that this unity is not constituted by the legal order but by an element which has nothing to do with law. However, such an element constituting the ‘one in many’ cannot be found.¹

The way in which Kelsen frames the analyses is also important. He identifies three separate but related questions, viz, the unity of a legal system, the unity of a state, and the relation of the two. And he argues that the unity of law is all that matters; a state has no unity other than the unity of the national legal system which operates as its legal system. There is there a unity of law and the state, in that the unity of law and the unity of the state represent but one and the same unity, which is of law.

The thesis disagrees with Kelsen, and seeks to prove that Kelsen’s charge can be resisted. As noted deliberately by the thesis’s title, law and state form two unities. There are different, separable facts that determine

¹ Kelsen, *GTLS* 183.

the status. Not only is there no single unity, the two unities also need not be coincidental. It means the following possibilities: a state exists and acts as a group independently of law (chapter 1); a legal system, by means of its officials, determines its operation in opposition to the political sector of the state (chapter 2); a state can continue to exist after its old legal system has been superseded by a new one in consequence of fundamental constitutional change (chapter 3); a new state comes into existence while its legal system is continuous with the regional legal system already in force before the creation of the new state (chapter 4); and so forth.

The thesis makes space for such varied possibilities by arguing that state and legal system are understood properly as a group which can act, and that the group which constitutes and acts as the state need not coincide with the group which constitutes and acts as the legal system. This is to say, the capacity to act as a singular agent at a time and over time is possessed by different groups. Kelsen considers but dismisses the possibility that a state has such capacity. For he thinks that it is unlikely that the whole population of a state can have an ‘identical state of mind’, i.e. a common will.² To be sure, unanimity is difficult to come by. But that alone does not warrant his response. The objective of theorising is to identify and elucidate the clearest possible case based on possible realities; the particular real-world case is thence understood by its resemblance and difference to the clear case. The clear case is idealised somewhat but not unrealistic or impossible. It ought to be built on an attainable state of affairs—attainable for practically reasonable people who recognise the possibility and need of such a way of organising their interactions. (Thus, the clear case is understood by me largely the same as the ‘central case’ according to the classical social theory.)³ It bears noting that such a method is no more unrealistic than Kelsen’s own solution of the problem, which grounds the unity of the legal order in an idealised conception of legal operations: all

² Kelsen, *GTLS* 184-5.

³ Finnis, *Aquinas* 42-51.

legal changes are made according to existing laws or else they destroy the unity of the normative system. This model courts the criticism that legal unity as conceptualised by Kelsen will be too easily disrupted by minor but not uncommon anomalies to sufficiently accord with the familiar legal experiences.⁴ In other words, it is not realistic enough.

The thesis also draws on resources which were not available in Kelsen's time. The philosophy of social sciences has brought much light on the special pattern of interpersonal intentions and actions which constitute a distinct kind of human action which underlies the common parlance and perceptions of groups. What many great thinkers in the past only presupposed as a possibility has by now been elucidated at the level of particulars.⁵ Such development allows us to entertain the possibility of a unity in common will more realistically than we could were we in Kelsen's position. On the other hand, there are still ongoing debate and unresolved questions about how one best conceptualises a group, in particular in the case of large complex groups. Indeed, a central question concerns how far unanimity among persons is constitutive of a group composed by such persons. Hence, the thesis not only draws on the ideas and analyses offered by the theory of groups (sometimes referred to as social ontology) to improve explanation of unities of law and the state, but also contributes to the social ontological debate over the composition of a large complex group by applying and assessing rival accounts in the particular contexts of state and legal system.

The thesis comprises four chapters according to four distinct but related subject matters: (1) momentary unity of a state, (2) momentary unity of a legal system, (3) continuity of a state, and (4) continuity of a

⁴ See chapter 4 for discussion of some such issues.

⁵ Richard Ekins notes that Aquinas 'saw clearly that groups act jointly', as did Hobbes, Locke, and Rousseau; the 'contribution of modern social ontology is to consider with care the pattern of intentions that makes intelligible out joint action'. 'Facts, Reasons and Joint Action: Thoughts on the Social Ontology of Law' (2014) 45 *Rechtstheorie* 313, 315-6

legal system. Each chapter explores the problem of unities of law and the state in its particular context and applies and broadens the concept of group action accordingly. Together, the chapters reveal the varied ways in which officials and citizens can organise themselves into groups to cooperate or compete with each other, thereby giving rise to various possible relations between a state and its municipal legal system.

II. Law and the State

Reflecting on the relationship between law and the state, Neil MacCormick recognises a close and nearly inevitable correlation between the two, as the state needs law to realise its typical functions. However, he notes, it is a mistake to draw the further implication that there is ‘straightforward identification of law and state’; taking into account the possibility of non-state legal systems and the customary basis of every state legal system, MacCormick thinks it better to recognise ‘imperfect identity of state and law, overlap without complete identity’.⁶

Imperfect identity suggests partial overlap. It implies that when and where the two are at one, and when and where they part, will likely have to be determined in each particular case. The thesis draws attention to one particular respect, where there appears strong identification of law and the state. It is when a particular state and a particular legal system are understood as a single, distinguishable object. For both they, as Aristotle puts it, are a composite which comprises many parts.⁷ It is curious how such many parts are combined to make up a single state or a single legal system. It is in the explanation of such formation that law and the state have been considered inseparable by many since Aristotle.

⁶ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 25.

⁷ *Politics* 1274b38.

Such a view is most straightforwardly asserted on the question of continuity. The continuity of a legal system, John Finnis argues, is a ‘function’ of the continuity of the society whose law it is.⁸ With Finnis, Joseph Raz claims also that the ‘identity of legal systems depends on the identity of the social forms to which they belong’,⁹ and that ‘an end to the existence of a state is the end of its legal system’.¹⁰ Why so? For a legal system on its own, Finnis explains, has no identity that can persist; there are only successive sets or aggregates of rules, in a constant flux. The dominant analytic jurisprudential position is in opposition to the classic proposition made by Aristotle, that a city-state maintains its identity by virtue of the identity of its constitution—the identity as a monarchy, an aristocracy, or a constitution (i.e. the successful counterpart of a democracy). Grounding a state’s identity in its constitutional form anticipates the latter legalistic argument that constitutional identity grounds the identity of a legal system which in turn determines the identity of a state. Whatever their disagreements, rival views converge on the idea that the identity-grounding facts for a state and a legal system are the same.

In relation to identity at a particular moment, however, the explanations permit greater possibilities. Among theorists who conceptualise the state as a group that can act as a single agent, there are different views about how law or law-related social rules bear on the formation and organisation of such capacity. Nicholas Barber argues that a state is a group that can act, or a ‘social group’, if people are bound by rules which prescribe common objectives and standards of behaviour that apply to and thereby delineate a group.¹¹ Such rules can be either codified as legal or constitutional rules, or followed as customary, social ones; the

⁸ Finnis, *CEJF* IV 428.

⁹ Raz, *CLS* 189.

¹⁰ Raz, *AL* 99.

¹¹ Barber, *CS* 67, 109-10.

point is that they are actually practised by the members of the state, so that the rules truly embody members' shared intention.¹² On Barber's account, rules are constitutive of a group.¹³ Richard Ekins, by contrast, does not think that law and rule figure in at the most fundamental level; unity as a group agent does not depend on rules in the first place.¹⁴ Persons form a group when they jointly intend to act for a given end; such intention is a disposition, not rule. A 'free people' is 'formed by, and consists of, persons who intend to secure their common good together'.¹⁵ Such intention serves as the basis for adoption of law for common good. In a related vein, Margaret Moore argues that a politically self-governing people is a collective agent if relevant individuals identify one another as part of the common political project, which identification constitutes a joint intention and need not be based on existing 'institutional demarcations'.¹⁶

Whatever their differences, all views recognise members' joint intention as crucial. A state cannot act as a group if members do not intend to act as one. Whether there is a rule already at this point does not affect the agreement on the necessity of joint intention. To ascertain such intention need not presuppose any pre-existing legal system. What needs further explaining is how the relatively simple unanimity at the fundamental level can help sustain the unity of the further intentions and actions, when a state, through officials or other members, carries out the many particular acts that one wonders whether it can really perform. This

¹² *ibid* 110.

¹³ Tony Honoré advances a similar line of argument about the relation between rule ('prescription') and group in *Making Law Bind: Essays Legal and Philosophical* (OUP 1987) 34 ff.

¹⁴ Richard Ekins, 'The Constitutional State' (2012) 128 LQR 308, 310. Commenting on Barber's account of social groups, Ekins writes, 'To ground jointly intentional action in social rules is to put cart before horse, and to insist that external rules settle group action is to fail to attend to how persons jointly reason and act.'

¹⁵ Richard Ekins, 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 170.

¹⁶ Margaret Moore, *A Political Theory of Territory* (OUP 2015) 50, 57.

is to say, while it is true that a state can be properly seen as a group if members have joint intention to act as one, it is a separate question whether the state does exhibit such capacity on the particular occasions when its characteristic functions are performed by officials or other members.

Ekins's discussion focuses on the operation of the legislature and citizen cooperation with it, for, suggests he, '[t]he way to explain the rule of a free people is to explain how the people jointly exercise (lawmaking) authority'.¹⁷ Important as legislation is, it is not the only characteristic respect of state activities where a state can act as a group. Some other characteristic activities, such as those of the executive and the electorate, are yet to be accounted for. In particular, there is a tendency to develop an aggregative explanation for citizen activities such as voting.¹⁸ It seems to imply that even if a state can act as a group, the democratic state does not when it elects its officials. There are important truths in the claim, but also interesting details to explore about how voting in an election involves and combines both group action of citizens and other kinds of interactions.

Law, on the other hand, is not obviously state-dependent for its unity at any particular moment. Dismantling the early view that there can be a unifying internal relations among norms, Raz argues for the law-applying officials' recognition as the true unifying factor;¹⁹ the unity of the officials thus become crucial—law-applying officials ought to work as a single group or for a single system, so that the norms recognised by them can possibly all be part of a single system. To account for the requisite unity among officials, some, such as Scott Shapiro, argue for legal officials' formation as a single group agent,²⁰ which argument is resisted by others,

¹⁷ *ibid.*

¹⁸ *ibid* 172.

¹⁹ Raz, *CLS* 190 ff.

²⁰ Shapiro, *Legality* (Harvard UP 2011) 204 ff. See other arguments in the same general direction: Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach*

such as John Gardner, who finds the unity of officials a much more random, less deliberate, phenomenon.²¹ In any case, the debates point to a probable position that the unity of a legal system has a separable cause or ground from the state. The unity of legal officials' practice is often developed and conducted not entirely under the control by and in line with the broader structure of the state.

The thesis carries out the analysis further and discovers that the state and the legal system are two fundamentally separable groups. In terms of states, the unanimity at the fundamental level is a simple joint intention to act as a singular group; law is not constitutive of such intention. I extend existing analysis from legislative action to the executive and electoral activities, to demonstrate the possibility and need for joint action in the performance of such functions.

For law, I bring forth a case for understanding unity among officials in the form of a group agent, under the particular condition that legal officials need navigate a complex normative terrain where multiple legal systems interact and compete with each other. The analysis suggests that a legal system becomes a self-determining body by virtue of its law-applying officials' practice; this opens up space for different possible ways in which the legal system can interact with the broader political structure. In some cases, legal officials are well integrated into the broader framework of the state, so that the law becomes part of the state, and legal officials are properly viewed as a sub-group of the state. In others, the integration is partial, such that the law may part from or compete with the other, especially the political sector of the state, represented by the legislative or the executive organ. In such cases, the unity of a legal system is best

to *Legal Theory* (OUP 2003) 96-9; Christopher Kutz, 'The Judicial Community' (2001) 11 *Philosophical Issues* 442.

²¹ Gardner, *LLF* 131.

understood on the basis of the legal officials' formation as a distinct group apart from the state.

III. Momentary Identity and Continuity

Momentary unity or identity concerns how the many parts form a whole at a time. Cross-temporal unity or identity—continuity for short—concerns how the many parts form a whole over time. While time appears what distinguishes continuity from temporal identity as a separate question, the true variant is change—change in the composition or properties of the object whose identity is in question.²² Time is only a proxy for change, which necessarily occurs in a temporally successive fashion. It will not require a different explanation of continuity from that of momentary identity, if no change occurs to any component part of the object concerned, however much time has passed by. This is to say, if a given thing is always in complete stasis, its momentary and continuous identity will be one and the same phenomenon. If a thing changes, as state and law normally do, the two dimensions of identity will need explaining separately. However, one can expect the two explanations to be fundamentally connected somewhat—what helps ground a thing's identity at a time will likely help ground its identity over time. The identity-grounding fact, in other words, is continuous while applying in different settings.

The subject matters of the study are state and law. Both their momentary and continuous identity are not obvious. The thesis seeks not only to explain their unity or unities at a time and over time, but also to elucidate the connection between momentary and continuous identity, to reveal how, if any at all, the fact that unifies a state or a legal system at a time continues to unify it over time.

²² Hence, the question is indeed often framed as how an object persists through change which involves 'incompatible properties': Sally Haslanger and Roxanne Marie Kurtz, *Persistence: Contemporary Readings* (MIT Press 2006) 1 ff.

Existing scholarly discussions on either states or law have supplied no clear consensus on such connection. In the case of states, Aristotle's classic account recognises a clear connection, as he considers a city-state's constitutional form to determine the city-state's identity at a time and over time. But this view has become much less popular in recent works, especially as Kelsen's argument for the juristic unity of a state has been refuted and no better solution than Kelsen's in this vein has been offered.²³ The more common view today welcomes diverse causes of continuity separately from that of momentary unity. Barber's account represents this standard view. He maintains that a state is a social group that can act. The group is constituted by rules which determine the group's objectives and organisation and members' corresponding intention to act per such rules; the upshot is that the state can act as a singular agent thanks to the suggested composition.

However, the continuity of the state is not explained in the same way, viz. that a state can act continuously as a singular agent; rather, Barber turns to a different and more diverse set of factors. Rejecting Kelsen's approach that tries to ground continuity in a single element, Barber argues that 'the continuity of the state comes from the intertwining of a number of different features: members, institutions, territory, and rules'.²⁴ Eventually he identifies as relevant the extent to and manner in which change to the suggested features take place. The short point is that the continuity of the state is not explained particularly by reference to its nature as a social group. It seems to me a missed opportunity that

²³ For that matter, the ancient criterion of identity is not accepted by modern international law, per which changes of government, even revolutionary ones, are only considered 'internal' and effect no change in state identity. See e.g. James Crawford, *The Creation of States in International Law* (2nd edn OUP 2007) 678-9. That said, some international lawyers are less sympathetic to the modern distinction between government and state, and argue for a simpler doctrine based on change of governments, which effectively resembles the ancient criterion. An exemplar of this view is DP O'Connell, *State Succession in Municipal Law and International Law*, vol I (CUP 1967).

²⁴ Barber, CS 141.

continuity is not explained on the basis of the capacity to act, over time, as it is likely to be an important condition, even if not the only one. The thesis seeks to substantiate this hypothesis.

As to discussions on law's unity, there are quite different approaches in legal philosophy. Some—notably Joseph Raz—have treated momentary legal system and continuous legal system as not only separate subject matters but also distinct phenomena, resulting in substantively different explanations of the two. In Raz's ground-breaking discussions on the composition of a legal system, there is a marked disparity between his treatment of a legal system's continuity and of its momentary identity: while he explains momentary unity with official recognition, he does not suggest a possible similar explanation for continuity. Raz's anticipation of a possible explanation of the latter suggests the need to take into account not only 'jurisprudential or legal considerations' but also considerations 'belonging to other social sciences'.²⁵ 'Not wishing to trespass on other fields',²⁶ Raz does not develop an analysis of continuity. That the explanation of continuity of a legal system will require such multi-disciplinary operation, so much more complicated than the treatment of momentary identity, is due to Raz's thought that the continuity of a legal system is ultimately a question of the continuity of the social form, which thought he shares with John Finnis.

Finnis suggests a more cohesive explanation for continuity and momentary identity. On his account, both are grounded in the 'continuity and identity of the society in whose ordered existence in time the legal system participates'.²⁷ In Finnis's view, law in itself, if 'considered simply as a set of rules', has '*nothing* to give it continuity, duration, identity through

²⁵ Raz, *CLS* 189.

²⁶ *ibid.*

²⁷ Finnis, *CEJF* IV 428.

time'.²⁸ 'Legal,' Finnis claims, 'like pre-legal, social rules have no common identity or basis of existence in time save that of the group of human beings which accepts them'.²⁹ This seems to entail a rather radical proposition that the continuity and momentary identity of a legal system are merely a reflection of the continuity and momentary identity of a society or (as Finnis more precisely means by 'society') political community; thus, Finnis does not actually argue for a connection between continuity and momentary identity of law, but the unreality of them. Moreover, while referring the questions to the other fields, Finnis does not go on to explain how the identity or continuity of a society is to be explained or determined. Cannot one wonder whether just as law comprises only constantly changing aggregates and therefore has no identity, so too does a state have no identity? Finnis's discussion in the final analysis not only eliminates continuity and momentary identity as distinct legal phenomena, but also leaves unanswered whether a state can really exist or persist with an identity, thus pointing to further analytic work to be conducted.

The thesis seeks to substantiate the following reservations about the existing accounts. First, it seems too quick of Finnis to conclude that unity of law either at a time or over time cannot be ascertained on the basis of distinctively legal facts. If facts about legal officials, in addition to legal norms or rules, are taken into account, new opportunities for accounting for continuity of law are likely to come up. Secondly, the difference between momentary identity and continuity seems exaggerated. If law-applying officials' practice can help explain the identity of a momentary legal system, it is worth considering whether it will also be able to help explain the identity of a continuous one. Thirdly, regarding the continuity of a state, it is curious that the analysis of the state as a group which can act had not been persistently carried out in the cross-temporal setting to

²⁸ *ibid.*

²⁹ *ibid* 429.

reveal the conditions of the state's continuity, given that such analysis in the momentary setting has revealed many important truths. Hence, the thesis seeks to extend the analysis of group action from momentary unity to continuity to produce a cohesive explanation of a state's identity both at a time and over time.

In all the suggested directions, the intended analyses note the probability of there being a group that can act. The elucidation of the nature of such a group also makes up a principal part of the thesis. In the next section, I briefly discuss the major problems and debates relating to groups which the thesis needs to address and engage with.

IV. Group Agency

Group agency is the capacity to act as a singular agent though many are acting. A group agent means a group which has such capacity. I do not strictly distinguish the more technical category of group agency from the more general category of the capacity to act; in the thesis, I use group action and group agency interchangeably to refer to the multiple persons' capacity to act as a singular agent.

The primary question about group agency which concerns the topic of the thesis is this: how a state can be a group, given its size and complex composition. It seems more plausible that officials act as a group for some particular function, rather than the state as a whole. Indeed, even the second possibility is not straightforward; the legislative assembly, for example, as Ekins's work demonstrates, is recognised as a group agent only after strenuous argument against a diverse body of sceptical views.³⁰

If the political community as a whole cannot act, a version of the so-called 'state scepticism' might have to be recognised as correct: many of our common expressions are at best a metaphor or a shorthand reference

³⁰ Ekins, *NLI* 15 ff.

to the operation of particular officials or official organs.³¹ Is it possible for one to resist the sceptical charge and truly mean it when saying a state does such-and-such things—makes a law, signs a treaty, elects a leader, votes for independence?

I think it is, but it is not likely to be easy. The standard model of group agency conceptualises an egalitarian and voluntary association; action turns crucially on continuous unanimity among participants. This would be a straightforward rejection to the possibility of a group like a state. Fortunately, there have been efforts to loosen and modify the model for larger and more complex social settings. There is interesting and important disagreement emanating from such efforts over how the standard simple model ought to be adjusted. One, exemplified by Scott Shapiro,³² forgoes the requirement for unanimity completely. On this account, it is immaterial that people join their intentions; they can act on whatever intention and for whatever reasons. They form a group insofar as they let their conduct coordinated by some common plans and planners. Another, represented by Margaret Gilbert and Richard Ekins,³³ reserves the requirement for unanimity, while loosening the group action's dependence on it. That people are united in a common intention remains the central distinct form of groups, but a crucial quality of such unanimity is to allow and enable members to act in the absence of unanimity on particular occasions. Despite the relaxation, the second still requires a much more demanding level of integration than the first.

Moreover, it is unclear whether a state can be so integrated. Gilbert discusses a particular situation, where citizens are united in their agreement

³¹ Leslie Green, *The Authority of the State* (OUP 1990) 64-8. Alternatively, they reflect a kind of 'working personification' as suggested by Ronald Dworkin in *Law's Empire* (Harvard UP 1986) 172-5.

³² Scott Shapiro, 'Massively Shared Agency' in Manuel Vargas and Gideon Yaffe (eds), *Rational and Social Agency: The Philosophy of Michael Bratman* (OUP 2014) 257.

³³ Gilbert, *PO* 125 ff.; Ekins, *NLI* 57 ff.

with politicians' conception of political unity;³⁴ in most, standard situations, citizens do not participate so closely, and the explanatory main task is to account for such *indirect* role of non-officials, while showing that they exhibit still the distinct form of group action. This is when the thesis intervenes and seeks to offer a distinct account.

In the last analysis, both approaches offer a distinct form of collective activity that could characterise the state and other large complex institutional settings. They represent two different opportunities, two different ways of organising social and official interactions. Eventually they are evaluated by the following criterion: the reason for which group action is worth one's attention as a distinct response to the need for collective action. Forming and joining a group represents a particular kind of commitment which one can have in relation to others; it involves the idea that the relationship is special and gives us distinct reason for action. Shapiro's approach is rejected in the thesis in part because it cannot properly accord with and account for this special quality of groups.

The minimum requirement for unanimity also entails that it will be much more difficult to act as a group for a group like a state. It should be difficult, and openly so recognised. Other kinds of coordination can be easier, but do not make a state a group agent. One should resist the temptation to solve the difficulty by transforming group agency into a much less demanding form of action; it is only candid to recognise the real challenge lying ahead of any large complex group which wants to act as one.

V. Outline

The thesis comprises four substantive chapters. They address in turn (1) the momentary unity of a state, (2) momentary identity of a legal system, (3) continuity of a state, and (4) continuity of a legal system. State and law are

³⁴ Gilbert, *PO* 353-5.

discussed pairwise to accentuate their relation, viz. contingent identity, that the thesis wishes to demonstrate.

In the first chapter, I explain how a state acts as a singular agent on a particular occasion. The chapter starts by developing an appropriate model of group action with particular attention to the ongoing debate over the question as to how and how far unanimity among participants is essential to group action for in particular complex or massive social settings. I examine rival lines of argument and maintain that unanimity in the form of group intention and in particular joint commitment is indispensable. It leads to the need for identifying a unanimous basis for non-unanimous acts; in the light of Gilbert and Ekins's explanations on possible modes of group action alternative to unanimity, I develop a new model that draws on and combines their respective strengths, thus readying the model of group action for application to the state. My strategy to explain a state's integration as a group agent is to focus on the particular characteristic functions of the state, and consider whether a state exhibits group agency (i.e. acts as a singular agent) in carrying out those familiar activities. The chapter picks out the following activities in particular: legislation, the executive acts, and the election, which are meant to be representative rather than comprehensive. In all three cases, group action depends on unanimity among all members—officials as well as citizens—on the most general level, which grounds a group intention to perform a particular function and permit modes of action that does not require unanimity of all; a particular act, performed by some individual official, counts as an act of the state by virtue of its connection with such general standing group intention. On the other hand, election differs from the other two, in that its central features comprise both group action and other kinds of collective interactions, and citizen action has a distinctively constitutive role, compared with their supplementary role in the other two cases.

The analysis recognises that a state normally needs law to organise its action if the state is configured as a group agent. But the unanimity at the foundation of the group action exists first and foremost in the form of the political community's disposition rather than positive law.

Chapter 2 explores how legal officials form and act as a group to maintain the operation of a legal system and in so doing give the legal system a unity in action. The analysis engages with the traditional or standard jurisprudential approach to the composition of a legal system in two particular respects. First, the question about the unity of a legal system has long been framed as a question about the identity in the content of a legal system, as how an aggregate of rules is united into one. I broaden the question to consider not only the content of the legal system, but also its officials, the people who act for and on behalf of the legal system. Secondly, in conceptualising legal officials as a group agent, I argue for a strong form of official integration, in opposition to existing views which recognise as sufficient to the operation of a legal system weaker forms of official unity such as convention and planning. I support the argument for the need of strong official integration by explaining the insufficiency of weaker forms in the presence of multiple competing or overlapping legal systems; moreover, I reinforce the argument by demonstrating the explanatory advantage when applied to the classic questions about the boundaries and individuation of legal systems. Legal officials' group intention, I suggest, helps sharpen the criterion by which rules and institutions of one legal system are distinguished from rules and institutions of another, and the criterion by which a particular legal rule or institution's native legal system is identified, when it appears that the rule is recognised and applied by the legal institutions of multiple legal systems. Such intention can be formed distinctively by and for the legal officials and especially the law-applying ones, so that it may not always coincide with the intention of the other sectors of the state. It follows that the status of a rule can differ according to the perspectives of the different subgroups of the state. Also, it helps explain how a territory of a state does not

necessarily determine the jurisdiction of its municipal legal system; multiple states can share a common municipal legal system without sharing a common political identity. Hence, I conclude the chapter by reflecting on the dynamic nature of the relation of law and the state, calling into question the popular thought that the identity of municipal law is somehow bound up with the identity of the state whose law it is.

Chapter 3 turns to the continuity of a state. The analysis of continuity is conducted as an extension of chapter 1's analysis of the momentary unity of a state. The chapter starts by examining existing explanations to identify problems that will be better solved if the purported account is accepted. In particular, I identify two major lines of argument, viz. the Aristotelian view and the nationalist view. The first represents an institution-centred approach, including Aristotle's original argument that a city-state depends for its identity on its particular constitutional form and the modern variations on the idea of constitutional identity. This line of thought does not recognise the political community's capacity to act and transcend institutional discontinuity; this becomes a major weakness, especially as chapter 1 has demonstrated that a state can act by virtue of its members' group intention independently of positive law. The second line of argument moves closer to the idea that a state, in the form of a national community, can act, and thus create constitution and other political institutions. Closer examination shows that there is no sustained analysis in leading nationalist writings on how a national group can act or how such a group can persist as a single continuous group through time. Indeed, it is questionable whether a group that can act and persist needs to be a national group. My analysis suggests not. A group constitutes a state if it carries out the characteristic activities of the state; continuity of a state is explained by how such a group persists. My answer is thus. Just as members' general, standing group intention to maintain the state's operation grounds its capacity to act on a particular occasion, so too is such an intention crucial to the state's continuity; a state continues, if people at different times all join the standing group intention as they

become members of the state. To maintain the identity of the group intention, the successive members' self-identification matters: the minimum condition requires that they must not conceive of themselves as forming a new state.

While members' intention helps ground continuity as it does for momentary unity, I consider how the group intention alone can be insufficient. For radical change in membership will sometimes rupture a state's identity, even when a standing intention can still be found among people who seek to continue the state. A second condition is needed to supplement the first in order to accommodate uncontroversial cases of discontinuity. However, it is also of primary importance in other respects. First, it accords with and accounts for the observation that sometimes it seems irreducibly indeterminate whether a state remains continuous or has become different in some situations: for example, if a state splits evenly in two, and both subsequent states claim to be the original, it would appear impossible to decide non-arbitrarily which one of them is the original. Indeterminacy in this and other cases, I say, is due to the quantitative nature of the second condition.

Secondly, member continuation helps answer the question about continuity of responsibility in the face of discontinuity of the state. On what ground should a new state be obliged by an old defunct state's obligation to pay debt, fulfil a contract, make amends for its wrongdoing, etc.? Some worry that discontinuity could allow a state to dodge its responsibility too easily. I say that the worry can be alleviated, if responsibility is tied not only to the state but also to the people whose action grounds the state's action. These people need to act as a group to fulfil the putative responsibility. It follows that the original group is not the only eligible one. If the original group can no longer be held responsible because it has been dissolved, it can be as justified that these people's new group should be held responsible in the former's place, on the ground that it is composed by the same set of people.

Chapter 4 considers the continuity of a legal system. Following chapter 2's discussion on a legal system's momentary unity on the basis of official group action, I explain the continuity of law by means of the persisting unity in officials' group action to maintain the continuous operation of a legal system. This is a novel approach to the subject matter, as existing approaches seek continuity either in the content of the legal system or extra-legal facts. I start by examining Kelsen's account with particular attention to possible modification which may enable it to rebut one of the popular critiques that the Kelsenian model cannot recognise creation of a new legal system, thus discontinuity of the old, by means of lawful devolution. The issue concerns whether it is possible to supplement Kelsen's master principle of legal continuity, viz. validation by a common constitutional origin, with a further principle which recognises the appearance of a new constitutional origin while no rupture to the chain of validation occurs. Does the addition really supplement the first principle rather than negate and displace it? In the situation where a new constitution is created through a process authorised by the old, it is unclear how the modified Kelsenian account should classify the change. Is there a new constitutional origin, or just a development based on the old one? I think that both cases are possible. But the problem with the Kelsenian account is that it has no space for the criterion for distinguishing between them, because the criterion is outwith the internal relations of the rules that constitute the legal system.

Aware of the problems with Kelsen's legalistic account of continuity, Finnis and Raz have sought an alternative view at the opposite extreme, seeking continuity-grounding conditions in wholly extra-legally facts, leading to the view to the effect that the continuity of a legal system is only derivative of the continuity of the state. The reduction of law to the state in terms of continuity faces its own challenges. First, it cannot recognise the continuity of the existing legal system in the event of lawful devolution. But there seems a live probability that the same old legal system can persist and coexist with successive states. Secondly, it cannot

recognise the creation of a new legal system if it is the same state which effects such legal transition. However, it seems plausible to think that it is well within the capacity of the state to retire its old legal system and implements a new one which introduces new constitution, statutes, and judicial appointments. Such challenges gesture towards what I think is the mistake of tethering the continuity of a legal system to the continuity of the state. I thus prefer a different approach: treating the continuity of law as a distinctively legal phenomenon.

I develop an alternative account of the continuity of a legal system that grounds continuity in legal officials' standing group intention and action over time. My account makes sufficient space for the cases which the existing views have had difficulty accounting for, and reinforces the common intuitions about such cases with explanation based on relevant agents' intention towards the legal system whose continuity is in question. The continuity of a legal system is separable from the continuity of a state; the two have a much more dynamic relation through time than previously recognised.

The upshot of the chapters' arguments is that unity of law and unity of the state are grounded in the relevant people's capacity to act as a group agent. The group that constitutes the law and the group that constitutes the state are different. Sometimes the former is fully integrated into the latter, so that law is properly seen as an integral part of the state. But such complete integration is contingent. The relation of law and state permits different variations and degrees.

Momentary Unity of the State

This chapter concerns the question of a state's momentary unity, meaning how the various parts and components of the state, in particular the people, are to be held to constitute a state as a singular unit at a particular moment. I develop an explanation by arguing that a state can act as a group agent in performing some of its characteristic functions, with a particular account of group agency I defend and develop in the chapter and will also use throughout the subsequent chapters. I consider rival arguments about group agency with a particular focus on large complex groups, which a state usually is; against Scott Shapiro's argument for a planning-oriented conception, I contend that group agency is always grounded in members' unanimity in the form of the special intention to act as a distinct group, and develop a model of group action for further explaining the characteristic state activities by drawing on and combining the respective strengths of Margaret Gilbert's and Richard Ekins's accounts of group action. The analysis then recognises a close correlation between a state and its law if the state is configured as a group agent. But such correlation, I argue, does not entail the unity of the state and law as one.

The structure of the chapter is as follows. Section I specifies the unity of collective actions as the relevant kind of unity to explain. Section II examines rival theories of group agency and argues for a model that combines elements respectively from Gilbert's and Ekins's accounts. Section III to VI seek to substantiate the claim that a state is a group agent; applying the purported model, I demonstrate how a state can act as a

group in carrying out the characteristic activities of legislation, the executive part of government, and election. Section VII considers how a state's group action is normally dependent on law but need not presuppose it in the first place. Section VIII reflects on the advantages of combining the apparently rival approaches to group agency.

I. Unity of Collective Actions

A state is a kind of human activity. States are often said to take actions. A distinction is thus maintained, as noted by Aristotle, between acts of the state and acts merely of the ruler.¹ Much of the important realities of the state comprise or are created by actions apparently taken by the state, such as the creation and application of laws, negotiating a treaty, deciding on a policy, electing a leader, and more abstract ones such as committing wrongful acts against oppressed communities and apologising for such acts. Such characteristic functions or activities are made up of actions of the state or more precisely people acting on behalf of the state. States have their distinctive, active reality as a kind of coordination of actions, an 'order'.²

That we can explain that the state acts as a group opens up one important way in which we can answer Hans Kelsen's challenge, explaining how the state has 'unity', independently of the unity of the legal system.³ Kelsen argues that it is impossible to rely on a purely social ground for unity: we cannot explain how the relevant materials are unified into one distinctive state unless we presuppose the unity of the legal order or system as the unifying form.⁴ An account that shows that in the many

¹ *Politics*, 1274b32.

² More precisely, as John Finnis explains, an order or 'unity of order' as opposed to 'organisms or substances'. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (OUP 1998) 23-9.

³ Kelsen, *GTLS* 181-8.

⁴ In so arguing, Kelsen reinforces Aristotle's thesis that an aggregate of persons forms a single city or state by virtue of the fact that they share a constitution, i.e. the particular form of the organisation of government. *Politics*, 1276b1, 1278b6 (Aristotle's concept of

familiar circumstances, the state is capable of acting as a unified group agent, fundamentally by virtue of members' sharing an intention, not by virtue of positive law, I argue, will serve as a rebuttal to Kelsen's charge.⁵

I seek to demonstrate that unity of collective actions, or the state's active unity, supplies a sufficient ground for recognising the unity of the state, irrespective of whether it is the only possible kind of social unity, while I follow John Finnis in considering it the primary and perhaps the only kind of unity.⁶ I do so by showing that, if we can explain that people act as a distinct group, we can answer most of the important questions about unity: people can share a common 'will' and are thus identified; legal and other official actions can be traced to a single acting (group) agent, thus making them all actions of the state; a state can interact with other states or communities and bear rights, duties, powers, etc. at the international level. In other words, a theory of group action can help explain how an aggregate of people can act as a singular group, in much the same way as a single person acts, to carry out the characteristic functions or activities of the state. Moreover, it is indeed part of the conditions of judging a particular theoretical account's success, as I will argue, that it can distinguish action taken by the state as a group agent not only from acts merely of the ruler or her agents, but also from other forms of collective actions which are influenced but not taken by the state.

This chapter addresses group action primarily for and in a particular event, thus the unity concerned is only momentary. Non-

a constitution, which is fundamentally the same as how we understand a constitution today.)

⁵ A full rebuttal should include both momentary and non-momentary unities. The present chapter offers only the former.

⁶ Finnis grounds a group's identity no more and no less in its action: 'a community's reality, its "personal" character, is fully manifested and instantiated only by its corporate, collaborative, or cooperative *action*'. Finnis, *CEJF* II 94. Also, *CEJF* II 83: 'What distinguishes the active members of a group is that they coordinate their actions in the pursuit of a common enterprise[.]'

momentary unity then involves group action in various and successive events conducted as by a single agent. This is the subject matter of chapter 3, on the continuity of states.

II. Integration of Large Complex Groups: Group Intention, Anonymity, and Representation

My starting point here is that massive or complex groups such as a state can exhibit a kind of group action. The question concerns how they can do so, and in particular how, if at all, they differ from the small or simple groups. Examining recent or leading discussions on the subject, I identify and advance three propositions. First, all members of large or complex groups, to be members, need to form a distinct kind of ‘plural’ intention on the basis of unanimity, as they do in small or simple groups. In this respect, large complex groups are continuous with small simple ones. Secondly, they can form such intention in a different way from that in small and simple settings; in particular, they need not know and communicate with each other member personally. All that members need do is to conceive of an abstract group subject, such as the state *S*, and to intend that *S* acts, together with all other members of *S* who they broadly know intend likewise. Thirdly, the group can rely on authorisation and representation to conduct group action without every member having to act on every occasion. It requires the group to devise its general intention or plan to allow agents or representatives to act on its behalf and recognise their authorised action as the group’s own act.

The first proposition is defended against the particular development led by Scott Shapiro, who argues that group agency as a distinct kind of coordination can be achieved by most of the participants acting on the ordinary kind of personal intention, if they act conformably with one another under a coordinative scheme devised by some planning agents who intend that the collective so acts. I argue that this account is insufficiently discriminating, and misses out the important insight about the reason for

which group action is importantly maintained as a distinct form of coordination from the other forms of coordination.

The second proposition is advanced by adopting Margaret Gilbert's analysis of large-scale groups. It is crucial that Gilbert's account shows a plausible possibility that members of a large group can form a group intention or joint commitment even if they only know each other tacitly as members of such-and-such population P.

The third proposition is advanced by adopting Gilbert's distinction between basic and derived joint commitments, and also Richard Ekins's analysis of standing and particular group plans. On the one hand, the group's standing plan is expected to set up a framework under which particular members are enabled to plan and act on behalf of the group on particular occasions, to reduce a group's dependence for its action on unanimity. On the other hand, this introduces representation as a distinct element, and certain artificiality, into the derivative kind of group action.

A.

Scott Shapiro pursues a functionalist explanation of group agency or shared agency. He thinks that a full-blown functionalist analysis—he terms 'Functionalism about Shared Agency' (FSA for short)⁷—will require one to dispense with the idea of group intention understood as a special kind of intention. As per Michael Bratman's formula, group intention comprises a pattern of concomitant, interlocking individual intentions which is characterised schematically as follows:⁸

(1)(a)(i) I intend that we J.

⁷ Scott Shapiro, 'Massively Shared Agency' in Manuel Vargas and Gideon Yaffe (eds), *Rational and Social Agency: The Philosophy of Michael Bratman* (OUP 2014) 257, 274-6. Henceforth, *Agency*.

⁸ Shapiro, *Agency* 263, citing Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (CUP 1999) 100-2. Henceforth, *Intention*.

- (1)(a)(ii) I intend that we J in accordance with and because of meshing subplan of (1)(a)(i) and (1)(b)(i).
- (1)(b)(i) You intend that we J.
- (1)(b)(ii) You intend that we J in accordance with and because of meshing subplan of (1)(a)(i) and (1)(b)(i).
- (2) It is common knowledge between us that (1).

It is Shapiro's novel contention that group intention, understood as above, is dispensable to group agency, and especially to the one he calls 'Massively Shared Agency' (MSA for short) which bears the features of authority, anonymity, and alienation.⁹ The category is meant to pick out larger and less voluntarist associations as distinct from Bratman's small and voluntarist setting. But most of Shapiro's analysis applies more generally to also small and simple groups. That there can be shared or group agency without members sharing and acting for a common objective is the distinguishing feature of Shapiro's approach to group agency, and is what I will argue against in the later sections of the chapter.

Shapiro follows Bratman in thinking that group agency performs three 'functional roles': coordinating plans, coordinating actions, and resolving conflicts.¹⁰ While Bratman argues for the importance of group intention as a nest of interlocking intentions by pointing to these functional roles that the group intention can realise, Shapiro contends that these functions can be realised even when the participants have no group intention. In Shapiro's view, one can explain what group agency is by

⁹ *ibid* 264-9, 270-4.

¹⁰ *ibid* 260.

identifying the pattern of coordination which can help realise the foregoing functional roles.¹¹

Shapiro advances his line of argument crucially by trying to explain what he terms ‘alienation’ or ‘alienated participation’.¹² This refers to participants who are indifferent to the group plan or its success, and concerned only with their part of the work. Alienated participants act only on personal intention and reason when accepting and carrying out their assigned task. In other words, alienation is the opposite of unanimity. Alienated participants contribute to the successful execution of the group plan only because their respective inputs are adeptly coordinated by some planner. The phenomenon is not limited to complex groups. Shapiro’s example involves two people hired to paint a house. Abel hires Baker and Charlie to paint his house. As instructed by Abel, Baker scrapes the old paint from the surface, whereas Charlie paints the building afresh. Both Baker and Charlie act only on the ‘singular intention to do as Abel says’, and together they can realise the plan to paint the house because they follow Abel’s instructions. Functionally, the coordinative scheme between Abel, Baker, and Charlie appears no different from where they have a group intention to paint the house together, as a singular group. For Shapiro, that the two ways are not functionally different means also that the two are not classificatorily different. They both instantiate shared agency.

Shapiro contends that the real necessary element is a shared plan. Abel sets up the plan, and Baker and Charlie act accordingly. Adapting Bratman’s formula, Shapiro proposes his version of the conditions of ‘shared intentional activity’¹³

¹¹ *ibid* 274-6.

¹² *ibid* 270-2.

¹³ *ibid* 277.

- (1) There is a shared plan for G to J;
- (2) Each member of G intentionally follows her part of the shared plan;
- (3) Members of G resolve their conflicts about J-ing in a peaceful and open manner
- (4) It is common knowledge that (1), (2), and (3); and
- (5) J takes place in virtue of (1) and (2).

Shapiro develops his distinctive view primarily on the idea of shared plan stated in the first and second conditions. On his account, a plan (to J) is shared by a group if (1) the plan is designed by some planning agents for members of the group to participate in J-ing, and (2) members who are not the planning agents all accept the plan,¹⁴ in a carefully qualified sense of acceptance, which does not require acceptance of the whole plan.

Apart from people who design the plan, Shapiro notes, non-planning members need not know the whole content of the shared plan; they need to know and accept only their part of the plan.¹⁵ Baker has to know only that his responsibility is to scrape off the old paints. He does not have to know the other parts of the whole plan, but has to be willing not to interfere with others. Thus, acceptance of the shared plan requires not only one's acceptance of one's own part, but also one's commitment to let others do their parts.¹⁶ However, this does not require one to accept or commit to the other parts of the plan, whether or not one knows the content of those parts. Putting it differently, Shapiro's acceptance refers to the kind of mixed attitude that one is committed to their own work and non-interference with others while not committed to the success of the whole plan including other people's parts of the plan.

¹⁴ *ibid* 278.

¹⁵ *ibid* 179.

¹⁶ *ibid* 279.

According to such understanding, the only members of the group who may need to intend that all paint the house together are the planners, such as Abel.¹⁷ Shapiro goes further to suggest that even the planners do not have to have a group *intention*, but the *wish* that the members of the group will act.¹⁸ For example, Abel mentions his plan to Baker and Charlie, and does not expect that they will agree. Shapiro would not say that Abel intends Baker and Charlie paint the house, because the attitude is not strong or certain enough. How far the distinction between intention and wish will hold does not affect the gist of Shapiro's thought: not all participants in a group activity need have a group-addressing attitude; only the members who design the plan for the group need. The rest of the members can join and contribute to the group action simply by acting on their personal intention. It is the content of the shared plan which crucially determines the content of group action and its members.

In what follows let me express a number of concerns about Shapiro's account as sketched above. First, Shapiro's account would seem to result in too broad a conception of group agency. On his account, any coordination plus a plan counts as group agency. Many cases could qualify, and questionably so.

Consider, for instance, my settling down in a new studio. The studio is unfurnished and I have to install many essential items—air conditioner, refrigerator, mattress, table, chairs, washing machine, and so on. Thus I make a plan to make everything ready within two weeks and ask several companies to deliver to my place the different items I purchase. In this case, each company has agreed to my particular plan of their service and acts on it. Eventually my plan succeeds, most items are installed by the

¹⁷ Note that there is no group intention and thereby no group per Bratman's account, if only Abel intends such. For group intention is the interlocking intentions of plural persons. Abel's intention that we J will have to be joined by another person's like intention to create a group intention.

¹⁸ *ibid* 281-2.

relevant companies at the scheduled date as per my plan. Do these different companies or contractors—air conditioner seller, furniture company, wash machine seller, etc.—constitute shared agency?

Maybe they do, as per Shapiro, if I so intend or hope. That is, if my plan is that these companies furnish my new studio together, their acceptance of their part of the plan renders the whole state of things shared agency. This seems counter-intuitive. Let me extend the example further: I make another plan that, for the subsequent seven years, I will ask the providers to come to my place reasonably regularly to check and replace an old item with a new one, depending on the condition of each. If they eventually act as I plan, do they thereby form a group during this period?

The intuition against an agency characterisation is not unfounded: these transactions could be properly understood as many separate acts. What they each do is to provide services as per my request and plans of action that I offer them. However, the providers' intention and action can be alternatively characterised as group action simply because my intention changes, from making separate plans to making a single common plan. This is to say, the distinction between group action and non-group action seems to reflect very little substantive difference, or if any, it would seem an exaggeration of a modest or even trivial change in my intention. As such, group agency can become an empty or inflated category on occasions.

Secondly, even if the counter-examples given above are to be recognised as appropriate cases of shared agency as Shapiro understands it, there is a further problem that the expansion could continue. All situations of planned coordination without shared plural intention are recognised under Shapiro's conception. Why only planned coordination? Why not also coordination *without* a plan? It is surely possible: people all act on their own personal intentions and somehow their self-centred actions contribute to the fulfilment of some desirable end. Or, they can act on

customs or conventions that they believe regulate the matter in question, and coordination comes by as a result. These solutions can be efficient or inefficient, depending on the particular circumstances. There is no general reason against seeing them as capable of realising the pertinent functions.

Shapiro's demarcation would track the presence of a shared plan. It is unclear why it matters in drawing the boundary of the conception. Functionalism about Shared Agency does not give a decisive answer. Unintentional coordination as a distinctively valuable solution of some common problems can satisfy the functional roles as well. The point is that the functions are realisable in many possible ways. Just as shared intention isn't the only way, so too isn't planning. Why should we not recognise and include all possible realisations?¹⁹

There is good reason that we should not. The distinction between intentional coordination and unintentional coordination denotes importantly different types of collective activity and distinct reasons for actions, not necessarily reflecting different functions.

John Gardner's analysis of 'teamwork' is an analysis of group agency that offers helpful insights about such difference.²⁰ Gardner distinguishes teamwork from non-teamwork coordination by pointing to a distinctive *teamwork reason*. Teamwork differs from non-teamwork coordination in that team members act not only on any relevant reason for coordinating towards a given end, but also, and necessarily, on the reason that they are part of the team. The second reason is the *teamwork reason*, which is 'for each team member to try to \emptyset , on top of the ordinary (non-

¹⁹ Indeed, Bratman thinks it is fine to include other possibilities. I'm not sure how far a functionalist approach can be maintained while making this move. Bratman, *Intention* 144.

²⁰ John Gardner, 'Reasons for Teamwork' (2002) 8 *Legal Theory* 495.

teamwork) reason to try to \emptyset that each has any way'.²¹ Non-teamwork coordination, by contrast, operates on only the first kind of reason.

Gardner notes an important value of teamwork, that it can help strengthen participants' commitment to their group and thus the stability of coordination. It is useful, for example, if the valuable coordination is more likely to be successful, if participants will insist on trying in order to honour their commitment to the group, than if they act only on the ordinary, antecedent reason to coordinate for the relevant end. (Gardner discusses in particular the situation where coordination has an in-built instability as each person's reason to try to \emptyset depends on a sufficient number of people trying to \emptyset . The coordination tends to dissolve if participants start to doubt one another's contribution.)²²

This proves an important value of teamwork and an important reason to team up. But that does not distinguish group agency from the general function of coordination commonly true of different kinds of collective action. Teamwork or group action can take place across many possible kinds of situations and to deal with various sorts of problems. It improves a given collective objective's chance of success; if successful, it realises the function of coordination, which function does not distinguish teamwork from other ways of collective action that can also realise the function of coordination. What distinguishes teamwork as a special kind of collective action is the form of the acting person's reasoning, the pattern of the acting persons' interrelated intentions. At times it is of great value when this form of integration helps secure the success of valuable coordination. Group action as a distinct form and its usefulness by virtue of such a form will be missed out when one, like Shapiro, adopts a purely

²¹ *ibid* 501.

²² *ibid* 500. Gardner notes also that in this and other like situations, teamwork reason acts as an *extra* reason to try. I agree, but do not apply this insight generally. For teamwork can take place and give reason for action not only when there is antecedent reason to \emptyset . When there isn't, the teamwork reason is a distinct reason to \emptyset , but not extra.

functional perspective towards the subject. The Shapironist approach thus risks impoverishing group action by obscuring not only its distinct form but also the distinct value which successful teamwork helps realise.

Thirdly, Shapiro is right to think that Bratman's model would require some modification if one would like to use it to account for complex social settings. Shapiro's general characterisation of MSA, viz. authority, alienation, and anonymity, is plausible. That is, the modification should allow for the kind of complex social settings that involve, first, the existence of an authority structure, where people do not always cooperate because they have freely chosen to so do, but because they are obliged by someone's power or even threat. It also needs to take into account the inclusion of members who are not committed to the overall objective of the group plan, who join only because they intend to pursue mostly personal objectives. Thirdly, the expanded model needs to allow for members who do not know the identity of each other; they only know vaguely an aggregate of people who all belong to a given group. A reasonably realistic explanation of group agency in complex social settings should surely recognise and respond to challenges that may arise from the suggested features.

The problem with Shapiro's response, it seems to me, is his choosing to treat alienation as a normal condition of MSA. This move requires him to accept singular intention as an eligible component of the account. In so doing, however, the explanation regresses to a much simpler phenomenon and misses out the distinctive pattern of interpersonal intentions which makes shared agency a complex subject matter of analysis. Eventually, we are told by Shapiro what coordination is like despite anonymity and alienation. But that is a plain and rather simple social situation; to conceptualise it as shared agency, then, I worry, would seem to have given theoretical pretence to a social reality which does not need it and become over theorising.

B.

I have tried to defend the understanding of group agency or action, in either small and simple or large and complex settings, as a state of affairs grounded in the distinctive form of group intention, against a particular line of argument to the effect that planned coordination can provide an alternative basis for conceptualising group agency in particular for complex groups. Let me further advance from the defensive position to explore the way in which the special condition of the large and complex setting, viz, anonymity, requires the group intention to be formed in a different way from it is in the small, simple groups. Margaret Gilbert's analysis in this particular regard is helpful.

According to Gilbert, a group of people constitute a 'plural subject' regarding a given goal when they *jointly commit* themselves to the goal.²³ To jointly commit is to commit precisely as a group. This requires that each person conceives of a distinct subject or agent made up of all the co-committing persons—that is, a distinct plural subject—and commits such a plural subject to the pursuit of the chosen goal. There are important differences in joint commitment from group intention as interlocking individual intentions as sketched earlier. For the present purposes, let me bracket their difference and focus on how persons can jointly form any group intention at all, be it interlocking intentions or joint commitment, when they cannot meet and interact directly with many of whom they will intend or commit together as a group.

To successfully form joint commitments, according to Gilbert, requires two conditions. First, each party's expression of readiness to form the relevant joint commitment with the relevant others. Second, common knowledge that such expression has been made by all parties.²⁴

²³ See a recent presentation of this view in Gilbert, *JC* 114-8.

²⁴ Gilbert, *JC* 115. Also, *PO* 138-40.

In the simple setting where everyone knows everyone, each party knows well the others with whom they are committing together, and expresses their commitment specifically to those others. They each know that each has expressed their readiness to jointly commit. A simple case of a plural subject is thus brought about. The simple plural subject depends for its existence wholly on face-to-face interaction. Needless to say, the simple way to form a joint commitment will encounter difficulty when the social setting becomes more complex. The difficulty can be overcome.

Gilbert specifies a ‘large-scale’ setting as including the following four features: inclusiveness, impersonality, anonymity, and hierarchy.

Inclusiveness. A plural subject is inclusive if ‘there are smaller plural subjects constituted by subsets of its members’.²⁵ This is characteristic of the large-scale group, but not peculiar to it. Gilbert notes that the ‘smallest and most fleeting of plural subjects are likely to be inclusive to some degree’.²⁶ In her example, a family of four can be inclusive such that children and father, for example, could form a plural subject apart from one that includes the mother too.

Hierarchy is found where structures are maintained to the effect that ‘one or more person or body within it [sc. a population] has some form or rule over the population as a whole’.²⁷ Gilbert thinks of in particular rule which is authoritative in nature, in that the ruler has authority over the rest of the population.

Impersonality refers to the situation where a given member does not know a given other member personally.²⁸ This includes cases where the

²⁵ Gilbert, *PO* 173.

²⁶ *ibid.*

²⁷ *ibid* 179-80.

²⁸ *ibid* 174.

first person knows of the existence and identity of the second person, but has no personal interaction with the latter.

Anonymity is closely related to impersonality and stronger. It stands for the situation where ‘a given member does not even *know of* another given member as an individual: the first member has no idea that this other, particular person exists’.²⁹ Anonymity therefore always entails impersonality, whereas impersonality does not necessarily entail anonymity. A case in point given by Gilbert is the relation between a celebrity and their fan. The fan ‘may know all too well who the star is... but she has never had any personal contact with her’.³⁰ On the other hand, the celebrity might know not the existence of this particular fan at all, exemplifying the situation of anonymity.

Gilbert notes that *anonymity* in particular could create a problem to the possibility of plural subjecthood in large-scale groups. She acknowledges, *arguendo*, that a concern could arise as to whether the requisite kind of expression is still possible if people cannot express the readiness directly to the specific people with whom they want to form the commitment. Given the simple case, it may ‘suggest that expressions of readiness jointly to commit must always be directed towards others who are known of as individuals.’³¹ If a committing party does not know who the people there are to form a commitment with, she cannot express her readiness to jointly commit to the people who will become party to the joint commitment. In brief, there could be a communication problem under the condition of anonymity.

The problem can be solved, if, first, the group has a means of communication for members of the group to know that there is prevalent expressed readiness among them to commit together as a group, and

²⁹ *ibid.*

³⁰ *Ibid.*

³¹ *ibid.*

secondly, if members cannot conceive of their joint commitment with all the specific persons who are members of the group, they can conceive of an abstracted group as the subject of the joint commitment and action.

To elaborate with Gilbert's example.³² Farming communities spreading over a 'long broad valley' have to join together to fight invaders. Each hamlet's members assemble in their respective hamlet to express readiness to fight together with members from other valley hamlets. The expressed readiness is then circulated by messengers who travel from hamlet to hamlet, so that members of a particular hamlet can learn other hamlets' readiness to act together, and form and express their willingness to join accordingly. Messengers are the means of communication. People in each hamlet have only tacit knowledge of people in the other hamlets, but they can form their intention with the general description 'all people living in the valley'. Every person who fits the description is a party with whom the villagers are ready to form the joint commitment.

In the large-scale setting, members do not have to know each other individually. They only need to share a general conception of the group, and intend the group action based on that. The actual group so created will comprise everyone who so intends. Hence, the real members might differ somewhat from what the members had intended. Villagers might intend to act with 'all villagers of the valley', but only those villagers who so intended form the defensive group as a result. In order to create a group agent, it is important that the would-be members conceive of the existence of the group agent, in some tacit form, when it does not yet exist. It follows that factual mistakes are possible and permissible.

This is to say, a group is not always what it believes it is. The actual group agent is not necessarily the same as the group agent which the members originally envisaged. Also, it might not have the exact composition as members intended. The actual group agent is made up of

³² *ibid* 179.

people who actually share the group intention. Moreover, if members conceive of a group that has existed for some time, whether the present group is truly the group that members think it is will become the question of continuity, involving some extra conditions than members' intention at a particular moment. (Chapters 2 and 4 address some such conditions.) Still, members' intentions have an undeniably primary role in determining a group's identity, while permitting room for modification on the basis of other facts.

In sum, anonymity in the large-scale groups can cause difficulty, but the difficulty is not insuperable. Group intention in large, complex groups can be formed more abstractly, based on a general conception of the group and its members, and through less personal means of communication, without personal contact or familiarity with every individual member. Large-scale groups are no different from small simple groups as a kind of coordination grounded in the distinctive form of group intention. However, large-scale groups require a different way of forming the group intention.

C.

Division of roles sometimes allows and authorises some particular person to make decisions for the entire group regarding actions which the group is to take, in the absence of unanimity on such decisions and actions. This is important especially in circumstances where it is impossible or inefficient for a group to act on unanimity, or the relevant act simply requires some natural persons to act on behalf of the group: only natural persons, say, can sign a contract.³³ The ensuing question concerns how group action can be squared with the apparently single-person acts in the case of authorisation and representation. More precisely, how, if at all, members

³³ Gardner, *LLF* 64.

modify their joint intention to enable some person or subgroup of persons to act on particular occasions for and as the entire group.

In this respect, Gilbert argues for minimal modification, which argument I think is broadly sound and attractive for its economy, and can be improved by supplementing an important subtlety regarding the artificial nature of action by representation.

Gilbert distinguishes a non-basic kind of joint commitment to accommodate cases of authorised making of joint commitments. Such cases come up from simple settings such as one person delegating another to settle plans of joint action for both, to complex ones such as a population referring to decisions of some decision-making authority. Not every group action has to be animated by knowledge and attitudes of every member of the group which takes the action.

The difference of the second category or sub-class of joint commitment from the first, in Gilbert's view, is minimal and *procedural*. The non-basic kind of joint commitment differs from the basic kind in the 'process' of which a joint commitment is formed.³⁴ The basic kind is created by every party's express readiness to jointly commit. The non-basic kind is created by the basic joint commitment, when the basic joint commitment includes as its content an authorisation of some particular person or body of persons to settle what people involved in the basic joint commitment are to do together. The authorised plan of joint action is a non-basic or derived joint commitment. Non-authorised members do not have and express readiness to form such a joint commitment to bring the particular derived joint commitment into existence; they might not know its content either.³⁵ In other words, the non-basic kind of joint commitment

³⁴ Margaret Gilbert, 'Joint Commitment' in Marija Jankovic and Kirk Ludwig (eds), *The Routledge Handbook of Collective Intentionality* (Routledge 2017) 130, 133. Henceforth, *RHCI*.

³⁵ Gilbert, *Obligation* 140-1.

is independent of non-authorized members' attitudes or knowledge of it. All that is needed is there being joint commitment of the basic kind which has authorized its making and its being accordingly made. Thus, it is possible that citizens form a basic joint commitment to authorize 'a certain person or body' to 'make law for them', and are therefore obliged by the resultant non-basic commitments to comply with the laws.³⁶

Gilbert's discussion is brief and includes very simple cases of authorization: some selected persons are asked to make a plan for the whole group to act on, and authorization takes place only once. It is worth expanding on the authorization of apparently personal acts to avoid suppressing or overlooking the peculiarity of the second kind of joint commitment.

In the situation where the derived joint commitment is a plan not for the whole group but for such as the authorized person herself, or a small group of selected members, the end product does not share with the basic kind the quality of being something which everyone is to do together. This helps to clarify an important thing about the jointness of the derivative kind of joint commitment: it lies in the original joint commitment which allows it to take place. Whether the end product is for only some people or for the whole group is irrelevant.

Still, a marked difference is revealed between group actions based on the two kinds of joint commitments. In the second, derivative kind, the group can intend or act when not every member intends or acts. It is not clearly so where the group only acts on the basic kind of joint commitments, where every member intends or acts.

The difference, I am inclined to think, is more significant than procedural. It is substantive in that *representation* is a distinct element in group action grounded in the derivative kind of joint commitment.

³⁶ Gilbert, *RHCI* 130, 133-4.

Requiring an element of representation, the second kind of group action is, as Gardner puts it, a form of ‘vicarious agency’, meaning that ‘one agent acts in the name of another’.³⁷ Only by incorporating this idea can we say that the group jointly commits to do something when strictly speaking only some particular persons, authorised as they are, so do. That a group can act by virtue of its representatives so doing is a distinct and essential element in recognising the second category of derived joint commitment and group agency. Gilbert’s characterising the difference as merely procedural, as a different process of forming a joint commitment, risks the disadvantage of concealing this distinction.

Substantive as it is, the modification is still minimal, in comparison with others. In particular, some theorists think that the second kind may involve the distinct element of ‘status assignments’, implying a more radical divide between the two kinds of group action. For example, In *The Nature of Legislative Intent*, Richard Ekins argues that complex groups ‘impose status functions on the outcome of particular procedures’.³⁸ He explains,

A procedure, such as majority voting, is adopted by a group when all the members of the group form interlocking intentions that the outcome of that procedure shall count as the act of the group.³⁹

The procedure is a departure from decision by unanimity and so must itself be adopted on the basis of unanimity.⁴⁰ The procedure then generates particular plans of group action, and the use of the procedure for that purpose is part of the group’s unanimity-grounded general and standing plan regarding the group’s goal and (non unanimity-dependent) ways of decision making for achieving it.

³⁷ Gardner, *LLF* 64

³⁸ Ekins, *NLI* 58, citing John Searle’s account of constitutive rules in *The Construction of Social Reality* (Free Press 1995) 28-9.

³⁹ *ibid*

⁴⁰ *ibid* 59.

Likewise, if the group intends to authorise some persons to act for it, it frames its general plan to include such a rule as ‘the intentional action of the CEO counts as the act of the group in deciding on strategy’.⁴¹ By virtue of this (status-assigning) rule, the CEO’s decisions for company action generate the company’s particular plans. Insofar as the company as a whole jointly accepts the general plan including its authorising rule, the CEO’s intentional action is the company’s act.

I tend to think that Ekins can make the same explanation with equal force without the extra theoretical trappings of status functions. But let me bracket the debate, as the propriety of the status assignments in this context is not meant to affect the kind of group action that counts as the non-basic one.⁴²

I mention Ekins’s account for a more important reason: his is a similar but alternative model to Gilbert’s of complex group action involving authorisation and representation. His division between general (standing) and particular group plans resembles closely Gilbert’s basic and non-basic joint commitments; like the non-basic joint commitments, particular group plans count as group plans by virtue of their connection with the general plan which provides for their creation on particular occasions. It is important, Ekins notes, that the group’s standing general plan provides for authorisation and other ways the group can act without unanimity, such as decision by simple majority. He discusses the form of the legislature as a group agent in detail, noting that its standing plan is ‘to adopt the procedures that characterise the legislative process by which it will act towards its defining purpose [viz. to make law]’.⁴³ It is by reference

⁴¹ 58-9.

⁴² I agree with Brian Epstein that status assignments do not explain group agency. See Epstein’s argument in *Ant Trap: Rebuilding the Foundations of the Social Sciences* (OUP 2015) 270-2.

⁴³ Ekins, *NLI* 219.

to this standing plan that the legislative intent, i.e. the legislature's particular intentions, is to be understood fully.⁴⁴

The major difference between the two models lies in how they conceptualise group intention. Ekins explicitly builds on Bratman's concept of group intention as a set of participants' interlocking intentions to cooperate. And in principle, the group intention's continuation among those participants depends on continuous unanimity among those participants. By contrast, Gilbert considers group intention as joint commitment which requires participants to conceive of themselves as the acting agent, the plural subject in the first place; the joint commitment, once formed, continues to exist and bind the participants, until and unless they jointly rescind it.⁴⁵ This is to say, compared with Bratman's conception of group intention, joint commitment does not depend for its existence on members' unanimous intention to maintain the commitment. It is the termination which requires unanimity.

I take the difference to concern primarily how broad one wishes to understand group intention and group. Gilbert's is narrower than Bratman's. For further discussions on the activities of the state in the rest of the chapter, I adopt Gilbert's account, thus understanding group intention in the particular form of joint commitment, while leaving open the question whether other forms can also count as group intention, as I do not have to settle the question for the purposes of the chapter. What matters is the particular kind of group intention that helps us explain the action of a state if it is to act as a group. As will be seen in next section, the special character of joint commitment coheres with the normative character of many a characteristic activity of the state. If legislation is based on group intention, for instance, it is meant to bind the members who intended that in the first place. The group intention to be regulated by

⁴⁴ *ibid* 224.

⁴⁵ Gilbert, *JC* 118.

a law does not seem to be properly modelled on the kind of group intention which permits any members to withdraw from it just if they so wish.

Be that as it may, Ekins's Bratman-inspired account of group action still offers strong analytic tools in the settings of the state. His clarification of the important procedural component of the general group intention proves helpful in thinking about how many a familiar state practice and institution can possibly be seen as a kind of group action. The truth of his conception about the relations between general and particular group intentions does not depend on the outcome of the debate between Bratman and Gilbert. As further analyses reveal, I will understand group intention always in the form of joint commitment, and it does not cause particular difficulty or inconsistency when applying Ekins's analysis. Hence, it will be most profitable not to see and use Gilbert's and Ekins's accounts as rival models, but to combine their insights and different emphases to cater for the multifarious realities of the state.

III. Explaining Group Actions of the State

The view is not universal, but one won't be alone in thinking that the state—its organs as well as the population as a whole—can act as a group agent and in that sense is a group. 'By many accounts,' as List and Pettit report, 'the state is an agent'.⁴⁶ In particular, I join Nicholas Barber and Richard Ekins in conceptualising the state in its well-ordered form as a group that can act.⁴⁷ What I seek to add to the existing analyses, in this chapter, is an explanation focused on the particular familiar institutions and practices of legislation, the executive action, and election, followed by analysis of the legal system in next chapter. Thus, I address matters on a

⁴⁶ Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (OUP 2011) 40.

⁴⁷ Barber, CS 25 ff.; Ekins, 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 170 ff.

more particular level, that is, some particular situations or events in which the whole of the state can be properly seen as an acting agent, meaning that on such occasions they exhibit group agency as a single subject.⁴⁸ This approach also means that the discussion does not address the group agency of less institutionalised kinds of political communities, such as a ‘people’ seeking political self-determination. Such groups need to exhibit their agency in other kinds of activities than those which a more institutionalised political community typically undertake. The possibility and need of group agency in those other settings are outwith the scope of my analysis.⁴⁹

The familiar or characteristic activities related to legislation, the executive, and election are picked out for on the straightforward ground that they seem sufficiently uncontroversial cases of the characteristic activities of a (democratic) state. I bracket the question whether it is part of the nature of a state that it performs such activities and thus whether such activities are characteristic in this deeper sense. I take it for granted that a state will need to be able to perform such activities well in order to fulfil the needs for which a state as a distinct form of human association is considered appropriate or necessary, but I do not make the argument here.⁵⁰ The intended discussion in what follows concerns primarily the possibility and need of group action, given what the relevant activity usually requires. The desirability of the particular activity given the nature

⁴⁸ Note that I understand agency in the sense of the capacity to act for a reason. In so doing, I do not maintain a sharp distinction, as Ekins, List and Pettit do, between group action and group agency in the more demanding sense of rationality in decision and action over time.

⁴⁹ For example, Margaret Moore argues that a people is a collective agent that seeks political self-determination and is entitled to a bundle of territorial rights: *A Political Theory of Territory* (OUP 2015) 50 ff. Cara Nine has reservations about an agency conception of the people in terms of claims to territorial rights, finding that it can be too demanding: *Global Justice and Territory* (OUP 2012) 45 ff.

⁵⁰ I am thinking in particular Timothy Endicott’s argument that we determine the ‘content of state sovereignty’ by the ‘powers and the forms of independence that a state needs *in order to be a good state*’. Timothy Endicott, ‘The Logic of Freedom and Power’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 245, 252-9.

of the state is a separable question and will bear only on how the evaluative question about group action is answered, viz. whether group agency is commendable or required in such-and-such situation.

I start by examining sympathetically some existing analyses of the state as a kind of group agent in the particular context of legislation, and then reinforce them by expanding the model or models, by applying their conception of how members of the state act together to form a group to further occasions, viz. the executive action and the election.

Overall, I seek to show that legislation, some executive actions, and citizens' voting in election all are the kind of activities which have the in-built character for which group action is a distinctively feasible and reasonable means of collective action. Normally they are proposed, by the initiating officials or citizens, as state or community-wide action, in which all members of the state are invited to participate, and intended to produce rules or measures which will bind or apply to everyone in the group.

My aim is to explain the particular institution or practice as group action in executing a particular project, or group action on a particular occasion. So I seek to explain momentary group action rather than non-momentary, i.e. persisting one. However, it is true that the institution and practice of legislation, the executive, and election are normally formed and designed to function over time. Explanation of only their momentary unity could obscure the important fact that such groups are meant exactly to exist and act as a single agent not only on a particular occasion but also on many continuously. I acknowledge that the state can exhibit non-momentary unity as a result, and explore the subject matter in chapter 3. It is no less important to clarify and substantiate the possibility of group action in a single event, independently of whether it can happen repeatedly to make up a single continuous action.

IV. Unity in Legislation

It is valuable that citizens form group intention, either to support legislation or to legislate themselves, even though the core legislative act can be completed wholly by officials. Citizens can act jointly to willingly obey, authorise the legislators to represent them, or act as the legislators themselves. The question is how members of the state can be involved in the legislative process and so can be seen unified in the legislative act.

Legislation by way of direct democracy, as in referenda, would seem to represent a straightforward possibility. Citizens need to act as a group, Anna Stilz argues, when making the law together. For ‘in intending that we enact law together,’ writes Stilz,

I must (a) consider your interests in formulating my own opinion, and therefore regard myself as a member of a group that also includes you; and (b) I must also intend that your opinion about the common interest be effectively taken into account’.⁵¹

Therefore, the ‘democratic formulation of just laws,’ on her account, ‘is necessarily a joint action’.⁵² For the present purposes, let me interpret the foregoing view narrowly as one about a legislative assembly comprising all adult citizens of the state.⁵³ As members of a popular legislative assembly, the suggested attitude of citizens is tenable. It follows that citizens act as a group if they act responsibly in discharging their duty as member of the popular assembly. I would like to recognise direct democracy, so understood, as a live possibility of community-wide group action. There is no general reason to deny its feasibility, especially when the size of the political community is moderate.

⁵¹ Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton UP 2009) 194.

⁵² *ibid.* Democratic formulation of some unjust laws might also meet Stilz’s criteria somewhat. I do not want to pursue the possibility, because, as will be explained next paragraph, I prefer to focus the discussion on the more familiar practice of representative democracy rather than direct democracy.

⁵³ Stilz seems to include more liberally a variety of democratic practices including voting in election and joining social movements. The propriety of the proposed intention has to be assessed according to each particular context.

The problem concerns the model's applicative scope. It is quite narrow. It does not account for legislation by representative institutions, thus leaving unexplained a significant part of the relevant reality, indeed the more familiar part. It is also questionable whether it accounts for referenda as commonly seen. It is a subject matter of serious debate whether citizens act as a group when voting in a referendum; there are strong arguments that citizens do not, or at least do not jointly intend the particular outcome of the referendum.⁵⁴ How far Stilz's model can explain the familiar features of referenda is not really my concern here. I am primarily concerned with explanation of group action for the familiar kind of legislation. So I bracket the argument about citizen integration in referenda and other possible forms of direct legislation, and concentrate the following discussion on citizen integration in the representative form of legislation.

In the representative form of legislation, citizens do not legislate; only a select group of officials does. Citizens can intend legislation, but when they so wish, they need delegate it to the legislators. As in Stilz's popular assembly, citizens are reasonable to conceive of lawmaking as a kind of joint practice even if they do not act as legislators. For legislation is meant to create rules binding on all members of the community *qua* members of the community, it is important that all members of the community recognise the fact. Group action is surely not necessary or inevitable, but is an appropriate response to the need to foster the right kind of interpersonal attitude towards legislation.

⁵⁴ The negative view sees citizen action in referenda in much the same way as that in election. Citizens vote in a referendum, even with Stilz's kind of attitude, and they do not jointly enact the particular legal change. They act jointly to settle the question authoritatively; there is group action on precisely that level. Further from that, there is no group action in relation to the particular outcome. That a given proposal should be enacted or dismissed is an outcome of aggregating votes, not citizens' group action. See Ekens *NLI* 147-8. Also, Leah Trueblood, 'Uses and Abuses of Referendums' (DPhil thesis, University of Oxford 2018) 112-5.

Thus, the question concerns how citizens and others are integrated into a structure of group action in which the legislative agent is an integral part and a kind of agent or representative, such that when the latter acts, it can be properly understood that the whole group, made up of the legislature, the citizens, and others, acts.

Indeed, as theoretical accounts of group action as discussed in section II have demonstrated, there is no mystery in that a group acts by means of its agent or representative. It is not entirely accurate to say that citizens, as apart from officials, authorise the legislature. Citizens are part of the group which jointly intends that a standing legislature will legislate on particular occasions. This group unifies and represents the whole of the political community, in that the political community is constituted precisely by people who join in this intention.⁵⁵ At this level, there need be no distinction between citizens and legislators or other officials. All people, including those who will act as legislators, are party to this joint intention or commitment, but in so intending, all act in the same role as the member, or citizen in this inclusive sense, of the political community. The relevant acting group at this level and stage is the political community. It is my contention that a state can be recognised as a group agent when the whole political community jointly acts, as they do in the legislative context.

The state-unifying intention to maintain a standing legislature is a shorthand expression of a set of complex conditions on the process and substance of legislative action. These conditions set up the state's general, standing commitment which authorises the legislature to act on particular

⁵⁵ This need not include only sane adults. Children can intend, as do many adults with less developed, impaired, or deteriorating mental conditions. It appears no demanding task to join a group intention. Still, people who cannot intend in any degree, unfortunately, will not be able to be part of group action. They can be part of the group in a dependent way, by virtue of their being represented by people who have the responsibility to take care of and represent them.

occasions. In the fullest possible form,⁵⁶ the general commitment authorises the creation of further joint commitments, of the non-basic or derivative kind,⁵⁷ on particular occasions through the act of the legislature. Members of the state are unified in and jointly committed to the particular act of legislation by virtue of their general, basic commitment to rely on the legislature to make laws which they will recognise and adopt.

In making a law, the legislature does many things that the citizens do not and cannot do. In particular, the citizens do not enact the law; the legislature does. But the legislature enacts law also as the agent of the state whose basic commitment and standing plan is to authorise the legislature to make laws. Thus, the state can be said to have enacted the law in the sense that its representative has so done. And law is the citizens' joint commitment, on the ground that they authorise the legislature and stand ready to recognise and act conformably with the law.⁵⁸

The legislature's group action has to be nested within a broader cooperative structure that involves other members of the state. Thus, both the legislature's internal integration and the external integration—its integration into the broader framework—are pertinent. This point may seem too obvious, but is well worth accentuating. It accounts for not only legislative mistakes or misfire, that an enactment fails to become a valid law because of disagreement with legal or constitutional requirements, but also for the different possible capacities a legislature can have: a federal legislature can legislate for the capital city; a national legislature can legislate for another nation; it depends on the particular external integration to determine whose representative and lawmaker the legislature acts as.

⁵⁶ There can be different degrees. See Gilbert, *Obligation* 210-2. Thus, a state can be unified in different degrees, depending on how far the joint commitment extends.

⁵⁷ Gilbert, *RHCI* 130, 133-4.

⁵⁸ I expand on the view that Gilbert outlines: *ibid* 133-4.

The legislative intent is the legislators' group intention in a particular legislative act.⁵⁹ The legislative intent, as a particular group intention, is nested within the legislature's standing group intention to legislate on successive occasions by means of the particular procedures which the legislature adopts.⁶⁰ Such a standing intention itself is in turn nested within the state's standing group intention to maintain the legislature.

Moreover, the particular legislative intent should also be the state's joint intention in each particular legislative act, if it is part of its standing intention to authorise the legislature to create and expand its joint commitments. This is to say, the legislative intent is the citizens' joint intention, too. The legislative intent is open to citizens' recognition, meaning that it is available to anyone who wishes to know it. This does not require every member of the state to know every particular legislative intent at the same time.

Given that it is their own intention to authorise group action by means of a legislature, citizens act rationally to recognise and comply with the law in accordance with the way in which the legislature intends it. They should stand ready to adopt the law according to the intended meaning of the legislature. This is not to say that they cannot object to, disobey, or resist a law when its content is unjust. The said obligation refers to a rational requirement that citizens should not act in contradiction to their own commitment, unless they have rescinded it, jointly. It follows that public disagreement over a particular piece of legislation may threaten unity, but need not. Sometimes disagreement, or more precisely the intention to disobey, just contradicts the standing joint commitment to treat the legislature's enactments as authoritative as long as it acts per relevant rules. In this situation, group intention, in the form of joint

⁵⁹ Ekins, *NLI* 224.

⁶⁰ *ibid* 219.

commitment, does not dissolve simply because some people fail to conform to it. Rather, the joint commitment continues to exist, to require members to honour it by observing the properly promulgated law, and to be the reason for criticising the intention or action to disobey as irrational, and where appropriate, for reparatory action by the recalcitrants.

Due to the structure of authorisation or representation, citizens' joint intention in particular cases is decidedly derived from that of the legislature. It will be extended to whatever intention that the legislators will jointly form in promulgating new laws, provided that the legislators act conformably with the group plan, normally codified as law or a part of a constitution, that frames their action. It would seem far-fetched to say that citizens intend every such-and-such law, so much so that the characterisation of a given situation as derived joint commitment may start to feel superfluous. But it need not be so if the legislative intention is open to the citizens' participation, review, and revision. As long as the citizens have the capacity to change the law whenever they find any problematic, the law stands to them properly as their derived commitment. In other words, control is crucial.⁶¹ In the simple case, the authorising party has close control over the continuation of all the joint commitments and also of the authorisation itself. This element needs keeping in order not to make the derived joint commitment vacuous in the complex case, such as citizens' authorising legislation.

It bears noting that citizens' joint commitment is not limited to laws that regulate their own conduct. Not all laws strictly concern problems of social interactions and coordination. Laws which are not norms—standards of behaviour—are a common part of the law. Likewise, not all laws address citizens. Many laws are intended to address officials and other subgroups within the state, such as the departments of government,

⁶¹ More substance of the idea can be found in Philip Pettit's discussion on the ideas of control and popular control in *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 153 ff.

agencies, and the courts. Insofar as these laws are made by the legislature acting as the agent of the state, these laws are the members' joint commitment, open to their recognition, criticism, and intention to change.

In sum, the state is the acting subject of legislation, if citizens and officials are united in the standing plan to authorise the legislature, acting as their representative, to make laws on behalf of the group, so that when each particular legislative act is also the act of the state. The legislative intent is the legislators' group intention in each particular act, and the state stands ready to recognise and adopt it as its own intention in accordance with the general, standing group intention to authorise the legislature to decide what its laws are to be. Whether there is such a standing group intention is contingent, depending on the actual intentions that members of the state have. The legislature might not be as closely integrated into the structure of broader group action, so that the legislative act should not count as the act of the state. The legislature can also participate in different group actions, depending on how the broader cooperative structure is arranged.

Discussion on the unity in legislation reveals a distinct form of group action for exploring unity in further contexts of state activities. Such a form features a relatively small group agent which is capable of complex actions, such as the legislature, nested within a broader structure of group action which represents the state as a whole. Whether it obtains in other familiar areas of the state activities, such as the executive acts, is the question I consider next.

V. Unity in the Executive Action

The most iconic case of the state seen as a person is perhaps its action in the international setting,⁶² considering just the common parlance in

⁶² Timothy Endicott identifies this role in particular as the 'constitutional value' for which the executive power serves. My discussion here draws much on his account of the

international law that a state is an ‘international person’.⁶³ Indeed, whether or not it actually acts as a singular agent, it is usually presumed to be one. It bears considering how, if at all, states can act as a singular agent when interacting with one another. Normally, the executive acts on behalf of the state when the state is thought to interact with other states. In what conditions can the members of a state S be seen as taking part in the act of the executive?⁶⁴ For example, when state A negotiates a treaty with state B to permit free movement of goods and people across their borders, how should one understand the position of A’s members such as citizens? On what ground can we take them to jointly commit to the resultant agreement made by their diplomats?

One can say the answer relies on whether citizens directly jointly commit to the purported act of the executive. This is surely a way, but not the only one. Antecedent joint commitment that authorises the executive to act in appropriate situations is also possible, and the primary way. Indeed, just as in the legislative acts can be nested within a structure of group action grounded in a general, basic commitment, so too can the executive operations be subsumed under a cooperative framework that authorises its particular acts.

First of all, such a framework should take account of emergencies.⁶⁵ There are situations, both domestic and international, which require swift response. The formation of popular joint comment for each prospective decision takes time and too much so in times of crisis. The officials need to

executive as given in *The Stubborn Stain Theory of Executive Power: from Magna Carta to Miller* (Policy Exchange 2017).

⁶³ ‘[E]very State which belongs to the civilised States... is an International Person.’ Lassa Oppenheim, *International Law: A Treatise*, vol I (Ronald F. Roxburgh ed, 3rd edn, Longmans, Green and Co. 1920) 99.

⁶⁴ Again, it is but a different way of asking the question noted by Aristotle as to whether it is merely the tyrant or the oligarchy that did such and such act, not the city. *Politics*, 1274b42.

⁶⁵ *ibid* 12.

act quickly, whether or not members of S are ready to endorse it. Sometimes even the legislature, given its characteristic process for debate and deliberation, is not well disposed to make quick, successive decisions to deal with the rapidly changing circumstances. The public goods thus require that an executive, structured to act with ‘unanimity, strength, and dispatch’,⁶⁶ will act on their judgement independently of close legislative authorisations and sure public consensus about such matters, and public assessment comes only afterwards.

Thus, it is reasonable that members of S, aware of the need for swift state action, jointly subscribe to a standing plan that authorises the executive to act independently in response to emergencies. Moreover, it is also reasonable that members of S further see the executive as making decisions to which they are all to jointly commit. For the executive, like the legislature in many situations, is also to solve some coordination problems facing S and proposes public standards for common action for members of S, which standards can be properly perceived by them as their joint plans of action.

Secondly, emergency or not, citizens need authorise the executive to act on their behalf in international settings.

In the negotiating of treaties and other diplomatic cases, the executive acts as the agent of the state, as someone acts on behalf of their company or association in signing a contract. The relevant subject of the transaction is the state. If a treaty is signed, for example, it applies to all members or sectors of the state in relevant fact-situations, in the face of successive cabinets. And when a state needs to undertake a transaction, for many conceivable good reasons, it always needs an agent, a representative to act on its behalf. This role is normally assumed by the executive.

⁶⁶ *ibid* 13, citing William Blackstone, *Commentaries on the Laws of England*, vol 1 (first published 1765, Chicago UP 1979) 242.

Members of S respond wisely to the need for the state to act as a rational agent in the international community by providing for the executive's capacity to so act, and standing ready to recognise that once the executive signs a treaty, the action commits the whole state to its terms and consequences. Thus, the treaties and other international agreements so created are properly taken as the members' or citizens' derived joint commitments, formed by the executive authorised by members of S to determine the international legal relations to which they will commit themselves.

As in the case of legislation, it is always possible that citizens disagree with the executive action, or even act against it. First of all, post facto disagreement or opposition alone need not prove the lack of joint commitment in the first place. The dissidents or opponents might simply have broken or revoked their original commitment. Whether there is joint commitment depends on the plans, members' intention and practice that exist at the time when the official action was being taken. If the officials do not act according to the conditions of authorisation, their action will misfire and cannot be recognised as the state's own act.

Or, the rules of authorisation can be found to be not entirely clear or not well thought through as the executive's action draws attention to the deficiencies not previously known. Citizens can refuse to recognise the act, thus no joint action at all, or they can recognise it, thus confirming, constitutively, the joint action (not least because they are persuaded that the condition is already there)⁶⁷ and supplementing (inadvertently) the conditions of authorisation. Still, even if the rules are clear but are found unwisely formulated in the wake of the executive's unpopular performance, citizens can form a new joint commitment to revoke the

⁶⁷ HLA Hart notes that public authorities can lawfully exercise a power that they did not exactly had if their exercise is accepted by relevant actors as lawful. That is, the lawful basis of that power is made up after the event. Hart, *CL* 153.

executive action and amend the old conditions of authorisation under which the executive action was taken.

Still, there is something peculiar about the executive: the executive action seems more likely to cause public concerns and disagreement than the other major powers of the state. In democracies, people tend to be sceptical of the propriety of the executive power, and when matters of great importance come up, want to relocate the power to decide on a particular matter from the executive to the legislature. Probing the constitutional practice and history of England and the UK, Timothy Endicott observes a popular thought that ‘the executive power of the Crown is a stubborn stain that we have only partly succeeded in washing out of the fabric of the constitution’.⁶⁸ This is not to say that other powers of the state do not cause public concerns and disagreement when deciding on matters of great importance. They all do. The peculiar problem with the executive is that it lacks ‘any organised account of the constitutional basis for executive power’,⁶⁹ so that the constitution will progress by eliminating such power altogether.

This observation gives one good reason to suspect whether the executive action is properly understood to represent and unify the state, if the aforementioned view is widespread in a community. Whether unity can obtain is a social fact, depending on the relevant attitude, intention, and action had by officials and citizens. If the social fact does not obtain, because of the widespread scepticism mentioned above, the executive does not represent joint action when acting. Yet the impediment comes from the relationship of the executive to the other powers of the state, not that there is less feasibility or need for unified state action by way of the executive.

The debate ultimately concerns the division of state powers, concerns whether only the legislature should represent and steer the joint

⁶⁸ Endicott (n 62) 7.

⁶⁹ *ibid.*

action of citizens when matters are of great importance, even though the executive is capable of so doing.⁷⁰ I am not to settle the debate here, but to identify the room for different views, and thus a sufficient reason, insofar as the room remains, to see the state as a unified acting agent when the executive acts according to citizens' authorisation.

So far, the discussions of legislation and executive have drawn much on Ekins's and Gilbert's accounts of group action to demonstrate how officials and citizens can be integrated into a structure of interrelated general and particular group intentions, and of basic and derived joint commitments. It is crucial that all members adopt the general intention or basic commitment to allow the further particular group acts to be undertaken by authorised persons or organs. So the resultant state of affairs is sharply different from the situation that Shapiro should allow to be an MSA: official organs successfully coordinate the behaviour of subjects who habitually or prudently conform to the laws and other official directives and conformably so with one another. Any effective government can count as an MSA. While it is true that an effective government is an efficacious deliberate planning and coordinative scheme, it does not always exhibit the kind of unity which I wish to foreground. A coordination and planning scheme has a loose kind of unity; the protean 'group' of international travellers at a state's airports at any given time, for instance, are part of the state government's coordinative scheme if they act according to the laws and other regulations during their transit. This and many others are surely interesting and important phenomena for study for many conceivable and valuable purposes, but they do not exhibit the kind of unity which I identify and seek to explain.

A further disadvantage of Shapiro's account is revealed when group action in election is being explained. Election involves a distinct mixture of competition and cooperation which differs from the 'full-blown' kind of

⁷⁰ Endicott (n 62) 21.

group action. Accounts of groups are useful if they can help us understand better the special feature of the electorate group action. To such questions I now turn.

VI. Unity in Election

Election can take place at many levels and in different ways. Here I am considering primarily national election where adult citizens are empowered to vote on candidates who will hold office at the national level, for the obvious reason that the question concerns whether citizens act as a group in election when they are all participating in the same event. There can be different ways of aggregating votes to determine the result; the gist of the question is what kind of intention can unite the whole (enfranchised part of the) population in their competing with one another for their favoured candidates. For that matter, referendum raises much the same question, as it exhibits much the same form of collective actions by citizens, who are required vote for a particular option, be it a candidate or a proposal, and their votes are aggregated and counted to determine which option will prevail.

Competition is part of group action if it is nested within a ‘cooperative framework’⁷¹ or ‘structure of group action’.⁷² In this case, such as a game, the activity is not ‘full-blown’ group action, but insofar as all participants jointly recognise and act on the rules regulating the proceeding of the game, the activity is group action down to such level.⁷³ Beyond that, at the level of contest, individuals do not act as a group; they compete against each other, either as individuals or teams. In the latter case, participants form and act as further groups from the overall group regarding the cooperation for the competition, as a game.

⁷¹ Bratman, *Intention* 107.

⁷² Ekins, *NLI* 59.

⁷³ Bratman, *Intention* 107.

In a game, one can ascertain multiple and concomitant groups and group actions. The cooperation of the teams maintains the game as a unifying group, and therefore qualifies the teams as subgroups of the large group. At the same time, the teams compete against each other within the cooperative framework, acting on their own discrete group intentions and thus as discrete groups. That is to say, for example, when there are two teams playing on the field, there can be at least (allowing for formation of further subgroups within each team) three group agents that are acting.

Victory takes place on the level of subgroups, and therefore is not action of the whole group. Yet it requires group action of all teams to cooperate on the basis of the outcome, such as accepting the prize, the particular team to play against for the next round in the series because it wins or loses in the present round, etc.

The joint, cooperative element of the game and other similar kinds of settings critically distinguishes it from settings which involve only competition or confrontation. The soldiers who fight one another in a battle,⁷⁴ a submarine commander seeking to outmanoeuvre a destroyer captain seeking to sink it,⁷⁵ and such like, are examples of the latter kind of settings.

But note that even such extremely unlikely cooperative activities may involve a thin element of joint commitment, that when one party surrenders, the victorious party should no longer see the former as an enemy and treat the soldiers or civilians as such, but treat them as prisoners of war or subjects of occupied territories.⁷⁶ It is imaginable that

⁷⁴ *ibid* 95, 107.

⁷⁵ Finnis, *NLNR* 152.

⁷⁶ William Blackstone, citing Pufendorf, defends the 'right of conquest' founded upon a 'compact' between conqueror and the conquered, that if the latter recognise the former as the master, the former recognise latter as subjects rather than enemies. I am not sure whether the joint commitment can be as tenably ascertained in this particular setting, where one nation invades and subjugates another by force. For the said 'compact' would be hardly distinguishable from successful extortion. In so arguing, one would eliminate

wars can become much more brutal if even this level of joint commitment is forgone or breached—mass murder of surrendered soldiers and civilians, as have happened deplorably from time to time.

Election resembles games. A significant part of its active reality is competition. People compete against one another, individually or in teams. There can be teamwork on the level of subgroups, but the contest between the teams, coordinated as it is, is not group action (as they exactly see themselves not as the same group). The outcome is decided by aggregating votes, and therefore is not intentional act of any agent.

These non-group action and mechanism are only part of the relevant dynamics of election; they are nested within a unifying cooperative framework. The overarching objective of the cooperative framework is to determine the winners, to determine who of the contenders will hold the contested offices for the next term.⁷⁷ Participants are supposed to accept this objective to participate in the process. For the election to take place successfully, they must follow the rules that regulate the competitive process and determine the outcome, and accept the outcome and recognise the victors as the holders of the offices.

Election is fit to be structured as a joint action. A participant, citizen as well as candidate, is reasonably expected to accept the objective when joining the process, and has good reason to expect others to have been so ready likewise. They can jointly adopt, as a singular body, the cooperative objective and plans. To this extent, election is a joint practice at its general, cooperative level.

the distinction between consent and compulsion. I bracket this problem as discussing it further would digress too much from the present subject. William Blackstone, *Commentaries on the Laws of England*, vol 1 (first published 1765, Chicago UP 1979) 101.

⁷⁷ This is not my novel insight. See e.g. Seumas Miller, 'Institutional Responsibility' in Marija Jankovic and Kirk Ludwig (eds), *The Routledge Handbook of Collective Intentionality* (Routledge 2017) 338, 343.

To be sure, participants need not intend specifically as a group; group action is by no means necessary or inevitable, as in the two former cases discussed above. But it is reasonable that they do so. The intention to participate is only rational when it can be formed as part of the interlocking intentions between participants, or else it is little point to intend to participate if one does not expect others to follow rules and respect the result. The group intention, as joint commitment, gives special *teamwork* reason for participants to uphold the system including the result, thus can enhance the conditions required for the election to succeed.

Apart from the unifying joint objective, voters and candidates can have many other relevant objectives and intentions, which are compatible with the group constituting and unifying ones. The intention to win, for instance, is had by each contending party. Each party's objective to win is diametrically opposed to each other. Such intentions are conformable with the intention to act together with opponents as a group in respecting the system and uphold the result. The same can be said for the many other possible private, personal intentions that one can entertain when voting. The key to electorate group action is that they have the relevant group intention, conformably with further intentions, motivations, etc.

As noted before, the electoral outcome is not a group act. Although all participants vote, their votes are aggregated and counted to produce the results according to the settled principle of decision. Their intentions affect but do not settle the counting, so the results cannot be their intentional act. The resultant majority is but the sum of individuals who 'happen to have voted the same way on a given issue'.⁷⁸ It will be a different story if, for example, voting is conducted strategically, in that votes are apportioned by political parties to achieve intended results. The merit of strategic voting is debatable in particular situations. But voting in general is not meant to

⁷⁸ Jeremy Waldron, 'Democracy' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012) 187, 189.

work in this way.⁷⁹ Voters need only vote individually, and thence stand ready, together, to accept the result. Voting in general is properly understood as non-group action within the structure of group action.

Hence, election is not a full-blown group action, and appropriately so. One's model of group action or agency serves one well if it can allow for such multifarious forms of action involved. If one relies on, for example, Shapiro's model of MSA, one could have difficulty in maintaining such subtleties. The election could appear a full case of MSA, given that the competition is coordinated and people act according to settled plans or rules of coordination. Voters on each side try to thwart the opponent's plan to win, but ought to let others run their campaign as per the law. People form an MSA even when they are competing against one another, insofar as they act on their part and allow others to do theirs. This is a plausible characterisation of election insofar as MSA is exactly coordination by planning. But the model fails to distinguish the multifarious kinds of action characteristic of election.

It bears noting the difference between the voting in election and the voting in legislation. Both institutions use some form of voting to determine the outcome. The legislative assembly is designed and structured to jointly choose and enact a particular legislative proposal by means of majority vote at the end of debates and deliberations.⁸⁰ In comparison, voting functions not in this way in the election. Voters are allowed, and even encouraged indeed, to act individually in choosing their preferred candidates, while majority vote is meant to settle the outcome of the competition, not merely, as in the case of legislation, as how participants should act as a group in the face of multiple choices and in the absence of

⁷⁹ Gardner (n 20) 508-9. But people who, like Anna Stilz, subscribe to a Rousseauian model of voting will likely disagree. Whatever the merit of the model, my argument here is that we need not see voting in the Rousseauian way—that it is supposed to foster a kind of collective will—to recognise some element of group action in the activity.

⁸⁰ Ekins, *NLI* 222.

unanimity. Hence, the electorate is a sharply different kind of group from the legislature, although both involve voting in determining the outcome. The electorate's group action is limited; I agree with Ekins that it does not even 'settle who is to be elected to office'; it acts on the level of holding an election and effecting the succession of office-holders.⁸¹ Modest as it is, it unifies the nation, and is one of the few cases of state-wide group action in which citizen action plays a specially necessary role. Let me explain.

The citizens' role is specially necessary in the sense that the kind of action that grounds an election requires citizen action. Citizen action—that they vote—is part of what makes a practice an election and necessary for election to take place at all. This differs from the former cases, where it is the official action that sufficiently determines the content and incidence of the relevant group action, while citizen action has a supplementary or supportive role. In cases of legislative and executive activities, so long as the officials are properly integrated, legislation and executive operations can be group action even without citizen participation. Citizens join to broaden the composition of the acting subject, and to that extent change it, but not to change the content, the incidence, and the joint form of the act.

Not so in the case of election. There can be no election and no group action without citizen participation. Official action remains crucial but is only a part of the joint act that holds an election. If citizens don't respond and vote, there will be an attempt, on the part of the officials or candidates, to hold an election, but no election takes place. That citizen action has such a necessary rather than a supplementary role distinguishes the kind of group action required for election from the others, and points to one way for us to explain, I think, why election is seen as indispensable to democracy.⁸²

⁸¹ Ekins, *NLI* 147; 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 172.

⁸² Putting it differently, citizen action in election is metaphysically important. However, for democracy, citizen action is important in primarily the moral sense. I suspect that

VII. Group Action's Dependence and Independence of Law

Whether the unity of the judiciary can be ascertained in the same way as those discussed above is worth considering, and addressed separately in next chapter. The subject matter involves the legal system as a distinct kind of group action, and requires attention to and engagement with existing jurisprudential discussions on the foundation of a legal system.

Though no complete discussion on the relation of law and the state is possible before the relevant questions about the legal system are sufficiently considered, the foregoing discussions on the state's group action in several iconic settings has revealed some important points about the relation of the two.

The state has the capacity to jointly create laws and other rules to regulate not only social interactions but also its own group action. Insofar as the constitution and law normally need regulate the organisation of the state powers and their relation to citizens, the constitution and law frame how state, its organs and members, are to jointly act. Consequently, there is necessarily a strong correlation between a state and law, such that whenever the state has a legal system, its group action is normally or necessarily regulated and facilitated by law.

That said, it is still possible to recognise a crucial law-independent quality of the state's group agency. The most general standing group intention that unifies the whole of the political community to enable them to conduct the various state activities as a singular group is crucially not a law. It is a disposition, a shared willingness of the political community. It need not depend for its creation on any law or exist in the form of a law. To be sure, in a continuous political community, one can usually identify such a disposition by tracking the members' particular group actions on

sometimes the metaphysical importance can be unthinkingly taken as moral importance to support use of referenda or other forms of direct democracy. I bracket the potential issues here as discussion on them is beyond the scope of the present chapter.

the basis of laws, so that the standing intention necessarily includes reference to law including constitution as part of the state's group intentions, plans, and commitments.

Therefore, it is close to the truth to assert that a state is a group agent if it adopts rules that coordinate its action. Nevertheless, it is not true if the statement is taken to mean that a state needs law to act as a group in the first place. All that is needed is sufficient unanimity among members that they want to live together in a state and take whatever actions that will help realise that end.

VIII. Strengths of the Combined Model of Group Action

Ekins's and Gilbert's accounts are different but need not be understood as mutually exclusive. Ekins's account excels in explaining action under complex group structures characteristic of state organs by translating them into a nexus of group intentions tracked to or connected with a general standing group intention. The model therefore provides much one needs to explain how the operation and practice concerned are to be conducted and explained as group action. In relation to political practices, Gilbert's account addresses more fundamental subject matters, such as the formation of social rules (and in particular the secondary rules discussed by HLA Hart) by means of joint commitment,⁸³ and application to simpler cases involving direct popular integration around a given public proposal. It is easier for one to explain how official organs work with its organisation by starting with Ekins's model.

Gilbert's account, however, offers a special and important advantage when it encourages one to think of the relevant acting subject as a distinct plural subject envisaged and formed by the acting members. Surely when the state acts to legislate, to negotiate an international treaty, or to hold an election, it is the same group agent that acts. Gilbert's

⁸³ Gilbert, *PO* 185 ff.

account offers an attractive explanation as to why it is so: that members, on the various occasions, conceive of the state as the acting subject and act accordingly. Their action on the conceptualisation of the same abstract subject, the particular state, grounds the identity of the group agent on the various occasions. The unity in legislation, the unity in the executive acts, and the unity in election can thus represent the unity of one and the same political community, at a given time and, potentially, over time.

Hence, I think it best to use the two models cooperatively as together they help provide a more complete explanation of the multifarious phenomenon that needs accounting for.

In the next chapter, I turn to the question of the momentary unity of a legal system. I argue that group action of legal officials can ground the unity, and the group action can be understood either dependently or independently of the group action of the state. Discussion is thus conducted with the particular purpose of clarifying the important subtleties in the legal system's relation with the state's structure of group action, to enrich and also challenge standard thoughts about the relation of law and state in legal philosophy.

Momentary Unity of a Legal System

This chapter focuses on the identity of a momentary legal system. The question has long been framed as a question about the identity in the content of a legal system, as how an aggregate of rules has a unity. I broaden the question to consider not only the content of the legal system, but also its officials, the people who act for and on behalf of the legal system. Facts about the momentary unity of a legal system, I argue, are not exhausted by facts about the identity in content alone; unity of officials is pertinent to thoughts about the identity of a legal system, too.

My discussions proceed in six sections. In the first, I consider unity among officials as a relatively simple situation involving convergence of behaviour, and note such a minimal case's limit when attention is drawn to a more complicated situation where official groups are individuated on grounds independent of the regularity of behaviour. In section II, I consider the argument that it is a particular kind of claims, viz. to normative self-determination, which grounds a legal system as a distinct, independent normative system, and build on it to develop my argument that legal officials' integration into a group agent is an especially appropriate response to the need of a legal system to operate as a self-determining normative system. The third section turns to the traditional question of the criterion which distinguishes between rules which are part of a legal system and rules which are recognised and applied but do not thereby become part of the legal system; with Joseph Raz and contrary to some of his critics, I argue that the particular reason for recognising a given rule is crucial to its

classification, while I note also that such a classification is a contingent feature of the legal rule and the legal system, as officials can operate as two distinct groups with no clearly segregated bodies of rules. Section IV extends analysis to the individuation of legal systems in the particular context of the kind of legal situation observed in the European Union. I distinguish, more carefully than current accounts, between ways in which multiple systems interact cooperatively, based on sharply different intentions had by law-applying officials, and consider how the resultant distinctions may enrich the standard concept of efficacy and existence of a legal system, when multiple legal systems appear to exist in the same place at the same time. In section V, I demonstrate that a legal system determines the geographical scope of its operation, by way of the practice of the law-applying officials, and explain how such practice can part from the state's intention to determine the legal system's boundaries as well as the state's own territory. Section VI reflects on the relation of law and the state and critically considers the thought that the identity of municipal law is somehow bound up with the identity of the state whose law it is. Drawing on analyses in previous sections, I recognise the possibility of such close relation, founded upon an inclusive structure of group action, but must loosen the tie as the relation between the two is much more varied and fundamentally contingent.

I. Unity among Officials

The identity of the legal system is, as Joseph Raz identifies, 'found in the criterion or set of criteria that determines which laws are part of the system and which are not'.¹ The momentary identity of a legal system is the identity of a legal system at a particular point of time, whereas the non-momentary identity of a legal system is the identity of a legal system over time. On Raz's terms, the two problems are both concerned with a complete statement of the content of a legal system, in different temporal

¹ Raz, *AL* 79.

settings. The present chapter focuses on the identity of a momentary legal system. But I broaden the question about identity to consider not only the content of the legal system, but also the officials, the people who act for and on behalf of the legal system. It is uncontroversial that a legal system that exists comprises necessarily laws and officials who apply those laws;² it seems potentially fruitful to reflect on the identity of a legal system in terms not only of the identity in content but also of the identity in people. I seek to substantiate the hypothesis that facts about the identity of a legal system are not to be exhausted by facts about the identity in content alone; identity in people may be pertinent to thoughts about the identity of a legal system, too.

Moreover, the two identities appear related in some important, yet to be elaborated way. Indeed, discussions in some classic texts in general jurisprudence hint at the importance of some form of official unity to the existence of a legal system or to the identification of its legal content. HLA Hart, for example, sees the ‘unity among officials’ as among the ‘normal conditions, the congruence of which is asserted by the unqualified assertion that a legal system exists’.³ For it is only under the ‘conditions of official, and especially of judicial, harmony’ that ‘it is possible to identify the system’s rule of recognition’.⁴ Absent such harmony, as law-applying officials are divided into rival factions, applying different criteria of valid law and therefore observing different rules of recognition, the legal system is in crisis, unless and until sufficient unanimity in their law recognising and applying actions is restored.

Joseph Raz, expanding on Hart’s account of the rule of recognition and, *pace* Hart, appreciating the standing possibility of multiple rules of

² As Kenneth Einar Himma puts it plainly, legal officials, together with norms and institutions, are the ‘conceptually necessary pieces’ of a legal system. Kenneth Einar Himma, *Morality and the Nature of Law* (OUP 2019) 123.

³ Hart, *CL* 122.

⁴ *ibid.*

recognition which exist within a legal system at the same time, grounds the criterion of the identity of a legal system in the law-applying officials' recognising the applicable rules for the right kind of reasons.⁵ The criterion assumes that, notes Raz, 'the identity and actions of primary law-applying organs are essential in establishing the membership of a legal system'.⁶ That is to say, unless the two or more law-applying organs are all seen as part of the same system or related in some relevant way, the rules identified by them respectively cannot be seen as part of the same momentary legal system. How the law-applying organs can be so identified in the first place is curious. We know that it cannot be answered by reference to rules, because the it is the very identity of the rules that depends on the law-applying organs' identity.

Hence, it appears that the existence and identity of a legal system turns on some form of official unanimity and unity. It is unclear, however, what kind of action that unanimity or unity depends on. More precisely, does it require a mere coincidence of behaviour among officials, or greater integration such as some form of group action?

Addressing the question in the particular context of the official action which constitutes the rules of recognition and, if any, other social rules at the foundation of a legal system, John Gardner brings forth a strong case for the former, minimal view. True, Gardner notes, the nature of the rule of recognition as a customary rule requires convergence of behaviour among the participants. But that common action need only follow from each participant's intention to act conformably with the way in which other participants regularly act; their behaviour converges around the custom and thereby the customary law thanks to the coincidence of their intentions, not a joint intention.⁷ In one place, Gardner calls this type

⁵ Raz, *CLS* 192 ff.; *AL* 101-2, 119-20; *PRN* 152-4

⁶ Raz, *CLS* 192

⁷ Gardner, *LLF* 72.

of collective behaviour the ‘convention case’, in which an agent ‘treats the fact that other people also \emptyset (now, regularly) as a reason for [her] to \emptyset ’; it differs from group action and other types of intentional coordination in that what gives participants a reason to carry on is the ‘mere fact that others \emptyset , never mind whether they try or intend to \emptyset ’.⁸

Gardner makes the minimal convention case in opposition to the more technically construed ‘conventionalism’, which understands a legal system’s ultimate social rules in terms of a particular account of conventions which associates conventions with the social functions of solving either a particular type of coordination problems or such problems more generally. Moreover, conventionalism, notes Gardner, has a tendency to further develop into the view that officials form a kind of joint agency to intentionally coordinate their behaviour and thus create the relevant conventions. The extra theoretical trappings to the minimal convention case, it seems to Gardner, are ‘not only misguided and unnecessary but contrary to the tenor of Hart’s original proposal’.⁹

The original idea is that the ultimate social rules at the foundation of a legal system are not deliberately created, because, at that early point, no one has got the normative power to create laws as intended. Even if some people, at the time, came together, acted as one, and tried to create rules of recognition and other ultimate rules, they could succeed only indirectly, if people (others or themselves) subsequently started to treat what the first group had created as binding rules, because, say, the second group believed, mistakenly, the first group really had the power to create the rules. It is the subsequent acts, by the second group, which constitute the rule of recognition whose content recognises the first group’s enactments, along with a rule of change recognising the legislative competence of the first group and a rule of adjudication recognising the

⁸ Gardner, ‘Reasons for Teamwork’ (2002) 8 *Legal Theory* 495, 500, n 7.

⁹ Gardner, *LLF* 73.

applicative competence of the second group. In other words, the actual ultimate rules, constituted by the applicative acts of the second group, are not the rules created by the first group, but separate rules which recognise those rules. Indeed, no one really creates these ultimate rules with an intention to precisely create them; even those of the second group, whose behaviour is decisively constitutive, intend only to apply what they believe is valid rules created by the first group, but such action of theirs creates, though with no intention to such, the ultimate rules.

The point of my recapitulating the familiar story is to demonstrate why even if either of the acting groups form joint agency, the forming of the ultimate rules, per the original picture, cannot be explained in terms of the joint action of the groups. However, pointing that out does not repudiate the alternative conception to the original of the rule-forming practice. The minimal case at its core offers an explanation of the distinct possibility of formation of social rules involving no intentional creation of rules, not to mention joint action in doing it. It does beat back the thought that Hart's account of social rules need involve joint action. That said, the minimal case in itself is no conclusive case against the idea of people really creating rules with the intention to so do by virtue of the normative power grounded in their joint intention. The latter is indeed meant to, or at least should be prepared to, differ from the original account; it points to a sharply different mode of not only a legal system's origin but also its normativity.¹⁰ It is not obvious, it seems to me, which view should prevail; they seem to reveal just different but similarly eligible situations.

Rather than further pursue the debate, I would like to consider the question in a slightly different setting. I draw attention to a different concern, viz. the identity of a momentary legal system, which brings new light on the rivalling models. Whatever its merits in the previous context, the minimal understanding encounters a significant limit when the legal

¹⁰ See e.g. Margaret Gilbert, 'Political Societies' in *PO* 185.

situation becomes more complicated in involving multiple legal systems interacting and intersecting with each other, giving rise to the need to individuate between legal systems and to distinguish laws and agents of one system from those of another. In such situation, officials of a legal system need to be capable of identifying themselves as a distinct group; only with which capacity is it possible for them to identify the rules of their legal system and the relevant law-applying practice as their own as distinct from rules and practice in other legal systems.

Indeed, that an agent can and does identify a distinct group of which she is a member is a condition without which it is not possible for the agent to identify the relevant regular pattern of behaviour for her to follow. The minimal convention case takes for granted that an agent is part of a sufficiently distinguishable social group whose members' behaviour is therefore relevant to her action. The condition becomes only more obvious when the agent enters a more dynamic setting and faces many people acting and only some of them are part of the group whose standards of behaviour that she must attend to. While in the simpler setting, the group need only be grounded in the regularity of behaviour itself, that the group is distinguished by the people whose behaviour forms the pattern concerned, this way cannot always work in the more complicated setting, for the reason that people in different groups may exhibit a similar pattern of behaviour, and yet can still recognise each other as separate groups whose rules are alike. The way of distinguishing between groups, different from what is feasible in the simpler setting, has to be independent of the convergence of behaviour itself.

More elements have to be found for the kind of official behaviour and unity that have to be present if the identity of a momentary legal system can be ascertained. It is not obvious, to be sure, at this point that it requires the kind of integration among officials characteristic of group agency or action. To anticipate, it is indeed my contention that the integration among law-applying officials into a kind of group agency

supplies the kind of unity which best grounds the momentary identity of a legal system. To reach that point, I start by considering Julie Dickson's argument that officials ought to make a particular kind of claims on behalf of a legal system so that the legal system can count as a distinct legal system. Dickson's account is of particular interest here, as is shown below, because it demonstrates a profitable way of theorising the observation that legal officials ought to be able to distinguish themselves as a group from other officials who form separate groups, and questions about some important details of her account offer an advanced point of departure for discussion of the propriety of group action.

II. Normative Self-Determination and Group Action

Reflecting on the criterion with which legal systems can be individuated with special reference to the legal situation of the European Union, Dickson builds on Raz's idea that it is part of the nature of a municipal legal system that it makes some particular kinds of claims and grounds the criterion in the kind of claims that a legal system has to make to be recognised as a distinct legal system. To 'differentiate genuinely distinct legal systems from normative sub-systems,' Dickson maintains,

the system concerned must claim authority to determine the existence, force, and effect of its norms, and must claim authority to determine the relation between its own norms and the norms of other normative systems.¹¹

A legal system is distinct by virtue of its claims to, in short, 'normative self-determination'.¹² Normative self-determination must not be confused with a rigid conception of 'supremacy'.¹³ The crucial difference is that normative self-determination permits the operation of rules of a

¹¹ Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 25, 46.

¹² *ibid* 49.

¹³ *ibid*.

foreign legal system within the local system and even the foreign rules' primacy over the local ones when incompatible. The local legal system remains self-determining in that it has the power, and continues to have it, to permit the application of the foreign laws and grant them a superior force against the local ones with which they conflict. Supremacy, understood in a particular way, may be taken to require that local laws always prevail. This is a needlessly rigid conception of supremacy, but surely not unfounded. An alternative understanding is perfectly compatible and congruent with the foregoing idea of normative self-determination. The point is that the requisite kind of claim is consistent with the legal system's decision to restrict, non-permanently, its own power to support the operation of the other legal system.

Two questions are appropriate at this point. First, how does one know whether a legal system makes such a claim? Secondly, do all uncontroversial cases of independent, well-ordered legal systems make such claims? Let me consider the questions in order, as one ought to know how to identify the claim, if the claim has actually been made; the second question comes up only if one has looked into all possible places and found no such claim.

Dickson accepts the dominant line of thought that a legal system makes claims only when its officials make the claims on its behalf. Thus, if the legal system does make the claim to normative self-determination, one can find it in assertions made by the officials. Which type of officials, i.e. the law-making or the law-applying ones? Dickson's answer appears to include both. In the examples she gives, the claims are found in both judicial decisions and legislation, viz. the European Court of Justice's rulings and the latter UK Parliament's legislation.¹⁴ This is to say, one can look for the claims by checking both law-making and law-applying officials' claims.

¹⁴ *ibid* 32-3, 45.

One may wonder whether it should be the law-applying officials' claims which really matter, as in the other cases of the characteristic claims of the legal system. I tend to think that it need not. But it is important that, if the claim comes from legislators, there is sufficient agreement with the claim within the law-applying sector of the legal system, and the law-applying action, in particular the reason for which law-applying officials recognise and apply a rule of law is consistent with the claim. So, the acceptance by law-applying officials of the claim is more of an efficacy condition than logical necessity. It resembles the normal condition of unity among officials, both law-making and law-applying ones, though especially the latter, as Hart notes, the lack of which will threaten the legal system's dissolution. What exact pattern of official unity in this regard is the question I shall consider shortly. Before that, let me consider the question as to whether the claim has to be made by any official in a well-ordered legal system at all.

It is curious whether the claim to normative self-determination can always be found in all uncontroversial cases of independent, well-ordered legal systems. It seems possible, I think, that neither the law-applying nor the law-making officials ever expressly make the claim, simply because it is always self-evident enough that the legal system is self-determining and no such claim ever needs making. Dickson's discussion, as noted above, is conducted with a particular focus on the EU legal situation. That the EU's high court has made such a claim is crucial to the recognition of the EU legal system as a distinct legal system, given that its character is in doubt. In many a case of a standard municipal legal system, however, the officials' acceptance of the content of the claim can be inferred from their practice which constitutes the self-determination of the legal system. If they ever face the need to claim such, they will no doubt so do. Thus, we can say, absent the actual claim, the readiness will suffice. Such readiness is ascertained in a somewhat hypothetical way: officials are ready to make the claim, if the need arises.

The readiness to maintain the legal system as a distinct system by making the claim affirming such requires some form and a certain level of official unity. Although unity can be maintained in different possible forms, group agency, I argue, is an especially appropriate means of achieving that unity. Integration of the law-applying and sometimes the law-making officials—legal officials for short—grounds the relevant group agent. This is not to say that there is necessity of their so doing, without which there is no sufficient official unity for one to make an acceptable assertion that a distinct legal system exists. The point is that group action offers a particularly helpful form of collective action for the situation; moreover, it makes the clearest or fullest case with which it is possible to explain the momentary unity of a legal system on the basis of the unity of its officials in all conceivable situations.

Legal officials recognise each other as part of a distinct group from other groups; the recognition can build on the tacit sense of the group which the officials already have, as assumed by the convention case, in the simpler setting. On the basis of this recognition they form a joint intention to maintain their legal system's operation as an independent, self-determining normative system.¹⁵ There is good reason for the integration. The legal system's operation as a distinct, self-determining normative system is a task whose success requires that most of the participants try, viz. recognise and apply laws on the legal system's own terms. In comparison with where each official individually so acts to help maintain the identity and independence of the legal system, joint action is obviously better at achieving the objective. By disposing officials to conceive of themselves as part of the group whose action preserves the existence of the legal system, group action responds well to the need for the collective action which grounds normative self-determination.

¹⁵ In chapter 4, I discuss the possibility of a not fully independent but sufficiently distinct legal system. The implication is that self-determination can permit realisation in varying degrees.

Formation of the group opens up new possibilities for conceptualising and explaining the unity of a momentary legal system. Grounded in the unity in group action, one can more confidently distinguish between the momentary legal system and its content in the form of an aggregate of rules. It becomes clearer how a momentary legal system is composed by and yet distinct from an aggregate of rules.¹⁶ The following two extreme cases are therefore possible. First, there are two groups of law-applying officials operate in accordance with a common aggregate of laws regulating social interactions. Second, one aggregate of people operate according to two different aggregates of rules and thereby act as two distinct groups of law-applying officials. In both cases, it can be right to say that there are two legal systems, because we can individuate legal systems according to the way in which relevant agents are integrated into groups.

It is important on my account that all legal officials, especially the law-applying ones, are committed jointly to the group action. In this, I follow Margaret Gilbert, Richard Ekins, and others who defend a strong integration model of groups in the complex social setting. Thus, it is important that high-ranking officials, such as judges in the high court, and lower-ranking officials, such as judges in the lower-courts and other tribunals, are united in their commitment to the standing intention of the group, which is to maintain the operation of the legal system and, given its character as a complex group, to delegate and authorise different agents to carry out particular actions on behalf of the group. Thus, despite their considerably different roles, high-ranking officials and low-ranking ones are part of the group, because their respective actions can be integrated into the general structure of complex group action participation in which they all are committed to.

¹⁶ Puzzles about identity and change concern how an object is to be distinguished from the object that constitutes it. See e.g. Michael C Rea, 'The Problem of Material Constitution' (1995) 104 *The Philosophical Review* 525.

The last point is noted against in particular Scott Shapiro's thought, per which it is the high-ranking officials alone who need be committed or pretend as committed to the group's objective; lower-ranking officials need only act conformably with what is required of them, especially by their superiors, for whatever reasons such lower-ranking officials see fit.¹⁷ However, dispensing with the stronger form of integration, as Shapiro does, will weaken one's account's capacity to correctly individuate legal systems, and should therefore be avoided.

Let me demonstrate the problem with Shapiro's account. On his account, the unity of a legal system in shared agency is grounded in its 'master plan or plans', usually set out by a constitution, deliberately created by some agents who plan for the coordination of official activities.¹⁸ It is crucial that such agents, being the legal system's master planners, conceive of the relevant official group and devise the plans of coordination for the group; plans are therefore united in their common addressee; it is unimportant, notes Shapiro, whether plans form a single plan or a single set.¹⁹ Apart from the master planners, regular or lower-ranking officials, given their particular roles, need only accept the particular part of the plan(s) that is relevant to their duty, plus a commitment to non-interference with one another.²⁰ Therefore, regular officials need have no intentions in common, not to mention joint intention. Shapiro wants to permit in his model of joint agency the kind of undemanding attitude characteristic of the convention case. His solution is to require only a select set of persons, the master planners, to have to have the special attitude or intention to constitute the distinct structure of joint

¹⁷ Shapiro, *Legality* (Harvard UP 2011) 216-7.

¹⁸ *ibid* 169 ff.

¹⁹ *ibid* 423, n 11.

²⁰ *ibid*.

agency; the identity of a group can be ascertained if the master planners specify the group or else some grouping as part of the group.

This account is insufficiently discriminating. Controversial or substandard cases will be classified too quickly as a legal system on the basis of the account. The minimal requirement for the regular officials' intention apart from the master planners means that a distinct legal system can be ascertained irrespective of whether most of the law-applying officials so intend, as long as they discharge their duties to apply the laws. However, their different reasons and intentions for doing what they do in conforming to the plans addressed to them can point to sharply different situations. For instance, officials of a legal system A are willing to conform to another legal system B's plans, merely because they intend to support their system's commitment to coordinate its operation in accordance with the plans of B, or just not to provoke hostile reactions from B, without recognising A and B as part of the same legal community. That A's law-applying officials' intention is such is important to determine that A and B are two separate legal systems.

In retaining the convention case's minimal requirement for the participant's intention, Shapiro's case repeats also the problem with the convention case, viz. the lack of the resources for distinguishing between legal systems when their rules and therefore their officials' law-applying behaviour are alike, because, in this case, both systems are willing to conform to an external scheme of coordination proposed by a transnational organisation. Certainly, one will know well that they are separate legal systems, if she takes into account the two systems' officials' reason and intention for coordinating their behaviour according to the plan. The master planners' attitude alone is insufficient.

The minimal requirement permitted by master planners for regular participants means also that the character of the 'group' conceived by the master planners is a scheme of coordination. It fits not only a standard

legal system but also coordination among multiple legal systems. The idea of the group so conceived is a broader category than the situation which one sees as precisely a singular normative system. Thus, Shapiro's model is fundamentally not disposed to, deliberately or inadvertently, address the question precisely of a legal system's identity. Shapiro's account is no doubt among the most eminent lines of thought on how a legal system is a kind of group agency, but not the suitable candidate for solving every one of the questions that we think can be solved by appealing to the idea of group agency.

Thus, I ground the momentary unity of a legal system in close integration of legal officials, especially law-applying officials as a group agent. The unity of the rules is therefore not essential to the unity of the legal system, although it is the focus of the traditional discussion. In the next section, I discuss the unity of laws, if any, in the light of the unity of officials.

III. Unity of Laws

Unity of laws entails membership of rules. Rule membership refers to the fact that a rule applied in a legal system is part of the system, i.e. a member of it, as distinct from rules of another legal system, which can for various reasons be applied in the present legal system, and also from many non-legal rules, such as the content of a valid contract, company constitution, etc. which may be applied by the court. In this particular context, 'rule' and 'norm' are used for different analytic purposes. A rule is distinguished by its generality, whereas a norm the specific normative functions, e.g. prescription, empowerment, permission. Parts of the two categories overlap. Hence, legal rules, or laws for short, include legal norms which can be applied to 'a succession of different fact-situations',²¹ and, if any, laws which are not norms.²² On the other hand, not all legal norms are

²¹ Gardner, *LLF* 178.

²² Raz, *CLS* 163.

legal rules. As Gardner notes, a legal system comprises laws and legal rulings, which are respectively legal norms which are laws, as defined above, and legal norms which are not laws, which are ‘binding applications’ of the laws.²³ The concern of the present section is with the legal rule or else any content of the legal system which is capable of being used recurrently by courts in adjudication. In what follows, unless stated otherwise, I always use rule or legal rule to represent this kind of legal contents.

The question of rule membership is notably raised by Raz as he explains that the rule of recognition does not provide complete criteria of rule membership.²⁴ Not all rules whose application is required as per the rule of recognition are rules of the system, explains Raz. An English court could be required by a rule of English law to apply rules of French law to settle a case before the English court. Such rules of French law are given effect in this and other like cases in the English legal system, and yet they do not thereby become rules of English law. An account of rule membership is to explain how this distinction is drawn.

In developing such an account, Raz pursues an approach based on a distinct principle which he identifies as the ‘principle of authoritative recognition’, that a law exists in a particular legal system by virtue of recognition by judges and other law-applying officials, rather than creation by law-making officials or enforcement by the executive agents.²⁵ Accordingly, ‘a legal system contains all,’ Raz claims, ‘and only all, the laws recognised by a primary law-applying organ which it institutes’.²⁶

The formula is sharpened further to accommodate applicative recognition for different reasons. Following the legal system’s rule or rules

²³ Gardner, *LLF* 178.

²⁴ Raz, *AL* 101.

²⁵ Raz, *CLS* 190.

²⁶ *ibid* 192.

of recognition, courts and other primary law-applying organs, distinguished by Raz as those institutions with the power to ‘determine the normative situation of specified individuals’ according to pre-existing norms,²⁷ will be obligated to apply norms which are obviously outwith the legal system sometimes. Reasons for recognition are therefore taken into account to distinguish between norms recognised because they are part of the legal system and norms recognised because of other reasons.

Raz’s test, to be further examined later, along with the principle of authoritative recognition, is fundamentally sound. Some have questioned whether the test can sufficiently classify all uncontroversial cases correctly. I shall defend Raz’s test, showing that the cases suggested by critics can be solved as per the test. While many a writer has worked on the subject matter,²⁸ I shall focus my engagement on the critiques made by Keith Culver and Michael Giudice and by Adam Perry to address unresolved questions.

Apart from defending Raz, however, I shall also note that rule membership is a contingent property of the legal system, and momentary unity of a legal system need not depend on the capacity to distinguish an aggregate of rules as the system’s own laws in opposition to the others. That the unity of a legal system is grounded in the group action of law-

²⁷ See e.g. *AL* 109-110; *PRN* 134-7. Note the difference from the early characterisation, in *CLS* 192, as ‘an organ which is authorised to decide whether the use of force in certain circumstances is forbidden or permitted by law’.

²⁸ For example, Scott Shapiro suggests that laws are part of the same system if they are ‘created and applied by officials of the same organisation’. (*Legality* 208) It is unclear how exactly Shapiro views the principle of authoritative recognition. There is ambiguity in Shapiro’s proposed condition of norm membership in relation to norms which are not created but required to be applied according to the system’s master plan. In some places (*ibid* 208 and 423), Shapiro seems to see both creation and application as necessary to membership. In another (*ibid* 208), made apparently as a clarificatory statement, Shapiro seems to say that norms, such as customary rules, whose application is required by the master plan are included, even if they are not created by any power in the master plan. The major problem is not the ambiguity itself; it is that either understanding has its problem and we do not know how Shapiro would solve it in either situation.

applying officials readily accounts for the contingent relationship of rule membership to the legal system's momentary unity.

In what follows I start by clarifying the contingent nature of rule membership, discussing the situation where multiple municipal legal systems operate with a shared set of laws. Thence, I move on to consider the situation where rule membership has become exclusive, giving rise to the need to distinguish local rules from non-local ones, and defend Raz's test against the critics.

A. Shared Laws

Rule membership is not exclusive if rules are shared by two (or more) legal systems. To say that there are two legal systems—A and B—despite the fact that rules are shared is to say that there are two independent systems of courts, operating within their respective discrete jurisdictions. To say that they share rules is to say that there is a common set of rules which are recognised as directly applicable laws by courts of both A and B. This is to say, courts of A and B do not recognise as applicable to local cases these laws because their own laws, notably their rules of conflict of laws, require them to so do. Moreover, the shared laws can just be typical positive laws, developed by legal institutions of A or B. This simply means that where a particular law is originally developed does not affect how it is recognised in the law-applying practices of A and B.

The foregoing scenario is imaginative but not innovative. Before the institution of conflict of laws became more fully developed in Europe, judges of one municipal legal system were ready to apply rules developed in another municipal legal system in place of locally developed laws to a particular case, if they find the laws as the more appropriate ground for deciding on the case given the fact-situation. Such fact-situation includes, for instance, transactions which take place in a foreign city. It is a matter of reasonableness that if a contract drawn at Pisa, while sued on in Perugia, questions about its validity ought to be judged according to the

laws of the place where the contract was drawn, that is, Pisan law.²⁹ In other words, the reason for recognising and applying a rule of Perugian law and the reason for recognising and applying a rule of Pisan law are no different; they both are, in short, requirements of reasonableness. Even if judges in each city understand Pisan law and Perugian law to be two distinguishable categories, the two categories do not affect their applicability.

This phenomenon is relatively overlooked in jurisprudential discussions, as primary attention has been drawn to explanation of how a norm applied but not developed locally is not part of the local legal system. They tend to encourage the thought that the identity of a legal rule is binary: it is either a local rule or an adventitious rule, which can only be applied as is adopted by local judges. But it has become clear by now that there is a third possibility, that such a rule is neither foreign nor local.

It is perhaps tempting to say the kind of rules in question is local in both legal systems. But that would distort the situation somewhat. For the rules are not foreign precisely because there is no local-foreign distinction in the understandings of the law-applying officials of the putative legal systems. Therefore, no rule can possibly be foreign or local, as there is no such distinction at all. For sure, as mentioned before, officials can distinguish between rules which are developed in the respective commune, but that distinction is legally irrelevant in that it does not affect their recognition of all the rules, wherever they are developed, indiscriminately as universally applicable rules.

And there is no difficulty for such officials as well as legal theorists to still recognise as two distinct legal systems the legal systems which share a common aggregate of laws, if law-applying officials in the two places

²⁹ The example is Samuel E Thorne's, from his illuminating discussion in 'Sovereignty and the Conflict of Laws' in *Essays in English Legal History* (The Hambledon Press 1985) 171, 179. See also H Patrick Glenn, *The Cosmopolitan State* (OUP 2013) 159.

operate as two distinct groups when adjudicating cases in accordance with the shared laws. Whether law-applying officials in each system form a distinct group in conducting the juridical activities depends on the intention they have when engaging in the activities. Formation of group intention requires the officials to recognise each other as part of a distinct group which performs the adjudicative function. The content of the law does not matter for such purpose.

B. Exclusive Membership

Now I move on to consider the situation where rule membership becomes exclusive and therefore pertinent to the applicability of a rule. Laws are no longer recognised simply because they are reasonable; whether a rule is part of the legal system's law is legally relevant, too. As mentioned in the early part of this section, Raz develops an account for rule membership based on the principle of authoritative recognition, i.e. recognition by courts and other law-applying organs. But official recognition can be too broad. As Raz himself points out, a municipal legal system recognises and enforces rules from other legal and normative systems, because it is part of the nature of a municipal legal system that it is an 'open system'.³⁰ So Raz further sharpens the account by taking into account and distinguishing between the different reasons and intentions for which the relevant law-applying organs recognise and apply the rules. Raz proposes a test, as below, to distinguish between recognition of local and that of non-local ones by reference to the reasons in play. The test, it seems to me, is fundamentally sound. In what follows, I quote the test in length, and discuss its strengths by considering some disagreements with it.

Raz's test is as follows:

Norms are 'adopted' by a system because it is an open system if and only if either (1) they are norms which belong to another normative system practised by its norm-subjects and which are recognised as

³⁰ e.g. Raz, *PRN*, 152-4.

long as they remain in force in such a system as applying to the same norm-subjects, provided they are recognised because the system intends to respect the way that the community regulates its activities, regardless of whether the same regulation would have been otherwise adopted, or (2) they are norms which were made by or with the consent of their norm-subjects by the use of powers conferred by the system in order to enable individuals to arrange their own affairs as they desire. The first half of the test applies to norms recognised by the rules of conflict of laws, etc. The second part of the test applies to contracts, the regulations of commercial companies, etc.³¹

The test has a marked asymmetrical structure. It offers no direct or positive criterion for what count as part of the law. We do not know the grounds on which a norm is recognised because it is part of the law; we know only the grounds on which a norm is recognised—merely adopted—*not* because it is part of the law. That is, Raz offers a negative criterion, that norms of the legal system are those norms which the courts are bound to apply and are so not for either the reason that they should observe comity towards another community's or legal system's way of regulating their activities, or the reason that it is the law's social function to support private arrangements and other social groupings.

Raz makes it clear that the first part of the test is to identify foreign laws which are applied in local courts, and the second the contracts, agreements, rules of companies and other private associations.³² This is to say, the test is meant to track some familiar, uncontroversial cases of non-legal norms. It is important to recognise that the test will have little to say on how controversial cases should be classified. Some controversial cases are inevitable, as they are, I think, on the border between the municipal legal system and other groupings. It need not be part of the criterion of success by which a test is evaluated that it can eliminate all borderline cases, which would necessarily be arbitrary. I shall not see the existence of borderline cases as sufficient reason for rejecting Raz's test or the entire

³¹ Raz, *AL* 120. Also, *PRN* 153-4.

³² Raz, *AL* 120.

project of distinguishing between norms which are applied by judges as the legal system's own norms and norms which are applied by judges on other grounds.

The main challenges to Raz's test concern the uncontroversial cases; some argue that the test does not classify some familiar cases correctly, i.e. yielding counter-intuitive results. First, Keith Culver and Michael Giudice argue that the test over excludes. Provincial laws would be mistakenly excluded by the second part of the test, where

the provincial laws are supported by the federal system through conferred powers set out in a constitution that provides provinces with the facilities for arranging their affairs as they desire.³³

Provincial laws are uncontroversially part of the law, as Culver and Giudice suggest, if they are so recognised and applied by the courts. But they are applicable laws indeed because the federal system intends to support the provincial self-government. Does it not prove that the two properties are not always mutually exclusive, that the second part of the test does not always mark out norms that are not part the legal system?

No, because the second part of Raz's test, clearly stated, identifies only norms created by private arrangements. Provincial arrangements are not private, and uncontroversially so, as with various instances of the national legislature's delegation of legislative powers to other state organs, to support and enable particular official sub-groups, as opposed to private ones, to make proper arrangements for their responsible matters.³⁴ Such a

³³ Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (OUP 2010) 50.

³⁴ On the other hand, there are borderline cases in this regard: norms created by the universities, especially public ones, which are official bodies but are also meant to be independent like private organisations, whose clear classification it is sterile to attempt, apart from describing the situation and noting it as a borderline case. The case of provincial legislation, however, is obviously not peripheral.

supportive function must be distinguished from the supportive function that Raz states in the test.

Secondly, there is the contention, made by Adam Perry, that Raz's test (for distinguishing non-legal norms) omits the following type of non-legal norms: norms created on the grounds of legitimate expectations. In cases of legitimate expectations, the government's promises are enforced, notes Perry, not because the courts respect the way in which the government arrange the relevant activities, but because they think that it is unfair that the government disappoints an expectation under certain circumstances.³⁵

Apparently, cases of legitimate expectations and, I add, estoppel show a strong connection with law's social function of controlling undesirable behaviour.³⁶ It would be odd indeed to characterise what judges in these cases do as trying to develop norms to enable the parties to make arrangements for realising their chosen ends.

However, such cases do have a strong connection with the law's supporting private transactions. That the relevant behaviour, if permitted by law, is particularly unfair and harmful to the misled party is crucially due to the standing institution of binding promises and agreements; if the society does not allow people to interact by means of making promises and drawing agreements, the behaviour in question will not cause a problem. That is, it is precisely because people have the practice of relying on legally enforceable promises and agreements to make important decisions and arrangements to conduct their lives that legitimate expectations are deemed protection-worthy and estoppel undesirable. So, if the law supports the norm-creative practice among private persons, the law should control wrongs that follow from that practice. The reason for legally obligating the misleading party to keep the would-be promise is continuous with (or in

³⁵ Adam Perry, 'Law's Boundaries' (2020) *Legal Theory* (forthcoming).

³⁶ See Raz's discussion of this and other social functions of law: *AL* 169 ff.

some important ways related to) the reason for legally supporting parties to advance their ends by making a promise.

Hence, norms created by legitimate expectations and estoppel, despite the first sight, can still be subsumed under the second part of the test by analogy with the norms created by private arrangements (and thereby expanding the test somewhat). The supportive function appears sufficient to capture all uncontroversial cases of legally enforced non-legal norms, apart from laws from other legal systems.

Surely an alternative solution to Raz is worth considering if it offers a simpler way of classifying all the uncontroversial cases correctly. This appears what Perry's purported solution tries to achieve. Let me consider whether it succeeds. I identify a difficulty facing Perry's account, the solution of which difficulty shows why one will proceed in the more hopeful direction in following Raz's guide to check the law-applying officials' reason for recognising a particular rule.

Perry proposes a test based on the directness of a norm's relevance to the subject's normative situation. A norm is part of the law, he says, if it is relevant to 'deciding on people's rights and duties' within a legal system, not merely because 'it is relevant to deciding on the interpretation, applicability, or consequences of some other norm.'³⁷ A norm is merely adopted by the legal system if it is relevant to deciding on people's rights and duties only because 'it is relevant to deciding on the interpretation, applicability, or consequences of a norm of direct relevance within [the legal system]'.³⁸ According to the test, norms such as foreign laws, contracts, customs, and apparent promises, once given legal effect by judges, are all classified correctly, as they appear indeed, as merely the legal system's adopted norms, for the straightforward reason that they are indirectly relevant to the determination of the parties' normative situation

³⁷ Perry (n 35).

³⁸ *ibid.*

in particular cases. If Perry's test is successful, it could mean that norm membership in a legal system is a matter independent of the law-applying officials' attitude; it is determined by the property of the norms themselves, viz. the way in which they affect the subjects' rights and duties.

Perry's solution has an important limitation and a major weakness. The limitation, admitted by Perry himself, is this. The test works for only the distinguishing of norms of the legal system and not for non-norm rules, including 'laws which establish definitions, territorial limits, statuses, categories, and so on'.³⁹ Such rules are in nature of only indirect relevance to subjects' normative situation; the relevance test will exclude them from the membership of the legal system. For Perry, this is a limitation as opposed to a weakness, because his account is concerned with norms rather than rules that are not norms.⁴⁰ Moreover, he thinks that it is possible to distinguish non-norm local legal rules (which are part of the local legal system) from merely adopted norms and foreign non-norm legal rules that are adopted according to the rules of conflict of laws, by distinguishing between norm and non-norm, for one case,⁴¹ and between the relation with local norm and with foreign norm, for another.⁴²

Perry's omission, however, is of the non-norm non-legal rules which indirectly bear on the directly relevant norms. The arithmetic and semantic rules are used by judges in a similar way as legal rules which establish definitions and suchlike, but do not become part of law. In his discussion of such rules, Perry treats them as (non-legal) norms.⁴³ To be sure, one need not subscribe to a particular conception of norms such that semantic

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*: 'There is no difficulty distinguishing *local rules* [as rules but not norms] from *adopted norms*: only adopted norms impose duties, confer powers, or grant permissions.'

⁴² *ibid.*: 'In general, adopted rules are locally relevant (if they are locally relevant) in part because of their relevance for non-local norms; local rules are not relevant for that reason.'

⁴³ *ibid.* 19, 21.

rules are not recognised as norms. But the point is that in any case, be it rule or norm, Perry would have difficulty distinguishing between such as law's own interpretive standard used by judges to determine the interpretation of a directly relevant law and the dictionary's semantic standard used by judges to determine the interpretation of a directly relevant law; they are both indirectly relevant to the normative situation in question, they are both rules of interpretation recognised by judges, but the former is part of law and the latter isn't.

If Perry's test can address only norms, such a limitation is a reason for questioning the strength of the test as a whole. If the Razian test, for example, can cover norms and rules indiscriminately, it will gain a major advantage over Perry's. It is clear, it seems to me, that the aforementioned distinction is easily explained by reference to judges' reasons for applying those rules: the former is part of the law, while the latter not, because judges intend to observe, say, the everyday meaning of words and common method of quantification.

The major weakness of Perry's account, however, concerns the status of EU law. Norms of EU law were applied by courts of the UK within the UK as norms directly relevant to subjects' rights and duties. As such, they are part of the UK law (or the respective municipal legal systems within the UK). I do not dispute whether the conclusion is right. The question is whether any classification of norms of EU law within the UK would affect the norms' kind of relevance. For those who think that EU law was not part of the UK law, they see it as foreign law given effect within the UK by virtue of UK legislation which characterises EU law as dependent for its validity within the UK on continuous recognition by the British state.⁴⁴ If this view is mistaken, the primary reason would seem to

⁴⁴ Ekins cites as evidence to EU law's foreign status the fact that the repeal of the enabling local law will automatically invalidate EU law. But certainly the doctrine of obliterating repeal is applicable to any kind of rules, not adopted norms alone. See 'Constitutional Principles in the Law of the Commonwealth' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 396, 398.

be the courts' recognition of the EU law as part of the domestic law. Whichever view prevails, it does not seem to change the fact that norms of EU law were indeed directly relevant to subjects' normative situation. It is a major weakness that the criterion of Perry's test is irrelevant to how the recognised norms of EU law are to be classified.

Moreover, there is also the distinct possibility noted by legal theorists that norms of EU law were perhaps applied by UK judges precisely as norms of EU law, who in so doing were acting as law-applying officials of a distinct EU legal system.⁴⁵ Whether this is the case will crucially depend on the law-applying officials' understanding of their role, the rules that they apply, or the legal system of which they act on behalf. The Razian test, characterised by its attention to law-applying officials' perspectives, can help identify not only which rules are part of the legal system, but also which legal system is home to the rules. By contrast, in determining the direct relevance of a norm, Perry's test presupposes that the norm belongs to some legal system but is incapable of identifying which particular system to which the norm belongs when the norms bears connections with multiple legal systems.

To be sure, it would be a bit unfair to discredit Perry's account with this case, as it is plainly beyond the matters which he intends to deal with. But it is a valid argument, I think, to make that the Razian test is preferable because the test, when persistently applied, can solve more problems than its rival. To such further problems I now turn.

IV. Individuation of Legal Systems

Two or more legal systems overlap when their laws are applied to a given country or more precisely a given population in the same place at the same time. Their interaction can give rise to distinctive questions as to how one determines to which legal system a particular rule and a particular law-

⁴⁵ Details explored in section IV.

applying institution belongs. As mentioned briefly at the end of the preceding section, the test for rule membership can be improved by appreciating not only the need to identify which rule belongs to a legal system, but also the need to identify which legal system a rule belongs to. When an observer needs to determine which legal system's law the law is in the face of overlapping legal systems, she addresses indeed the question of whether a law is part of a given legal system, only formulated in a different way. A purported account of the criterion of rule membership can be judged incomplete, if it has difficulty addressing the second question. Thus, the discussion on the forms of the inter-systemic relations is in part a continuation of the discussion of the test of rule membership; the practice and attitude of the law-applying officials is crucial to the shaping of the particular form.

Theorists have considered such questions in the particular context of the European Union: EU laws and legal institutions appear to constitute a distinct legal system from the municipal legal systems of Member States, and maintain a jurisdiction which expressly overlaps with those of the latter. In particular, some wonder how, and how far, this legal situation in Europe can be explained by the dominant type of jurisprudential account of legal systems; what is the exact pattern of action and interaction of law-applying officials, where overlap of systems is suggested? And how, under the condition of overlapping systems, to determine which system's law or law-applying official a particular law or law-applying official is?

In what follows I consider some current discussions, notably by Nicholas Barber and Julie Dickson respectively, which address such questions with an express purpose for testing or improving the dominant jurisprudential account of legal systems. I follow and expand their analyses, arguing that one should distinguish, more carefully than the current accounts, the situation where two (or more) legal systems interact cooperatively to advance their respective ends, from the situation where the cooperative legal systems intersect with each other further such that they

can be properly considered to have shared part of their laws and law-applying institutions. Such more rigorous distinction is revealed by appreciating the different forms of coordination in which officials can conduct their law-applying action, depending on the kind of reason and intention on which they act; for which legal system an official acts and as whose law a law is applied will depend on such reason and intention. This is to say, it is part of my contention that a theory of group action, as a particular form of coordination, is needed to develop a better explanation of the legal situation in question. The overlap in the European legal situation involves, I suggest, not so much operation of shared institutions and laws as coincidence of law-applying behaviour induced by the intention and plans of the Union. In the wake of that conclusion, I consider how the European legal situation might appear intriguing because it exhibits an anomaly to the standard concept of efficacy and existence of a legal system, when multiple legal systems appear to exist in the same place at the same time.

As Dickson's examination reveals, the European Court of Justice recurrently makes the claim to the effect that EU law is a distinct legal system apart from the legal systems of Member States.⁴⁶ ECJ's claim is constitutive of the character of EU law as a distinct legal system. However, ECJ also makes the intriguing claim from time to time that EU law forms 'an integral part of the legal system of the member states'.⁴⁷ If both claims are true, the EU legal system is a distinct legal system from Member States' legal systems and yet a part of them. This is apparently a paradoxical situation; how can a legal system both a distinct legal system and an integral part of another?

⁴⁶ 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, 16-21.

⁴⁷ *ibid* 33.

Dickson resolves the apparent tension by pointing to an ‘overlap in content’, that ‘EU norms are simultaneously part of a distinct EU legal system and a constituent part of Member States’ legal systems’.⁴⁸ More precisely, the EU norms which are ‘enforceable in national courts are part of a distinct EU legal system *and* part of Member States’ legal systems at the same time.’⁴⁹ (Dickson follows Raz’s approach and suggests that courts’ reason for recognising a norm is crucial, but does not go on to specify the kind of reason on which national courts recognise the EU norms to create the putative amphibious character.)

As with the EU laws, so too could the courts and other institutions which recognise and apply the EU laws, become EU institutions by virtue of their enforcing the EU laws, and acquire an amphibious character as these law-applying institutions retain the identity of Member States’ law-applying institutions. So there is also an overlap in official organs; the EU legal system includes, Barber summarises, ‘the judges and courts of the national legal orders, as well as the judges of the European Union’.⁵⁰ But such an order is ‘pluralist’, notes Barber, because of and to the extent that judges within the EU legal system disagree about the supremacy of EU law in opposition to national legal orders.⁵¹ Dickson is more reserved about overlapping or shared institutions in this case. While she entertains the possibility, she largely considers it as a hypothesis which, to be substantiated, need substantial work to be done to fit relevant facts and to provide a more nuanced understanding of norm recognition and application to characterise the law-applying practice within the Union as a

⁴⁸ *ibid* 36, n 75.

⁴⁹ *ibid* 43.

⁵⁰ Barber, CS 169 n 96.

⁵¹ *ibid*.

‘joint business’ of ECJ and national courts performing differentiated roles.⁵²

She refers to the UK’s legal situation as a possible model in support of the possibility: the Scottish legal system operates as a distinct legal system alongside the legal systems of England and Wales, and of Northern Ireland, while some decisions of the Scottish Court of Session can be appealed to the Supreme Court of the United Kingdom for the final authoritative rulings;⁵³ on such occasions, the UK Supreme Court acts as a Scottish law-applying institution, for the relevant legislation makes it clear that in hearing appeals from a part of the UK, the UK Supreme Court’s decisions shall be regarded as those of a court of that part of the UK, i.e. as decisions of a Scottish court.⁵⁴ The UK’s legal situation involves multiple distinct municipal legal systems which share a common law-applying organ in addition to their respective local ones. Perhaps the EU’s legal situation can be understood in a similar or comparable way, although it is not obvious that the relevant facts support such interpretation.

Dickson is right to show reservations: one would appeal prematurely to the model of shared courts when the situation in question may be but cooperation between two systems under partially realised plans devised by officials of one system: insofar as there is coincidental actions in both systems, the plans are realised, but partially so if the acting officials act on different reasons and intentions. Given all the known facts about EU and Member States’ law-applying officials’ attitudes, it depends on the theoretical understanding of whether it is that law-applying officials act cooperatively because they are part of the same legal system or because they intend to advance their respective legal system’s duty or aspiration to support the operation of the other legal systems, to determine whether the

⁵² Dickson (n 11) 43-4.

⁵³ *ibid* 45.

⁵⁴ Constitutional Reform Act 2005, s 41(2).

EU legal system and the municipal legal systems of Member States are properly seen as distinct cooperative systems or as overlapping systems which share laws or law-applying institutions.

Let me abstract the following discussion to focus on the theoretical questions involved in determining the character of the inter-systemic relation. For the present purpose is to produce an improved theoretical model which supplies more rigorously drawn categories and distinctions that one can apply when trying to clarify the European and other legal situations where multiple systems' mode of interaction is a mixture of cooperative, competitive, and other various elements.

It is important to appreciate the different ways in which multiple legal systems—say, A and B—can interact productively for their respective ends, and identify among them the particular kind of coordination in which the participating law-applying officials and institutions, among other things, are properly understood as shared by A and B at once. The mere fact that courts of A apply and enforce laws made or otherwise developed by official institutions of B need not make the courts of A part of B's law-applying institution, unless, I submit, there is a special kind of integration of A's and B's law-applying officials, which requires two particular conditions: (a) law-applying officials in A and B observe the same ultimate rule or rules of recognition in recognising the laws concerned, and apply those laws not because they intend to support a foreign legal system or have any other intention which implies that they do not recognise the laws as part of their law; (b) law-applying officials in A and B see each other as part of the same group, united in their joint intention to recognise and apply a particular aggregate of laws as a distinct body. They need only have an abstract conception of the group, and need not know one another individually, but collectively by reference to the membership of the group. The conditions, in short, are (a) common aggregate of rules and (b) group intention.

I argue that group intention is crucial. Absent such a condition, two legal systems can cooperate as two distinct legal systems, with a common aggregate of rules identified according to the same ultimate rule of recognition. The ultimate rule of recognition need not unify all the law-applying officials, whose practice in sum grounds the rule, into a singular official group; it is equally open to conjunction with rules that empower separate groups of law-applying officials to operate according to the ultimate rule of recognition, respectively as distinct, self-determining adjudicative groups.

This kind of relation between legal systems can represent that of some municipal legal systems, as discussed before, in Western Europe before the institution of conflict of laws came up. Courts of each municipal system operate as distinct bodies, by virtue of their self-identification that helps individuate one group from another. Thus, courts of A and courts of B operate as precisely courts of A and courts of B respectively in recognising and applying the rules that they share, including the common ultimate rule of recognition. It is true even when there is the practice in A that courts will refer an interpretive question about those of the shared rules developed by B's official institutions to B's courts for authoritative answers, because A's judges intend to, say, honour A's standing commitment to support the operation of B based on a treaty previously drawn by the two states whose legal systems A and B are. This way, courts of B act as courts of B in delivering the interpretive answer, and court of A courts of A in adjudicating the case according to the interpretation.

A and B can cooperate without (a). There is nothing puzzling that two groups of officials can act as per their respective distinct ultimate rule of recognition and in so acting realise their respective ends. So is the situation where B's officials' plans to steer the official law-applying action in A appear realised by what is in fact a coincidence of behaviour, when A's judges recognise and apply B's laws, on different grounds from what B's officials have intended. The coincidence of A's and B's officials'

behaviour in this case is not really coordination, for to count as coordination, it is crucial that the purported plans of coordination are followed, and in this case they are not; plans purported by officials in B (henceforth, B for short) to coordinate official behaviour in A, that A's judges shall recognise and apply B's laws as directly applicable as A's municipal laws, are not followed by A's judges. The latter act per their own reasons and rules of recognition. Unrealised though they are, B's plans gain important success such that law-applying behaviour in A largely resembles A's judges' really sharing B's ultimate rule of recognition and reason for applying those laws.

For some,⁵⁵ I would seem to have tried too hard to draw the foregoing distinction between coordination as per plans and coincidence of behaviour induced by plans. The philosophical dispute about what is a group sets in. The coincidence of behaviour as described above functionally resembles the operation of B within which courts of A are nested within and rendered B's law-applying organs. If so, from the functionalist perspective, the state of affairs is sufficient to count as the operation of B within which A's courts are nested and recruited as B's officials for applying B's laws within A. A's courts become shared with B for the mere fact that A's courts recognise and apply laws developed in B, for which reason A's judges so do, in this view, it is immaterial.

The foregoing line of thought posits a concept of groups which I believe is unconvincing. It downplays the difference in the ways in which coordination and cooperation can be achieved. But it is that difference which helps distinguish between different kinds of collective action. In the present case, that A's law-applying officials observe their own ultimate rule of recognition and reasons in recognising and applying laws developed in B very sensibly reflect the reality that they continue to insist on operating as a self-determining legal system, that laws of B by itself are not binding as

⁵⁵ I am thinking of those who subscribe to a Shapironist approach to joint agency.

laws on them, and that they will not act irrationally, in the sense of self-contradicting, when they refuse to recognise a particular law of B according to A's own laws.

Likewise, that B's officials try to coordinate the law-applying action of A's officials when they understand that officials in both systems share a common ultimate rule of recognition and reason for recognising the laws concerned, on the one hand, and that B's officials try to coordinate the law-applying action of A's officials when they understand that the latter adhere to a different ultimate rule of recognition and act on distinct reason for recognising the laws concerned, on the other, entail different kinds of action on the part of B's officials. Whereas in the first case, B's officials can sensibly claim extension of laws of B to A, in the second, to be rational, they can only pretend that they can make such a claim, that B's laws extend to A, as it does not; in the first, B's officials have a standing to require cooperation of officials in A, while in the second a basis for predicting conformable behaviour on the part of A's officials.

Correspondingly, the two situations require B's officials to consider very different techniques to secure the coordinative state of affairs that they hope will obtain. That B's officials claim that B's laws extend to A while knowing that A's officials recognise B's laws only on A's own terms need not be taken to betray a misunderstanding or wishful thinking on the part of B. That kind of claim may serve primarily as a rhetoric of B's officials, rhetoric not in the pejorative but the classical sense, of persuading people to take the desirable action to advance valuable political ends. To claim that, as EU's high court does, B's laws will become an integral part of A's municipal law, mistaken as it is, might best help realise the coincidence of official law-applying behaviour in the two systems, thanks to the strong pressure exerted by the direct effect talk. It could be true that ECJ's

assertion of EC norms' supremacy and direct effect is 'mere rhetoric',⁵⁶ but such appreciation need not entail that such claims should be dismissed.

The theoretical dispute may partly explain why the European situation is resistant to a straightforward characterisation even if all relevant facts about the relevant courts' attitudes are available. That a particular philosophical view about what counts as a group as distinct from non-group coordination has to be had may be a cause of disagreement over the character of national courts' relation to the EU legal system when they recognise and apply directly effective EU norms ostensibly as the EU officials have intended.

Moreover, what is so intriguing about the European situation is not only the character of the EU norms and national courts which enforce them, but also the character of efficacy and in this sense existence of the EU legal system in the areas where EU's laws are recognised and applied through the operation of member states' municipal courts. It is not directly efficacious; it is efficacious through the efficacy of member states' municipal laws. So its efficacy, if any at all, in a particular area, say, the territory of a member state, is derived from and for this reason coincidental with the efficacy of the state's municipal legal system (or systems) which is efficacious in itself, by virtue of their officials' readiness to apply the laws or a sufficient level of obedience on the part of its subjects,⁵⁷ and dependent on the state's law-applying officials' continuous willingness to recognise and apply the EU laws.

I think it is important to recognise the situation as a distinct kind of efficacy to the familiar kind as in the typical situation of state legal systems; it presupposes and causally depends on the latter. Precarious as it may be, it marks out a distinct way in which legal system exists, different

⁵⁶ Dickson (n 46) 42.

⁵⁷ And either can be sufficient, as explained by Thomas Adams: 'The Efficacy Condition' (2019) 25 *Legal Theory* 225, 239-40.

not only from the municipal law of states as just explained, but also from international law, whose efficacy, if any, is primarily a matter of its subjects'—the states' and perhaps other self-governing polities'—obedience.⁵⁸

To recognise that the aforementioned legal systems are efficacious in different kinds and that one is dependent on the others allows us to see the 'overlap' of these systems in a different light from where we understand the overlap in terms of two (or more) legal systems both of which try to establish or maintain their efficacy, in the undifferentiated sense, within the same space. With an undifferentiated understanding of efficacy, the situation of two legal systems which are all efficacious within the same area represents an apparent anomaly, given the standard account of legal systems: it is characteristic of the municipal law of the state that it claims supremacy or more precisely self-determination over the matters, people, and areas it purports to control; how can two legal systems exist in the same space at the same time, if they both make such claims (as they do in the European case) in the same space? Would not that just give rise to an ongoing contest between legal systems for control over the relevant matters and population in the area, until or unless one system succeeds and prevails over the other? But we need not see the situation this way, if we introduce the dependent kind of efficacy. With the differentiated understanding, it is possible to see the situation as not so much a competition or conflict as symbiosis of the interacting legal systems. Both legal systems exist in the same space, but in different senses and different ways. The observed overlap is one's dependence for its efficacy upon the other.⁵⁹

⁵⁸ *ibid* 242-3: Adams notes a significant character of the efficacy of international law as that subjects' obedience is much more central, and important, than official enforcement in ascertaining the international order's efficacy and existence.

⁵⁹ The idea is inspired by Gardner's brief discussion in *LLF* 286: 'In each EU member state, at least two legal systems are concurrently in force, the first largely effective through its own mechanisms, the second largely effective through the mechanisms of the first.' The passage hints at two possible ways of conceptualising efficacy, which I pursue here.

Given its efficacy as understood above, the EU legal system's geographical domain does coincide with the territories of member states, or more precisely the geographical domains of the municipal legal systems of the member states. My discussion so far has deliberately avoided equating the territory of a state with the jurisdiction of its municipal law, without clarifying what their interrelation, if any, is. Let me turn to this subject next.

V. Law's Territory

My analysis focuses on state legal systems and more generally municipal legal systems. A municipal legal system is a geographically delineated legal system. A state legal system is a municipal legal system of a state. A state can contain multiple municipal legal systems governing different parts of its space. They can all be spoken of as state legal systems. But one may want to understand a state legal system as a national legal system, whose boundaries track the national territory of the state. I have no strong view about how to use the term. These are municipal legal systems for sure, and I shall refer to them as such. Municipal legal systems are not limited to state or domestic ones. Transnational legal systems, such as EU law, are municipal if they demarcate themselves partly in territorial terms.⁶⁰ Municipality, so understood, in short, is territoriality.

It bears noting that territoriality is a feature of the legal system considered on the whole rather than every and each individual law of the system. Territorial scope of the legal system can be different from that of individual laws of the system. The system may confine its operations largely in a specific space, thus applying most of the laws within the borders. This can also permit exceptions; some laws can be made to apply beyond the borders, such as to its own citizens overseas or matters whose regulation is (thought to be) of universal importance. These exceptions need not contradict the municipal nature of the legal system on the whole,

⁶⁰ Gardner, *LLF* 287.

which is supported by the system's general practice of operating within the borders.

In what follows, I argue that the identity of the spatial scope of a state legal system and the spatial scope of a state is contingent. The former is decidedly determined by the practice of law-applying sector of the state, and the latter the political. The two coincide when the state legal system is wholly integrated into the structure of the state; whether this condition obtains is a contingent social fact. Even when they are congruent, they could follow from two separate courses of actions. The territorial scope of a municipal legal system can be either smaller or larger than that of the state. Varied as the situations could be, each can be explained by recognising the legal system's capacity to determine its boundaries on its own terms.

The subject matter concerns the relation between the territorial dimension of the state and the territorial dimension of the state's legal system or systems. Some may think that they are one and the same, and only express or emphasise different respects of the entity. A state necessarily has a space according to the traditional theory; it is a constitutive condition of the state.⁶¹ Following from his thesis that the state is but the legal system personified, Kelsen reduces national territory to the geographical domain of the national legal system.

The juristic reduction has serious problems; in this particular context, Kelsen's model relies too much on the possibility that there is always a national legal order that can be ascertained in correspondence with a state. That is, the success of his model turns on the truth of the thesis that every state, in the final analysis, has a national legal system which comprises all its laws and, if any, all the subordinate legal systems operating within its boundaries. In the United Kingdom, for instance, there

⁶¹ Territory is considered a necessary element of a state in the *Staatslehre* tradition: Martin Loughlin, *Foundations of Public Law* (OUP 2010) 192.

has to be a national UK legal system which encompasses as its sub-systems the legal systems of England and Wales, of Scotland, and of Northern Ireland. This can be achieved by, say, a common constitution that validates all three legal systems. Absent that, there are only three separate legal systems, and the unity of the United Kingdom, in its territory and other respects, cannot be ascertained. There may in fact exist no such constitution, and Kelsen cannot recognise how the UK is a state. Perhaps he would say that there is no unity when no national legal system is found, and people are mistaken in believing that there is such.

But it is no rare situation where the state's space is divided into multiple jurisdictions governed by separate legal systems with no clear overarching master rules that unite them all, while they coordinate with each other well as per each system's own rules regulating the inter-system matters. Kelsen offers no compelling reason as to why this case shows no or less unity than that of a unified national legal order, and I do not think there is any. That position seems but to exaggerate a difference in the way in which the various (sub)systems are coordinated. A state can go in either direction in shaping and determining how the regional municipal legal systems within its borders are to be related to one another. The particular choice or pattern should not affect the fact that the state has a definite geographical scope. Kelsen, in short, does not convince us that there always has to be a unified national legal system when the state can be recognised, and cannot account for the national territory where there is no such system.

Kelsen's failure may lead one to embrace the view that it is a matter of the state's effective control. Some may think that, as I imagine, the territory, as a constitutive condition of the state, is a precondition of the legal system. It has to be secured so that the particular municipal legal system can come into existence and operate. The state has to be able to exist, before its legal system or systems can. Moreover, there is no compelling reason to think that the state and its laws ought to be

concomitant. The state may exist without use of laws, in part or the whole of its territory.

The view captures an important respect of the common-sense conception of territory. One should resist, however, reduction in the opposite direction. The problem is not that the state can exist antecedently of law; surely it can. Be that as it may, when there is state law, there arises some close connection between state law and territory. When the municipal legal system emerges and begins to regulate the geographical scope of its own application, the territory gains a legal element, i.e. it becomes a matter of law, too. That is to say, the territorial dimension of the municipal legal system or systems would seem to inevitably intersect, in ways yet to be specified, with the territorial dimension of the state. As Oran Doyle aptly argues, there seems an irreducible ‘normative’ or juristic⁶² element in the territorial phenomenon, irrespective of whether one shifts focus from law and constitution to state or effective control.⁶³

Hence, Doyle develops a hybrid approach, conceptualising territory ‘as a normative concept dependent on practices of political control or law application’.⁶⁴ This is already a significant improvement from the former reductivist approaches. In my view, however, a further step has to be taken to ascertain that there are two kinds of phenomena and thus two corresponding concepts of territory. Doyle’s model still too much relies on the coincidence of the state legal system’s and the state’s geographical boundaries. As noted before, it is not obvious that they are always coincidental or ought to be so.

First, there may be multiple municipal legal systems which cooperate within one state’s territory, where no one has a rule specifying

⁶² By ‘juristic’ I mean properties derived from legal norms or rules, which are not all norms.

⁶³ Oran Doyle, ‘The Silent Constitution of Territory’ (2018) 16 *ICON* 887, 890-1.

⁶⁴ *ibid* 892.

the whole of the national territory, apart from its respective jurisdiction; secondly, the municipal legal system may only extend to part of the state's territory.

In such situations, the geographical domain of the legal system is apparently a different thing from that of the state, while they are allowed to overlap, and always do. Recognition of two separate and related territorial entities, it seems to me, best makes sense of these situations. The state can obtain, change, and determine its geographical domain, by actions conducted by its political sector, viz. the executive, including the military, and the legislature. One can identify a sufficiently clear territory of the state by reference to such actions, and such identification is possible even if the courts do not recognise some part of the territory so identified as part of its jurisdiction, because, for instance, the courts observe a standing principle that the municipal laws do not extend to conquered or ceded territories which have their own local legal systems.⁶⁵ On this occasion, one observes that the legal system has and regulates its own and separate territorial scope, by the actions of the courts. The legal system can obtain, change, and determine its geographical domain on its own terms.

Viewed from this new perspective, the observed close connection between state territory and state law can be accounted for as the interaction between the two territorial entities or phenomena. Doyle says that territory is a normative concept.⁶⁶ The alternative view, I say, is that the familiar territorial realities are a mixture of the territories of the state and the legal system, one juristic and the other not. My purported view can supplement Doyle's account by clarifying that much of Doyle's analysis is conducted on the territorial scope of the legal system rather than of the state, while I appreciate a more material role of the codified constitution on territory by considering its effect on not only the courts but also the

⁶⁵ William Blackstone, *Commentaries on the Laws of England*, vol 1 (first published 1765, Chicago UP 1979) 104-5.

⁶⁶ Doyle (n 63) 892.

political sector of the state. Moreover, it is well prepared to explain the dynamic territorial relations between state and municipal law.

With Doyle, I hold that the practice of the law-applying officials, not the law-making officials, determines the rule which draws the geographical scope of the legal system. Legislated rules, in either a codified constitution or a statute, have to be recognised by law-applying officials, and are not in themselves decisive. I differ somewhat with Doyle as to why this is so. He argues that a municipal legal system's territorial scope is necessarily determined by the system's ultimate rule of recognition, which is part of the system's unwritten or 'silent' constitution. His argument for this proposition involves two crucial moves.

First, the ultimate rule of recognition of a municipal legal system, he contends, 'must be geographically limited'; as legal officials apply the rules of municipal law necessarily as rules binding for and within such-and-such geographical domain, such 'geographical referent' is thought to be an 'essential component' of the ultimate rule of recognition.⁶⁷ Secondly, the territorial scope of the legal system consists precisely of the 'geographical area in which the ultimate rule of recognition is accepted', as '[n]o ultimate rule of recognition extends beyond the geographical range of the officials whose practice constitutes the rule'.⁶⁸ I take this to mean that the ultimate rule of recognition necessarily requires the officials to recognise as the system's geographical domain the area where they actually apply the system's rules, i.e. control. Thus, Doyle holds that the legal system, by means of its ultimate rule of recognition, necessarily delineates the space that its officials actually control. This then helps further his argument that it is 'unnecessary and ineffective' that a legal system tries to delimit the

⁶⁷ *ibid* 894.

⁶⁸ *ibid* 895.

scope of its territory by posited rules, notably in the form of a provision in the ‘master-text constitution’.⁶⁹ He summarises his view thus:

the silent conventions of a geographically located group determine the geographical scope of a constitution’s application. Constitutional delineations of the national territory are therefore unnecessary.⁷⁰

I would like to broaden Doyle’s account of the possible ways in which officials can act to determine and shape a legal system’s territorial scope. In my view, it need not be the ultimate rule of recognition that has to specify the spatial scope of its own and the rest of the system’s application; a posited rule validated as per the ultimate rule of recognition can do that as well, if law-applying officials follow it. If law-applying officials’ practice differs from the posited rule, it could mean that they act according to a customary rule. That customary rule, it seems to me, need not make up part of the ultimate rule of recognition.

It is true that the ultimate rule of recognition, as most other rules of the municipal legal system, must be geographically limited in its application. But that a rule’s application necessarily has a geographical limit does not mean that it needs to provide that limit itself. All that the ultimate rule of recognition need provide is the conditions by reference to which rules can be identified as rules of the legal system, which exists ‘in a given country or among a given social group’.⁷¹ (It becomes more apparent on my account that a legal system exists in a group, composed by legal officials.) Such identification need involve no territorial delineation, especially in the latter case where the law is group-based. The system’s operation in a municipal setting requires territorial delineation, which can be provided by a separate rule, developed either by the law-applying officials or the law-making officials. The master-text constitution or an

⁶⁹ *ibid* 896.

⁷⁰ *ibid* 888.

⁷¹ Hart, *CL* 112.

ordinary piece of legislation can provide such a rule, which can work as long as the law-applying officials accept it, applying the rules of the system according to its territorial demarcation.

In brief, a municipal legal system necessarily includes at least a rule regulating the boundaries of its application. The rule needs not be part of the ultimate rule of recognition. It can be provided by a statute, a codified constitution, a precedent, or a customary rule. Whatever its origin and type, it is its acceptance by the law-applying officials which is crucial to the determination of the legal system's territorial scope. I figure that this is what Doyle would like to foreground, but ties exclusively to the ultimate rule of recognition. It remains a standing possibility that the rule practised by the law-applying officials states a different—larger—territory than where they successfully apply the laws and are obeyed. The practice of the law-applying officials determines the rule which draws the scope of their geographical domain; whether that domain is actually theirs turns on the success of their law application in the whole of the suggested domain. The practice of law-applying officials determines the content of the law, while the efficacy of the practice determines the law's existence, at a given time and in a given place.

The political sector can try to shape and define the territorial scope of its legal system, by means of legislation or constitution making. Whether it will succeed depends on how the judiciary decides to respond to the political sector's attempt. The posited rule can be ineffective, because the law-applying officials can ignore it.

It is conceivable that the state controls greater space than the space in which laws of its legal system can apply. The state can exclude a given area from the application of the laws of its municipal legal system; the area may be lawless, but not without order secured by non-legal means of social control, or by a special legal system such as martial law. In this situation, the territorial scope of the state and the territorial scope of the legal system

overlap but do not coincide. It can be the very intention of the political sector of the state that is to prevent the municipal law's extension to the protected areas; but it is the court which finally determines whether the law extends, and can defy the political wish and so expand its territorial scope within the broader scope of the state. If the court has so ruled, and the political sector is not ready to resist the court's ruling, then the geographical domain of the legal system will successfully expand.

The posited rule may bear a closer relation with the territory of the state than the jurisdiction of the law. Statutes can be deliberately passed to adjust or clarify the change in the state's territory. Yet, how change in the state territory will translate into change in the legal system, again, importantly turns on the practice of the law-applying officials. The legislature, on behalf of the state, may contract the territory by passing a law to renounce its legislative competence over a given region. The courts may not recognise law as capable of contracting the jurisdiction of the municipal legal system which formerly extended to the region concerned, say, on the ground that the renouncement is contrary to the system's standing principle that no legislature can bind its successors.⁷² The court may eventually have to recognise the change in its jurisdiction, not on the ground of the legislature's say-so, but of, say, the reality that the law no longer exists in that region. The state can deliberately contract its territory, but not the legal system's.⁷³

The municipal legal system need not operate within the territory of a single state. It can exist and operate in multiple states' territories. The territorial domain thus comprises the territories of these many states. In this case, the relevant states share a common legal system, a common aggregate of rules and group of law-applying officials. This is possible as long as the states are willing to cooperate in this way. The EU law indeed

⁷² KC Wheare, *The Statute of Westminster and Dominion Status* (5th edn, OUP 1960) 153-4.

⁷³ For a different view, see Doyle (n 63) 897.

exemplifies such a transnational kind of municipal legal systems. The EU law exists alongside the municipal legal systems of the member states. It shows that the transnational legal system, of a transnational political community, can coexist with national municipal legal systems.

So far, municipal law appears to be law of either a state or a non-state political entity. It need not be so. The municipal law of one state and the municipal law of another state are part of the same municipal legal system. William Blackstone suggests that English law, as the municipal law of England, applied also to Ireland, although Ireland was a separate kingdom. The geographical domain of English law comprised two distinct kingdoms.⁷⁴

One may doubt whether that is factually accurate. After all, in reality the two kingdoms were ruled by the same person, and Ireland was subject to the English rule as a conquered land. It is questionable whether there were really two kingdoms rather than one. These are legitimate concerns, I say, but need not trouble us here. For what matters for the present purposes is the possibility of this particular legal situation that allows Blackstone to so describe English law's jurisdiction, if the facts obtain. That is to say, the question is whether the legal situation is conceptually possible.

I think it is, depending on the practice of the law-applying officials and the cooperation of the two states. Surely the English rule over Ireland in this particular case helped secure the requisite condition, but that should not be considered the only way of attaining the needful kind of cooperation between two states to share a common legal system. This way of cooperation is no doubt unusual and yet possible. It is possible because the municipal legal system can determine its own territorial scope; it need not accept and track the borders that the state has or claims that it has. It has an in-built capacity to operate transnationally. States need only

⁷⁴ Blackstone (n 65) 98-9.

recognise that and design the overall structure of their national institutions to accommodate the operation of a shared, transnational legal system. This need not involve the renouncing of the state's boundaries, or its existence as a distinct state.

Still, if two states share a common municipal legal system, they are likely to be considered a substandard case according to the familiar criteria of statehood. It is questionable how far one will see them as two separate states. Perhaps some will insist that the apparently two states are really part of one state. Be that as it may, my point is that it need not be so.

VI. The Relation of Law and the State

The relation of law and state, Raz claims, 'affects the two distinct aspects—scope and continuity—of the problem of identity'.⁷⁵ Let me focus on the former here, while the latter is kept for Chapter 4. On the problem of scope, Raz maintains thus,

Every state—by which is meant a form of political system and not a juristic person—has one legal system that constitutes the law of that state, and every municipal legal system is the law of one state. Since, then, the identity of a legal system is bound up with that of the state the law of which it is, the relation between law and state necessarily affects the problem of scope.⁷⁶

It is not obvious to me that Raz's assertion as quoted is true. On the contrary, the discussions conducted above show that the relation between a municipal legal system and a state turns on many contingent facts, and there is no necessary identity of the municipal legal system and the state whose law it is. Law-applying officials act on behalf of the legal system to recognise laws which are part of the legal system and therefore determine the legal system's scope. The scope, so determined, is not limited to only the laws of the state, understood as the laws legislated by the state's legislature or else developed by local institutions. The municipal legal

⁷⁵ Raz, *AL* 98.

⁷⁶ *ibid* 98-9.

system can therefore very possibly contain laws which are developed by and in foreign legal systems. Such adventitious laws do not thereby become the laws of the state by virtue of judicial recognition. For the state may not want to recognise them, as per the intention of its political sector, viz. the executive and the legislature acting on behalf of the political community. Besides, it is possible that a municipal legal system is shared by two states, so that laws recognised as part of the legal system do not become laws of both the states.

The greater a state can exert control, by way of law-making officials in its political sector, over the legal system, the closer to identity the legal system and the state will come. The corresponding form of group agency includes as a central element close cooperation between the law-making officials and the law-applying officials. As law-applying officials are disposed and supposed to faithfully follow the law-making officials' directives, the intention and action of the law-making officials assume a decisive role in settling the boundaries of the legal system's content, space, and other respects of its relation with other legal systems.

On such an understanding, the unity of the law can indeed be subsumed under the unity of the state and considered an integral aspect of the latter. For in the well-ordered case, the law-making officials act as the agents of the state, on behalf of the political community, when they legislate. So too are the law-applying officials, when they apply and enforce laws that represent the political community's joint commitments, and sometimes so do even against the law-making officials as well as the general public, particularly in constitutional cases, to enforce the community's standing commitments as embodied in the Constitution to secure continuous conformity to such commitments.⁷⁷ The operations of

⁷⁷ Plus an important rider that the Constitution is reasonably amendable by processes that involve citizen participation. Richard Ekins, 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 174. I bracket the problem with the conditions under which a constitutional constraint can be appropriately characterised as a commitment enforceable by courts, acknowledging Jeremy Waldron's thoughtful

the law-applying officials can be integrated into the overall structure of the state's complex group action to maintain its legal system. The municipal legal system then becomes group action by ultimately the state as the relevant acting group, in the fullest form of a political community comprising citizens as members.⁷⁸

Still, it is not necessary that a legal system has to depend for its unity on the state or other political entity whose law it is. The identity of a legal system is well grounded in the joint action of its law-applying officials. It will be a mistake to tie the unity of law to the unity of the state, and in so doing miss out many a possible way in which law may be entangled with a state or states.

argument against the 'precommitment' characterisation of the constitutional bill of rights: *Law and Disagreement* (OUP 1999) 255 ff.

⁷⁸ This is obvious Ekins's conception of the kind of joint action that a legal system is. See e.g. 'Facts, Reasons and Joint Action: Thoughts on The Social Ontology of Law' (2014) 45 *Rechtstheorie* 313, 332-4; 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 170-6.

The Continuity of States

This chapter seeks to explain how a state can exist and change over time while still being appropriately understood as a single continuous state. I start by identifying and critically examining two major lines of argument about this question from political and legal philosophy. I term these two lines of argument, respectively, the Aristotelian view and the nationalist view. The Aristotelian view is centred on the continuity of the constitutional order associated with a state, and the nationalist view focuses on the shared identity of a historically extended national community. The Aristotelian view, I argue, has much too narrow a focus so that it fails to make sufficient room for a political agent's cross-temporal existence which transcends constitutional discontinuities. The nationalist explanation, on the other hand, presupposes the persistence of a national community as a distinct subject, but does not explain how this is possible, and thus offers an account of continuity which is but an uncritical recognition of a national group's historical self-understanding.

Having demonstrated problems with both views, I go on to offer my own alternative. Based on a conception of the state as a political community which, when well-ordered, is a group agent composed by officials and citizens, I analyse the continuity of states by considering what it is to be a persisting political group agent; I contend that it depends on two crucial elements: first, a standing group intention shared by successive members, and second, no radical break in the succession of the people who share the standing group intention.

First, a state is a group agent if its members form a joint intention to act for a given end. A political agent, on my account, is the kind of group agent which performs the characteristic activities of the state, viz. maintaining a standing structure which creates and authorises the official agents of the state to perform such characteristic functions as legislation, administration, and adjudication on behalf of the state. A state persists through time, I argue, if people, present and future, continue to join the standing intention to maintain the standing structure which ensures the performance of the characteristic state functions. That is, it is crucial to a political agent's persistence through time that there are successive members who all join the same standing group intention when joining the group.

The first condition entails a second requirement for a degree of member continuity, in that there are always old and new members co-existing at any particular time. For new members cannot join a standing group intention if there are not already people who have it and are willing to accommodate new members. Therefore, successive members naturally form a kind of coexisting or overlapping 'cohorts' through time. The second condition helps exclude some counter-intuitive causes of continuity, and also explain why some situations are fundamentally indeterminate partly due to the quantitative character of the condition. Moreover, the second condition serves as an important basis for grounding the continuity of a state's responsibility when a state has been discontinued.

The structure of the chapter is as follows. Sections I, II and III critically examine Aristotle's account, modern constitutionalists' variations on it, and nationalism. Section IV presents my own view. Section V offers an explanation of succession, i.e. continuous state responsibility in the condition of discontinuity. Section VI concludes the discussion by briefly reflecting on how far the proposed account might be seen just as another variation on the Aristotelian explanation; while not entirely unfounded, I explain why it is advisable not to understand constitutional identity in such expansive way.

I. Aristotle's Solution and Its Problems

A city or city-state is, Aristotle notes, 'a composite', consisting of many parts.¹ But he also sees it primarily as an organisation of persons, as a 'society of citizens sharing a constitution'.² By a constitution Aristotle refers to 'an ordering of a city in respect of its offices and particularly of the sovereign one', which he goes on to specify as the government.³ As such, the kind of social and political reality which Aristotle identified and sought to explain is much the same as the kind of social and political reality which more recent writers have sought to explain; the differences, plentiful as they are, indicate not so much different kinds as different sub-classes of the same kind, and therefore should not prevent us treating Aristotle's and those more recent accounts as comparable attempts to solve the same kind of problem. Moreover, to engage with Aristotle's account as still relevant today is faithful to the philosophical character of his argument, while not overlooking the possibility that his philosophising could reflect a radically different way of thinking about the reality prevalent at his time, that any implausible outcome of his analysis reveals not necessarily a weakness, but a different way of thinking about the state at his time compared to ours. That said, Aristotle's argument is deployed and tested as a philosophical one about universal truths about the state, so it will be accepted or rejected precisely on the ground of its explanatory soundness in relation to cases from our basic and common experiences.

Aristotle should doubtlessly be credited for the first clear formulation of the question of continuity for analysis: 'when we ought to say that the city is the same and when not the same but another one'.⁴ He

¹ *Politics* 1274b38. I rely largely on the translation by Richard Robinson, *Aristotle: Politics Books III and IV* (OUP 1995).

² *ibid* 1276a30. See a useful introduction to the Greek polis in Richard Kraut, *Aristotle: Political Philosophy* (OUP 2002) 12ff.

³ *ibid* 1278b8.

⁴ *ibid* 1276a17.

notes, rightly, that the answer does not lie in the identity of the place, for the ‘place and persons can be parted’.⁵ He also distinguishes identity from stasis; he is clear that the continuity of a city-state is a different question from the duration of a particular aggregate of persons and other materials which make up a city-state at some particular moment.⁶ Having noted these, Aristotle contends thus

Since the city is a society, and a society of citizens sharing a constitution, it would seem that, when the constitution takes another form and differs, the city also cannot be the same.⁷

By ‘another form’, Aristotle refers to the form defined according to the established classification of constitutions: kingship, aristocracy, and constitution, plus their corresponding perversions, viz. tyranny, oligarchy, and democracy.⁸ The relevant change refers obviously to change from such as kingship to aristocracy or constitution, while less obviously to change from a correct constitution to its corresponding perversion, such as kingship to tyranny. The uncertainty is immaterial for the present purposes, for what we need to examine is whether Aristotle’s criterion is sound even in the obvious kind of change.

Aristotle does not permit a city-state to undergo a change from one constitution kind to another while remaining one and the same state. For some, that a state cannot change its constitution without causing its own demise seems too obviously false.⁹ True, one may wonder whether the view was such because it had to accommodate the prevailing common sense of

⁵ *ibid.*

⁶ *ibid.* 1279a30.

⁷ *ibid.*

⁸ *ibid.* 1279a25-1279b4.

⁹ See e.g. Robinson’s comment: (n 1) 9-10. The objection seems to operate on an assumption that to argue that a state cannot survive a change of constitution is but to instantiate *reduction ad absurdum*. For an example of this kind of thinking in modern constitutional theory, see Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, vol 1 (Mirjam Künkler and Tine Stein eds, OUP 2017) 149-50.

the time.¹⁰ Be that as it may (although some note otherwise),¹¹ we can still ask whether Aristotle's account is indeed too dependent on the intuition at the time, and therefore cannot be recognised as a general explanation of states, but largely as a particular explanation of the ancient Greek polis. This will still amount to a kind of valid objection.

In the last analysis, it is right to be sceptical of Aristotle's explanation. However, I think that one should avoid dismissing the view too quickly. Its counter-intuitiveness is surely a disadvantage to the criterion. But unless and until it is demonstrated that the intuition is well founded, the counter-intuitive result does not automatically work as refutation. In what follows, I discuss two particular criticisms of the criterion. They are of particular interest here, because their critiques identify the specific situations which a better account should aim at explaining.

First, in describing deliberate constitutional transition as discontinuity of the city-state, it precludes the possibility of the transition as a political agent's continuous efforts to order itself, as one persisting body, by contemplating, choosing, executing, and sometimes experimenting with different successive plans and arrangements that best secure a good order. Radical change in the constitutional form is by no means uncommon especially when changing circumstances, unfamiliar conditions, and future uncertainty do not always allow of a persisting stable structure to be identified and installed once and for all. Constitutional breaks can thus be well squared with an extended process of one continuous political group's active search for the form of order best suited to its conditions of the time. Eric Voegelin illuminates this process by referring to the formation of the American state:

¹⁰ Robinson (n 1) 9: Richard Robinson suggests that Aristotle was deliberately counter-intuitive.

¹¹ *ibid* 21-2.

[T]he whole period, from the beginning of the movement for independence to the making of the Constitution of 1789, is considered one social process in which the growing nation, winding its way through the difficulties of intercolonial and interstate relations and the labors of the war, gained its power physiognomy and, after the unsatisfactory experiments with the Continental Congress and the Articles of Confederation, at last found the Constitution that was valid and at the same time expressive of the authoritative power structure of the new nation.¹²

To be sure, it is not self-evident that there had been a distinct American nation by the time of constitution making in 1789, and Voegelin's assessment is not uncontentious. Still, his treatment of the topic is worth noting as it demonstrates the way in which the question should be addressed. That is, a more careful understanding and analysis of the subject matter has to take into account the possibility of a radical constitutional change as a state's successive deliberate actions over time. The sharp transitions and breaks but reflect the extraordinary circumstances under which the state has to navigate to eventually secure its well-ordered existence. The constitutional breaks, in short, are part of the continuing existence of the state which sees and oversees such breaks. Hence, if it is true that the 'American nation' cannot be considered to exist before 1789, there has to be deeper explanation than the succession of constitutions.

Voegelin's objection, in my view, refers to a possible different criterion of continuity but does not substantiate it; without proving that such a different criterion is really possible, the argument against Aristotle's position is hypothetical at best. However, it does offer an observation that marks out a successful condition for an alternative to Aristotle's account: if an account of continuity can explain how a state maintains its identity through the episode of fundamental constitutional change, it is superior to the account which cannot. Aristotle's criterion will be dismissed for its

¹² Eric Voegelin, *The Nature of the Law and Related Legal Writings* (Robert Pascal, James Babin, and John Corrington eds, Louisiana State UP 1991) 37.

failure to recognise a case which is not only intuitively possible but also really possible, as the alternative account proves.

The second problem, noted by John Finnis, is that Aristotle contradicts his purported criterion somewhat by recognising a subsisting city-state despite constitutional change when noting the question of the city-state's responsibilities. Finnis writes,

For as soon as he has reached his conclusion that there is a new *polis* with every revolutionary change of *politeia*, he adds: 'Whether a *polis* is bound in justice to fulfil its engagements when it changes its *politeia* is another question.' In this sentence, the *polis* is a subject that retains its identity through the changes of constitution and 'legal systems'—it is a subject that has a *history* which embraces, and is not ended by, revolutions; and it is a subject that has or may have *ethical* obligations unaffected by revolutions.¹³

That particular sentence noted by Finnis, I think, indeed contradicts the criterion based on constitutional identity somewhat. But note that the problem is not deep, not only because it can be solved simply by change to the wording—replacing the single subject with two,¹⁴ but also because, even if Aristotle keeps the current wording, he is incoherent only in the way that he uses the word *polis* differently.

In the sentence in question, *polis* can be taken to mean the place, the same geographical area where the *polis* is seated. Athens can be used to mean the place, the part of Attica where Athens as a political entity is. Certainly this use differs from the main usage Aristotle has noted and defended regarding what a *polis* is (not just a place marked out by city walls), and so Finnis is right to expose discrepancy. But the language is

¹³ John Finnis, 'Revolutions and Continuity of Law' in *CEJF* IV (OUP 2011) 431.

¹⁴ A rephrased sentence such as 'Whether *the new polis* is bound in justice to fulfil *the previous polis's* engagements when *the previous polis* changes its *politeia* and *thereby disappears* is another question'. The rephrased parts are italicised.

capacious enough to allow that to still convey conceptually coherent contents.

Even if the verbal incoherence is resolved or tolerated, there remains a deeper question as to the nature of the relation between the pre- and post-break city-states. There is apparently something special in their relation so that the post-break city is obligated to discharge some of the former's obligations. It is not self-evident that states which exist in the same space at different times have obligations to fulfil predecessors' engagements. They can be totally isolated from each other. No state has any obligation to continue anything done by any states which existed in the same location in the past simply because they are founded in the same place. It requires explanation why two temporally successive states can also be normatively continuous. Aristotle is silent on this.

This is to say, what the verbal infelicity helps reveal is that Aristotle implicitly recognises a second kind of continuity, but does not explain it. Discontinuity as constitutional discontinuity has a subsisting remainder such that we cannot see it as discontinuity *simpliciter*. A mark of this distinction is his judgement that the debts (among other things) incurred by the pre-change state have to be devolved on the post-change new state. A certain special connection seems to have persisted, unbroken by the constitutional break, to ground the transfer of debts and other important obligations, rights, etc. And Aristotle here is not incoherent to say that this is a separate problem from that of continuity. It can be addressed as whether a second *polis* should inherit the debts of the first *polis* and fulfil some of its engagements. The analysis runs out of steam at this point; the account based on constitutional identity offers little clue or resources for how the second problem is to be solved. As I demonstrate later when developing my explanation of continuity, an adequate account of continuity helps locate and determine considerations pertinent to the solution of the problem of responsibility, rather than just notes it as a separate question.

Finnis's critique, in sum, exposes that Aristotle either recognises the *polis* as a kind of a persisting subject following constitutional change, thus contradicting his own proposed explanation of continuity, or recognises some connection between the two *poleis* which requires the new *polis* to continue the old *polis*'s engagements, which connection it is not obvious how Aristotle would explain.

Based on the foregoing critiques, I submit two principles, as conditions for any successful explanation, for guiding further theoretical improvement. First, the proposed account of continuity and discontinuity takes into account the possibility that a political agent can endure and effect changes, even radical ones, in its active existence over time; it requires strong argument to reject this possibility. Second, it has to make room and account for the second kind of continuity which grounds succession of responsibility and other normative relations, irrespective of how we distinguish between continuity and discontinuity of states. In particular, it has to take into account the concern that it could be too easy for a state to shirk obligations owed to other parties if its discontinuity is ascertained; some will therefore wonder, for instance, whether the ascription of responsibility should be among the very considerations that determine a state's continuity, to prevent unreasonable practical implications. I do not think it should, while developing an account of the continuity of responsibility to help prevent some possible unfair consequences of the discontinuity of a state.

II. Variations on the Aristotelian Solution

Let me turn to consider modern explanations of the continuity of a state or of its constitution that in effect, if not explicitly, continue and extend Aristotle's original view in various ways. To distinguish this body of views from the others considered in the chapter, I sometimes refer to them by the phrase 'constitutional identity', while I acknowledge that the term in modern constitutionalist writings has been used for a broad variety of

ideas.¹⁵ Given the different purposes and contexts for and in which the idea of constitutional identity has been developed and used,¹⁶ the explanations which I select are those which treat the question of constitutional identity, as did Aristotle, in part as a question about when one ought to determine a constitution is the same and when a different one.

Judging by how they conceptualise constitutional continuity, such modern explanations can be divided up into two major bodies. One is the theory of systemic continuity defined by a structure of validation according to a common constitution; the other is the theory of constitutional identity formulated as a constitution's 'basic structure' composed by substantive principles of the constitution which are so fundamental that they cannot be lawfully and constitutionally amended. Both bodies are characterised as a continuation of Aristotelian thinking in their subscription to the idea of a distinguishable constitutional identity, and have developed, in different directions, a more elaborate account on what make a constitution identical over time. I focus my discussion in what follows on the second line of thought to explore relatively overlooked and unresolved problems emanating from the second way of understanding constitutional continuity. A brief discussion is made on the first line of thought to emphasise the difference between the two conceptions of constitutional identity.

The most sophisticated formulation of the idea of systemic continuity can be found in Hans Kelsen's works.¹⁷ On his account, a state continues to be the same state as long as it is the same constitution that validates all its laws. Continuity requires all legal changes, including constitutional ones, be made according to the constitution or to relevant rules created according to the constitution. It follows that change of constitutions does not disturb continuity, if it is authorised by the present

¹⁵ Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó, *Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 756, 756-7

¹⁶ *ibid* 760 ff.

¹⁷ Kelsen, *GTLS* 115-6; *PT* 198 ff.

constitution. Thus, constitutional identity per this understanding permits a series of successive constitutions, even if their contents are radically different; constitutional identity is maintained as long as it is the same original constitution to which all the successive constitutions can be traced back through a chain of validation. Different from Aristotle's idea, this conception no longer grounds constitutional identity in the identity in content. Transition from monarchy to democracy, for example, does not break constitutional identity, if the monarchical constitution regulates its own supersession by the democratic constitution. Still, the difference is only a variation on Aristotle's theme that it is some constant constitutional element that sustains the identity of the state in the face of the many changes it undergoes. The constant element, on this account, is the historically first constitution (or the basic norm which validates the historically first constitution).

For the present purposes, I do not discuss here the problems with the foregoing line of thought. I find the standard critiques broadly agreeable; I discuss some of them, plus my own thoughts, in chapter 4, on the continuity of a legal system. Suffice it to say that the account does not improve too much where the original Aristotelian explanation is found problematic. Continuity based on validation by a common original constitution contradicts some uncontroversial cases of continuity and of succession of states;¹⁸ moreover, it runs into the same two problems with the original Aristotelian argument as discussed above.¹⁹

Let me now turn to the other body of arguments to expose and address some relatively ignored or unresolved problems. In contrast to the first, the second strand seeks to tie constitutional identity in the constancy of some central material features of a particular constitution or

¹⁸ See Kelsen, *GTLS* 181-92, 219-20; Finnis (n 13) 407 ff. Also, Barber, *CS* 139-44; Leslie Green, *The Authority of the State* (OUP 1990) 75-8; Raz, *AL* 99.

¹⁹ Notably, the quoted passage from Voegelin is originally meant as an objection to both Kelsen and Aristotle.

constitutional order, meaning the whole body of constitutional norms usually comprised of but not exhausted by the codified Constitution.²⁰ Thus, this approach is a more straightforward continuation of Aristotle's original explanation than is the first.

What this modern variation differs from or adds to the original account is a richer, more developed idea of the identity-defining 'basic structure' of the constitution than the ancient classification of constitution kinds. Usually attributed by constitutionalists to Carl Schmitt as its original author,²¹ the idea of the basic structure has attracted great attention recently in comparative constitutional theory for in particular the debate about whether the constitutional amendment power is necessarily limited. Some argue that the amendment power, however it is textually expressed, cannot be exercised in a way that alters the constitution's identity, framed as its 'basic structure', and therefore is inherently limited.²² To be sure, this recent use pursues a different purpose from Aristotle's original one. But the argument about constitutional basic structure in itself represents a serious and distinct effort to theorise about the criterion of constitutional identity, and thus a potentially fruitful way of modifying the Aristotelian argument on state identity based on, as will be seen in what follows, a broader array of a state's constitutional practices and commitments. It is worth considering whether the expanded understanding of constitutional identity

²⁰ See e.g. Kelsen, *GTLS* 124-5. He notes a constitutional rule is defined materially by a particular function, independently of codification. Note that there is a literature surrounding identification of uncodified constitutions. The concern here is not with its proper scope, the debate on which norms should count as constitutional. My clarification of the potential inclusion of uncodified norms is meant to make space for constitutional theorists who draw flexibly on a broad range of sources—statutes, cases, customs, etc.—to argue about the constitutional basic structure.

²¹ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke UP 2008) 150-1.

²² For a critique of use of constitutional identity as a constraint on constitutional amendments, see Oran Doyle, 'Constraints on Constitutional Powers' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 73.

could serve as a better foundation for the continuity of the state with which the particular constitution is associated.

The central idea of the new argument is the ‘basic structure’ of the constitution, which consists of what can be recognised, by way of interpretation, as the constitution’s core principles and features. These principles and features are core and basic in the sense that they help make sense of a unitary constitution on the basis of an aggregate of codified provisions and case law, by making them into a coherent whole, a system of values and principles. When a principle or feature in this category is changed, the constitution will be changed so fundamentally that it can no longer be considered the same constitution: it will be brought to an end and replaced with a new constitution.²³

To be sure, it is unlikely that the basic structure is always determinate. And it inevitably requires some authority, usually the courts, to determine the content and boundaries of the basic structure, in the face of widespread disagreement. Not all debates over the problems with the basic structure and its operation for the particular purpose of constraining the power of constitution amendment can be addressed here. What I want to focus on is how far the purported idea gives us a feasible account of a constitutional identity. My worry is that it doesn’t. As the following examination reveals, the basic structure renders constitutional identity too dependent on the particular aggregate of rules present at a particular time, and too vulnerable to relatively minor changes; moreover, the structure can also be too abstract to determine whether a change of the structure occurs, or just changing factual or social conditions require a fundamental

²³ As summarised by Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 148-9: ‘The identity... is “the normative identity of the Constitution, supported by a coherent interpretation of its core constitutional principles or basic features”. It is the constitution’s “genetic code”, and destruction of this identity results in the formation of a new constitution.’

principle to be disapplied non-permanently. I discuss the three problems in turn below.

First. Constitutional breaks will have to be recognised so often on the new theory as to trivialise the idea of constitutional identity. Constitutional identity is changed as long as an amendment is made in contradiction to the basic structure, an abstracted superstructure of principles and values. That is to say, identity-friendly amendments should embody only principles and values which can be reasonably interpreted as compatible with the existing principles and values that make up the basic structure. As such, their addition to the current constitutional order can only represent a coherent development of that order. If not, amendments will count as breaks and transform—end—the current order's identity.

This line of thinking has been proposed to substantiate the doctrine of unamendability: that some changes, viz. identity-destroying ones, cannot be effectuated through constitutional amendment. This has been primarily or exclusively targeted at legislative authorities such as parliament and special constitution-changing assemblies, constraining their power to amend the constitution as they think fit.

The problem is this. The suggested constitutional break or breakdown has actually been not uncommon in the standing and well-accepted practice of constitutional adjudication, so that it does not turn out as extraordinary an event. The law-applying organ which has the authority to interpret and apply the constitutional law to solve disputes involving constitutional law and make publicly binding decisions will sometimes, perhaps more often than many would have believed, pass judgements which can hardly be considered a coherent development of the existing law. Mistakes are a common cause of this event, not to mention deliberate efforts to alter substantially the existing law. This not always coherent development of the constitutional order would seem to paint an accurate picture of the reality of constitutional development and change in

the hands of the judiciary. Then, should we recognise there being a constitutional breakdown—a substitution of the current constitutional order with a new one—every time when the court makes a judgement that silently alters the basic structure?

My suspicion is thus that, when completely developed by taking account of the familiar standing practice of constitutional adjudication, the argument will become much less plausible, as it characterises, as it has to, as identity-breaking many events which are indeed quite an ordinary aspect of the constitutional order.

Second. Constitutional identity is conceived of as too static and fragile a state of affairs to be plausible. Too often, change to a particular constitutional principle is cast as change to an entire constitutional identity with no good explanation, as the change indeed is but some principle or feature being repealed or qualified, whereas the others stay as before, untouched. What is so extraordinary about the change that it cannot be seen just as what it is, viz. change to the particular principle or feature, but more profoundly, as change to the unity of the whole constitutional order? In the last analysis, I say, such description is hardly distinguishable from exaggeration and distortion of what is simply change to a fundamental principle of the constitutional order.

As stated above, the basic structure is considered a coherent body of principles and values abstracted from the positive norms of the constitutional order. As such, the basic structure could be understood schematically as a set of normative statements which provide a complete description of the body of principles and values.²⁴ Granted, we can now consider what it is to alter the basic structure: minimally, it is to alter or eliminate one of the aforementioned normative statements. So, for instance, let us suppose the basic structure can be fully stated with ninety-

²⁴ Raz, *AL* 80-1.

five normative statements, and one of them, say, federalism,²⁵ is now eliminated, whereas all the other ninety-four statements, such as republicanism, separation of powers, rule of law, and freedom of speech, remain undisturbed. Fundamental as federalism may be, we cannot presume that its elimination will necessarily have a sweeping impact upon the rest of the basic structure.²⁶ When not, its removal is just its removal, no more and no less. Given the fact that all but one theses of the basic structure remain unchanged, it would seem far-fetched and indeed distorting to describe the change to one normative statement as change to the entire constitutional identity.²⁷

This line of thinking on constitutional identity has the same vice as some views about cultural identity that discontinuation or alteration of a particular tradition, such as whaling, will be fatal to the group's cultural identity, effectively holding that cultural identity cannot endure any change in any respect of its inherited way of life.²⁸ That a culture, or a constitutional order has to stay completely the same, at least in some secluded domains, in order to maintain its identity is implausible. It

²⁵ A widely recognised fundamental principle in practice. See discussion of cases in Roznai (n 23) 44-7, 49-51.

²⁶ To be sure, the change could disrupt the previous coherent interrelations among all the statements. Yet, it does not necessarily negate the existence of the others apart from altering their application in particular settings, as these principles can be quite broad and not easily contradicted completely by a single move of eliminating a related but separate principle. And in any event, the exact impact of one principle being changed upon the others really depends on what the principles and their interrelations actually are; it should vary due to changing details.

²⁷ The claim to change to the entire constitutional identity will become much more plausible when it is actually the whole of the fundamental principles are being changed. This leads to the idea of the change of material identity as a matter of degree. For example, if ninety-one of the ninety-five theses are abandoned in consequence of a change, we can sensibly say the material identity has been broken and a constitutional break has taken place.

²⁸ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001) 257.

ultimately equates identity with stasis, a poor starting point for probing identity over time.²⁹

Moreover, it can hardly be taken seriously as a plausible description of any long-standing constitutional order. Should one see the US constitutional order as one continuous order from its creation onwards, precisely for the reason that it has undergone no change in its basic structure, no change to any of its fundamental principles and values?³⁰ To be sure, interpretive efforts can be made to suggest that all changes are in line with the original spirit of the constitution. But I am not sure whether it is advisable that constitutional identity in the end has to turn so heavily on creative interpretation to neutralise apparently fundamental changes, thereby making it a matter conditional on the success of a particular approach to interpretation of constitutional change.³¹

How precisely a particular constitutional change should be interpreted gives rise to the third problem I wish to discuss.

Third. Whereas the first two problems concern whether a constitutional break could happen too easily on the new account, the third concerns whether constitutional breaks would not take place as easily as expected, especially in cases which would have appeared as the most straightforward instance of constitutional discontinuity. In the last

²⁹ Identity over time, i.e. continuity, is not the identity in the narrow sense of non-change. As will be demonstrated in IV, continuity is best understood as designating a specific way in which change takes place. This characterisation is true of continuity of many other things, such as that of a person.

³⁰ Of course one doesn't have to. If one chooses to take the bull by the horns, recognising constitutional breaks from time to time, one then circles back to the first problem: whether we are offered a plausible account of constitutional discontinuity.

³¹ Note again that my strategy here is to treat argument about constitutional identity precisely as argument about constitutional identity. I agree with Oran Doyle's critique (communicated to me as private written comments) that 'the "constitutional identity" argument to impose limits on amendment is just a front for moral arguments that lawyers feel reluctant making'. Still, that does not mean we could just dismiss the possibility of the argument being a successful argument about constitutional identity, despite whatever demerit as an argument about constitutional amendability.

analysis, even the classic case of transition from monarchy to democracy, for instance, could appear to permit an identity-consistent interpretation.

To be sure, it will require deft interpretation of existing constitutional norms as well as analysis of philosophical theses to determine whether a particular constitutional change is consistent with the constitutional order's current basic structure. People should often disagree over the answer in particular cases, and this in itself is no problem. The problem is this. If constitutional changes can very often be framed plausibly, and even rightly, not as a matter of change to fundamental principles, but as, as I shall demonstrate, change to those principles' application, the basic structure doctrine may lose its distinct capacity as a basis of demarcating constitutional continuity.

First of all, a fundamental principle can be broad, so as to allow of many possible and actually some incompatible ways of embodying it. Democracy, for example, allows of many designs of political representation. A fundamental change, say, from one design to another, only reflects different ways of participating in the democratic ideal. When amendments were passed to loosen the 'anti-defection provision' (that legislators lose their seats in the relevant legislatures if they 'cross the floor', i.e. change their party affiliation after election), the South African Constitutional Court was asked to determine whether the change is too fundamental to be justifiable. The Court identified democracy as the principle at stake, and reasons that different electoral systems, including ones with and without the 'anti-defection' requirement and ones committed to differing degrees of proportional representation, are consistent with democracy.³²

Moreover, this also in part depends on the level of abstraction at which the relevant principle is to be located. If the Court chose instead proportional representation as the constitutional order's fundamental

³² 2003 (1) SA495 (CC)

principle, the conclusion would become different. However, it is not clear how precisely the choice should be made. Putting it differently, it is not clear why proportional representation should not also be recognised apart from democracy. Indeed, just as proportional representation can be subsumed under democracy, so too can democracy be subsumed under a further category, such as freedom or equality. When all the mentioned elements are present in a constitutional order and only some are selected as fundamental, it is not evident where to draw the line.

Lastly, a change of principle may not be easily distinguishable from change to its application, even in such classic cases as transition from one constitution kind to another. The basic idea is this. Commitment to a principle is not renounced simply because the principle is not applied to a particular case to which the principle is apparently relevant. For the principle may be reasonably overridden by another principle when both are applied to a particular case. The principle often has to be qualified in its particular application, unless it is the only relevant principle to the case or is proven absolute. In any event, non-application need not mean diminishing of the commitment to the principle.

Consider, for example, the principle of democracy. It can be sensibly argued that the principle's reasonable application is conditional on social conditions which permit meaningful deliberation at least at a local level to facilitate political representation on the national level.³³ This is to say, a society may not be ready for a democratic form of government, when means of deliberation remains undeveloped. The principle's apparent non-adoption on this occasion actually emanates from the principle itself, that democracy is not a reasonable choice given the society's current condition. Thus, the transition from monarchy to democracy need not be understood to indicate the polity's change in its commitment to principles.

³³ JS Mill notes the matter as the 'physical conditions for the formation and propagation of a public opinion', in 'Considerations on Representative Government' in John Gray (ed), *On Liberty and Other Essays* (OUP 1991) 203, 210.

It may reflect simply the change in the social conditions and therefore the principle of democracy now prevails as the best suited form of government. The transition ought not to entail rejection of the principle of monarchy as a justifiable form of government. Monarchy is legitimate under certain social conditions; the principle prevailed before as the best suited form of government.

Indeed, change in the government form is taken by Aristotle as the standard event of constitutional breaks. But in the light of the new argument's focus on the constitutional order's principled, normative foundation, the change in the government form can be viewed differently. From the new perspective, all that the constitutional change to the government form requires is no more than changed application of the same body of principles, according to the changing states of facts.

The foregoing analysis exposes the complexity in trying to explain constitutional change, and thereby continuity and discontinuity, by reference to theoretical change. The radical scale of an institutional, constitutional change may not be corresponded by any significant change in the moral and political thinking that forms the theoretical background or foundation of the constitutional order over time, as principles can operate in varied ways to bring about diverse results. There is no simple function between two changes, as constitutional change at the institutional level on the one hand, and theoretical change in fundamental principles on the other. It may turn out that there will be far fewer cases than expected which can be truly argued as constitutional breaks in the sense of breaking with the basic structure, whereas there will also be more unexpected cases of constitutional breaks due to judicial norm-making.

It seems that under the new theory, constitutional identity will become a much less clear and less certain a subject matter than Aristotle's original principle. It can be curious why it cannot work as straightforwardly as the original Aristotelean criterion did. Isn't it just a

particular kind of constitutional and political order which should not be altered?

First of all, it is not obvious that Aristotle's criterion could really work in a straightforward way. The impression is based on only the obvious cases that it invokes. The matters can quickly become complicated and indeterminate when less obvious cases are taken into account—not only borderline cases between the clear kinds, but also the boundaries of the clear kinds. Is inclusion and exclusion of a particular kind of people to and from government, for instance, permitted by a particular kind of constitution? The operation of the criterion, it seems to me, would encounter just similar problems as those noted above as soon as the principle starts to apply to varied and subtler settings. Secondly, it is understandable that the new criterion is more difficult to operate than the ancient criterion, due to its inclusion of far more principles than does the ancient one as constitutive of the identity. Such move makes the identity dependent on the fate and interpretation of a broad composite aggregate of rules, which is sure to generate more problems to the determination of an identity based on the aggregate than when the aggregate is simpler and smaller.

To conclude, there are obvious cases of constitutional identity and changes that threaten the identity. But the attempt to formulate a coherent general account of constitutional identity out of those cases to ascertain identity based on a constant basic structure has met with many problems. It calls into question whether even the obvious cases can be really recognised as involving change of constitutional identity. But we need not dismiss altogether the possibility that those particular cases really reflect such change. They can reflect some popular or customary understanding of when a particular kind of constitutional order loses its identity, just as some change to the doctrines may transform the Catholic faith to a particular Protestant one. Why some change has the transformative effect may have a largely historical and contingent cause. It can reflect factors

that a subject used, in the particular case at the time, to distinguish itself from another, so as to resist the forces for change. The factors can be considered by a subject so essential to its identity that, if lost, the subject will no longer be able to see itself still as the same subject. I think this can be how the constitutional basic structure bears on the identity of the constitutional order. As I will argue later, the identity of a group agent turns importantly on a self-referential intention; if members believe that some factors are crucial to what they are, such belief will indeed affect their identity by affecting their self-identification. This is to say, the basic structure can be irrelevant to continuity, too, if members do not consider a constant basic structure essential.

The last argument can be true of the continuity of the state whose constitutional order the relevant one is. If the relevant actors see the constitutional identity as essential to the identity of the state, its change can affect the political agent's self-understanding, so much so that the state may undergo change in identity, i.e. discontinuity, or so I shall suggest later. But this is not an argument for a constitution-grounded account of the continuity of states; it is against the inherent relation between the two. It presupposes constitution's possible irrelevance, to make room for its becoming relevant by virtue of state members' intention.

The discussion has mostly focused on the difficulty in ascertaining constitutional identity on the basis of a basic structure, to demonstrate the serious problems one will encounter if one tries to determine the continuity of a state by trying to determine the continuity of its constitution. Granted, it still bears noting that the new criterion, if adopted, will also repeat the problems with the original Aristotelian criterion discussed above: it is questionable why a state cannot substitute one constitution with a sharply different one and achieve the objective by a sustained action that exhibits the state's capacity to self-government. It also raises the question about the basis on which the new state is held obliged by the obligations of the old. Another account will be judged preferable if it can accommodate the first

situation and offers ways of solving the second. Let me turn to a potential candidate, namely the nation.

III. Nationalism

Nationalism is the body of arguments about communities characterised by members' shared identity formed upon shared history, language, customs, religion, ethnicity, or other inherited, ascriptive commonalities. A nation is often contrasted with a voluntary association formed on the basis of features which participants can choose to adopt. Nationalist arguments are made about a broad variety of topics, but can all be classified as nationalist on the grounds that they involve and recognise as the appropriate political subject the national communities as mentioned above. My focus here is on nationalist discussions on what a nation is, exploring whether they provide an account of national continuity which can in turn provide an account as the solution we need for the continuity of states.

Nationalism appears an improved approach to the problem of continuity. First, a nation is institution-independent. As David Miller suggests, a nation aspires to become politically self-determining.³⁴ Political self-determination requires the establishment of political institutions. A nation may still not yet achieve that end and so lack those institutions. It may, for instance, still be subject to and part of a controlling state, while seeking independence from it. This means that a nation can exist without a political structure which is required for a self-governing political unit. Moreover, a nation, being institution-independent, could move across different structural settings while still being the same nation which seeks its self-government. This could exactly avoid the deficiency of the Aristotelian explanation caused by its institutional focus on constitutional continuity. Secondly, a national community is often understood as a historic community. As will be seen later, allusion to historical continuity is common in explaining what a nation is or what collective attitudes are

³⁴ David Miller, *On Nationality* (OUP 1997) 19. Henceforth, *Nationality*.

associated with it. Would that point us to a properly theorised conception of continuity which facilitates the history-talk? If so, would national continuity be the explanation we need for the question of the continuity of states? Is the continuity of states best understood and answered by an account of the continuity of nations? Discussion below seeks to answer these questions.

Before we delve into the nationalist discussions, the distinction between a state and a nation, on my account, bears clarifying. For me, a state need not be a nation. Group agency requires joint intention, and joint intention requires participants to consider themselves to act as one group that carries out the characteristic activities of the state; whether the group is perceived as a national group is immaterial to the required attitude. If so, it is already obvious that focus on national continuity will be too narrow, as it will miss out the continuity of states which are not nation-states. This indeed will be the reason for my subsequent development of an *alternative* account of the continuity of states rather than just an improved account of national continuity. Still, as will be seen, there is much value in examining the nationalist thoughts. They point out some promising directions to proceed, which are not relevant to nationalists alone. The rest of this section, however, largely exposes just how far national continuity is not so much explained as presupposed in theoretical accounts of nationalism; nationalism does not really explain the criterion of continuity, while needing such criterion to support many of its claims.

My discussion focuses on Miller's account of nationalism for its two particular elements: that a national community is said to be historic and active. They distinguish a Millerite nationalist theory from other nationalist writings, and make it a well prepared candidate to overcome the weaknesses of the Aristotelian explanation. For they point to a politically active community that is capable of making and surviving all the fundamental constitutional changes.

Miller's discussion on 'national identity' or 'nationality' identifies five elements which together distinguish a nation from non-national communities. As he summarises, a nation is a community

(1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture³⁵

The second and third elements are of particular relevance for present purposes. Miller writes that national identity 'embodies historical continuity'. 'Nations stretch backwards into the past', and '[i]n the course of this history, various significant events have occurred, and we can identify with the actual people who acted at those moments, reappropriating their deeds as our own'.³⁶ Moreover, a nation is active in character in that, Miller writes, '[n]ations are communities that do things together, take decisions, achieve results, and so forth'.³⁷ Miller does not explain much what it is to so act. He only mentions briefly that people have to rely on 'proxies who are seen as embodying the national will—statesmen, soldiers, sportsmen, etc.' Here Miller seems to gesture towards an idea of collective agency; it seems plausible to take Miller to see a nation ultimately as a collective agent. Hence, to say a nation is active is to say it is agential. In what follows I take Miller to share this view. These two particular characteristics seem to make a Millerite national community a promising candidate: a cross-temporal, active group whose self-determining actions transcend the continuity of any institutional arrangements.

It is less clear how Miller thinks a nation maintains its continuity in the course of history. There is ambiguity surrounding Miller's discussion of history as an element of nationhood. Is it posited as an essential property

³⁵ *ibid* 27.

³⁶ *ibid* 23.

³⁷ *ibid* 24.

of the nation as having a history? Or is it posited as an essential property of the nationals' shared conception that their community has a particular course of history? The former indicates an external requirement for nationhood, that there has to be actual history of the national group before it can justifiably establish itself as a nation. The latter indicates an internal requirement; all that is required is people believing that there is a history they share, and whether that history is actual has no impact on the created group's nationhood. The two interpretations are not mutually exclusive. They can be both posited as requirements for nationhood. It is not clear whether Miller requires both, or just one of them.

The second coheres with wider nationalist writings, that it is the nationalist consciousness alone that matters. Nationalism is not so much about national community as an actual historic community as about the collective belief that there is a historic community and this historical fact somehow requires people who share certain ascriptive features to join together to (ultimately) form a political self-governing community. Nationhood turns on a distinct type of communal solidarity facilitated by ascriptive identities. As Bernard Yack writes,

National community, I suggest, is an image of community *over time*. What binds us into national communities is our image of a shared heritage that is passed, in modified form, from one generation to another. National communities, as a result, are imagined as starting from some specific point of origin in the past and extend forward into an indefinite future.³⁸

Yack's explanation nicely foregrounds the idea that a national community as a community over time is an imagination. It seems irrelevant whether it is actually cross-temporal as imagined.

Some go further to suggest that it doesn't matter if it is not. Anthony D Smith notes how nations could be formed when they could not

³⁸ Bernard Yack, 'Popular Sovereignty and Nationalism' (2001) 29 *Political Theory* 517, 520.

‘fall back upon a community with long and rich cultural heritage’. They could ‘imitate those which could do so by, if necessary “inventing” or rather “rediscovering” and “annexing” histories and cultures for their communities’.³⁹ Yael Tamir endorses this view, noting that the nationalist ‘urge for continuity’ can be met by the ‘invention of tradition’.⁴⁰ According to these nationalist writers, history matters as an element of the collective belief which goes on to make the resultant community national. History is not essential or directly essential as a quality of the nation itself, but is essential to the collective nationalist attitude that is essential to nationhood.

Miller can be taken to share this nationalist thesis such that the suggested historical belief is an essential property of nationhood. But he could be taken to share the first view somewhat, in that actual historical continuity could affect how we assess a nationalist belief to some extent. In some places Miller might allude to actual historical continuity, or at least needs to do so to make his discussion sensible, especially when he discusses nations as an ‘ethical community’ and the phenomenon that people can feel pride and shame for their forebears’ deeds. In such discussions Miller points to a relation between forebears and incumbents (and future members) of one and the same cross-temporal national community; people at each time are appropriately bound to identify with their forebears and their deeds, such that they rightly feel proud for past achievements and ashamed for wrongs; moreover, people can be obligated to secure the continuation of the nation because their forebears have struggled to do so.⁴¹

This obligation-imposing cross-temporal relation seems to have to be grounded in some actual relation. A completely imaginary relation can

³⁹ Anthony D Smith, *Theories of Nationalism* (2nd edn, Duckworth 1983) xxx.

⁴⁰ Yael Tamir, *Liberal Nationalism* (Princeton UP 1995) 64

⁴¹ Miller, *Nationality* 23-4; David Miller, *National Responsibility and Global Justice* (OUP 2007) 158-9.

be taken precisely as a reason for denying there being any obligation, so that merely felt obligation in relation to the past is unfounded. Miller touches on this issue *somewhat* when he addresses the problem of myths and how far myths can be accepted as a legitimate part and basis of nationalist beliefs. He thinks myths are acceptable if they result from ‘a particular interpretation on events whose occurrence at a sufficiently basic level is not in dispute’, and there are ‘open processes of debate and discussion to which everyone is potentially a contributor’.⁴² As long as these conditions are met, Miller does not think a historically sounder belief is necessarily more valuable than a more selective, sanitised one. What matters more is the ‘the effect it has on the nation’s present self-understanding’.⁴³ Overall, Miller recognises a factual constraint on national beliefs, but grants much freedom to how historical facts are to be understood selectively, and sees historical accuracy as much less important than consequences to current national behaviour.

I suggest that even this thin factual constraint would still require Miller to use a basic, simple idea of actual historical continuity to distinguish, however faintly, a factually credible myth. A community cannot ‘annex’ any historical community and events as it wishes. Some annexations can be plainly absurd and incredible, even if we grant that the ownership over pasts is often debatable in much the same way that how a historical event can be appropriately commemorated is debatable. It is plain that the Chinese today cannot include Dunkirk as their national history. There are past events whose ownership is ‘at a sufficiently basic level is not in dispute’. Annexation is permissible only when it is not in contradiction to clear, well-established boundaries. This still allows of a large space for debatable cases.

⁴² Miller, *Nationality* 38-9.

⁴³ *ibid* 39-40.

The point is that the boundary of appropriation is consistent with, and indeed essential to Miller's conception of legitimate use of myths in shaping nation's historical beliefs. Such boundaries, though often much a matter of custom, ultimately turn on a conception of a nation's actual historical continuity, so as to individuate and attribute past events by identifying them as a particular historical community's actions or experiences. Such an underlying conception of continuity is especially needful when disputes arise over particular events which are not well within the customary boundary of national history. Explanation as to why such an event is or not 'theirs' will crucially depend on the available understanding of their community's continuity: the community now is one and the same as the community at the time of the event, the historical community which experienced that event. Explanation which includes these elements is needed, at least tacitly, I say, to make sense of appropriation of any past event as a nation's national history. In many cases this might seem too obvious to need noting, but the explanation has to be available.

Overall, we can say the Millerite project alludes to a needful account of national communities as an actually continuous community, but does not supply one. Miller needs it to facilitate in particular the prescriptive part of his theory that a national community is a 'community of obligation'.⁴⁴ Consistency alone will be incomplete a basis to sustain Miller's thesis that the people now should be held responsible (in various ways) for the wrongs committed by their forebears. Inconsistency is a real problem when both the right and responsibility, benefit and burden, pride and shame, are what the people in question should own, so that it is unjustifiable to only enjoy the right, benefit, and pride without assuming the responsibility, burden, and shame which they should recognise. This is evident especially when there is no straightforward correlation between past benefits and wrongs like inherited wealth originally acquired from

⁴⁴ Miller, *Nationality* 23.

colonial exploits. In less straightforward cases, the correlation between the benefit and burden to demand consistent inheritance lies elsewhere, eventually in the fact that they originated from the same past community, and the special relation between this past community and the community now requires inheritance of both, thus determining the actions which will be consistent. If there is no such special relation, the mere fact that one community receives some benefits from another (historical) community does not oblige the former to share the latter's responsibility too. The special relation, as in this case the continuity as one national community, is crucial. Miller's consistency-based argument for his prescriptive thesis crucially turns on such continuity being there.

In sum, Millerite nationalism is indeed in some places concerned with the actual historical community, rather than the nation-building attitude which involves historical elements. Despite the promising sign shown in Miller's conception of nationhood as a historic and active (agential) group, there is no sufficiently developed account of continuity, beyond a tacit, intuitive understanding, to be found. There is no such account indeed because Miller does not recognise as a problem national community persisting as a single community in the course of history. It is telling when Miller explains why he prefers nation to state (meant by him the institutional structure) as the subject of collective responsibility in part by referring to the difficulty involved in determining the continuity of states. He writes,

demonstrating the identity of states over time is generally much more problematic than the state-centred approach assumes. The UK and the USA are unusual in having states whose evolution has been gradual and unbroken. Of how many other European countries, for instance, could one say that they are governed by the same state that governed them in 1750, in the light of the radical disruptions that have occurred meanwhile, including territorial expansion and contraction as well as regime change?⁴⁵

⁴⁵ David Miller, *National Responsibility and Global Justice* (OUP 2007) 141.

This is fair, but nations could have the same problem as well. Miller doesn't consider the possibility at all before he goes on to posit national responsibility as the subject of his account of inheritance.

In what follows I develop an account of continuity to fill the gap. I follow Miller in recognising the active or agential nature of the relevant political group. However, I do not completely follow Miller in using nations as the unit of analysis. Nations seem to me too narrow a category. I am interested in the broader category of political group agents, of which nation, territorial state, and others, when well-ordered, are sub-categories. This will supply an important—necessary—condition of national continuity, while continuity qua a national group is likely to depend on further factors. On the other hand, a nation can be expected to survive in conditions where a state cannot, as a state depends for its existence on institutions (and other factors for continuity, such as member continuation, as I argue in IV.B.). There could be scepticism of use of states as the unit of analysis, on the grounds that a state is a set of institutions, that is, it is not an agent, as a nation is, and will not yield useful results. This is a legitimate concern. So, I take only states which are agential. And a state can be a political agent without being a nation; this kind of existence is already important enough as basis of continuity. A nation-based analysis will miss this out, as mine will not.

IV. Continuity of a Political Group Agent

I develop my account by considering what it is to be a persisting political group agent. The relevant state of affairs will be identified and illustrated by reflecting on the successive interpersonal relations, actions, and attitudes that can be properly understood to constitute and maintain a political agent over time. The analysis is conducted to answer the central question of how some persons living at different times can be considered to form themselves into one group. I find that two major elements are of particular importance. First, there has to be a standing group intention, so

that people acting at different times are joined together as one continuous group if they join the same standing intention. Secondly, there has to be a kind of continuity of successive members in that there is no radical break in the succession of the people who share the standing group intention. Both elements indicate that the continuity of states has a strong intentional character, in that it exists as a matter of the relevant persons' collective choices and actions, and therefore continuity can be broken—discontinuity created—precisely as a result of deliberate action.

That continuity is intentional in nature bears especially on the solution of the two problems which impedes the Aristotelian solution. Regarding the first problem, viz. the identification of a distinct political subject's existence over time, it will be argued that the continuity of a state as persistence of the political agent turns on the agent's own choice, that is, what the agent intends to achieve, to effect by means of the choice it makes. Regarding the second problem, viz. persistence of responsibilities somewhat independent of continuity, I will provide a basis on which we explain continuity and succession as two distinct situations in which responsibilities transmit over time. Continuity is subject to deliberate action, whereas succession is not, or not entirely. I take succession as a status ascribed to the discontinuous entities to mark and trace the appropriate attribution of moral responsibilities which are fundamentally connected with the acting persons, and therefore beyond the deliberate disposition of those persons.

A. Standing Group Intention

To act as a group is to act jointly for some chosen end or ends. A state is a group agent, on my account, when officials and citizens form group action to carry out in particular the characteristic activities of the state. The question of continuity concerns what extra component, if any at all, would have to be there for the active, successive persons to act as the same group over time. If there is any distinction between one group acting over time

and successive one-off group actions, it is this. In the former case, people at different times all share in one standing group intention; in the latter, their group intentions at each time are separate. Whether the group intention is standing during a given span crucially depends on how members during the span conceive of the group, and in so doing, identify who they are. More precisely, I argue that members, when acting during the relevant time span, ought to conceive of a persisting group, or at least do not conceive of a different group, so that they can be understood to form a standing group intention. Moreover, the intention remains constant, if successive members continue to join the standing intention, to add their wills to an existing 'pool of wills',⁴⁶ when they join the group. That requires new members to share, *inter alia*, old members' conception of a persisting group as and for which they act.

This is to say, for a group to be recognised as continuous, it needs to intend to be a continuous group. This is somewhat self-referential, but not in a problematic way. The full content of the intention is to perform the characteristic functions of the state as one and the same group; real continuity then depends on successful execution of such intention over time. In a previous chapter, I identify the characteristic functions with the familiar activities related to legislation, the executive, and election. It is meant to be representative rather than exhaustive. The idea is that whether a state can be properly understood as a group agent importantly depends on whether the state's characteristic activities can be sensibly understood as a kind of group action performed jointly by officials and, ideally, citizens. I argue that they can, if they recognise themselves as all part of a singular group which performs such various activities through a complex structure which permits and facilitates group action by not only unanimous collective acts but also authorised individual acts in place of action by unanimity. The group action is therefore self-referential in that the

⁴⁶ Margaret Gilbert, *On Social Facts* (Routledge 1989) 220: she suggests an explanation based on 'the notion of continuity in a given pool of wills.'

intention needs to involve recognition of a group in order to bring a group into existence. The actual group is composed by all who so recognise and intend; it is not precisely the fictive group to which the group intention refers. Self-reference is constitutive of a group, but not the sole condition.

Continuity of a state, I argue, also depends on self-reference in a similar way. Members need recognise the group they form as a single continuous group on successive different occasions, or minimally, do not conceive of a group as a different one to the group which they formerly recognised. The first involves a kind of cross-temporal self-identification, that the group now is recognised as the group then. It stands for the clear case, where members consciously maintain a continuous group. The second is partly entailed by the first, but also permits a lack of any cross-temporal self-identification; members tacitly recognise a group now, whose identity with any group before is not specified. This attitude is sufficient to sustain the continuity of a state, if members normally recognise and carry on past group actions, much as they do when they recognise and carry on past actions because they recognise the past state and the present state are one and the same state. That is, I grant that they achieve continuity if they act as they usually do (as a group). Cross-temporal self-identification makes continuity clearer but is not necessary. What is certainly essential to continuity is that members do not identify themselves specifically as a different group from before.

The continuance of the standing group intention allows for the situation where members recognise that the state has undergone significant change in its institutional, social, or cultural features. What is necessary to continuity in this situation is that members do not see any of the changes as threatening to their joint self-identification. Insofar as members do not think that their group identity is incompatible with significant institutional, cultural, or social transformation, the state persists as the same group agent which acquires new institutional, cultural, or social properties.

Indeed, members need not see any change (except one)⁴⁷ as inconsistent with continuity, as long as the state can still operate as a state in terms of the characteristic activities. In this regard, the purported account of continuity of a state resembles Margaret Moore's account of continuity of a people which also gives members' self-identification as central place: a people is continuous despite rapid cultural and social change, if members of it recognise its identity, and no cultural features have to be tied to such recognition.⁴⁸ Apart from the difference between state and people (which category includes non-state, less institutionalised communities), Moore's and my accounts differ in two respects. First, I supplement the condition of self-identification with a second condition of member continuation, as explained later. Secondly, I permit the group standing intention to be less exacting. The requisite joint self-identification need not be clearer than a lack of an unequivocal recognition of a new group identity.

That the requisite kind of standing intention need involve no clear self-identification also marks a crucial difference from nationalism, which requires members of a national group to share in the recognition of the group as a historical community. Moreover, even if members of the state adopt clear cross-temporal self-identification, my conception of it also differs much from the kind of attitude and awareness which makes a group a national one. For the cross-temporal self-identification does not have to stretch long. I consider all that is necessary to be a moderate span, meaning that the acting persons need only identify their group with that in the recent past, such that the relevant past actions are probably all initiated, quite recently, by themselves or past members whom they know. They do not have to have a precise and complete idea of how far in the past the group now can be stretched, how long exactly the group has existed since its formation. Nay, they need only conceptualise the limited period of time that is theirs, as do those before them and those after them. Together, these

⁴⁷ That is, radical change in membership, to be discussed later.

⁴⁸ Margaret Moore, *A Political Theory of Territory* (OUP 2015) 56-9.

successive and overlapping identifications constitute the cross-temporal group intention which grounds a single persisting group.

Modest self-identification is too momentary for the historical dimension of nationalist beliefs. As mentioned above, all that has to be identified includes no more than the acting persons' own past group actions (joined perhaps by some past members who no longer are). This can describe a young group which is clearly not a national community. To recognise this as a national attitude will trivialise nationality as a distinct idea. It is more plausible to say there is a distinctive national consciousness only when this modest self-identification is further accompanied by some ascriptive identity.

Requiring only quite modest cross-temporal self-identifications, the standing group intention allows continuity to be traced back to a past point independently of existing memories and known history. That is, the persons can be totally ignorant of their past, but can still be understood to form a group with past persons they do not remember or identify with. This can be done as long as we can track the successive and overlapping self-identifications. The temporally extended group so identified probably isn't sufficient to count as a national group either.

More interestingly, my approach makes it possible and sensible to speak of unself-conscious continuity and recovery of a community's forgotten, lost past, as successive identifications can indeed persist without participants' full self-awareness, and memories of them lost as a result. Yet, continuity may never be recovered or ascertained because no proof is available.

On the other hand, many groups share this modest kind of standing intention when existing over time.⁴⁹ So this component is not peculiar to

⁴⁹ A one-off, simple group may lack such identification. Momentary groups, depending on how momentary, may indeed have it. The difference is how long it extends—it reproduces this basic temporal unit. Persistence over time is the accumulation of such basic units.

the state. As should be seen in various settings, what is true of states is true of many kinds of groups. In particular, a legal system, as I argue in chapter 4, exists continuously, if legal officials maintain a standing group intention in a similar form, *mutatis mutandis*. Continuity of a state, therefore, is a particular subclass of a more general kind of continuity of groups. But the analysis of the chapter will focus only on this particular subclass.

As the standing intention connects the successive momentary groups that constitute the state at each particular moment and make them into one, it unifies acts at different times as the actions by the same agent that is the state at such different points of time. Constitutional and legal breaks can be understood and accommodated under this framework. Even the most general part of a state's constitutional order is a particularised plan for the state under a specific social condition or set of social conditions. The need to amend or replace it may arise from time to time due to social change, and could be brought about in extraordinary manners due to extraordinary situations. These are not inconsistent with a general, unifying intention to carry out functions of the state as one state over time.

Therefore, constitutional breaks need not mean the breaks of the continuity of the state with which the disrupted constitutional order is associated. They could simply represent the moments when the group action is taken to create such fundamental changes as it considers necessary. Putting it differently, whatever change is made or happens to the legal or constitutional order, continuity of the state is not affected as long as members at the time of the change accommodate the change with the same general standing group intention as before.

Finally, a group can discontinue itself by so intending and acting. As continuity requires that members do not intend to act as a different group, it follows that members have the power to discontinue the existing group to create a new one, if they so jointly intend. This is to say, the new state is distinct from the old, even if the members are completely the same. That

members' intention should make such sharp difference is not obvious, to be sure. It follows from my understanding that a state is a group agent, and its continuity depends on the group agency, continued. If a group is not a group agent, it is not obvious that change of the self-referential intention bears on change of the group's identity. The agency-centred analysis can be controversial such that it foregrounds an intuitively unobvious fact, but not so much as to contradict intuitively obvious ones.

Further, it is curious whether a state can be resumed after it is dissolved or replaced. Let me focus, for now, on the same set of persons who want to act together again as the old state, after the old state was either replaced or simply dissolved. While people can surely form a group again as they intend, can the new group really be continuous with the old?

The question may seem sterile to answer at first sight, as it is either the same group or two groups formed by same people. But a meaningful distinction can be drawn between distinct intentions. If they regret the previous decision and wish to resume the group, it seems sensible to reflect that attitude by recognising continuity in this situation. And it is consistent with the self-referential character of group agency; if people can create a new group by so intending, it is only a moderate extension of that power that people can also resume a defunct group by so intending. It follows that a state cannot really be dissolved permanently, at least if the original members are there (for reasons yet to be explained). I do not say that people in practice cannot try to permanently dissolve a state; they can successfully so do if it is their view that they have the power to permanently terminate a state, or that, in other words, they do not have the power to resume a defunct state. The point is that there is a standing possibility that a discontinued state can be resumed, if members so wish.

It has been repeatedly noted that the intention to resume has to be had by the same set of persons, at least somewhat, who made the previous decision to discontinue. Let me turn to the reason why this condition is

needful. It concerns a required element of member continuity, explored next.

B. Member Continuation

The insufficiency of reliance on the standing intention alone can be illustrated by first considering the scenario I term *replication*:

A political community X is invaded and destroyed by a foreign power. The result is total assimilation of its space, order, and people into that foreign power. But not long after the destruction of X, a separate political community Y, which has long existed in a different region and maintained a close relationship with X, after it learned of this tragic event, decides to ‘inherit’ X’s legacy. Rather than take it just metaphorically, Y decides also to adopt X’s identity, conceiving of itself from now on precisely as X. In other words, Y changes its self-determined identity as if X relocates itself to where Y inhabits now.

Can we really take Y to be identical with X in virtue of Y’s replication of X? Replication is intuitively problematic, possibly because the people in both states concerned are completely different. Thus, there is an intuitive case for some kind of connection based on populational composition in order for the group to be identical. While we are not bound to always affirm our intuitions, it is sensible to try starting with it to seek out, if any at all, a possible theoretical explanation, which I believe can be found.

Replication should be considered problematic actually because in allowing one group to unilaterally make itself identical with the other, it contradicts the nature of the group as an agent. To recognise replication as a cause of continuity of the replicated group would be to recognise that a group can act and persist without actions of its members, that is, without

its own action! Replication, in short, contradicts agency.⁵⁰ (However, it will be a different case if replication is *authorised*. This is discussed at the end.)

For a group to really exercise its agency in maintaining its own existence, the admission of new members should be a mutual act—mutual between the prospective members who seek membership and the current members who seek new members.⁵¹ That is to say, new members need add their intentions to the standing group intention in order to join a state. That there is a standing intention for them to join means that there are already people who maintain that standing intention, and make it open for other people (who meet certain qualifications, if any) to join to become new members. Therefore, new members always join the state (and more generally any group agent) by joining current members. This is the cause, I say, of the populational connection that we intuitively suspected might be necessary in the beginning. What this entails is there being coexistence or overlap of old and new members (cohorts) at each point of time, and in the long run the successive members of the group can be described as an extension of such overlapping cohorts.

This model explains an identifiable thread over time, especially when no members constituting the group now were present in the group in the distant past (and will be in the distant future). In the short term, old and new members have to coexist. Some—numbers yet to be specified—members of the group at present time t_x are (remaining) members of the group from the previous time t_{x-1} , while others are new members who join at t_x . Likewise, at t_{x+1} , some members are also members already at t_x and joined by new members to form the group at t_{x+2} . This process can repeat itself indefinitely, so that at some time t_{x+n} , some members of the group at

⁵⁰ More precisely, agency of the group whose self-governed existence is in question.

⁵¹ This is but an extension of the uncontroversial idea that '[m]embership is based on acceptance of mutual identification': See e.g. Yael Tamir, *Liberal Nationalism* (Princeton UP 1993) 27.

the time are members from the previous time t_{x+n-1} , and yet none of them is also a member at t_x , t_{x+1} , t_{x+5} , etc. I call this distinctive thread *member continuation*. I use ‘member’ to emphasise the condition that members of the population are identified by their membership of the state. That is to say, residents, even permanent ones, do not necessarily count as members, if they are permanently excluded from participation in any meaningful way in the group action of the state, even though they could form part of a state’s population according to the common sense of the word. I use ‘continuation’ as opposed to continuity to save the latter word for the technical use of individuating a singular object, and prevent the mistaken impression that the membership, as mere successive aggregates of persons, has an identity. In other words, member continuation is continuity-neutral; the relation can obtain between two uncontroversially distinct states.

Member continuation holds as long as overlapping cohorts are found at each particular t_x in relation to t_{x-1} within the relevant timeframe within which member continuation is considered. Thus, we can say that people at t_1 and people at t_2 are continual if and only if (1) they together form overlapping cohorts, *or* (2) there is between them an unbroken chain of overlapping cohorts.

The idea of overlap is not new in its use to help explain continuity or its related issues. Daniel Butt develops a model of ‘overlapping generations’ to explain how moral responsibilities can transmit in a national community over time.⁵² He identifies the crucial fact that generations overlap with each other such that old and new members form an ‘ongoing collective’. My account broadly resembles his, while I elaborate more on the details and implications of the quantitative nature of overlap. Moreover, I deliberately choose the expression ‘overlapping cohorts’ rather than ‘overlapping generations’ to avoid the unwanted

⁵² Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (OUP 2008) 174-94.

connotation that members are born to become such. I wish to accommodate all possible ways of gaining new members; it does not presume that the group acquires new members by any specific way, and in particular, by birth, while for sure it is the most prevalent way in which a political community gets new members. Insofar as naturalisation is an equally eligible way of admitting and becoming members, the model has to make room for it.⁵³

However, as the second condition is meant also to avoid implausible consequences, it can face difficulty caused by indeterminacy in drawing a quantitative baseline for assessing continuation within any particular time span. Suppose that all members are equal in their role in forming the connection—that is, it is not the fact that some particular members are so specially important that they have to be present in order to make the overlap count, the question is thus: to what degree—percentage—the members at t_2 have to be members at a not too distant t_1 ⁵⁴ in order for the new composition to be properly understood as overlap?

Let us consider three scenarios (1) membership decrease, (2) membership increase, and (3) combination of the two. The first two scenarios represent just the common situations that a community becomes smaller and larger. Change of size should in principle not be a problem to identity. Decrease, when too substantial, will make the group disappear,

⁵³ That being said, the ‘natural’ membership seems to enjoy a privileged status, in that reproduction, no matter how large the number of new members it suddenly contributes to the current membership, does not seem to cause any problem to the overlapping chain. No matter how much the babies outnumber the parents, it makes no threat to substantive member continuation. It can only strengthen it. The special status that reproduction—natural acquisition of membership—enjoys in its relation with substantive member continuation can be puzzling. Is there good reason to consider natural members to be identity-friendlier than naturalised ones? The underlying thinking, or even justification, is that families are the fundamental units of the political community. Their natural function of reproduction can only contribute to the state’s growth.

⁵⁴ The length of the timeframe is flexible. The point is to capture the intuitive notion of radical change in the short term. We could posit one year as the timeframe here; two years or five years seem to work equally well.

but does not make the group become a different one. Increase, on the other hand, should pose no problem, if it does no more than adding more members to the existing joint intentions and plans rather than also altering the latter. Continuity's compatibility with membership increase suggests that the required overlap is compatible with a high proportion of new members at a particular time.

The third scenario—decrease and increase simultaneously—seems the real problem: too few old members plus too many new ones. But how few is too few and how many is too many? Suppose at t_2 60% of old members from t_1 do not make it while a significant number of foreigners, as many as the surviving old members at t_2 , show up and become members, amounting to 50% of the total membership at t_2 . Do the new members at t_2 still form overlapping cohorts with members from t_1 which make up only 50% of the whole now and represent only 40% of the whole at t_1 ? To be sure the question is not about whether we can use the word overlap to describe the situation—of course we can. For the question is not about semantic rules. It is about what state of affairs we should accept as the basis, the basic unit of member continuation.

It seems difficult to draw a quantitative baseline. As we reflect back upon the reason for there being such overlap, viz. membership being a matter that requires cooperation between current and prospective members, the need does not dictate a clear baseline. It requires the presence of some current members, and no more can be inferred. All that matters is there being coexistence of successive members to facilitate joint action among them. There are clear cases of member continuation and discontinuation (as in replication and like cases), whereas some cases between the two clear poles may be quite ambiguous. Under some imaginable conditions, the presence of the old members at the next point of time may become so weak that the resulting situation much resembles that of replication.

Should it be classified as discontinuation? It seems difficult to answer. Consider also ‘fission’: when a state splits roughly evenly into two states following a civil war and both claim to be the original state and both their members maintain continuous standing intention with that of the old, it seems extremely difficult to determine which one, if either, of them is the original state. Indeed, only arbitrary decision can settle an answer. If one state is far smaller than the other, then there is a strong case for recognising the latter as the original state, due to uncontroversial member continuation.⁵⁵ If no such distinguishing factor is available, cases like fission are really difficult.

Some may go so far as to suggest the question about continuity in such cases is empty, in that the question can be answered in either way, and either answer makes no difference, as we know already all that we can know by describing the facts of overlapping cohorts and the standing intention.⁵⁶ Whether the state is continuous or becomes a new one does not represent different possible realities. I tend to agree that the question is indeed indeterminate or empty in many situations. The point is that there clearly is an ineliminable quantitative or indeterminate element of member continuation. It in turn requires the continuity of states to permit a significant space for indeterminacy. That is, continuity is not always a determinable matter, because member continuation can be genuinely ambiguous sometimes, thus making it not always a binary question, which can always be given either a positive or negative answer (continuity/discontinuity).

However, in some other cases, I believe that the indeterminacy can be much reduced, if the state continues to exhibit unquestionable group agency for carrying out its characteristic activities, even though the aforementioned indeterminacy is not caused by any question about the

⁵⁵ I am thinking of in particular the case of China and Taiwan.

⁵⁶ The idea of an empty question is taken from Derek Parfit, *Reasons and Persons* (OUP 1984) 213-4, 260.

state's capacity to act. The intuitive uncertainty about continuity, it seems to me, could follow from the lack of a clear criterion of assessing continuity. Then, if the standing group intention provides such a clear criterion, one may become much more confident in ascertaining continuity in the face of sharp membership change, on the grounds that the standing group intention is strong and clear and the characteristic state functions are continuously performed per the intention. This is to say, if the state is capable of acting as a political group agent, i.e. a group agent capable of carrying out the characteristic state activities, at all the relevant moments, it makes a strong case for continuity, irrespective of how the member composition has changed. If, by contrast, the membership has decreased so sharply that it becomes questionable that the state can be meaningfully considered a political group agent, the case for continuity becomes much less clear.

Finally, let me return to the case of replication again for an unresolved question which arises if replication is authorised, that is, X jointly permits or authorises Y to be its replicant. This highly imaginary scenario is meant to test the coherence of the analysis, as I am inclined to recognise authorised replication as an acceptable cause of continuity. What distinguishes this case from the original case of replication is that 'authorisation' allows members of Y to join X's standing intention. Therefore, the case is not so much replication as the regular case of accepting new members. Member continuation is maintained. While accepting new members, the process also relocates X to a different location (that of Y). Following the incident, old members of X can either give up or continue their membership (as members who live abroad, if they do not migrate). Neither affects X's continuity.

In sum, the continuity of states turns on two elements: standing group intention and member continuation. A test (or two) can be formulated thus: two momentary states at two different times are part of one continuous state if (i) members of each have the same standing group

intention, and (ii) there is sufficient overlap between their members or if not, a chain of overlapping members of which their members are both part.

The second part of the test is partly quantitative in nature, and inevitably permits room for indeterminacy, apart from obvious cases of member continuation and discontinuation. It is meant to accommodate some common intuitions about the continuity of a state. My explanation thus reveals that uncertainty comes from not the lack of a principle of continuity, but from the very limited nature of the principle. However, I also suggest a possible alternative principle: the indeterminacy can be much reduced, if one considers recognising member continuation on a *qualitative* basis that the state at each relevant moment is sufficiently populous to discharge its characteristic functions. This, I tend to think, can be a tenable alternative to the quantitative principle of member continuation. The suggestion has a prescriptive element in that it will require some common intuitive way of thinking about a state's continuity to be altered somewhat.

Also, if a state, apart from being a group agent, possesses some special structure as its constitutive character, it could entail further conditions of continuity in addition to the foregoing two. Consider, for instance, a composite state—a union of multiple constituent units. Its break-up means not just membership decrease for each of the resultant groupings. Each resultant grouping can be considered continuous with their former existence as a constituent unit of the composite state; no one should be considered the continuation of the former composite state itself, even if some of the units so regards itself and the change shares the character of membership decrease. The composite character of the dismembered state means that each constituent unit is a sub-group and by itself does not represent the whole union, even if a particular sub-group inherits more members from the dissolved state than the other sub-groups do. The break-up of the composite state would mean the only group that represents the state as a whole no longer exists. The special composition of the composite state creates an extra condition of continuity.

V. Succession and Continuous Responsibility

Despite all that has been done to enrich and improve the account of continuity, it has not fully solved the problems with Aristotle's original thesis. A complete solution of the original problems, in particular the second one, that set us off on the search for a satisfactory account of continuity requires, I say, recognition of where continuity's limit is. My contention is as follows. Continuity cannot accommodate every situation in which a state should be obliged by past acts and events. To try subsuming all such cases under continuity will not only obscure the intentional character of continuity as has been elucidated above, but also make it impossible to explain cases where multiple states share responsibilities for actions by an expired old state. This suggests that we need to recognise a special kind of relations under the condition of discontinuity when a new state (or new states) is obliged by past acts and events. I refer to this as *succession* (due to obviously the standard meaning of the word), a special connection to be had between two or more temporally separate and distinct states. While succession can necessarily only take place in the event of discontinuity, it shares a crucial quality with continuity that it represents conditions in which responsibilities transmit over time. The basis for such quality, I argue, is member continuation between the successive states. Indeed, it is member continuation which allows two states to be considered successive when discontinuity occurs. It bears noting that member continuation is continuity-neutral; that members of two successive states are continual need not entail continuity.

With Aristotle, I focus on the state's responsibility immediately following discontinuity, to consider how the change of identity may or may not affect the existing rights and obligations. Thus, my discussion is limited in the following ways. First, the responsibility in question is specifically outcome responsibility, of either the strong kind that the subject bears the original duty or the modest kind, that the subject bears not the original but

the secondary, remedial duty which arises when the original is breached.⁵⁷ The first kind of responsibility always contains as part the second, while the second is not necessarily limited to agents who owe the original duty. Secondly, the discussion is limited to the situation where there is a subsequent state, rather than statelessness following the first state's dissolution. The need to remedy the breach of the original duty will surely require some appropriate action and arrangement in the latter circumstance, that provides the best possible fulfilment of the original duty (or more precisely, following John Gardner's 'continuity thesis', best possible conformity with the reasons for the original duty),⁵⁸ which possibilities I recognise but will not further explore in the chapter. Thirdly, the discussion does not seek to solve the question about the ground of continuous responsibility in the long run,⁵⁹ although the solution, comparable with the second, will depend much on what would best fulfil the original duty in the circumstance. The limited discussion here aims not so much at developing an account of continuous state responsibility as at demonstrating that the proposed account of the continuity of states contains the resources for further development of an account of responsibility.

To recall, the second of the problems with Aristotle's original account originates from the fact that there is a special connection between two sequential city-states which he still recognises even though he considers the city-states in question discontinuous. That is, the discontinuous cases here still involve a certain persisting connection, which distinguishes them from cases where states have no interrelation in any

⁵⁷ This is a simplified description of the idea of outcome responsibility, which is meant to locate the relevant kind of responsibility as elucidated by Tony Honoré, 'Responsibility and Luck' in *Responsibility and Fault* (Hart Publishing 1999) 14.

⁵⁸ John Gardner, *From Personal Life to Private Law* (OUP 2018) 102.

⁵⁹ A problem involves, *inter alia*, the question whether the severity of injustices could diminish with time, as addressed by Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4.

way, such as one state coincidentally brought into existence when another state has just collapsed and disappeared. In short, discontinuity does not mean mutual isolation. The remaining, surviving connection in the event of discontinuity thus needs identifying.

I ground the connection in member continuation, thus permitting continuation of responsibility despite discontinuity of the originally responsible state.⁶⁰ Continuity of the state (or continuity, for short) is therefore one but not the only ground on which responsibility will be transmitted. Indeed, continuity is sensibly taken as a cause of continuous responsibility, I say, crucially because members are continuous. The reason is that, I think, if people are empowered to act jointly as a group to enjoy the advantage of a broadened capacity to act, it is fair to require them to take responsibilities for the exercise of that capacity. Even if we are to recognise their power to dissolve their association as they intend, it is not inconsistent to still hold them responsible for their previous group actions, by taking them as still a group for the particular objective of fulfilling the previous group responsibility. The group in this case may be only fictive, especially when those people are no longer integrated. It does not follow that people should be taken as group counter-factually to hold them responsible. However, if they are indeed integrated again, as a different group, which is the situation in question, the fictive group becomes real, for the new group will inevitably share the responsibility-holding condition of the fictive group, due to the members' normative situation.

Continuity remains a distinct ground for responsibility, for it marks not only member continuation but also a clear disposition to act as a

⁶⁰ Daniel Butt (n 52) develops an account of a nation's restitutive or compensatory obligations for its past wrongs on the basis of, like mine, 'overlapping generations'. His explanation focuses exclusively on responsibility of a continuous nation, while mine extends to discontinuity. A notable difference between our accounts is that I argue that continuity is not necessary for continuous responsibility such as the restitutive or compensatory obligations, while it is unclear whether Butt would so think. Still, I share his view that 'overlapping generations' are of crucial importance to the explanation of continuous responsibility.

continuous group, so that members can be expected to act rationally to honour their previous transactions. In the case of discontinuity, members may lack such clear disposition; the reason for holding them continuously responsible, fairness-grounded, is less straightforward.

In cases of both continuity and discontinuity, responsibility is continuous by virtue of old members' normative situation, members who participated in the relevant acts related to the transactions. Hence, the responsibility is still the group's as a distinct agent. When new members join the group, they come to share the group's responsibility by virtue of their membership. This is to say, in the case of succession, new members of the new group will still be obliged by the old responsibility as they are in a continuous group, because it is the group which is responsible by virtue of the old members' collective normative situation.

It bears noting that member continuation is assessed on the basis of members in the sense of members of the relevant political group agent. Thus, if a state is democratic and permits meaningful political participation, it is likelier that ordinary subjects are members in the requisite sense, and therefore more sensible to recognise continuous group responsibility on the ground of member continuation.⁶¹ Likewise, in cases of 'liberation', as Nicholas Barber puts it, where a colony secedes from her former imperial master, the colony does not inherit the responsibility for the controlling state's engagements, '[i]n many cases this will be because there has been a radical change in membership at the point of liberation',⁶² referring to the fact that people of the colony were denied political participation in the government of the former state. Political inequality thus prevents the people sharing and inheriting the joint responsibility from the former state, when they successfully secede and form the new state. This is true not only of colonial independence (granted or fought), but also

⁶¹ Butt (n 52) 179.

⁶² Barber, *CS* 142.

of a state's internal change such as South Africa's abolition of apartheid. Therefore, in the last analysis, whether discontinuity is achieved by secession or lawful devolution need not affect the inheritance of responsibility; a sternly ruled colony can be devolved according to imperial law, whereas a reasonably self-governed one takes unilateral action.⁶³

It appears that, as Barber notes, remedial responsibility can sometimes be inherited by a new state despite sharp discontinuity in membership. He writes:

Modern South Africa, for example, should probably not be thought of as a continuation of its apartheid forerunner. There has been a radical change in the nature of membership of the state, and a profound change in the institutions of the state. It is not, therefore, directly responsible for the immoralities of the apartheid era. It is remedially responsible, however, for redressing these wrongs. Contemporary South Africa is responsible for investigating the actions of the old regime, removing benefits which certain people immorally (though perhaps legally) acquired through apartheid, and compensating their victims.⁶⁴

Barber's solution is to distinguish remedial responsibility from the 'direct moral' responsibility, and maintains that the new state in such a situation as the post-apartheid South Africa's assumes or inherits only the remedial responsibility and not the direct moral responsibility which implies that the subject breaches the original duty.⁶⁵ The solution is, I think, fundamentally sound. However, Barber does not explain the basis on which the new state is remedy-responsible or more precisely inherits such responsibility. One is right to wonder why the new state should

⁶³ While Barber sometimes appears to suggest that the different ways of achieving discontinuity affect the inheritance of responsibility, his characterisation of the different ways broadly tracks the distinction based on change in membership. To be sure, he could have made it clearer that the different models of discontinuity are only a proxy to membership change.

⁶⁴ Barber, CS 143.

⁶⁵ *ibid* 127.

inherit even the remedy responsibility from the original wrongdoing state, if it is so fundamentally discontinuous from it.

Indeed, I do not think that the new state inherits the responsibility, although it indeed has the responsibility to repair what the wrongdoer had done. Remedial responsibility, like the fire-brigade's responsibility to put the blaze out,⁶⁶ need not be inherited from the perpetrator. The remedial responsibility can arise from the role of the responsible agent, such as in this case the state's role responsibility to solve the particular problem caused by past wrongdoing, whoever the perpetrators were. Therefore, I suggest that the historic atrocities noted above should be recognised as part of the problems or more precisely injustices that the new state is obligated to resolve, due to its responsibility as a state, and the particular social conditions which the new state comes into when it is brought into existence.⁶⁷ And the new state, at times, may have to repair the damages itself or honour some past transactions, if and because it is in the best position to repair, to provide the best possible fulfilment of the primary duties which were breached by the wrongdoing state, given that the original wrongdoing state can no longer do such. Hence, successor or not, a new state will always have to be prepared to assume the reparative duty derived from the wrongdoing of the defunct state whose subjects and perhaps territory the new state now governs, as performance by the new state normally would provide, as John Gardner puts it, 'the best conformity still available with the reason or reasons that went unconfirmed to when [one] breached the primary duty'.⁶⁸

VI. Nearly Constitutional Identity

⁶⁶ The example is Barber's: *ibid* 127.

⁶⁷ That is, the state's capacity to solve problems is sufficient to ground the responsibility as part of the general 'responsibility of governing': Finnis, *NLNR* 246-52; Leslie Green, 'The Duty to Govern' (2007) 13 *Legal Theory* 165.

⁶⁸ Gardner (n 58) 115.

Let me conclude the discussion of my account of the continuity of states by reflecting on how or how far it differs from Aristotle's explanation. One may wonder whether the proposed account is just another variation on the Aristotelian explanation. The thought is not unfounded.

Indeed, the standing group intention as argued above shares two important characteristics of Aristotle's account: first, that members intend to maintain continuity or at least not to change it is crucial to continuity; secondly, the intention to maintain or change continuity is primarily forward-looking, in that it is largely concerned with the state's action or status now or from now on.

On my account, members maintain or change the state's continuity in a self-reflective way, as they either intend to act as a continuous group or not to act as a different one. This way, continuity and discontinuity are decidedly an intended result of their action. On Aristotle's account, the constitution kind is also the relevant actors' deliberate choice. The change of the constitution is intentional; it reflects the relevant actors' deliberate action to take control of government from some others. This is to say, the change of constitutional identity is intentional. The change requires relevant actors' intention to implement a different constitutional form. My account differs from Aristotle's largely in the object of the intentional change: for him, it is the constitutional form on his account, while for me it is the self-identification of the group.

By contrast, the modern account of the constitutional basic structure is significantly different in this regard, such that it conceives of the change of identity largely as an unintended effect of an action performed with a much more modest intention, indeed often a diametrically opposite intention to change only the content of the constitution without intending to alter its identity. This is to say, to change the basic structure does not require the intention to change it. It can be

very much an accidental, unexpected outcome of a seemingly innocuous action.

Nationalism, on the other hand, does not appear to permit deliberate change of identity at all. Once a national group has come into being by virtue of a particular national self-identification, it is unclear how the group can possibly change its identity by, say, intending to become a different group. This reveals the second characteristic of the Aristotelian explanation which I share, that is, continuity crucially turns on what members of a state want to do or who they want to be from now onwards—such as to form a democracy rather than an aristocracy, or to be a new state in place of the previous one. Recognition of a state's past existence need not limit or prevent members choosing to form a different identity. Continuity is the outcome of successive choices, made by successive members, regarding their collective action or status, at each particular moment. This is to say, continuity is the outcome of largely forward-looking intentions and actions over time. The difference between my account and Aristotle's lies in the content of such intention and action.

In a way, the standing group intention of a state is like its constitution. If a state is a group agent, its constitution should frame its joint action.⁶⁹ Thus, the constitution, written or unwritten, will normally embody in a certain degree the political group agent's standing intention and further particular intentions regarding how the group is to act. If so, can the standing group intention therefore be understood as an instance of constitutional identity?

I would prefer not to, considering, *inter alia*, the potential confusion which can arise in the following situation: a coup d'état takes place; an army commander and her troops topple the democratic government, and in its place implement an autocratic and oppressive new government, which

⁶⁹ Richard Ekins, 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163, 173.

excludes much of the population from participating in any of the characteristic state functions. The change thus causes discontinuity of the previous state, due to the radical change to the state's membership. However, as will be explained in the next chapter, this change need not break the legal system's continuity, if the coup d'état does not too much disturb the judiciary, and if legal officials mostly manage to hold their offices following the incident and continue to act as the same group. In this situation, there is discontinuity of the state along with continuity of a legal system. It would be confusing to say that the 'constitutional identity' were changed in this case, given that the legal-constitutional one is not. Given the possibility that two continuities can diverge, it is advisable to reserve 'constitution' for use in its standard legalistic sense.

The Continuity of a Legal System

This chapter focuses on the unity of a non-momentary legal system. As a legal system exists over time, the question of its unity concerns the criterion or set of criteria according to which a legal system can be recognised as one and the same legal system despite the successive changes that it undergoes. Putting it differently, in examining non-momentary unity, or continuity for short, of a legal system, one needs a test for determining whether multiple momentary legal systems, identified at different points of time, are all part of the same non-momentary legal system.

Like the question of momentary unity, the question of continuity of a legal system has long been framed as a question about unity of a legal system's content. I broaden the question to consider the continuity of law as grounded in the persisting unity in officials' group action to maintain the continuous operation of a legal system. The account based on the unity among legal officials, I argue, best represents and explains the continuity of a legal system as a distinct legal phenomenon from related social and political dynamics, whilst avoiding some of the implausible results following from current accounts, which seek to ground continuity in either the internal relation of the rules of a legal system or the unity of the social or political entity of which the legal system is a part.

My discussions proceed in four sections. In section I, I broaden the critical discussion of Kelsen's account with particular attention to possible modification which may help rebut the popular critique that the Kelsenian

model cannot recognise creation of a new legal system by means of lawful devolution. Section II examines a body of arguments against Kelsen's view about revolution; I note it as explanation of the continuation of laws and distinct from explanation of continuity of a legal system. In the third section, I consider the dominant line of thought in legal philosophy on the continuity of a legal system and call into question the proposition that the continuity of a legal system depends on the continuity of the state whose law it is. In section IV, I advance my account of the continuity of a legal system on the basis of legal officials' group action over time, separable from the continuity of the state.

I. Old and New Problems with Kelsen's Account of Continuity

Let me start by examining Hans Kelsen's account to enrich the standard explanation as to why it is problematic to ground the continuity of a legal system in the internal relations of the rules that constitute a legal system. I join and broaden some of the dominant critiques that the Kelsenian model leads to counter-intuitive results in a number of situations. Despite Kelsen's awareness of some such problems and such possible modification as Benjamin Spagnolo's proposal, Kelsen's account, I say, does not contain the resources for developing a coherent explanation to solve them.

A.

My discussion as follows focuses on two particular elements of Kelsen's account of a legal system, viz. the origin of a legal norm and chain of validation, to consider how they determine the continuity of a legal system and the problems that follow from such an account of continuity.

Kelsen's model of a legal system is a normative system united by and in a common ultimate norm, namely a basic norm.¹ On this model, legal rules whose validity—a rule's property of being binding—is

¹ Kelsen, *PT* 193-5.

determined, directly or indirectly, viz. through a series of acts of validation, by the same basic norm all belonging to the same legal system, the same normative system. It follows that new laws and new constitutions, no matter how fundamental a difference they make to the contents of a legal system, remain part of the legal system as long as they are created, directly according to the system's rules of creation of new law and constitution, and ultimately according to the basic norm of the legal system.² This is to say, even if a second legal system appears independent following the making of a new national constitution as a result of an exercise of authority in a first legal system, the independence is only apparent and the second system remains part of the first.

The apparently second system is part of the first if its constitution is created in such a way which allows one to track the creation of any given legal norm of the second system back to the constitution of the first system, and eventually to its basic norm. The process tracks the legal norm according to which another legal norm is created, and it should sooner or later reach a legal norm which is created according to no other norm and the enquiry can go no further. Such a legal norm which creates all other legal norms while being created by no one is said by Kelsen to be the 'historically first constitution' to all the legal norms it creates.³ Note that this is a simplified picture in that the first constitution is described above as a single legal norm, while there is no reason against conceiving of the first

² Kelsen, *PT* 198-201; *GTLS* 115-6. It bears noting that HLA Hart notes that to say a statute A validates another statute B has to presuppose an independent principle of recognition which helps determine that A is the real validating norm, given the possible existence of other statutes—foreign legislation for example—which purport to validate B. This is to say, validation as suggested by Kelsen, which is 'validation purport', is not always sufficient to identify a clear single chain or structure of validation. This critique portends the argument, to be considered later, that official recognition is crucial in determining not only the real legal source of validation but also the basis for continuous validity. HLA Hart, 'Kelsen's Doctrine of the Unity of Law' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 309, 334-9.

³ Kelsen, *PT* 200.

constitution as a number of historically first legal norms.⁴ Taking into account the latter possibility, Kelsen has to understand the historically first constitution as a cohesive set of multiple norms if it is not a single norm, as he does when saying that the basic norm in some cases authorises a sum of individuals who form an assembly to ‘posit norms that represent the historically first constitution’.⁵ But if the multiple first legal norms cannot be united by a single legal norm (in which case that single norm ought to have been recognised as the historically first constitution), how can they be considered a cohesive set is curious. (And to be sure, that the assembly may be a cohesive group is irrelevant to the cohesion of norms on Kelsen’s account.) This is a problem for Kelsen. It appears that he can only solve it by stipulating them as cohesive, that is, by stipulating a basic norm which recognises these first legal norms as constitutive of one constitution,⁶ while the ground for so recognising them isn’t clear on Kelsen’s account. For the purpose of demonstrating the model’s problem with explaining particular legal situations, let us suppose for the rest of the discussion that the first constitution, and indeed any constitution, is indeed a single legal norm.

If the first norm of the second legal system mentioned above is the constitution of the first legal system and therefore also the first legal norm to which the creation of the first legal system’s legal norms are traced, norms of both systems share the same constitution as the common *positive* source of their validity; this unity in the constitution is fortified into the unity of legal norms *qua* norm by finally imposing upon the constitution a basic norm, only by virtue of which, according to Kelsen, a legal norm can be properly (objectively) so identified. Therefore, the common constitution is the direct and *positive* source of the validity of the putative legal norms, but the basic norm has to be recognised and stated as the final *reason* for

⁴ Raz, *CLS* 101.

⁵ Hans Kelsen, ‘The Function of a Constitution’ in Richard Tur and William Twining (eds), *Essays on Kelsen* (Iain Stewart tr, OUP 1986) 111, 114.

⁶ Raz, *CLS* 101; Finnis, *CEJF* IV 427.

validity, back to which those legal norms, to be recognised as norms, are traced, and according to which, in the last analysis, those legal norms are created.

If the second legal system is to become independent, it has to be cut off from the unity of the genetic origin. How? As already mentioned briefly above, the only obvious way which Kelsen recognises, at least according to the standard reading,⁷ is to create new laws but especially a new constitution unlawfully—not following the prescribed or authorised methods of creation in the first legal order. Any instance of this way of creation, in Kelsen's words, 'every not legitimate change', is to him a revolution.⁸ Revolution so understood is broader than the usual sense; it includes coup d'état and need not implicate use of violence and force.⁹ A victorious revolution necessarily and minimally installs a new constitution which is effective, that is, generally applied and obeyed, and the old constitution is displaced because it has become ineffective. That change of effectiveness should affect validity of a constitution is recognised by Kelsen as 'the principle of effectiveness', which, in the revolutionary situation, limits the general principle of 'legitimacy' that validity of a legal norm is determined by the norms of the legal system to which the norm belongs.¹⁰

The new constitution, Kelsen argues, introduces a new, genetic chain of validity: laws which remain valid as before the revolution are valid only because the new constitution has received those laws. Legal norms of the pre-revolution legal system are either abolished or received, expressly or impliedly, under the new constitution. Now, as the victorious revolution introduces a new constitution, and as laws still in force post revolution are all created, by way of reception, according to the new constitution, the

⁷ Benjamin Spagnolo notes other ways recognised by Kelsen, to which I turn later.

⁸ Kelsen, *PT* 209.

⁹ *ibid.*

¹⁰ *ibid* 209-10.

common positive source of validity of the laws is the revolution-introduced constitution, whose own validity cannot be traced further to a higher, older positive source due to the unlawful way of its creation. That is to say, this new constitution is the historically first legal norm in relation to the other laws still in force. Consequently, these laws together with the new constitution constitute a distinct legal system. They are now all tracked ultimately to and thereby united in a basic norm which recognises that the new constitution is norm, in comparison with the pre-revolutionary situation, where laws and constitution are all tracked to and united in a different basic norm which recognises that the old constitution is norm. The division of the two legal systems is thus pellucid.

B.

The first problem or reservation about Kelsen's account is that his understanding of revolution appears counter-intuitive in characterising some relatively minor changes as creating a new legal system. This kind of change includes coup d'état, usurpation, and judicial rulings that effect a new rule of recognition, when, for example, judges start on their own accord to apply rules as valid law developed by a body which previously had no legislative competence.¹¹ When change is effective, it necessarily amends the legal system's ultimate rule that regulates the creation or succession of rules; amendment to such rules of validation, unauthorised by existing rules, requires a Kelsen to recognise a new unity of the laws grounded in the changed rule of validation. This would seem an odd conclusion, especially if the regular operations of the legal system are largely unaffected by the particular change.

However, the intuition makes no conclusive case against the Kelsenian assertion of discontinuity in this kind of cases, as it is a standing possibility that the common sense can be proven mistaken by sustained

¹¹ Finnis, *CEJF* IV 411-2; Raz, *AL* 98; Barber, *CS* 140.

analysis. And the claim that some changes are far more fundamental to a legal system than most people have commonly and carelessly thought is hardly an unusual thesis to be accepted. Therefore, the first body of cases exhibits not so much a weakness as a reason for reservation, thus the need to consider more cases for evaluation.

The second kind of cases more decisively exposes a weakness of Kelsen's account, viz. its incapacity to recognise, not continuity, but discontinuity, in situations where discontinuity is obvious, where a legal system exists clearly as a separate system after it gains independence from a controlling legal system in which it was formerly a subordinate part following a process regulated by the laws of the controlling legal system. In this particular context, discontinuity means more precisely division between the partitioned legal system and the controlling legal system. For clarity, in what follows I refer to the problem as division. Discontinuity is used, in the core sense, to refer to a different kind of situation, that the partitioned legal system is discontinuous from its pre-independence phase, rather than the controlling system.

In the light of Kelsen's analysis, that a state, along with its national legal system, can be partitioned from a controlling state and legal order of which it was formerly a subordinate part by means of the controlling state's grant of independence, a constitutional practice commonly known as lawful devolution, appears only illusory. The apparently partitioned legal system remains part of the controlling legal system, as the validity of its legal norms is still traced to the latter. Unlike the revolutionary situation, the new constitution does not come into existence by means of effectiveness, but by virtue of the validation of the old. The old constitution remains effective in that the new constitution that it validates is effective. Thus, the successive constitutions' effectiveness is concomitant. There is still only one, after the devolution as before, legal system which is the controlling legal system which includes the devolved system as a distinguishable subunit, or simply as its own norms those norms of the

apparently devolved legal system, which is strictly speaking not a distinct system.

The problem with division, seemingly theoretical only, could threaten the genuine independence of the emancipated states, as noted by John Finnis, when the following practical question comes up: ‘whether or not the new rule and constitution could be repealed by an exercise of authority under the old rule and constitution’.¹² Could the Imperial Parliament revoke its grant of authority to devolved colonies to reassert its authority over them?

As the Kelsenian analysis has difficulty in recognising genuine independence in the devolutionary situation, it was observed that ‘[g]reat care has, on occasion, been taken to perform some unauthorised act in the course of transfer of authority,’ Finnis writes, ‘so that it may be claimed that, *because* there has been a revolution, *therefore* the validity of the new constitution legal order *cannot* be traced back to the British imperial constitution’.¹³ That Kelsen’s model cannot recognise lawful devolution as a cause of perfect independence is a weakness of the model, or so the standard criticism has understood.

Benjamin Spagnolo suggests a different reading which allows a Kelsen to ascertain discontinuity in the devolutionary situation. Discussing the problem in the particular context of Australian law, he argues that ‘only an entirely unreconstructed and unmodified understanding of Kelsen’s model would produce the unsound conclusion that Australian law continued to be part of an Imperial legal system’.¹⁴ A charitable interpretation, and in that sense reconstruction, of Kelsen’s account should

¹² Finnis, *CEJF* IV 414.

¹³ *ibid*, citing inter alia KC Wheare, *The Constitutional Structure of the Commonwealth* (OUP 1961) chapter IV.

¹⁴ Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2015) 161. Henceforth, *Continuity*.

reveal a coherent explanation of division, or as he puts it at all times, ‘discontinuity’¹⁵ of a legal order in devolution and other situations. The standard reading recognises authorised, lawful change as Kelsen’s primary explanation of the unity of a changing legal order (summarised by Kelsen as the principle of legitimacy), and the principle of effectiveness as a limitation on the first principle. Spagnolo adverts to other exceptions to the legitimacy principle expressly noted by Kelsen to bring into relief situations where other considerations than authorised change and change of effectiveness are decisive in determining the identification of the genetic origin of the legal norms in question.¹⁶

Drawing on the recognised exceptions, Spagnolo argues for a new exception, namely the ‘principle of ultimacy’, which would allow Kelsen to recognise division of a legal order in the event of devolution, consistently in particular with his explanation of the termination of a national legal order due to its assimilation into another by way of the assimilated order’s lawful arrangement.¹⁷ Spagnolo’s reading reveals that Kelsen is not unaware of the potential weakness of his model in explaining discontinuity, and does try to account for it, somewhat. The question is whether Kelsen is or can be successful in doing it, as I think he rather signalled than really solved the problem.

Spagnolo’s case for the inclusion of a ‘transformation to national legal system exception’ to, or as a second principle of ultimacy in addition to the principle of legitimacy is summarised as follows.

¹⁵ To anticipate my later contention, I do not think that ‘discontinuity’ is properly used for this situation. The problem becomes clear when we need to recognise simultaneously division and continuity as two distinctive properties. Note that this is not a problem peculiar to Spagnolo’s discussion. The confusion has its origin in the dominant discussion on the subject matter whose established ways of analysis he draws on.

¹⁶ Spagnolo, *Continuity* 102-113.

¹⁷ *ibid* 148-50, 160.

Drawing on Kelsen's recognition that a legal system can authorise its subordination to another legal system and thereby its own termination, Spagnolo identifies as a distinct cause of disunity the 'change in ultimacy'.¹⁸ The authorisation effects a new set of 'ultimate constitutional norms' in the controlling legal system;¹⁹ following the merger, it is the ultimate constitutional norms of the controlling legal system which provides the source of validity to all norms of the system, thus cutting off the link with the merged legal system's constitution whose constitution authorised the change. In short, the post-merger reality of new ultimate constitutional rules determines the source of validity. It represents a change in ultimacy, which is an exception to or a second principle apart from the principle of legitimacy according to which the unity of a system is assessed. Spagnolo applies this second principle to the situation of devolution, arguing that the 'transformation of partial to total (national) legal system' effects a change in ultimacy.²⁰ As does merger, devolution creates a new set of ultimate constitutional norms that unify all norms of the new devolved legal system in one common positive source of validity, thus denying the ultimacy of the norms of the legal system which authorised the devolution.

Change in ultimacy differs clearly from the principle of effectiveness. The old constitution still validates the ultimacy change; as such, it does not become ineffective following the change, because a constitution continues to be effective, on Kelsen's account, as long as the further constitution(s) which it validates is effective. Therefore, ultimacy counts as a distinct cause of discontinuity from effectiveness change. It qualifies the principle of legitimacy, when the principle of effectiveness does not apply.

¹⁸ *ibid* 107.

¹⁹ *ibid*.

²⁰ *ibid* 150.

The ultimacy principle, however, is not easily to be squared with the principle of legitimacy. Per Kelsen's account, it is normally the principle of legitimacy which helps one identify a legal system's ultimate constitutional norm. If validation is not disrupted by illegitimate change, the ultimate constitutional norm is located by tracking the chain of validation. The problem with the putative change in ultimacy is that it is unclear how a constitution authorises another but also loses its ultimacy to the latter. This seems a direct contradiction to the whole of Kelsen's principle of legitimacy, rather than just a modification. The distinguishing factor seems this: in the two relevant cases, viz. termination of systemic validity and transformation to national legal system, the old constitution does not really authorise the new; what such events really involve is the old constitution's self-termination and therefore the new location of ultimacy, for 'acceptance of norms superior to (or... different from) the ultimate, non-authorised constitutional norms of a legal system is never, in substance, an authorised change'.²¹

It is not obvious such change can be limited just to such cases. Would not the old constitution also terminate itself in any event when it just authorises the making of a new constitution to permanently take its place, or when it is nearly impossible to appeal to the authority of the old constitution after the new constitution is in place? Why not see the new constitution in such an event as also the new ultimate constitutional norm which severs the legal system from the old source of validity? I am not sure what can make the new constitution in the putative cases more ultimate than that in other cases of constitution making. In the absence of a clear difference, the change of ultimacy cannot be adopted just as an exception. It will threaten wholesale negation of the first principle of legitimacy, which is the cornerstone of Kelsen's account of the continuity of a legal system.

²¹ *ibid* 108.

Hence, the change in ultimacy exception would indeed appear merely ‘ad hoc or stipulative’,²² if it is to be limited to only the two uncontroversial cases. Eventually, Spagnolo’s close reading foregrounds Kelsen’s awareness and recognition of the weakness of his model when applied to the cases in question, rather than a successful modification.

The two uncontroversial cases, viz. merger and devolution, involve the same question: is the legal system at issue really independent, given the previous act of constitutional authorisation? The question is actually about the momentary unity of the relevant legal system rather than about its continuity. Whether the assimilated legal system and the devolved legal system are really independent legal systems are both questions to be answered by examining the relevant aggregates of laws and officials and their relations to the other legal systems from which the relevant legal systems’ independence is in question, which other legal systems exist at the same time as the relevant legal systems, rather than at a different time. Thus, Kelsen’s problem here is more precisely with explaining momentary unity rather than continuity or discontinuity.

While the majority of current critics have focused on the case of division to make the argument that Kelsen cannot explain discontinuity, their conclusion is right. I agree that Kelsen’s model has difficulty explaining discontinuity, considering a different kind of situation from that noted in current criticisms.

The kind of situation involves the uncontroversial case of the creation of a new legal system following a process regulated, permitted, and authorised by existing laws. The creation of the US federal legal system exemplifies such situation. The 1787 Philadelphia convention took place according to the Articles of Confederation on the application of the states, and its enactment was approved by the Continental Congress and ratified

²² *ibid.*

by the states. It becomes curious whether the creation of the United States Constitution and the corresponding federal legal system should be classified really as a change authorised by, and thus made to, the existing legal order founded upon the Articles of Confederation, if Kelsen's theory is accepted. It turns out that one relatively peripheral respect of the process proves crucial to a negative answer. The Constitution breaches the Articles of Confederation's rule of amendment: the latter requires confirmation 'by the legislatures of every state' (Article XIII), while the new Constitution's Article II requires ratification by special conventions of nine states.²³ The illegality could help ground discontinuity of the old legal regime, although it did not prevent the Continental Congress approving it and proceeding with the process that led to the Constitution's activation in 1789. In any event, one can imagine an alternative scenario in which a new constitution produces no such inconsistency with the old and comes into effect under the auspices of the old law and organs in much same way as the US Constitution. There is a standing possibility that a state so does to fundamentally alter its legal and constitutional structure, and there is good reason for relying on existing law to order such change. Kelsen's theory does not permit a political community to create a new legal system (and thereby discontinue the old) by following the rules of competence currently in force. It is a highly counter-intuitive conclusion to draw that a political community cannot do such.

Counter-intuitive results are seriously disadvantageous to Kelsen's theory, because they require Kelsen to demonstrate that the relevant intuitions are necessarily unfounded in order for his theory to succeed.

²³ Some find it obvious that the Constitutional Convention had acted unlawfully in drafting the new Constitution: e.g. Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale UP 2020) 46. However, for a different view on how far such inconsistency was unlawful, see Akhil Reed Amar, 'Popular Sovereignty and Constitutional Amendment' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP) 89, 93-5.

Thus, as long as an alternative account can be found to make room for and sense of such intuitions, it counts as rejection of Kelsen's theory.

The Kelsenian analysis's incapacity to recognise continuity in the case of revolution, division in the case of devolution, and discontinuity in the case of lawful creation of a new constitution and legal system does not directly amount to rejection, but reveals the criterion for successful rejection and alternative to his account, viz. one that can coherently account for the three phenomena. Such an account, I say, is available; some discussions have pointed to a promising direction, although have not fully developed one.

II. Continuation of Laws

Alternative analyses of the revolutionary situation draw attention to the possibility of legal continuity on the basis of some relevant agents' practices. I consider in particular Tony Honoré and John Finnis's accounts, for their discussions helpfully foreground the factors that need considering and problems still unresolved. I explore and recognise the strength of Finnis's explanation of the continuation of laws on the basis of what he terms the 'general principle', while calling into question his strategy to explain the continuity of a legal system, in the core sense of a persisting unitary system despite change in its composition through time, as a derivation of the continuity of the political community.

A.

Reflecting on the revolutionary situation, Tony Honoré argues for a popular social basis for the authority of the office of a judge; he locates the source of authority in the 'acquiescence of the population in submitting their disputes to him [sc. the judge]'.²⁴ Honoré allows the suggested basis to be either customary or voluntary ('consensual' in his word), but is clear

²⁴ Tony Honoré, 'Reflections on Revolutions' (1967) 2 *The Irish Jurist* 268, 276.

about its popular character as it concerns the behaviour and attitude of the ordinary subjects of the law, the populace. 'Any group can agree on the submission of disputes to adjudication,' writes him, 'and this agreement is... itself a source of law'.²⁵ Custom can be substituted for agreement in the passage above and works just fine, if 'agreement' appears problematic as implying wholly voluntary, thus not obligated, behaviour. This gives a 'legal source of authority' to a judge 'who comes to the conclusion that the source of his original authority has disappeared'.²⁶

Honoré conceives of a source, a rule that is both customary and legal. It is a legal rule that becomes a legal rule by virtue of the conforming practice of the general population. While Honoré's discussion is focused on judges appointed by the old regime before the revolution, the basis works also for judges appointed by the new regime after the revolution. Their appointment is according to the new constitution, but thence their continuation is a matter of the popular custom or customary law.

Honoré's analysis is right to draw attention to the subsisting custom from the successive and legislated constitutions. While he locates the relevant custom among the subjects, I think it is better to locate it differently. Popular acceptance or conformity is important, I agree, but is so largely in its relevance to the efficacy of the official operations of a legal system. It is among the conditions under which a legal system can be said to exist; as such, it is a precondition for continuity, because no momentary legal system can be said to exist if it is not efficacious, and continuity can be ascertained only between existing momentary legal systems. But the precondition is also continuity-neutral, as two momentary legal systems can both be efficacious but discontinuous.

²⁵ *ibid.*

²⁶ *ibid* 276-7.

As a condition of efficacy, popular conformity has the problem of being insufficiently discriminating. Acquiescence to the old courts appointed under the old constitution and acquiescence to the new courts appointed under the new constitution may comprise just the same attitude on the part of the subjects; they just recognise the authority of those who apparently have it, irrespective of the exact legal or constitutional ground of the authority. Consider, for example, a region has gained, after a victorious revolution, independence from its former controlling state and created a new independent legal system from the laws of the controlling state that formerly governed the region. The radical break in the region's legal situation may not be reflected in the popular attitude about laws and their officials; the ordinary subjects may simply conform habitually to public officials who represent the law. Popular conformity and the custom that supports it are constant and thereby continuous. Thus, one cannot correctly determine the precise character of the legal situation on the basis of popular conformity.

B.

John Finnis offers an alternative approach, which focuses the attention on the practice of legal officials. Reflecting on the law of repeal, Finnis identifies a particular principle of validity which follows from the standard doctrine of repeal. Per the standard doctrine, repeal is non-obliterating in that the repeal of a law that authorises the making of other laws does not automatically invalidate those laws whose creation was authorised by the repealed law. This doctrine, however, Finnis notes, embodies no necessary feature of repeal. There is an alternative doctrine per which the repeal of the authorising law also invalidates the laws created according to the authorising law. The standard doctrine of non-obliterating repeal reflects a particular choice made by a legal system. In such a legal system, Finnis writes,

it seems reasonable to suppose... that there is a general principle of the practical and theoretical understanding of law which can be

formulated as follows: a law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.²⁷

Revolution's impact upon a legal system is then considered by Finnis as a kind of repeal. A revolution need not, capable though it is, obliterate the unity of an existing legal system; a revolutionary change can be recognised as continuity-compatible, if it primarily aims at the change of the legal system's content, in particular, of political or constitutional laws, laws which regulate, say, the succession to office, official competence, and succession of these and other rules of the system.²⁸ As Finnis notes,

All that a revolution normally seeks to do is to modify the application of the general principle in one special respect, viz. insofar as this general principle is the present basis of *the rules of succession of rules*: the revolutionaries postulate new conditions of repeal, and on the basis of this postulate, they repeal (or modify) first the pre-existing rules of repeal and then (in accordance with the new rules of repeal) such other rules (if any) as they may wish to.²⁹

To be sure, the point is whether a revolution can permit the continuity of the legal system whose content is under the revolutionary attack, as there is little doubt that it can certainly destroy continuity. While revolutions inevitably compromise somewhat the unity of the legal order, as at least the rule of succession of rules cannot be fully conformed to by revolutionary action, they can be pursued broadly alongside the continuation of the present legal system. Such compromise does not destroy the standard practice of the officials: in the wake of a revolution of the aforementioned kind, most law-applying officials, and perhaps even many law-making officials too, continue to hold office and discharge their responsibilities, just as they did before the revolution. And the standing for their continuation need not depend upon the new constitution or indeed

²⁷ Finnis, *CEJF* IV 423.

²⁸ *ibid* 411.

²⁹ *ibid* 424.

any constitution. It rests on the general principle—by virtue of the application of the principle in the particular respect of the laws regulating the authority, the tenure of the officials.

It reflects the particular choice of legal officials that they observe the general principle in the revolutionary situation and thus treat the resultant legal change as comparable with a standard case of repeal, rather than adopt a different one, thus the obliterating kind of repeal. If legal officials think and act differently, the revolution can have a much more radical effect on the legal system, such that the laws of the post-revolution system are properly said to be saved on the basis of the new constitution or other rules of recognition. The second practice is shown in the kind of situation mentioned before (at the end of II.A.), where a region has gained independence revolutionarily from its former controlling state and created a new legal system for itself.

It bears reiterating that the suggested general principle is a positive rule, is a matter of particular practice. Though reasonable to adopt, a given legal system may have practised differently, thus not allowing this principle to be ascertained to characterise the system's working.³⁰

Thus, when Richard Ekins describes the general principle, aptly, as a 'disposition of the political community, especially of the officials who represent the community', and furthers, 'a disposition that follows from the reasonableness of ordering public life in this way'.³¹ Finnis carefully qualifies the phrase 'follows from', specifying its proper indication as

³⁰ This agrees with Peter Oliver's reading in *The Constitutional Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005) 298.

³¹ Richard Ekins, 'Constitutional Principles in the Law of the Commonwealth' in John Keown J and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 396, 399.

‘psychological generalisation rather than logical implication’.³² The principle’s reasonableness justifies and prompts officials’ having the disposition; whether the disposition is present is after all a separate matter. We should not expect to find that principle and practice, wherever and whenever we find a legal system, even a well-ordered one.

Certainly, a particular situation could permit multiple interpretations, if the operative principles are not clear or determinate when the event takes place. The new constitution might include a clause, as many do, that recognises the validity of the laws made under the superseded constitution. Does it mean that the old laws from that moment onwards stand on the basis of the new constitution due to the recognition? If so, does that mean the operative model of that legal order rejects the general principle? Alternatively, it seems no less plausible to read the relevant clause as primarily declaratory, confirming the application of the general principle to pre-empt possible doubts about the continuation of old laws or the scope of the continuation.

Indeed, the situation can be indeterminate as relevant officials may not have a clear view. Given the state of things, we cannot ascertain an existing rule to explain the event, but we can perhaps ‘suppose’, with Finnis, that the particular legal system operates pursuant to the general principle, as it best represents and makes sense of the tacit understanding and attitude of the relevant officials or other persons in the system.

In comparison with popular acceptance, official practice seems more discriminating between continuity and discontinuity, given the different grounds on which officials recognise and apply laws. To be sure, members of the general population can share the attitudes as well, as noted above by Ekins’s ‘disposition of the political community’, permitting a similarly discriminating account of popular acceptance. But the point is that it is the

³² John Finnis, ‘Reflections and Responses’ in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 459, 557.

official practice that grounds the existence of the particular principle as a rule of positive law; whether the general principle applies depends on just such. Popular acceptance of the principle affects its efficacy, if it has been determined, on the basis of official practice, that the principle applies in a given legal system, within a given official group.

C.

The question of continuity in its core sense of the persisting identity of a singular legal system, however, is not yet solved. What is solved so far is the possibility of a standing source of the validity of laws, for situations where the revolution is commonly seen to have a limited impact on just a small part of the relevant legal system.

What remains unexplained, however, as Finnis goes on to address, is the continuity of the legal system as one and the same legal system with successive aggregates of different laws, caused by revolution or other incidents, at different points of time. True, the source of validity in the successive aggregates is constant. But Finnis does not ground the continuity of a legal system in that constant source, as it seems a tempting option. The reason for not so doing is not expressly noted by Finnis, but can be inferred from his use of the principle in the context of lawful devolution. To sever the devolved legal system from the normative power of the former controlling legal system which authorised the devolution, the general principle replaces the original rule of competence as the source of validity immediately following the moment of the creation of rules. Therefore, just as the general principle protects the validity of old laws from disruption due to a new constitution, so too does the general principle protect the validity of new laws from disruption due to an old constitution. This is to say, given its applicability to both revolution and devolution, the principle is equally compatible with cases of apparent continuity and of discontinuity in the sense of division. This could be the reason why Finnis

does not go on to ground the continuity of a legal system in the general principle of validity.

Instead, Finnis points to non-legal facts for explaining law's continuity. He recognises as a 'basic phenomenon of legal experience' that a legal system is not merely an aggregate of rules; it persists through time, while aggregates of rules cannot, as an aggregate disappears every time when rules change. However, 'if [a legal system's] existence cannot be grounded on any "basic" rule or set of rules,' Finnis concludes, 'there seems only one conclusion:'³³

the continuity and identity of a legal system is a function of the continuity and identity of the society in whose ordered existence in time the legal system participates.³⁴

Raz, briefly speculating on the question of continuity, also writes, 'The identity of legal systems depends on the identity of the social forms to which they belong.'³⁵ This view has met with little open objection since its assertion. In what follows, I refer to it as the dominant view on the explanation of continuity.

The dominant view, however, is underdeveloped and unclear. First of all, it is not straightforwardly obvious what 'society' and 'social form' refer to. Raz probably uses a vague term 'social form' deliberately to just locate the subject matter within a broad category. On the other hand, it is clearer that by 'society' Finnis means the political community, the state, given his relating the problem back to Aristotle's endeavour to ground the continuity of a state in the constitutional form. Granted, the further problem is how precisely the continuity of the political community determines the continuity of the legal system. Neither Finnis nor Raz says anything more than stating abstractly the general character of the possible

³³ Finnis, *CEJF* IV 428.

³⁴ *ibid.*

³⁵ Raz, *CLS* 189.

explanation, that one depends on the other. Furthermore, how exactly a political community can have continuity is not explained either. It is impossible to give an account of the continuity of a legal system without an account of the continuity of a political community. In sum, Finnis and Raz note a possible explanation rather than develop one; the purported possibility—hypothesis—largely relies on a tacit, intuitive idea of the continuity of a political community; it remains too crude to be operative.

There is a further concern. If Finnis and Raz's hypothesis is correct, we will have to recognise that the continuity of a legal system as a phenomenon is not distinctively legal. The legal phenomenon itself is just the successive sets or aggregates of rules, which alone have nothing to give them an identity through time. What gives the successive aggregates a continuity is the continuity of the society or political community. That is to say, continuity or discontinuity is ascertained on the basis of non- and extra-legal facts, and therefore is extraneous to law. The radical implication is that a legal system has no non-momentary unity in itself.³⁶ Such unity, when ascertained, is originally ascertained as a different, social or political phenomenon and then grafted onto the law.³⁷

One should surely entertain the possibility that the radical implication is indeed correct. However, just as I resist the tying together of the momentary unities of law and the state, I have reservations about the dominant view. I believe that it moves prematurely from the legal system to the broader political medium for explanation. The problem of this move

³⁶ While Raz obviously confines this implication to continuity and not momentary identity, Finnis is less clear whether he thinks that the implication is true of only continuity or of momentary identity also, as he addresses largely the question about continuity. It is not unreasonable to infer that, as I note in the beginning of section IV, momentary identity of law in Finnis's view would also depend on the identity of the political community.

³⁷ This incidentally agrees with the critique that the identity of a legal system is a vacuous question because a legal system has no more reality than the rules and institutions that constitute it, and such components exist through time no more than successive aggregates. See Christopher Arnold, 'Institutional Aspects of Law' (1979) 42 MLR 667, 679-80.

becomes apparent when we consider two cases: (a) legal continuity in the face of political independence and (b) legal discontinuity within a persisting political form. I turn to them next.

III. Whether the Continuity of Law is a Function of the Continuity of the State

This section critically examines the dominant view of law's continuity noted at the end of the preceding section, that the continuity of law is determined by the continuity of the political community. It reveals two weaknesses. First, it cannot recognise the possibility of continuity in the devolutionary situation. Secondly, it cannot recognise the possibility of discontinuity in the case of lawful creation of a new legal system. Such weaknesses, I suggest, demonstrate the mistake of tethering the continuity of a legal system to the continuity of the society or political community where the legal system operates. It thus gestures strongly towards a different approach: treating the continuity of law as a distinctively legal phenomenon.

A.

It is my argument that the dominant view cannot recognise the continuity of law where devolution does not break the continuity between the devolved legal system and its previous momentary parts or phases as a dependent, controlled legal system. To appreciate the weakness of the dominant view, it must be first demonstrated that the very question has been much ignored in the jurisprudential analyses of the devolutionary legal situation. Instead, analyses have largely focused on the 'discontinuity' between the devolved legal system and the controlling legal system which authorises the devolution. Thus, efforts are largely made to explain 'Why discontinuity?' in such a situation, not 'Why continuity?' The resultant explanation has little to say about the relation between the devolved legal system now and its past existence.

Regarding the question of how devolution creates a new legal system, Finnis offers a partial solution—partial in that Finnis solves primarily the practical respect of the problem, viz. ‘whether or not the new rule and constitution could be repealed under the old rule and constitution’.³⁸ As the general principle serves as the present source of validity, new rule and constitution need not be tied or subject to the authority of the old constitution, once they were brought into force by virtue of the old constitution’s authority. However, the theoretical respect of the problem, viz. whether the legal system has been divided into two independent ones, is not squarely addressed and answered.

As noted before, Finnis does not use the general principle to address the question about identity, and rightly so. For the principle is continuity-neutral: that the principle is the present source of all other laws’ validity in itself entails nothing about the present legal system’s relation with its previous existence. The legal system can be a new legal system or a continuous one; the general principle applies and works indiscriminatingly.

Although Finnis offers no direct explanation of the theoretical part of the problem, an implied explanation is available. Considering Finnis’s thesis that continuity of law is derivative of the continuity of the political community, one can infer that Finnis would explain the division of legal systems on the basis of the division of states: the devolved legal system becomes a separate legal system because it is part of an independent state.

In my view, the problem is better solved by framing and solving it as a problem of momentary unity of a legal system: whether the relevant legal officials operate as a distinct group to maintain the legal system concerned. As such, it is solved independently of the continuity of the broader political form. Moreover, it becomes apparent that the problem isn’t actually about continuity. Continuity is a different question, apart from the question of

³⁸ Finnis, *CEJF* IV 414.

division. As we have determined that the devolved legal system becomes separate from the former controlling legal system, we still have an outstanding question as to whether the devolved legal system is continuous with any momentary legal system or systems (considered successively) existing before the devolution.

That discontinuity is a separate and still outstanding problem in addition to the problem of division tends to be masked by the ways in which current accounts have approached the devolutionary case, that is, they tend to conflate the two problems under the loose reference to ‘discontinuity’. For instance, Spagnolo purports as the problem for study the continuity of a legal order, and to examine theoretical accounts, offered by Kelsen and Raz in particular, of ‘how to determine whether a legal system existing in a given place is the same legal system as one existing in that place at a different time’.³⁹ Likewise, Finnis, in one place but not others, formulates the difficulty facing Kelsen as, ‘Can the identity of a legal system be changed without violating some existing rule?’⁴⁰

However, if we recall the problems which their analyses actually pick out and address, as we have considered above, it is obvious that those problems are not that of continuity in the core sense as Spagnolo specifies in the beginning of his enquiry. Those problems, namely with division of a legal order, concern the relation between two legal orders at a particular time and the same time, rather than between two legal orders at different times. And their solutions, correspondingly, work only for discontinuity in the loose sense of division.

Such confusion is permitted, if not encouraged, also by Raz’s analysis, as he formulates the problem of the identity of non-momentary legal system in a way that allows for, inadvertently, such loose sense of

³⁹ Spagnolo, *Continuity* 1.

⁴⁰ Finnis, *CEJF* IV 413.

discontinuity. The problem of continuity, notes Raz, is the problem of ‘deciding whether two given momentary systems belong to the same legal system’,⁴¹ whether ‘two momentary legal systems are part of one, continuous, legal system’.⁴²

The language of ‘belonging to the same system’ and ‘part of one, continuous, system’ is capacious. Read literally, either description is incomplete as a definition of the continuity relation. Two discrete colonial systems, taken at a particular time as two momentary systems, are part of the same non-momentary Imperial legal system. They fit the description, but the two are obviously not continuous. The problem seems only slight as a minor interpolation to the wording will solve it. For instance, further specifying that the momentary legal systems belong to one continuous legal system in the form of a temporal part that represents the whole of the continuous legal system at a particular time. This is likely presumed by Raz’s formula. However, if the question of continuity is defined more accurately, it will become clearer that the problem of devolutionary independence is not a problem of continuity. The loose description, as I show below, somewhat allows Raz to treat Kelsen’s incapacity to account for devolutionary independence as one of the examples showing the defects of Kelsen’s criterion for continuity.

Devolution helps reveal Kelsen’s omission of the fact that, notes Raz, ‘the creation of a law is authorised by a law belonging to a certain legal system [is not] a sufficient proof that the authorised law belongs to that system’.⁴³ Granted, it bears noting first of all that whether or not ‘the authorised law belongs to that system’ is not a problem of continuity, even as per Raz’s formulation ‘whether two momentary systems belong to the

⁴¹ Raz, *CLS* 187

⁴² Raz, *AL* 81.

⁴³ Raz, *CLS* 188.

same legal system'.⁴⁴ Read literally, the problem concerns only *a law's* being one or another system. This may be a trifle. We could take Raz to refer also to the creation of a distinct legal system, as closer to the devolutionary situation.

Then, the problem with the Kelsenian model would be that authorisation is no sufficient proof that the authorised momentary system belongs to the authorising one. Raz's definition permits this to be classed as a continuity problem. My point is that this isn't a matter of continuity, i.e. relation between two momentary parts of the same continuous legal system. A momentary part represents the whole of the continuous legal system at a particular moment. If the authorised system belongs to the authorising one, it doesn't exist as a momentary part, as it is only part of a larger normative system. There won't be a question as to whether two momentary systems, at different moments, belong to the same non-momentary system. The question is whether one momentary legal system, or perhaps a mere aggregate of rules and officials, is part of another momentary legal system, both of which exist at the same time.

The question is obviously not about continuity; to exclude it, Raz's description should be understood or indeed revised more accurately to state what the eligible comparative objects are. The following clarification will be helpful: the eligible comparative objects are momentary legal systems which exist at different points of time. Thus, it becomes clear that whether the authorised momentary legal system and the authorising momentary legal system are part of the same continuous legal system is not necessarily a question of continuity, because the two momentary systems concerned can both exist at the same time. The question of devolutionary independence involves just this kind of coexisting momentary systems; that they are taken as successive momentary systems is the source of mistaking devolutionary independence as a problem of continuity. The successive

⁴⁴ Raz *CLS* 187; *AL* 81.

relation does exist, but between a different set of momentary legal systems, to which the existing analyses have paid little attention.

B

It is not clear whether the jurists we have discussed would recognise the partitioned legal system as continuous with any momentary legal systems before. More precisely, the question is whether the post-devolution legal system can be continuous with the pre-devolution regional legal system which was a subordinate legal system within the larger controlling legal system. The question takes into account the possibility that a subordinate legal system, though not independent, is eligible to form a momentary part of a continuous legal system. If a subordinate regional legal system is considerably autonomous, it seems plausible to think that transition to a fully independent national legal system need not bring about discontinuity, if the process is lawful and exactly meant to ensure continuity; the transition involves a significant change in a legal system's relation to another legal system, which change is one that can occur to a continuous legal system. (Further elaboration in IV.E.)

However, the dominant view seems incapable of recognising the foregoing possibility at all, because it ties the continuity of a legal system to the state whose law the legal system is. This requires its follower to ascertain discontinuity of law whenever a new independent state comes into existence. Independence marks new political unity, and a new legal unity must follow from that. However, it is not obvious why this must be so. That the dominant view cannot appreciate the possibility of legal continuity alongside political discontinuity as the common sense strongly gestures towards, it seems to me, just exposes an implausible consequence of grounding the identity of law in the identity of the state.

On the other hand, the dominant view also leaves no sufficient space for discontinuity of law, where the state operates as a continuous group agent, as the political community as a whole is trying to create a

new legal system to substitute for the old one. Consider, for instance, once again the creation of the 1789 US Constitution and the corresponding federal legal system. It shows the possibility of a persisting political community which intends to fundamentally rearrange its constitutional and legal system. That the dominant view cannot accord with this possibility, again, is a mark of its weakness.

The two cases point to an important possibility: continuity of law should not be bound up with the continuity of the social or political entity; whatever important connections between them, which I am sure are plentiful, their continuities are simply not always coincidental. They are determined by different facts. In other words, continuity of a legal system appears a distinctively legal phenomenon, or at least not dependent on or derivative of the continuity of the state. The dominant view, therefore, has to be rejected, or so I argue. In the next section, I substantiate the rejection by advancing an alternative explanation which can account for the intuitions about continuity and discontinuity in the two cases. As noted before, to prove that a given intuition is not necessarily unfounded is a way of refuting an account that dismisses the intuition.

IV. Continuity of Law and Standing Group Intention

Aware of problems of Kelsen's legalistic account of continuity, many have sought an alternative view at the opposite extreme, thereby arguing also for the identity of law and the state, only in this case it is the law that depends for its unity on the state, not the other way round, as Kelsen contends. The discussion so far has found obvious counterexamples to the identity of law and the state, which makes a strong case for renouncing this view. In what follows, I develop an alternative account of the continuity of a legal system that grounds continuity in legal officials' group intention and action over time. This account, I demonstrate, makes sufficient space for the cases which the existing accounts have had difficulty accounting for, and reinforces the common intuitions about such cases with

explanation based on relevant agents' intention towards the legal system whose continuity is in question.

A.

My explanation of continuity is a continuation of my explanation of momentary unity. Momentary unity is grounded in legal officials' joint intention to maintain the operation of a legal system. On my account, a legal system has momentary unity, if legal officials, especially law-applying ones, conceive of themselves as a distinct group whose joint objective is the operation of the legal system. Continuity of a legal system is such unity in group action over time. Just as officials' group intention grounds the legal system's identity at a time, so too will it ground the legal system's identity over time. The question of continuity then concerns what intention that legal officials will jointly hold to maintain the legal system's operation not only at a particular moment, but also continuously through successive moments.

Notably, the foregoing 'continuity' between momentary and non-momentary unity is distinct from the dominant line of thought. Finnis, for example, does not directly address the question of momentary unity. However, given his view that '*the legal system, considered simply as a set of "valid rules", does not exist*,'⁴⁵ it seems coherent to infer that he would also subsume law's momentary unity, as with continuity, under the momentary unity of the political community. Raz, by contrast, treats the two dimensions of unity as sharply different explananda. Although he expressly confines his analysis to only the question of momentary unity, one can discern in Raz's brief remarks that he envisages a fundamentally different approach to continuity. That is, while he explains momentary unity with official recognition, he does not suggest a possible similar explanation for continuity. His speculations about possible explanation of

⁴⁵ Finnis, *CEJF* IV 428.

continuity point to an explanation that needs to take account of not only ‘jurisprudential or legal considerations’ but also considerations ‘belonging to other social sciences’.⁴⁶ That the explanation is so different is obviously due to Raz’s thought that the continuity of law is ultimately a question of the continuity of the social form, which thought he shares with Finnis. While Finnis possibly subsumes also momentary unity under the social form, Raz keeps the criterion of momentary unity a distinct matter to be determined by jurisprudential considerations.

My intended explanation is different from the existing accounts in two obvious ways. First, I do not subsume either respect of the unity of a legal system under the unity of the social form or political community. Secondly, I approach the question of continuity as fundamentally a matter about legal officials’ intention and action, therefore treating the matter in much the same way as the question of momentary unity. Thus, momentary and non-momentary unities are both considered as questions about how they will be determined by the same jurisprudential factor, viz. legal officials’ group intention and action.

To be sure, continuity will require a different explanation, though based on officials’ group intention, from what momentary identity requires, due to the different or extra fact that continuity distinctively involves, and therefore warrants a separate analysis.

More precisely, continuity becomes a separate question from momentary identity and requires extra analysis to account for its condition because a variant is introduced into the situation. The variant is change—change in the composition of the object whose identity is in question. Explanation of continuity is in general to find a way of squaring identity with change. Time is only a proxy for compositional change, which necessarily raises the question of identity in a temporally comparative

⁴⁶ Raz, *CLS* 189.

form. But it will not require a different explanation of continuity from that of momentary identity if no change occurs to any component part of the object concerned, however much time has passed by. It is only because the object undergoes change in its composition that a particular explanation is needed for explaining how two different and successive⁴⁷ compositions actually make up one and the same object—in this particular context, how two different aggregates of rules and people who make or apply the rules indeed make up one and the same legal system. Hence, to explain the continuity of a legal system is to explain its identity despite change, to identify the criterion or set of criteria by which the kind of change in a legal system that is consistent with the system's identity is to be distinguished from the kind of change that is not.

B.

Change to the content of the legal system need not disrupt its continuity. It necessarily creates a different aggregate of rules from that before the change, but does not affect continuity, if the new aggregate of rules and the pre-change aggregate of rules both constitute momentary legal systems which are part of the same non-momentary legal system. The crucial fact that secures the identity of the two momentary legal systems lies not in their contents (the respective aggregates of rules), but in the connection between the two momentary official groups—that they are connected to the same standing group intention to maintain the operation of a particular legal system.

Officials' standing intention remains one and the same in the face of change in the legal system's content, if the change is made in accordance with the standing intention to maintain the present legal system's operations. Just as officials' intentions to make and apply laws are nested within the overall structure of the group's standing intention to maintain

⁴⁷ Unless stated otherwise, different aggregates discussed in this context are necessarily successive. So are different momentary legal systems.

the existence of a particular legal system, so too is the intention to make or effect change to the legal content of the system. Thus, change is continuity-consistent, if officials continue to act according to the same standing group intention.

The standing intention does not change, insofar as the officials do not try to change it, by dissolving itself or conceiving of a new legal order. The identity of a group in part depends on the self-referential identification. I recognise that a group has the power to discontinue itself,⁴⁸ and the people who compose the defunct group can create a new group by so intending. This prevents the rigid and counter-intuitive implication that members of a group cannot dissolve their group and form a new group while pursuing the same kind of collective activity, if the members are the same; members' intention to make a difference is relevant to the identity of a group. Hence, the standing intention depends for its sameness on the (successive) officials' joint intention to act as the same group, or alternatively, their lack of intention to act as a different group or for a different legal system.

To use the negative criterion is to accommodate a variety of official attitudes. As when officials are said to intend to act as the same group or for the same legal system, one may wonder whether they have to conceive of the legal system more specifically as the same as the legal system a moment ago. That is, need their standing intention contain some degree of cross-temporal identification? I think they can, but need not. The standing intention can be recognised as identical, as long as there is no deliberate replacement of it. Thus, the lack of an intention to act for a different legal system or as a different group, in my view, is sufficient to count as the intention to act for the same persisting group.

⁴⁸ It is a power in that it can change the plural subject's metaphysical status. This seems an expansion of the standard conception of power, which is normative, in that it changes the subject's normative situation.

Also, officials inevitably undergo change in their membership; the standing intention, as does the identity of the group, persists, if new members intend to join the group's standing intention. Hence, two momentary groups composed by completely different people can share the same group intention and thereby represent two momentary parts of the same continuous group, if change in the group's composition observes the foregoing pattern, viz. new members continue to join the group by joining the standing intention of the existing members at the time of one's admission.

Accordingly, a test (or two) is formulated as follows: two different aggregates of laws constitute two momentary legal systems which are momentary parts of the same continuous legal system, if and only if the legal officials in the two situations have the same standing group intention. Two groups of legal officials share the same standing group intention, if and only if either (i) one group does not conceive of a different group or a different legal system from that of the other, or (ii) they are connected by successive momentary groups of officials all of which satisfy (i). So, one group can be discontinuous with another not because it intends to be different from the other, but because it is preceded by a group which so intended.

Thus, a legal system is not just its material composition, the aggregate of rules that make up its content at any particular time. The legal system can survive change in its content somewhat while the aggregate of rules cannot; any change ends the previous aggregate and creates a new one. This is not to say that a legal system can survive any sort of change. Some changes are identity-consistent, while some not. It depends on the particular intention that legal officials have for each particular change. In what follows I further compare continuity-consistent change with the standard operation of a legal system regarding legal change, to explain that the focus on the standing official intention is not to replace a principle of legality, that it is part of the nature of a legal system that it regulates

change to its content; rather, my account supplements the principle to demonstrate that continuity depends on official practice that is legality-honouring but not strictly legalistic.

C.

Continuity-consistent change should normally take place lawfully and according to the rules of the system that regulate change in law. These rules include the power-conferring rules of change, rules of ‘succession of rules’ governing the ‘amendment, suspension, or replacement’ of all rules of the system including themselves,⁴⁹ and rule of discretion regulating the exercise of the adjudicative function in deliberately or inadvertently making new laws to settle a particular case.⁵⁰ In virtue of these rules, changes to the existing laws thus made are authorised or regulated by the system. To maintain a legal system is in part to maintain such distinct, systemic way of creation and application of rules.

This is not to say, changes should never take place in other, unlawful ways to the content of the legal order. Respect for legality need not mean strict adherence to it. Law-respecting officials can make a change to existing laws unlawfully, while believing that what they do is well within the law. This is nothing out of the ordinary, and need not be seen as deviation from their commitment to maintain the legal system’s self-determination of normative change. Apart from the good faith, the act in question, normally occasional rather than daily, does not obstruct the working of the system, and might even improve it as it could be expedient sometimes that changes are made without full conformity to strict legality. If such deviation from strict legality, out of mistake, ignorance, or even deliberate choice, is found out and becomes a matter of dispute, the willingness of the officials to rectify the deficiencies, not dismissing legality

⁴⁹ Finnis, *CEJF* IV 411.

⁵⁰ Raz, *AL* 96-7.

lightly as mere formality, shows the commitment to uphold the legal order, to uphold its ideal of the Rule of Law.⁵¹

Moreover, there are conceivable situations where no available way of changing the existing laws is lawful. It is not unthinkable that a constitutional court ought to act unconstitutionally to secure the constitution's survival in a new, unexpected situation. Legal norms have run out in a novel fact-situation. The court could rely only on norms of political morality to defend the judgement it is to make. In this situation, the constitution needs amending to adapt to the new circumstance, while all possible courses of action open to the court are unlawful.⁵² The court has to make an unlawful decision to secure the constitution and legal system's survival. Inaction, though not unconstitutional, would endanger system's survival. Might not the unlawful change, made deliberately for the legal order's continuation, be consistent with the legal order's continuity? It is only if one thinks that a legal system depends for its continuation on perfect authorisation of all changes, that this conclusion seems odd.

With Kelsen, I think that it is important to the unity of a legal system that it regulates change in its content. But strict legality has to be dropped to permit a more capacious understanding of the varied ways in which a legal system operates and navigates changing and unusual circumstances. The alternative still honours the spirit of the Rule of Law. Acceptable ways of change ought to respect the lawful or else the characteristic ways in which a legal system works. Indeed, that officials have shown due respect for the ideal of the Rule of Law, when they

⁵¹ Spagnolo identifies conformity to the Rule of Law as one of the two criteria of continuity of the legal system of New South Wales as a 'partial legal system', viz. a colonial local legal system part of and subordinate to the British Imperial legal system. On his account, that conformity to the Rule of Law is a criterion of continuity is peculiar to the New South Wales legal system, and a matter of Imperial law at the time: *Continuity* 135. I draw on his identification of the Rule of Law as a criterion of continuity of a legal system, and generalise it into a factor relevant to all legal systems, thus different from his original conception of the criterion as a local and contingent doctrine.

⁵² Honoré (n 24) 269.

compromise it for overriding or countervailing reasons, can usually serve as a pointer to the appropriate attitude on the part of officials. Therefore and to this extent I subscribe to the importance of legality as a normal element of the unity of the legal system, not because I subscribe to unity as unity in validity, but because it wouldn't seem coherent that one can show little interest in the ideal of the Rule of Law while committing to law's systemic and normative self-determination. A standing commitment to the latter commits one to act in ways honouring the values associated with legality.

That said, while the continuity-maintaining intention requires respect for legality, respect for legality has no exclusive relation with continuity. Respect of legality, I say, is compatible with both situations of continuity and discontinuity. That officials follow existing rules in effecting legal change in itself does not determine whether the change is consistent with continuity of the legal system whose laws those officials follow in making the change. Officials can so do with the purpose of creating a new legal system to replace the existing one; that they still follow the rules of the existing legal system throughout the transition can suggest that it is reasonable that such process should be regulated by the law in force at the time, as such conformity best solves any possible coordination problems which could obstruct the process leading to the creation of a new legal system. A group's intention to dissolve itself to create a new group is perfectly compatible with an intention to respect and observe the rules of the group until its dissolution.

D.

Another important element which the purported model is meant to supplement rather than displace is the general principle of validity which Finnis proposes. The principle, in short, stipulates that a law, once created, remains valid until either it expires on its own terms or it is repealed

according to relevant conditions at the time of the repeal.⁵³ As noted before, the general principle is continuity-neutral. It serves as the present source of validity for both laws originated in a defunct legal system and for laws developed by a continuous legal system. My purported account of continuity agrees with this observation, while offering a new ground for supporting the adoption or supposition of the general principle in a continuous legal system. If officials intend to recognise a rule because it is part of a continuous legal system, the general principle provides an operative basis for such recognition.

To be sure, it is a standing possibility and live option for a particular legal system to decide that, contra the general principle, the repeal of a constitution should have an obliterating effect, viz. automatically invalidating the laws whose creation is owed to the repealed constitution, as if it applies to this particular setting the old common law doctrine of obliterating repeal.⁵⁴ Should the society or constitution makers wish to keep those old laws, they will have to let the new constitution expressly save those old laws. The curiosity concerns not with technical feasibility, which there clearly is, but with the reason for favouring it over the alternative, viz. continuation of the existing laws independently of the fate of their original empowering laws, thus confining repeal's effect to the repealed constitution alone.

If the continuity of a legal system is tied to officials' standing group intention rather than any particular rule or constitution, there is no particular reason for having to think that the change of constitutions effects a change in the source of validity for all existing laws. All rules are valid because they were created in accordance with constitutions or other power-conferring laws, in force still or not, which are all part of the same continuous legal system; they should remain so, until they expire as per

⁵³ *ibid.*

⁵⁴ Finnis, *CEJF* IV 423.

their own terms or are repealed by new laws. The general principle represents the way in which the laws of a continuous legal system are and remain recognised according to my purported account of continuity.

Hence, in the situation of a continuous legal system, I ground the general principle in officials' recognition of laws as valid for the reason that such laws are all valid for their connection with constitutional or other power-conferring laws which are all part of the same continuous legal system. In other words, the officials' conception of a persisting legal system crucially determines the operative status of the general principle in the legal system.

E.

That continuity of a legal system depends crucially on legal officials' group intention opens up space for continuity of a legal system in the devolutionary situation, where a state has become independent, but its legal system remains continuous with its past. To entertain the possibility, I am referring in particular to the situation where there is already a distinct local legal system operating as a subordinate subunit of the controlling legal system, such as Australia's legal system, before the activation of the Statute of Westminster in 1942, as a distinct subordinate system within the total legal system of the British Empire.⁵⁵ Could we say the pre-devolution local subunit and the post-devolution independent national legal system are both momentary parts of the same continuous legal system?

It would be curious why we could not. Continuity can be ascertained if the momentary parts are connected with the same group intention. The difference here concerns the transition from the legal system's subordinate, non-independent character to an independent, self-determining one. It would surely be a fundamental change, if a new legal

⁵⁵ By contrast, Pakistan was once not 'even a sub-unit identifiable as such' of the British Imperial legal system: Finnis, *CEJF IV* 413.

system was created out of the aggregate of rules which had no distinct unity and was formerly part of a larger legal system. But in the case that concerns us, the subordinate legal system has a distinct identity. It is not independent but considerably autonomous. Though subordinate to the controlling legal system, the local legal system is clearly distinguishable, in terms of the group of legal officials, the boundaries of its jurisdiction, the rule membership, and the abstract perception or recognition of the legal system as a reasonably self-governing community. It is not a mere aggregate of rules and officials which is part of a larger aggregate which constitutes a distinct legal system. In comparison, if a province or a country, for instance, is designed only as geographical divisions for the operations of a single national legal system, no distinct system at the local level can be ascertained.

The difference rests on whether the local community is permitted to be sufficiently legally autonomous, that it can largely rely on its own law-making and law-applying operations, while subject to occasional intervention from the official organs of the controlling system. Unless it attains full independence, such autonomy is inevitably a matter of degree. The idea is that in many conceivable situations, autonomy, though short of full independence, is sufficient to vindicate an assertion that a distinct legal system exists, in the form of a subordinate unit to a large one. The same is true of, I think, Julie Dickson's idea that a distinct legal system makes a claim to normative self-determination.⁵⁶ The claimed self-determination can be taken to include a range of cases involving different degrees and forms of self-determination; a legal system need not claim to be fully normative self-determining to be recognisable as a distinct legal system.

My suggestion, in short, is that we can identify a distinct legal system as long as officials have identified themselves as a sufficiently

⁵⁶ Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 25, 46.

distinct group and system, whose dependence or independence from another legal system is then a separate question. Lack of full independence does not contradict a distinct group intention and thereby identity.

If we can establish that a local legal system already operates as a distinct legal system in the aforementioned form before the devolution, devolution does not create a legal system but changes the character of an existing one. The system was a subordinate unit before the devolution; some of its laws can be changed by the officials of the controlling legal system and law-applying decisions overruled likewise. Devolution removes the subordinate status and such links. These changes need not affect the core of the official intention that they maintain and operate within the same legal system, which undergoes change in its relation to the controlling legal system owing to the devolution. But it remains towards and for the same legal system that officials conduct their law-applying or law-making behaviour.

Officials might well have committed to the local legal system particularly as a part of the larger controlling legal system. Such kind of commitment is inevitably changed following the devolution. What is changed, I say, is the local legal system's relation to the larger, controlling legal system. The aforementioned commitment recognises that there is a hierarchical relation between the two. Such relation is then dissolved, reflected in the commitment of local officials towards the legal system as a national, independent one. It is commitment to the same legal system which sees change to its relation with another legal system.

Devolution creates a new state but sustains the legal continuity. The new political identity does not percolate into the legal system. Australia's national legal system after 1942 need not be considered discontinuous from the previous colonial legal system, just because Australia became an independent state. There is no necessary reason why the Australian legal system could not maintain its identity despite the former colony's accession

to statehood. Hence, I have reservations about Spagnolo's view that Australia's adoption of the Statute of Westminster necessarily causes the discontinuity of its colonial legal system as a result of the change of the political status. However, I do not wish to stress my disagreement with Spagnolo on this issue. For his primary concern is with explanation of separation from the Imperial legal system, despite his use of the word 'discontinuity'. It is unclear whether he really recognises discontinuity, in the sense I use, of the Australian legal system in 1942.

The identity of the legal system is grounded largely in the action and attitude of the legal agents, its officials; legal officials' joint intention to act for and as a continuous legal system is compatible with, it seems to me, their other joint intention with other members of the political community to act as a new independent state. It is but an instance of the possible situation where a composite social group contains a sub-group which predates itself. Therefore, *pace* Finnis and Raz, I say that the continuity of law is not a function of the continuity of the state. It is fundamentally a matter of the persisting unity of its own agents and actors.

And just as continuity of a legal system need not be disrupted by political discontinuity, so too can a legal system discontinue to exist while the political community persists. A legal system dissolves itself, if its officials so intend. This incident can take place within the broader structure of group action which also intends and participates in the change. Whether a state remains the same state following a constitutional or legal break depends on members' self-identification. They can conceive of themselves as precisely a persisting group agent which initiated and completed the relevant constitutional or legal change. Thus, the state continues, while its legal system is new. That the continuity of a legal system crucially depends on the facts about its officials, while the continuity of the state turns on a much broader set of members allows the continuities of the two to diverge in many a situation.

Conclusion

I.

The thesis has sought to provide an improved account of the relation between law and the state in a particular respect, which is the relation between their identities or unities, by elucidating the element of group action which comprises an important part of the realities of law and of the state but has not been sufficiently appreciated in existing theories of legal systems and states.

Identity means the quality of quantitative singularity. When it obtains for a particular object, it means that there is one and only one object at a time and over time. Identity entails standards of distinction by reference to which we can identify and distinguish one object another, be they two objects at the same time or at different times. There are facts which give a state its identity, and there are facts which give a legal system of the state its identity. The questions are what these facts are, and what their relation is.

The existing views suggest an overlap of the two domains. The identity of the state and the identity of the legal system are sometimes determined by the same kind of facts, and especially so in the case of continuity. The existing accounts divide the problem of identity into momentary identity and non-momentary identity. Momentary identity concerns identity at a time, whereas non-momentary identity—continuity for short—concerns identity over time.

For momentary identity, states and legal systems are generally treated as separate unities; their identities appear to depend on fundamentally different facts. Concerning the momentary identity of the state, there is a notable body of views which seek to conceptualise the state as a group agent. While their concerns are with the ability to act for reason, these accounts entail that the state, as a group agent, has a momentary identity grounded in the momentary unity of the group which acts. On the other hand, concerning the momentary identity of the legal system, there is a well-received and plausible line of argument that a legal system's momentary identity is owed to the legal officials, especially the law-applying officials' practice—that an aggregate of rules forms a momentary legal system because the law-applying officials so recognise those rules when they actually apply them or would apply them hypothetically. There is a tendency to assimilate momentary identity of the legal system into that of the state, as it may be thought that the law-applying officials relevant to the putative practice are identified by reference to their membership of the same state. Even on the existing accounts, this move is unfounded and should be resisted. The distinction between the two domains of momentary identity is fundamentally clear.

For continuity, the distinction falls away. The standard account of the continuity of the legal system considers it an extra-legal, extra-jurisprudential phenomenon, and part of the continuity of the state. The law-applying officials' practice, which is taken to be decisive to momentary identity, does not have a comparable role to continuity. Furthermore, there is no clear explanation of the conditions of the continuity of a state, apart from allusion to considerations which belong to other social sciences. The analysis of a state's momentary identity based on group action is not extended persistently to the explanation of its continuity. This is to say, for both law and the state, there is an apparent 'discontinuity' between the explanation of their momentary identity and of their continuity in the existing discussions.

The thesis has sought to demonstrate that such explanatory discontinuity is unwarranted. The continuity of each is determined by the same kind of facts as what determines the momentary identity of each, which is always people and their group action. For the state, it is the officials and citizens and their action as a group which give the state its identity, momentarily and continuously. For the legal system of the state, it is the law-applying officials and their action as a group which give the legal system its momentary identity and continuity. In each domain, it is the same kind of identity-determining facts which are applied to the two temporal settings. Momentary identity is more basic, as it works as the momentary unit of continuity, so that continuity is indeed the continuation of momentary identity.

This makes law and the state two distinct domains of identity, which can converge and also diverge, depending on how the two groups are actually related to each other. Thus, even when a legal system is the legal system of a state in a particular moment, the identity of the two is not necessary and does not have to be permanent. For example, when an old state disappears and a new state comes into existence, it can rely on the legal system which was once the legal system of the old state. On the other hand, a state can implement a new legal system to replace an old legal system, and therefore it is possible for the state to survive fundamental legal or constitutional discontinuities.

It follows that the continuity of law is a distinct legal phenomenon; its explanation is found in the distinctively legal facts which are about law-applying officials. This is a major departure from the standard account in existing views. On my account, the continuity of a legal system is no longer the function of the state whose legal system it is; if it is a function of anything, it will be that of the legal officials' group action.

On the other hand, I have also offered an account of the continuity of the state. I have attempted to demonstrate that it is possible for a state

to exist as a cohesive active subject over time. Continuity depends on the persisting group intention shared by successive officials and citizens, on successive, different occasions where they carry out state activities. The group intention is a disposition of the members. Thus, the state has the ability to act and persist despite fundamental legal or constitutional discontinuities, including the substitution of one legal system for another. This is to say, the analysis has revealed precisely the possibility that a state need not coincide with its legal system for its continuity. The relation of the state's continuity to its legal system's continuity is not what the standard view thinks it is.

II.

The argument has been driven crucially by analysis based on group action. I have argued that the existing accounts do not offer a satisfactory explanation or explanations because they do not give sufficient attention to the fact that group action is what comprises the identity-related realities, except for the momentary identity of the state. I have attempted to show that group action is a standing element of law and the state and the ground of identity in all temporal settings.

The discussion has repeatedly noted that group action is not inevitable for all the relevant activities. It is an opportunity, and there is good reason for having it. It requires a different kind of intention on the part of the participants, who ought to intend that they, as a group, act. Such intention creates a different and distinct practice or phenomenon from where each person intends that she, as an independent agent, acts and the resultant collective action is the function or convergence of the many individual acts. Group action is not simply a different description of the same practice or phenomenon, but a different category that marks out a distinct form of intention and action.

Moreover, group action is not necessary—it is no necessary feature of the state and of the legal system; we can properly recognise some

composite entity as a state without recognising any act of officials or citizens as a group act. Even if we explain the state by reference to the kind of actions that comprises it, the actions need not be taken as group action. Officials of the state, for example, make the characteristic claims to supreme and wide-ranging authority over the subjects.¹ They can do so as individual officials rather than as representatives of a group. In either way, it does not affect the kind of the claims that they make and the fact that the claims are among the characteristic or necessary features of the state. The same can be said for the legal system. The law-applying officials are those who are empowered by laws to make authoritative applicative decisions in particular situations on behalf of the legal system as a system of norms. These acts, too, can be properly performed as individual acts without undermining the nature of the act and the nature of the legal system which comprises this kind of operations.

Granted, the question that the thesis has considered is whether it is possible or desirable for the relevant actions to be organised as group action. The thesis has sought to contend that it is both possible and desirable. Thus, even if the relevant entity works broadly well without group action, there is a standing possibility that the entity will work better at what it does if it is organised as a group agent. This is not to say that *all* actions of the entity ought to be carried out as group acts. Some characteristic activities ought to be carried out by the relevant person precisely as an individual agent, while these activities are connected with the group action of other characteristic activities, which, say, provide the structure within which the officials are empowered to act as an independent agent.

In the case of a legal system, the question arises as to whether all law-applying acts in particular cases are group acts, or better taken as

¹ Leslie Green, *The Authority of the State* (OUP 1988) 86.

group acts.² I think they are not, even if the law-applying officials form a group agent in relation to the laws that they apply. In many a standard and mundane law-applying situation which involves the interaction between a law-applying official and a subject with regard to some obligation, permission, power, etc., the official acts precisely as an independent agent, rather than a representative of the official group agent. For even if the law-applying officials have formed a group for some important tasks (yet to be specified), they have not done so in order to act as a group in every and each particular case. To think that the particular law-applying official acts as a representative who carries out a group act is precisely to think that the whole official group needs to act to make the applicative determination in this and other particular cases. It is unobvious why the whole group must so act, and indeed, I say, unfounded.

The official group is formed because law-applying officials need unity in an important respect of their practice, which is, in brief, the formation of the legal system. This indicates a set of conditions including the sources of the law, the law-applying officials' authority, their membership, and suchlike. They are the conditions with which a legal system can operate as a system, as opposed to merely a set of rules of conduct which lack a systemic character. This is to say, the conditions are concerned with the operation of the secondary rules of the legal system. The unity among law-applying officials is among the crucial conditions to the normal operation of such rules. The discussion in the thesis has demonstrated that such requisite official unity can be attained by coincidence of personal behaviour, but more securely so by group action. The group action is therefore conducted at the secondary level of the legal system.

While law-applying officials act as a group at the secondary level, their group agency does not extend to the primary level, where they make

² I owe this important question to Professor Timothy Endicott's insightful comment.

authoritative applicative determinations in particular cases. As long as the requisite unity is secured, the reason for adopting group action is satisfied; it does not require law-applying action at the primary level to have a similar unity. Action at the primary level can be performed by a particular law-applying official or organ rather than the whole official group. The need of group-wide unity does not arise at all. There is no obvious reason to extend group action to this domain under general circumstances; the particular primary law-applying acts need not be subsumed under the auspices of group action, and the law-applying officials in these cases do not act as the agent of the group.

Hence, it would be imprecise to say that the legal system is a group, as it can imply that all its characteristic operations are group actions, which implication is incorrect. The better proposition is that the legal system involves group action at its secondary or fundamental level. The law-applying officials form a group agent in relation to a particular domain of the legal operation. In other domains of the legal operation, the law-applying officials do not act as a group, but still act *qua* law-applying officials. Indeed, the typical law-applying action, viz. the applicative determination of rights, obligations, powers, liabilities etc., is not a group act. Part of the point of the relevant group action is precisely to facilitate the non-group official acts. These acts must not be confused with group acts taken by individual officials on behalf of the group agent.

It bears noting, again, that whether a legal system involves group action of the law-applying officials is a contingent fact. It depends on whether the officials do act in a particular way. I have argued that there is good reason for the officials to so act. And the identity of a legal system is best explained if the legal system is taken as involving such group action, whether or not it actually involves such.

III.

The thesis has advanced a particular account of group action. I have defended the line of argument that group action is not just coordination, but coordination with a particular kind of collective self-identification. The self-identification distinguishes group action from other kinds of collective action. The argument has been made particularly against a recent line of functionalist argument, which explains group agency by the ability of a given arrangement to realise coordination. This ability or functional role does not always require unanimous intention.

My discussion has shown that the coordination model as advanced by the functionalist argument is over inclusive. The model, as developed in a recent account known as Planning Theory, will include too many a situation as group action simply because a simple change of the intention of some particular plan-making agents. This tends to exaggerate a relatively minor change and trivialise the concept of group agency. Moreover, when applied to complex legal and political activities, the Planning model cannot provide a sufficiently nuanced analysis of the different kinds of collective action involved. The problem is especially salient when the model is applied for analysis of election. The model has also difficulty explaining the momentary unity of a group agent. As planned coordination can succeed in multiple possible ways, the model blurs the distinction between cooperation as a single group and cooperation among several groups. Insofar as the distinction can be well explained with a different model of group agency, the Planning Theory's disability to maintain the distinction as clearly and coherently amounts to a major weakness.

More fundamentally, the coordination model misses out the important fact that group action represents a special way in which people can form relationship with one another and undertake normative reason for action. It creates distinct reason for action when members are so committed and interrelated, provided that it is for some valuable end. Coordination too is reason-giving, but in a different way; it transmits the

pre-existing reason for realising the valuable end which requires the coordination. To reduce group action to coordination or planning will miss out the potential normative ability to create intrinsic reason for action which only some form of coordination has. This does not seem to be easily recognisable from a functionalist perspective.

The better model, as defended by the thesis, demands unanimity among participants as essential and foundational to group action. For complex activities characteristic of legal systems and states, such unanimity should include as a standing element that a group can act without unanimity on particular occasions. That is, there needs a unanimous basis for non-unanimous action, such as accepted rules and procedures that enable delegates or representatives to act on behalf of the group. Unanimity is a disposition of the group; on the basis, the group can adopt non-unanimous arrangements such as rules and authority structure to broaden the group's ability to act on particular occasions for particular objectives. This marks a distinct subclass of group action, given its lack of unanimity at the executive stage, but still an instance of group action, as it extends the group intention to situations where it is impossible or impractical to require unanimous decision or action of the whole group.

Still, whether an act should be performed as a group act (in the second form) depends on whether there is good reason for group action for that particular act. As noted above, some activities do not require group action at all. If so, there is no need to extend group agency to those activities to replace personal action.

IV.

The thesis has sought to contribute to current philosophical understandings of the subject matters discussed in the thesis. Whether the theoretical contribution will have practical output is not straightforward. On very few occasions, the thesis's discussion make direct recommendations on how the existing practice should be conducted differently from the way it is.

However, discussion on group action and identity of a group are closely related to many of the further practical questions as to how people ought to act to act as a group, what they ought to do to allow their group to persist, and how people ought to be held responsible as a group.³

Discussion on the continuity of states is especially relevant to the question about responsibility. The analysis of continuity identifies the conditions in which a group can be properly seen as a coherent active subject over time and held responsible for its past acts. Moreover, even when the continuity is ruptured, the analysis reveals the basis of succession of the responsibility from the old state to the new state, which basis lies in the continuation of membership. For the responsibility of a state is tied not only to the state but also to the people whose action grounds the state's group action. These people need to act as a group to fulfil the responsibility. The original state is not the only eligible group. The new state is eligible too, if and because it is formed by the people who ought to be held responsible as a group. Hence, the new group is held responsible in place of the old group which should have been held responsible but no longer can due to its disappearance. The analysis of continuity and of the related category of succession helps reveal grounds of the transmission of responsibility and the differences between the two situations. It should be able to help guide deliberation on the practical question as to whether a state should be held responsible for a past act, at least a recent one, either as a continuous state or a successor state.

The analysis on the continuity of the legal system may also be helpful to the practice, in its relation to the validity of the laws. The discussion has shown that the determination of validity of laws made in the past requires an account of continuity. The legal system depends on a standing general rule of validity which provides a constant basis for the validity of a law irrespective of whether the original power-conferring law,

³ I thank Professor David Kenny for pressing me to think more in this direction.

such as the constitution according to which the law was promulgated, is still operational. The rule itself does not determine which past rules are eligible and which are not. It relies on the account of the continuity of the legal system to determine which laws made in the past should still be recognised as valid now *because* they were part of the legal system with which the present legal system is continuous. In other words, if a past law cannot be classed as part of the continuous legal system per the account of continuity, a different ground must be sought to allow it to be validated by the general rule of validity. For example, the ground can be that it is adopted as part of the present legal system by the constitution which expressly incorporates this and other laws of a past, different legal system.

Hence, the continuity of a legal system affects the reason for which a law is recognised as valid. It is valid because of the continuity between its original legal system and the present legal system, or because of other operations. All valid laws are applied for the same reason that they are valid, but they are valid not always for the same reason. Insofar as the determination of validity is a practical question of law, the continuity of the legal system has practical output in its relevance to the grounds of such determination.

Bibliography

- Adams T, 'The Efficacy Condition' (2019) 25 *Legal Theory* 225
- Amar AR, 'Popular Sovereignty and Constitutional Amendment' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995)
- Aristotle, *Politics*
- Arnold C, 'Institutional Aspects of Law' (1979) 42 *MLR* 667
- Barber N, *The Constitutional State* (OUP 2010)
- Barry B, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001)
- Böckenförde EW, *Constitutional and Political Theory: Selected Writings*, vol 1 (M Künkler and T Stein eds, OUP 2017)
- Blackstone W, *Commentaries on the Laws of England*, vol 1 (first published 1765, Chicago UP 1979)
- Bratman M, *Faces of Intention: Selected Essays on Intention and Agency* (CUP 1999)
- Butt D, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (OUP 2008)
- Culver K and Giudice M, *Legality's Borders: An Essay in General Jurisprudence* (OUP 2010)
- Coleman J, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003)

- Dickson J, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union' (2008) 2 *Problema* 9
- 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 25
- Doyle O, 'Constraints on Constitutional Powers' in R Albert, X Contiades, and A Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 73
- 'The Silent Constitution of Territory' (2018) 16 *ICON* 887
- Dworkin R, *Law's Empire* (Harvard UP)
- Ekins R, *The Nature of Legislative Intent* (OUP 2012)
- 'The Constitutional State' (2012) 128 *LQR* 308
- 'Constitutional Principles in the Law of the Commonwealth' in J Keown and RP George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 396
- 'How to be a Free People' (2013) 58 *The American Journal of Jurisprudence* 163
- 'Facts, Reasons and Joint Action: Thoughts on the Social Ontology of Law' (2014) 45 *Rechtstheorie* 313
- Endicott T, 'The Logic of Freedom and Power' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 245
- *The Stubborn Stain Theory of Executive Power: from Magna Carta to Miller* (Policy Exchange 2017)
- Epstein B, *Ant Trap: Rebuilding the Foundations of the Social Sciences* (OUP 2015)
- Finnis J, *Aquinas: Moral, Political, and Legal Theory* (OUP 1998)
- *Natural Law and Natural Rights* (2nd edn, OUP 2011)

- ‘Persons and Their Associations’ in *Intention and Identity: Collected Essays Volume II* (OUP 2011) 92
- ‘Purposes, Public Acts, and Personification’ in *Intention and Identity: Collected Essays Volume II* (OUP 2011) 83
- ‘Revolutions and Continuity of Law’ in *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 431
- ‘Reflections and Responses’ in J Keown and RP George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 459
- Gardner J, ‘Reasons for Teamwork’ (2002) 8 *Legal Theory* 495.
- *Law as a Leap of Faith* (OUP 2012)
- *From Personal Life to Private Law* (OUP 2018)
- Gilbert M, *On Social Facts* (Routledge 1989)
- *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (OUP 2006)
- *Joint Commitment: How We make the Social World* (OUP 2013)
- ‘Joint Commitment’ in M Jankovic and K Ludwig (eds), *The Routledge Handbook of Collective Intentionality* (Routledge 2017) 130
- Glenn HP, *The Cosmopolitan State* (OUP 2013)
- Green L, *The Authority of the State* (OUP 1990)
- ‘The Duty to Govern’ (2007) 13 *Legal Theory* 165
- Hart HLA, ‘Kelsen’s Doctrine of the Unity of Law’ in *Essays in Jurisprudence and Philosophy* (OUP 1983) 309
- *The Concept of Law* (3rd edn, OUP 2012)
- Haslanger S and Kurtz RM, *Persistence: Contemporary Readings* (MIT Press 2006)
- Himma KE, *Morality and the Nature of Law* (OUP 2019)

- Honoré T, 'Reflections on Revolutions' (1967) 2 *The Irish Jurist* 268
- *Making Law Bind: Essays Legal and Philosophical* (OUP 1987)
- 'Responsibility and Luck' in *Responsibility and Fault* (Hart Publishing 1999) 14
- Jacobsohn G and Roznai Y, *Constitutional Revolution* (Yale UP 2020)
- Kelsen H, *General Theory of Law and State* (A Wedberg tr, Harvard UP 1945)
- *Pure Theory of Law* (M Knight tr, University of California Press 1967)
- 'The Function of a Constitution' in R Tur and W Twining (eds), *Essays on Kelsen* (I Stewart tr, OUP 1986) 111
- Kraut R, *Aristotle: Political Philosophy* (OUP 2002)
- Kutz C, 'The Judicial Community' (2001) 11 *Philosophical Issues* 442.
- List C and Pettit P, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (OUP 2011)
- Loughlin M, *Foundations of Public Law* (OUP 2010)
- MacCormick N, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999)
- Mill JS, 'Considerations on Representative Government' in J Gray (ed), *On Liberty and Other Essays* (OUP 1991) 203
- Miller D, *On Nationality* (OUP 1997)
- *National Responsibility and Global Justice* (OUP 2007)
- Miller S, 'Institutional Responsibility' in M Jankovic and K Ludwig (eds), *The Routledge Handbook of Collective Intentionality* (Routledge 2017)
- Moore M, *A Political Theory of Territory* (OUP 2015)
- Nine C, *Global Justice and Territory* (OUP 2012)

- O'Connell DP, *State Succession in Municipal Law and International Law*, vol I (CUP 1967)
- Oliver P, *The Constitutional Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005)
- Oppenheim L, *International Law: A Treatise*, vol I (RF Roxburgh ed, 3rd edn, Longmans, Green and Co. 1920)
- Parfit D, *Reasons and Persons* (OUP 1984)
- Perry A, 'Law's Boundaries' (2020) *Legal Theory* (forthcoming).
- Pettit P, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012)
- Raz J, *The Authority of Law: Essays on Law and Morality* (OUP 1979)
- *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, OUP 1980)
- *Practical Reason and Norms* (Princeton UP 1990)
- Rea MC, 'The Problem of Material Constitution' (1995) 104 *The Philosophical Review* 525.
- Robinson R, *Aristotle: Politics Books III and IV* (OUP 1995)
- Rosenfeld M, 'Constitutional Identity' in M Rosenfeld and A Sajó, *Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 756
- Roznai Y, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017)
- Searle J, *The Construction of Social Reality* (Free Press 1995)
- Schmitt C, *Constitutional Theory* (J Seitzer tr, Duke UP 2008)
- Stilz A, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton UP 2009)
- Shapiro S, *Legality* (Harvard UP 2011)

- ‘Massively Shared Agency’ in M Vargas and G Yaffe (eds), *Rational and Social Agency: The Philosophy of Michael Bratman* (OUP 2014) 257
- Smith AD, *Theories of Nationalism* (2nd edn, Duckworth 1983)
- Spagnolo B, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2015)
- Tamir Y, *Liberal Nationalism* (Princeton UP 1995)
- Thorne SE, ‘Sovereignty and the Conflict of Laws’ in *Essays in English Legal History* (The Hambledon Press 1985)
- Trueblood L, ‘Uses and Abuses of Referendums’ (DPhil thesis, University of Oxford 2018) 112-5.
- Voegelin E, *The Nature of the Law and Related Legal Writings* (R Pascal, J Babin, and J Corrington eds, Louisiana State UP 1991)
- Waldron J, ‘Superseding Historic Injustice’ (1992) 103 *Ethics* 4
- *Law and Disagreement* (OUP 1999)
- ‘Democracy’ in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012) 187
- Wheare KC, *The Statute of Westminster and Dominion Status* (5th edn, OUP 1960)
- *The Constitutional Structure of the Commonwealth* (OUP 1961)
- Yack B, ‘Popular Sovereignty and Nationalism’ (2001) 29 *Political Theory* 517