Joseph Raz

The Concept of a Legal System

An Introduction to the Theory of Legal System

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PREFACE

THIS book is based on a doctoral thesis submitted at the University of Oxford. I wish to acknowledge my great indebtedness to Prof. H. L. A. Hart. I learnt much from his published works, from his lectures, and most of all from his very patient and detailed criticism of previous drafts of this study. I am also most grateful to him for his constant encouragement and guidance.

I am greatly indebted to Dr. P. M. Hacker, with whom I had many illuminating conversations on the topics discussed, and to Dr. A. Kenny, who read and commented on two papers I wrote on Bentham and Kelsen; these served as a basis for some of the material in Chapters 3–5.

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Both Professor Hart and Dr. Hacker read previous drafts of the book, and if it were not for their pains there would be many more mistakes and stylistic infelicities in the English than in fact remain.

ABBREVIATIONS

Some books are often referred to by the first main word in their name: e.g. *The Limits of Jurisprudence Defined* is referred to as *Limits*.

CL Hart's *The Concept of Law*.

GT Kelsen's *General Theory of Law and State*.

NA von Wright's *Norm and Action*.

PTL Kelsen's *The Pure Theory of Law*.

TP Kelsen's *Théorie Pure du Droit*.

WJ Kelsen's *What is Justice?*

OLG Bentham's *Of Laws in General*. This is in substance a new edition of the *Limits*.

CONTENTS

INTRODUCTION

THIS work is an introduction to a general study of legal systems, that is to the study of the systematic nature of law, and the examination of the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon Law, or some other legal system). A comprehensive investigation may result in what could be called a theory of legal system. Such a theory is general in that it claims to be true of all legal systems. If it is successful it elucidates the concept of a legal system, and forms a part of general analytic jurisprudence.

The approach to the subject adopted here is in part historical, and starts from a critical examination of previous theories. The constructive part of the work is analytical in character, and the authors examined in the historical part all belong to the analytic school of jurisprudence.[1] From an analytic standpoint a complete theory of legal system consists of the solutions to the following four problems:

(1) The problem of existence: What are the criteria for the existence of a legal system? We distinguish between existing legal systems and those which have either ceased to exist (e.g. the Roman legal system) or never existed at all (e.g. Plato's proposed law for an ideal state). Furthermore, we say that the French legal system exists in France but not in Belgium, and that in Palestine there is now a different legal system from the one which was in force 30 years ago. One of the objects of the theory of legal system is to furnish criteria to determine the truth or falsity of such statements; these we shall call the 'existence criteria' of a legal system.

(2) The problem of identity (and the related problem of membership): What are the criteria which determine the system to which a given law belongs? These are the criteria of membership, and from them can be derived the criteria of identity, answering the question: which laws form a given system?

[1] Cf. Bentham, *Principles*, pp. 423 ff.; Austin, 'The Uses of the Study of Jurisprudence'; Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence'; Hart, 'Positivism and the Separation of Law and Morals'.

(3) The problem of structure: Is there a structure common to all legal systems, or to certain types of legal system? Are there any patterns of relations among laws belonging to the same system which recur in all legal systems, or which mark the difference between important types of system?

(4) The problem of content: Are there any laws which in one form or another recur in all legal systems or in types of system? Is there any content common to all legal systems or determining important types of system?

Whereas every theory of legal system must provide a solution of the first two problems, since existence and identity criteria are a necessary part of any adequate definition of 'legal system', it may give a negative answer to the last two questions. It may claim that there is no structure or shared content common to all legal systems. The examination of structure and content is fundamental also to the theory of types of legal system (which is how we may name the analytic part of comparative jurisprudence).

This essay is concerned with the first three problems only, and only in so far as they belong to the general theory of legal system. Analytical jurists, apart from Hart, have paid little attention to the problem of content, and as we have chosen to develop our systematic conclusions largely through the critical examination of previous theories it will be convenient to disregard it almost completely. A few remarks on the interrelation between the problem of content and the other three problems will be made in Chapter VI and elsewhere.

All four problems of the theory of legal system have for the most part been neglected by almost all analytical jurists. It seems to have been traditionally accepted that the crucial step in understanding the law is to define 'a law', and assumed without discussion that the definition of 'a legal system' involves no further problems of any consequence. Kelsen was the first to insist that 'it is impossible to grasp the nature of law if we limit our attention to the single isolated rule'.[1] Here it is proposed to go even further: It is a major thesis of the present essay that a theory of legal system is a prerequisite of any adequate definition of 'a law', and that all the existing theories of legal system are unsuccessful in part because they fail to realize this fact.

[1] *GT*, p. 3.

In arguing for this thesis certain aspects of the general theory of norms will be considered (in Chs. III and VI). The discussion will, however, be confined to the bare minimum necessary to prove the validity of the general position.

The three most general and important features of the law are that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force.

Naturally, every theory of legal system must be compatible with an explanation of these features. Because of their importance we shall, moreover, expect that every theory of legal system will take account of these features, and will, at least partly, explain their importance for the law.

The emphasis on these three features of the law is the most important factor which we share with two contemporary analytic theories of legal system—those of Kelsen and Hart. The differences between our various positions may be reduced to a difference in the interpretation of the three features, their interrelations, and their relative importance. This common denominator makes it useful to present this attempt to solve the problems in the context of a critical examination of other similar attempts.

There is, however, a great difference in the use made here of the two contemporary theories. Kelsen's theory is explained and criticized in three successive chapters (III, IV, and V) before any positive contribution to the theory of legal system is advanced. The purpose of this is to gain a more detailed understanding of the problems of the theory of legal system, and to explore some of the difficulties involved in tackling them, and at the same time to learn both from Kelsen's achievements and from his mistakes. Hart's theory, which resembles much more closely the approach used here, is discussed in conjunction with the formulation of a positive contribution to a theory of legal system (Chs. VI to IX). Other legal philosophers who did not produce a complete theory of legal system, nevertheless held views relevant to the construction of such a theory, and some of

their views are taken up and examined whenever the occasion arises.

Though Kelsen was the first to deal explicitly and fully with the concept of a legal system, there is already implicit in Austin's work a complete theory of legal system. His theory, though differing in important respects from that of Kelsen, can be profitably regarded as a variant of the same kind of theory. I propose to regard their theories as two variations of what I shall call the imperative approach. Austin's variant being the simpler, we shall begin our discussion with it and use it to describe the nature of the imperative approach (Ch. I). Austin's theory is, however, very defective, and many of its defects can be remedied within the framework of the imperative approach. Therefore the criticism of his views (Ch. II) cannot be regarded as proof of the inadequacy of the imperative approach as such, but rather as an introduction to Kelsen's theory, which is much less vulnerable.

I

AUSTIN'S THEORY OF LEGAL SYSTEM

AUSTIN in effect defines 'a law' as 'a general command of a sovereign addressed to his subjects'. His theory of legal system is implicit in this definition. To make this clear we shall divide the definition into three parts, each providing an answer to one of our three main problems: A law is (1) a general command (2) issued by some person (Austin's usual expression is 'set' or 'given')[1] (3) who is a sovereign (that is, is habitually obeyed by a certain community and does not render habitual obedience to anyone).

From the second part of the definition a criterion of identity and a criterion of membership may be derived:

Austin's criterion of identity: A legal system contains all and only the laws issued by one person (or body of persons).

Austin's criterion of membership: A given law belongs to the legal system containing laws issued by the legislator of that law.[2] That is Austin's answer to the problem of identity.

The third part of the definition contains most of the material from which an existence criterion can be extracted:

Austin's criterion of existence: (1) A legal system exists if the common legislator of its laws is a sovereign. Therefore: (2) A legal system exists if it is generally efficacious. The transition from (1) to (2) is guaranteed by the fact that a person is sovereign only if he is habitually obeyed, and he is habitually obeyed if, and only if, his commands are generally obeyed. In Chapter II (sect. 2) we shall modify the criterion to make it more exact.

The first element of the definition of law is our only clue to Austin's opinion concerning the structure of a law. He never tackled the problem directly, but he says enough about the meaning of the term 'general command' to enable us to reconstruct a rudimentary doctrine of the structure of laws. It will be one of our main contentions in this chapter that this doctrine

[1] Austin regards the issuing of a general command by the sovereign as legislation.

[2] Cf. Hart's summary of Austin's position, *CL*, p. 66.

excludes the possibility of any internal relation between laws constituting a necessary element in a legal system. By internal relation between laws we mean relation between laws one or more of which refer to or presuppose the existence of the others. Thereby Austin excludes *a fortiori* any specific internal structure (i.e. pattern of internal relations) which a legal system must necessarily have.

This brief summary demonstrates how Austin's theory of legal system is virtually a by-product of his definition of 'a law'. Both the theory and the definition revolve around and presuppose the applicability of one concept—the concept of sovereignty. For this reason we shall begin our detailed examination of Austin's theory by considering his concept of sovereignty, and then proceed to discuss his criterion of existence (I.2), his criterion of identity (I.3), and his theory of the structure of a law, which prepares the ground for his theory of the structure of a legal system (I.4).

I.1: SOVEREIGNTY

'Sovereignty' belonged to the philosophical and political terminology long before Austin. It had, however, been recently transformed by Bentham: 'When a number of persons', he wrote, '(whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom we may call governor and governors) such persons altogether (subjects and governors) are said to be in a state of political society.'[1] One need only compare this passage with the following from *The Province* to realize how great is Austin's debt to his master: 'If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.'[2]

Two major innovations were introduced by Bentham and adopted by Austin:

(1) Sovereignty is neither derived from nor explained by

[1] *Fragment*, p. 38. [2] *Province*, p. 194.

reference to morality or moral principles. It is based exclusively on the social fact of the habit of obedience.

(2) The concepts of a habit and of personal obedience, namely obedience to a specific person or group, become the key concepts in the analysis of sovereignty.

These points form the basis of Austin's theory of sovereignty, and the basis was provided by Bentham. There are, however, two differences between the passages from Bentham and Austin which should not be overlooked.

Bentham defined 'being in a state of political society'; Austin 'an independent political society'. That explains why Austin's definition consists of two conditions, one positive (the bulk of the population habitually obeys the sovereign) and one negative (the sovereign is not in the habit of obeying anyone), whereas Bentham's definition mentions only the positive condition. The negative condition is relevant only to the independence of a political society with which Bentham was not in this passage concerned. Austin comments on this omission and says that 'Mr. Bentham has forgotten to notice' the necessity of a negative condition.[1] This is not true of the *Fragment* to which Austin referred, yet it is true of Bentham's definitions of sovereign in *Of Laws in General*, his most important jurisprudential work, and elsewhere.[2] But it is no more than a technical fault. There can be no doubt that Bentham would have approved of Austin's amendment. In the *Fragment* he writes:

> But suppose an incontestable political society, and that a large one, formed; and from that a smaller body to break off: by this breach the smaller body ceases to be in a state of political union with respect to that larger: and has thereby placed itself, with respect to that larger body, in a state of nature . . . [and suppose] the subordinate governors, from whom alone the people at large were in use to receive their commands under the old government, are the same from whom they receive them under the new one. *The habit of obedience which these subordinate governors were in with respect to that single person, we will say, who was the supreme governor of the whole is broken off insensibly and by degrees.* The old names by which these

[1] *Province*, p. 212.

[2] Austin's contention (ibid.) that because every political society is either an independent political society or part of it, the definition of a political society presupposes the definition of an independent society, is clearly fallacious.

subordinate governors were characterized . . . are continued *now they are supreme.*[1]

The implied definition of a supreme governor includes Austin's negative condition.

The second difference between Austin's and Bentham's concept of sovereignty, though it was never noticed by Austin himself, is of much greater importance. Austin's sovereign has four attributes, all of them of vital importance to his theory of legal system. His sovereignty is:

(1) *not subordinate*, that is (a) sovereign legislative power cannot be conferred by a law; and (b) this legislative power cannot be revoked by law;

(2) *illimitable*, that is (a) the sovereign legislative power is legally illimitable, it is the power to legislate any law whatsoever; and (b) the sovereign cannot be made subject to legal duties in the exercise of his legislative power;

(3) *unique*; for every legal system there is (a) one and (b) only one non-subordinate and illimitable legislative power;

(4) *united*: this legislative power is in the hands of one person or one body of persons.[2]

Bentham's sovereignty is certainly non-subordinate and unique, but he never said that sovereignty is illimitable or united. It is interesting to examine the development of his views on the subject: In the *Fragment* he avoids using the term altogether, and uses the term 'supreme governor' instead. He is silent on the problem of unity, and on the limitability of the supreme governors he says: 'The field . . . of the supreme governor's authority, though not infinite, must unavoidably, I think, unless where limited by express convention, be allowed to be indefinite.'[3] There is no telling whether this convention is

[1] *Fragment*, p. 44. My italics.

[2] It is here assumed that sovereignty can be divided and yet unique. If, for example, according to one legal system one person has non-subordinate legislative power on religious matters while another has non-subordinate legislative power on all other matters, their powers are regarded as parts of one sovereign power, which is divided between them. On the other hand, if according to one system two persons have each non-subordinate and unlimited legislative power, then sovereignty is not unique, for there are two sovereign powers in that legal system, but sovereignty is united, every sovereign power being in the hands of one person.

[3] *Fragment*, p. 94.

law or not. In his second published work on jurisprudence, the *Principles*, he tends to admit the concept of sovereignty:

To the total assemblage of the persons by whom the several political operations above mentioned come to be performed, we set out with applying the collective appellation of the government. Among these persons there commonly is some one person, or body of persons whose office it is to assign and distribute to the rest their several departments, to determine the conduct to be pursued by each in the performance of the particular set of operations that belongs to him, and even upon occasion to exercise his function in his stead. Where there is any such person, or body of persons, he or it may . . . be termed the sovereign, or the sovereignty.[1]

According to this watered-down definition of sovereignty it seems that the sovereign can be limited. On the other hand, he is both unique and united, but there is a footnote attached to this passage which says:

I should have been afraid to have said necessarily [i.e. that there is necessarily a sovereign in every country]. In the United Provinces, in the Helvetic, or even in the Germanic body, where is that *one* assembly in which an absolute power over the whole resides? where was there in the Roman Commonwealth? I would not undertake for certain to find an answer to all these questions.[2]

If the sovereign power is united, then it seems that not every state has a sovereign. We may deduce that if every state has a sovereign, then it cannot be united.

In *Of Laws in General* Bentham maintains that every state has a sovereign, but he did not abandon his view that sovereignty need not be united or unlimited:

The efficient cause . . . of the power of the sovereign is neither more nor less than the disposition to obedience on the part of the people. Now this disposition it is obvious may admit of innumerable modifications—and that even while it is constant. . . . *The people may be disposed to obey the commands of one man against the world in relation to one sort of act, those of another man in relation to another sort of act*, else what are we to think of the constitutional laws of the germanic body. . . . *They may be disposed to obey a man if he commands a given sort of act: they may not be disposed to obey him if he forbids it and vice versa.*[3]

[1] *Principles*, p. 325. [2] *Principles*, p. 325, my italics.
[3] *Limits*, p. 101 n; *OLG*, pp. 18–19 n; cf. also *Limits*, p. 153; *OLG*, p. 69.

The passage is far from clear. It seems that Bentham never made up his mind on the question of the distinction between legal limitations and *de facto* limitations of sovereignty. The passage shows how he tries to explain legal phenomena by direct reference to social facts in a way which we cannot but judge to be confused. But it is clear that in the first sentence italicized above Bentham allows for a divided sovereignty and that in the sentence which follows he admits the possibility of a limited sovereignty.

Of course we should be careful not to attribute to Bentham more than he actually wrote. He did not have an explanation of divided sovereignty. He suggested no way of deciding whether a certain legal power is part of a sovereign power, and, if so, of which. Nor did he explain what are the relations, if any, between the various powers constituting one sovereign power. Similarly, he did not explain satisfactorily how sovereignty can be legally limited.[1] He was aware of certain legal phenomena which he could not reconcile with the doctrine that in every legal system there is one undivided and unlimited sovereign, and consequently he declined to subscribe to that theory.

We have elaborated this point, not only because it is usually overlooked that Bentham thought sovereignty to be divisible, but mainly because the fact that he thought it divisible and limitable prevents one from imputing to him the same views on the identity and existence problems which we have attributed to Austin. As Bentham held no other views relevant to these issues, it is Austin, and not Bentham, who is the first analytical jurist to supply us, even though without applying himself directly to the subject, an answer to these two problems, and so with a theory of legal system. For if sovereignty is divisible (or if, contrary to Bentham's and Austin's theories, it is not necessarily unique), then by tracing the origin of the laws of one system we may find several distinct legislators. And if there is no legislator common to all the laws of the system there is no bond common to them all, unless it is to be found somewhere else. Likewise, if the sovereign is legally limitable (or if he may be subordinate), the limiting law must be made by someone

[1] He did attempt two explanations: (1) convention, (2) limited disposition to obey; but they are not satisfactory. For his most extensive discussion of the problem see *Limits*, pp. 150–4; *OLG*, pp. 67–71.