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THE INSTITUTIONAL NATURE OF LAW [1]

Introduction

My purpose is to outline one view concerning the identifying features of municipal legal systems. Analytical jurisprudence deals with three main problem areas. One concerns the special features of the judicial process and of judicial reasoning. The second encompasses the discussion of legal concepts (*e.g.* rights, duties, ownership, legal person) and of types of legal standards (rules and principles, duty imposing standards and power conferring standards). The third range of problems revolves round the idea of a legal system and the features which distinguish such systems from other normative systems. It is with some of the problems belonging to this area that I shall be concerned.

It may be useful to begin by confessing to some of my prejudices and to make explicit a few of the assumptions underlying my reflections. One of them can be dubbed the assumption of the primacy of the social. We are familiar with the distinction between legal systems which are in force in a certain society and those which are not. There is a legal system in force now in Great Britain and there is one in force in Norway. But the legal system once in force in the Roman Republic is no longer in force, nor is the legal system proposed by a group of scholars for country X in fact in force in that country. Whether or not a system is in force in a society depends on its impact on the behaviour of people in the society. The precise nature of the criterion determining if a system is in force is a disputed issue with which I will not be concerned. But whatever it is, it concerns the attitudes and responses of all or certain sections in the society to the legal system: Do they know it, do they respect it, obey it? etc. This seems to me to be a very significant fact. The reason is that whether or not a system is in force is not just another question about a legal system comparable with questions such as: Is it a Socialist or a Capitalist legal system? Is it a Federal system or not? etc. We identify the question of whether or not the system is in force with the question of its existence. A legal system exists if

[1] This is an expanded version of a paper read in a seminar in the faculty of law, the University of Oslo in May 1974.

and only if it is in force. The significance of the point is that it brings out that normative systems are existing legal systems because of their impact on the behaviour of individuals, because of their role in the organisation of social life. Consequently when we look at legal systems as systems of laws, when we consider their content and disregard the question of whether they are in fact in force, whether they exist, we should look for those features which enable them to fulfil a distinctive role in society. These will be the features which distinguish legal systems from other normative systems. This is the assumption of the primacy of the social. It does not mean that legal systems do not also have other characteristic features. They may, for example, have certain moral features. It may be a necessary truth that all legal systems conform to some moral values and that a system which violates those values cannot be a legal system. My claim is merely that if this is indeed the case then these necessary moral features of law are derivative characteristics of law. If all legal systems necessarily possess certain moral characteristics they possess them as a result of the fact that they have other properties which are necessary for them to fulfil their unique social role.

If legal positivists are those who hold it to be a criterion of adequacy of legal theories that they do not entail that every legal system necessarily has some moral worth then I am not a positivist. If natural lawyers are those who hold it to be a criterion of adequacy of legal theories that they do entail that every legal system necessarily has some moral worth then I am not a natural lawyer either. The assumption of the primacy of the social means that it is a criterion of adequacy of legal theories that they identify legal systems as a distinct type of normative system in virtue of those of their features which are necessary to explain their unique social function. This is compatible with arguing that those features which legal systems must possess to fulfil their unique social function entail that they also have certain moral characteristics. But I will not be concerned to examine such arguments today.

There are two other assumptions which I wish very briefly to mention. The first is the assumption of universality according to which it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems. Since a legal theory must be true of all legal systems the identifying features by which it characterises them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfil in some societies because of the special social, economic or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the

universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.

My third assumption has already been incorporated into my second criterion of adequacy by restricting it to municipal legal systems. It can be called the assumption of the importance of municipal law. It reflects our, or at least my, intuitive perception that municipal legal systems are sufficiently important and sufficiently different from most other normative systems to deserve being studied for their own sake. They are, or are part of, a form of social organisation which is both important and different from most others and which therefore should be made an object of a separate study. Obviously, in part the investigation of municipal systems is designed to compare and contrast them with other normative systems. Indeed it is to this part that the present talk is dedicated. In pursuing such investigations it may turn out that municipal systems are not unique, that all their essential features are shared by, say international law or by church law. If this is indeed so, well and good. But it is not a requirement of adequacy of a legal theory that it should be so or indeed that it should not be so. It is, however, a criterion of adequacy that the theory will successfully illuminate the nature of municipal systems.

Primary Institutions

Many, if not all, legal philosophers have been agreed that one of the defining features of law is that it is an institutionalised legal system. Two types of institutions were singled out for special attention: norm-applying institutions such as courts, tribunals, the police, etc., and norm-creating institutions such as constitutional assemblies, parliaments, etc. I have argued elsewhere that the existence of norm-creating institutions though characteristic of modern legal systems is not a necessary feature of all legal systems, but that the existence of certain types of norm-applying institutions is. Let me try to say something about the nature of those institutions which are a necessary part of every legal system. What are the distinguishing marks of norm-applying organs? This is a notoriously difficult question. We have only to look at the debate concerning the nature of courts to become aware of the difficulties. Lawyers and sociologists have offered various incompatible explanations and the battle is still raging. Given this history of disagreement the first thing to note is that various theorists studying this question are really tackling a variety of problems. Lawyers studying the defining features of "a court" or "a tribunal" may be concerned with solving any one of a variety of legal problems arising under a specific legal system: A certain court in that system may have supervisory powers over all judicial determinations by judicial bodies. The law of evidence or some of its rules may apply to proceedings before

every judicial body, etc. When a lawyer faces the question: "What is a court?" he is usually concerned with one or more of the many problems which such laws give rise to. Is the body A a judicial body subject to the supervisory jurisdiction of the relevant court? Do the general principles of the law of evidence apply to proceedings before A? etc. Social scientists have their own problems which are quite different, though usually indirectly related to those of the lawyer. They may be interested in the classification of different social methods of settling disputes, or the different channels for the articulation of demands, etc. Our purpose in looking for the identifying traits of norm-applying institutions is primarily to establish the nature of the kind of institutions the presence of which is a defining feature of legal systems. An adequate answer to our question need not be a satisfactory solution of the problems of the lawyer or of the sociologist, nor is it intended as an answer to their questions.

Some have attempted to define judicial and other norm-applying organs by the social functions they fulfil. Others have looked for an answer in the norms which establish these institutions. I shall follow the latter kind of approach. Norm-applying institutions are first and foremost normative institutions established by norms and it is to these we must turn for a clue to their identity. It may be true that they are established to serve some social functions, but it is likely that the same functions can be and are served by other means as well. Norm-applying institutions should, therefore, be identified by the way they fulfil their functions rather than by their functions themselves. This does not detract from the importance of studying the functions which the institutions serve, it merely means that the institutions have to be identified by other means.

Of legal systems it can be said that every act by a public official which is the performance of a duty or an exercise of a regulative power is generally regarded as a law-applying act. A policeman arresting a suspect, an official granting a trader's licence, a court rendering judgment in which Doe is ordered to pay a sum of money to Roe—all these are commonly regarded as instances of the application of law by public officials. These cases differ from similar acts of private individuals who pay taxes, make contracts, give orders to their employees, etc., only in being the acts of public officials. Therefore, on the most general interpretation of "norm-applying institutions" these are identical with public institutions (in one sense of the word "public").

What are the identifying features of public officials? This is a problem which is both important and difficult. It is, however, a problem which it would be best to avoid here, for though we will find public officials in all legal systems, not all of them must exist in the system if it is to count as a legal system. Instead we should try to identify a subclass of norm-applying institutions, namely those the presence of which is necessary in all legal systems.

The terminological contrast between "norm-creating" and

"norm-applying" draws attention to one important class of norm-applying institutions—those which apply norms not by making other norms but by physically implementing them. The courts apply the law by rendering judgments which are themselves norms. The prison service or public officials instructed to pull down a house against which a demolition order has been issued physically enforce the law. I shall call norm-applying institutions of this kind norm-enforcing institutions. There is no doubt that norm-enforcing institutions play an important role in all modern legal systems. Yet they cannot be regarded as the key to the identification of legal systems. Though all legal systems regulate the use of force and ultimately rely on force to ensure compliance with the law, not all of them need have law-enforcing institutions. There may be normative systems which share all the characteristics of legal systems and do not have law-enforcing machinery. Once a judgment is given its execution is left to the parties to the dispute. In such a system an individual is not allowed to use force to secure his rights whenever he likes. He is obliged to go to a court and obtain an authoritative declaration of his rights. But once he is in possession of a decision he is entitled to implement it using reasonable force and he may be entitled to authorise others to use force in his name for this purpose. Such a system is clearly a legal system. It does not have law-enforcing institutions but it has other norm-applying institutions which warrant regarding it as a legal system.

We must, therefore, look elsewhere for the kind of norm-applying institutions which are crucial to our understanding of legal systems. I shall suggest that the type of institutions we are looking for are those which combine norm-making and norm-applying in a special way. Let us call these institutions primary (norm-applying) organs, to indicate their importance. Primary institutions are just one kind of norm-applying institutions. Norm-enforcing organs are another kind of such institution and there are others as well. Norm-enforcing organs are concerned with the physical implementation of norms and this determines their character as norm-applying. Primary organs are concerned with the authoritative determination of normative situations in accordance with pre-existing norms. Consider judicial bodies. Courts and tribunals have power to determine the rights and duties of individuals. But can't any person do the same? Can't John determine whether he owes £100 to Alan or whether Paul owes money to Jack? He may be ignorant of the facts but like a court he may investigate them. He may be ignorant of the law but like a court he may study it. The difference between a court and a private individual is not merely that courts are provided with better facilities to determine the facts of the case and the law applying to them. Courts have power to make an *authoritative* determination of people's legal situation. Private individuals may express their opinion on the subject but their views are not binding.

The fact that a court may make a binding decision does not mean that it cannot err. It means that its decision is binding even if it is mistaken. My declaration of the legal situation is not binding at all because it is not binding if it is mistaken. To be a binding application of a norm means to be binding even if wrong, even if it is in fact a misapplication of the norm. This seemingly paradoxical formulation illuminates the nature and function of primary norm-applying organs.

The paradox is generated by the following problem: How can we say of a determination (decision or declaration) both that it applies a pre-existing norm and that it is binding. We may feel that we regard a determination as norm-applying if it merely determines which rights and duties individuals have in virtue of pre-existing norms, whereas we regard a determination as binding only if it changes the rights and duties of individuals. Only with regard to a new norm imposing duties on individuals or releasing them from their duties, investing them with rights or divesting them of their rights can we ask whether it is valid or not. If the determination purports merely to ascertain what rights and duties they already have and not to change them then the only question arising is whether the determination is correct or incorrect. The question of the binding force arises only with respect to creative determinations —those which change the normative situation. Creative determinations can be binding or not but cannot be either correct or incorrect. The reverse is true of applicative determinations.

On this view a determination cannot be both binding and norm-applying. This is, however, an over-restrictive view of the sense of "binding". A determination can be binding even if it does not change the normative situation, provided it would have been binding had it changed it. Consider a new piece of legislation which, though its authors may be unaware of this fact, merely repeats the content of an old but valid law. The new legislation can be judged to be either valid or invalid, even though it is clear that it does not change anybody's rights or duties. The point is that if valid it would have changed the legal situation had the old law no longer been in force. Put in another way—if valid it creates another basis for the rights and duties imposed by the old law. In the same sense a court's determination that Doe owes money to Roe is binding even though the debt existed by virtue of a pre-existing norm, provided that it is binding even if there would have been no debt but for the decision of the court—hence my original formulation that a norm applying determination is binding only if binding even if mistaken.

Now we are in a position to describe the defining features of primary norm-applying organs: They are institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong. A few comments on this characterisation will be in place here:

(1) The definition attempts to identify one kind of institution. The nature of institutions in general is presupposed and is not explained in it. It is important to stress that we are concerned with primary *institutions*. Legal systems are not identified merely by the fact that they contain norms conferring powers to make binding applicative determinations. They must contain norms conferring such powers on institutions, *i.e.* on centralised bodies concentrating in their hands the authority to make binding applicative determinations.

(2) Courts, tribunals and other judicial bodies are the most important example of primary organs. But other officials, such as police officers, may also be primary organs. There are obvious reasons to impose on primary organs a duty to follow judicial procedures, but this need not be always done. It does seem reasonable to suppose, however, that the notion of a primary institution provides a necessary step in any attempt to analyse the nature of judicial institutions.

(3) The definition of a primary organ may have to be further refined. As it stands it applies only to final and absolutely binding determinations. It has to be modified to allow for the possibility of appeal, re-trial, etc., and also for the possibility that the determination is binding for one purpose but not for others. In many legal systems there are applicative determinations which are binding only with respect of the cause of action whose litigation resulted in the determinations.

(4) The definition identifies primary organs by their power to make binding applicative determinations. This is compatible with the fact that the same institutions have other powers and functions. In particular courts often have power to create precedent and lay down general rules, to issue orders to individuals to perform certain actions and authoritatively to determine the facts of the case (the *res judicata* doctrine). All these are either entirely different or, at best, overlap with the power to make binding applicative determinations. Applicative determinations are determinations of the rights or duties of individuals in concrete situations and are entirely different from the power to create precedent or to issue orders instructing individuals to pay damages or fines or be jailed, etc., because they disregarded their duties or the rights of others. Applicative determinations are most closely related to declaratory judgments. In fact the definition suggests that a declaratory judgment is an ingredient in many courts' decisions. This is part of the effect of the *res judicata* doctrine. But this doctrine is wider and applies also to purely factual findings, and not only to determinations of rights and duties in particular situations.

The Limits of Law

My claim is that our common knowledge of intuitively clear instances of municipal systems confirms that they all contain primary

institutions and that such institutions play a crucial role in our understanding of legal systems and their function in society. Both the analysis of the existence conditions and of the identity of legal systems depends on the rules governing the working of their primary institutions and their actual behaviour. Furthermore, it seems reasonable to suppose that the law differs from any other methods of social control in providing machinery for the authoritative settlement of disputes. To explore these issues will take us beyond the scope of the present essay.

I would like, however, to point to one consequence of the necessary existence of primary institutions. We saw that their presence means that law provides a method for settling disputes. It is important to notice that this is a special method for settling disputes. Consider a normative system containing only rules instituting tribunals and regulating their operation. When a dispute is referred to a tribunal it will be authoritatively settled by its decision, for the system includes a rule to that effect. It contains a rule making it obligatory to observe the decisions of the courts and providing for their enforcement by a police force created for this purpose only. In such a system the courts can settle any dispute in any way they like. There are no legislated, customary or any other standards which they have to apply. Nor do they have to follow their own precedents. The courts of this peculiar system are not entitled to decide in an arbitrary way. They are instructed by a rule of the system to make that decision which seems to them the best in the circumstances, taking account of all the considerations which seem to them relevant. Since the courts have to act on reasons and reasons are general, we could expect some regularity in the decisions of the courts. The same judge hearing two very similar cases on the same day is likely to reach the same decision in both. But cases will be heard by many different judges and judges may change their mind as well as forget complex and intricate arguments, etc. Consequently, the decisions of the courts over a period of time are unlikely to reflect any consistent line on any one issue. The degree of regularity will depend on contingent factors such as the number of judges, the degree of uniformity of their social background, etc.

It is unlikely that such a system has ever existed or will ever exist. I am conjuring up the image of a system of this nature simply because it resembles legal systems in having courts with powers to settle disputes. Therefore, by contrasting it with legal systems we can better observe what other features legal systems necessarily possess. Since its judges are not obligated to follow any common standards and can decide whatever they think best, the system does not provide any guidance to individuals as to how to behave in order to be entitled to a decision in their favour, should a dispute arise. Legal systems, on the other hand, do provide guidance to individuals. They contain laws determining the rights and duties of individuals. These are laws which the courts are bound to apply in settling dis-

putes and it is because of this that they also provide an indication to individuals as to their rights and duties in litigation before the court.

Am I merely stating the obvious, namely, that legal systems must include laws, including some which are addressed to the general population? I think that two further consequences are contained in what I said, consequences which are far from being trivial. In the first place, law contains both norms guiding behaviour and institutions for evaluating and judging behaviour. The evaluation is based on the very same norms which guide behaviour. Indeed the test by which we determine whether a norm belongs to the system is, roughly speaking, that it is a norm which the courts ought to apply when judging and evaluating behaviour.[2] Thus the law can be said to possess its own internal system of evaluation. We can assess behaviour from the legal point of view and the legal point of view consists of the norms by which the courts are bound to evaluate behaviour which are the very same norms which are legally binding on the individual whose behaviour is evaluated.

The second important consequence of the difference between law and a system of absolute discretion described above is that legal systems contain, indeed consist of, laws which the courts are bound to apply regardless of their view of their merit. A more accurate formulation would be that legal systems consist of laws which the courts are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered. It does not follow that the courts are to be regarded as computing machines, always applying pre-existing rules regardless of their own views of which rules or which decisions are the right ones. But it does follow that they are to apply a certain body of laws regardless of their views on its merits and are allowed to act on their own views only to the extent that this is allowed by those laws. The law sometimes instructs judges to decide cases by whichever principle they find just or appropriate.[3] In many other cases the law requires the courts to render judgment in cases for which the body of laws they are bound to follow does not provide one correct answer. Because of the vagueness, open-texture and incompleteness of all legal systems there are many disputes for which the system does not provide a correct answer. Even if it rules out certain solutions as wrong, there are others which are neither wrong nor right in law. If the system requires, with respect to some such cases, as all legal systems in fact do, that the courts should not refuse to settle the dispute but should render judgment in it, then they are thereby required to determine the case in accordance with their own perception of what is right. Needless to say, even in such cases their

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2 One modification of this test is introduced in the next section.

3 Such instructions are usually subject to various restrictions designed to preserve the coherence of purpose of the body of laws which governs cases similar to the one before the courts.

discretion can be limited by general legal principles, but they will not eliminate the element of personal judgment of the merits.

It might be thought that there is one overwhelming objection to the view just expressed. In many legal systems, for example, in all common law jurisdictions, there are courts with power not only to settle at their discretion unsettled cases but actually to overrule established precedent. They are entitled, in fact, to repeal laws and replace them with rules which they judge to be better than the old ones. Doesn't that provide a counter-example to my claim that the law consists only of rules which the courts are bound to follow? It is possible, of course, to argue, indeed I wish to argue, that such courts derive their power to repeal or overrule settled law from laws of the very same system. But this is no answer to our problem. For even so how can it be said that the courts are bound to follow laws which they are at liberty to disregard. The answer is that this is quite impossible and yet the supposed counter-example fails for it misdescribes the situation.

A rule which the courts have complete liberty to disregard or change is not binding on them and is not part of the legal system. But the courts in common-law jurisdictions do not have this power with respect to the binding common-law rules. They cannot change them whenever they consider that on the balance of reasons it would be better to do so. They may change them only for certain kinds of reasons. They may change them, for example, for being unjust, for iniquitous discrimination, for being out of step with the court's conception of the purpose of the body of laws to which they belong, etc. But if the court finds that they are not the best rules because of some other reason, not included in the permissible list, it is nevertheless bound to follow the rules.

The situation is parallelled in other areas of practical reasoning. People have an obligation to keep their promises. This entails that they are not at liberty to break their promises whenever they find that, all things considered, it will be best to do so. But this does not mean that they ought to keep their promises come what may. The presence of reasons of a certain kind will justify breaking the promise. It follows that the fact that one is under an obligation is consistent with being at liberty to disregard it under certain conditions, provided that one is not at liberty to disregard it any time one finds that on the balance of reasons it would be best to do so. For this reason the purported counter-example fails. All it shows is that in common-law jurisdictions there are courts which are sometimes at liberty to repeal some valid laws. Since they are entitled to do so only for certain specific types of reasons [4] and not whenever

[4] The fact that their liberty is to act on reasons of types specified by the law does not negate the personal discretion of the court. They have discretion not only to establish whether the facts justify the conclusion that reasons of that type are present in the situation, but also a discretion to act on their personal view of what counts as a valid reason of that type: What is an unjust law, etc.

this is desirable all things considered—their liberty to use their power to repeal those laws is consistent with the fact that they are under an obligation to follow them.

These remarks are meant to establish the thesis that there are limits to law. If a legal system consists of a set of laws which can be identified by a certain test then it is meaningful to ask of rules and principles whether they are legal rules and principles or not. Law has limits and that is why we can refer to legal systems and to legal rights and duties which are not necessarily moral rights and duties, etc. Prof. Dworkin has, in recent years, criticised the thesis of the limits of law.[5] I have argued elsewhere that he failed to reveal any inconsistencies or other defects in the thesis of the limits of law.[6] The argument of the present section provides a partial answer to the question: why is it necessary that legal systems have limits. The answer is that the only alternative (for a system based on judicial institutions) is a system of absolute discretion. If the courts do not have absolute discretion to act on whichever standard seems to them best, this can only be because they are bound to follow some standards even if they don't regard them as best. That entails that they are bound to follow them even in preference to those standards which they regard as best. Thus the standards courts are bound to follow take precedence over other standards which they may on occasion be entitled to follow, and the two classes of standards are in principle distinguishable. That is the essence of the thesis of the limits of law.

The Uniqueness of Law

It is a necessary feature of all legal systems (1) that they contain norms establishing primary institutions, (2) that a law belongs to them only if the primary institutions are under a duty to apply it and (3) that they have limits. These structural features of legal systems are not, however, sufficient to distinguish them from many normative systems which are clearly not municipal legal systems. I have in mind particularly the rules of voluntary associations such as universities, sports clubs or social clubs, trade unions and political parties. Many of them have primary institutions and share all the mentioned structural features of law. We could call normative systems sharing these characteristics institutionalised systems.

Legal systems differ from other institutionalised systems primarily by their relation to other institutionalised systems in force in the same society. I think that we feel that legal systems not only happen to be the most important institutionalised system governing human society, but that that is part of their nature. We would regard an institutionalised system as a legal one only if it is necessarily in

[5] *Cf.* his " Is Law a System of Rules? " in R. Summers (ed.): *Essays in Legal Philosophy*, 1968, p. 25, and " Social Rules and Legal Theory " (1972) Yale L.J., p. 855.

[6] See my " Legal Principles and the Limits of Law " (1972) Yale L.J., p. 823, where those of Dworkin's arguments then in print were examined.

some respect the most important institutionalised system which can exist in that society. My aim is to explain this feeling by attending to the spheres of human activity which all legal systems regulate or claim authority to regulate.

What is it for a normative system to regulate a certain sphere of behaviour? Every norm regulates that behaviour which is its norm-action, that is, the behaviour which the norm either requires or permits or which it turns into the exercise of a power. A normative system regulates all the acts regulated by its norms. A normative system claims authority to regulate all those acts which it regulates and which can be regulated by norms which can be enacted by the exercise of powers recognised by norms of the system.

The attempt to characterise legal systems by the spheres of activity which they regulate or claim authority to regulate cannot be a very precise one. The general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees. In typical instances of legal systems all these traits are manifested to a very high degree. But it is possible to find systems in which all or some are present only to a lesser degree or in which one or two are absent altogether. It would be arbitrary and pointless to try and fix a precise border-line between normative systems which are legal systems and those which are not. When faced with border-line cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to the typical cases, and leave it at that.

These features characterise legal systems:

1. Legal Systems are Comprehensive

By this I mean that they claim authority to regulate any type of behaviour. In this they differ from most other institutionalised systems. These normally institute and govern the activities of organisations which are tied to some purpose or other. Sport associations, commercial companies, cultural organisations, political parties, etc. are all established in order to achieve certain limited goals and each claims authority over behaviour relevant to that goal only. Not so legal systems. They do not acknowledge any limitation of the spheres of behaviour which they claim authority to regulate. If legal systems are established for a definite purpose it is a purpose which does not entail a limitation over their claimed scope of competence.

We should be careful to see precisely the nature of this feature of comprehensiveness. It does not entail that legal systems *have* and other systems do not have authority to regulate every kind of behaviour. All it says is that legal systems *claim* such an authority whereas other systems do not claim it. Furthermore, legal systems do not necessarily *regulate* all forms of behaviour. All that this test means is that they *claim authority to regulate* all forms of behaviour, that is, that they either contain norms which regulate it or norms

conferring powers to enact norms which if enacted would regulate it.

The authority which all legal systems claim is authority to regulate any form of behaviour of a certain community. They need not claim authority to regulate the behaviour of everybody. It should also be remembered that any action is regulated by a norm even if it is merely permitted by it. Furthermore, the test requires that every legal system claims authority to regulate behaviour in some way but not necessarily in every way. Therefore, the test is satisfied by those legal systems which contain, *e.g.* liberties granted by constitutional provisions which cannot be changed by any legal means. Such systems may not claim authority to regulate the permitted behaviour in any other way but they regulate it in one way by permitting it.[7]

Finally, it should be remembered that this test sets at most a necessary condition and not a sufficient condition for a system to be a legal system. We should not be surprised, therefore, to find that some systems which are not legal systems meet this condition, though I do not think that there are many such cases. The laws of various churches qualify by this test, but then many of these meet the other conditions as well and are ordinary legal systems. If there are religious normative systems which meet this test but not the others, they would be borderline cases.

2. Legal Systems Claim to be Supreme

This condition is entailed by the previous one and is merely an elaboration of one aspect of it. The condition means that every legal system claims authority to regulate the setting up and application of other institutionalised systems by its subject-community. In other words it claims authority to prohibit, permit or impose conditions on the institution and operation of all the normative organisations to which members of its subject-community belong.

Once again this condition is a weak one in allowing for the possibility that a system claims only authority to permit the functioning of some such organisations. It seems to me, however, that this does not deprive these conditions of their importance since claimed authority to grant permission by a norm is a most significant feature of a normative system and is not to be compared with the mere existence of a weak permission because the system does not regulate the behaviour concerned and does not claim authority to regulate it.

Are legal systems necessarily incompatible? It is evident that two legal systems can co-exist, can both be practised by one community. If they do not contain too many conflicting norms it is possible for

[7] A normative system does not, however, regulate behaviour which is merely weakly permitted by it. An act is weakly permitted if the system contains no norm prohibiting it. It is strongly permitted if the system contains a norm permitting it. See on the distinction my "Permissions and Supererogation," *American Philosophical Quarterly*, April 1975.

the population to observe both and the institutions set by both systems could all be functioning. This would in most cases be an undesirable and an unstable situation but it can exist and it need not always be undesirable or unstable. But in asking whether two legal systems can be compatible I am not asking whether they can co-exist as a matter of fact but rather whether they can co-exist as a matter of law. Can one legal system acknowledge that another legal system applies by right to the same community or must one legal system deny the right of others to apply to the same population? Of course, almost every legal system permits some normative systems to apply to its subject-community, but perhaps it does not permit this if the other system is also a legal system? There is no doubt that many legal systems are incompatible with each other, but there is no reason for assuming that this is necessarily true of all legal systems. Most legal systems are at least partly compatible—they recognise *e.g.* the extra-territorial validity of some norms of other systems. Cases of relatively stable and mutually recognised co-existence of secular and religious laws in various countries provide examples of different degrees of compatibility. All legal systems, however, are potentially incompatible at least to a certain extent. Since all legal systems claim to be supreme with respect to their subject community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system.

3. Legal Systems are Open Systems

A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it. The more " alien " norms are " adopted " by the system the more open it is. It is characteristic of legal systems that they maintain and support other forms of social grouping. Legal systems achieve this by upholding and enforcing contracts, agreements, rules and customs of individuals and associations and by enforcing through their rules of conflict of laws the laws of other countries, etc.

Norms which are recognised for such reasons are not normally regarded as part of the legal system which gives them its sanction. They are, however, recognised and made binding in such systems by norms which require the courts to act on and enforce these norms. Therefore, we must modify the criterion of membership in an institutionalised system in order to exclude these norms. We want a test which will identify as belonging to a system all the norms which its norm-applying institutions are bound to apply (by norms which they practise) except for those norms which are merely " adopted." But how are we to characterise the adopted norms? How are we to define with greater precision the character of an open system?

Many have tried to find the distinguishing mark in the manner or

technique of the adoption. It seems to me that this is a blind alley. These distinctions inevitably turn on formal and technical differences which bear no relation to the rationale of drawing the distinction and lead to counter-intuitive results. We must rely on the reasons for recognising these norms as binding, for our purpose is to distinguish between norms which are recognised because they are part of the law and those which are recognised because of the law's function to support other social arrangements and groups.

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

Norms which meet this test are recognised by a system but are not part of it. If a system recognises such norms it is an open system and, as I said, all legal systems are open systems.[8] It is part of their function to sustain and encourage various other norms and organisations.

The Importance of Law

I have relied on our general knowledge of the law and human society in claiming that legal systems are institutionalised systems characterised by the combination of these three conditions. If my claim is right it is easy to see that they provide the beginning of an explanation of the importance of law. There can be human societies which are not governed by law at all. But if a society is subject to a legal system then that system is the most important institutionalised system to which it is subjected. The law provides the general framework within which social life takes place. It is a system for guiding behaviour and for settling disputes which claims supreme authority to interfere with any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself as the supreme guardian of society.

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[8] Saying that all legal systems are open systems isn't to commend them. They may "adopt" the wrong norms and refuse to adopt those that should be "adopted."

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