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THE ASPIRATIONAL VIEW ON THE PROBLEM OF LEGAL SYSTEMS' CONTINUITY

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THE ASPIRATIONAL VIEW ON THE PROBLEM OF LEGAL SYSTEMS' CONTINUITY

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PEDRO NOBUYUKI CARVALHO URASHIMA

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Resumo: Esta tese aborda o problema da continuidade, isto é, o que significa dizer que sistemas jurídicos persistem e quais aspectos explicam sua capacidade de persistir ao longo do tempo. Propõe-se distinguir a identidade de sistemas jurídicos enquanto um tipo de sistema normativo da identidade de sistemas jurídicos específicos. De forma mais precisa, o foco do trabalho está no segundo tipo de identidade ao longo do tempo. A razão é que a continuidade de sistemas jurídicos se torna um objeto de reflexão após intensas transformações e instabilidade em sistemas jurídicos específicos. Assim, para responder ao problema da continuidade, a tese defende a "visão aspiracional", segundo a qual sistemas jurídicos continuam os mesmos na medida em que concretizam o Estado de Direito. O argumento em defesa dessa posição exige adotar posições metodológicas e substantivas controvertidas. Dessa forma, o presente trabalho tem como objetivos: primeiro, definir a objeção da questão vazia como um desafio que deve ser superado por qualquer resposta adequada ao problema da continuidade. Uma vez que esse problema é considerado diante de mudanças políticas de grande importância, como revoluções, golpes de Estado, processos de redemocratização, a identidade de sistemas jurídicos deve ser tão importante quanto esses acontecimentos. Segundo, reconstruir e criticar aquela que tem sido a forma predominante de formular e responder ao problema da continuidade, chamada de abordagem da reidentificação. Essa abordagem investiga se sistemas jurídicos momentâneos temporariamente distintos fazem parte de um sistema jurídico não-momentâneo. Além disso, ela apenas foca no comportamento das autoridades públicas ao tentar determinar a identidade dos sistemas jurídicos. A distinção entre sistemas jurídicos momentâneos e não-momentâneos é criticada por três falhas: gera confusões, é obscura e leva a respostas inconsistentes sobre o que são condições de continuidade/persistência. O terceiro objetivo deste trabalho é propor uma outra abordagem, que investiga a identidade diacrônica de sistemas jurídicos no contexto discursivo em que reivindicações, pedidos, reprovações e responsabilizações jurídicas ocorrem. Nesse contexto, é preciso delimitar os recursos a partir dos quais a pergunta do sujeito de direito, "mas como isso pode ser direito para mim?", pode ser respondida. Quarto, demonstrar que a pergunta do sujeito de direito não pode ser adequadamente respondida sem que se compreenda o valor do Estado de Direito. Quinto, esclarecer o que é o Estado de Direito, explorando as ideias de *guidance* e *accountability* em conexão com razões que tornam reivindicações válidas interpessoalmente. O resultado esperado é que ficará claro que a versão da visão aspiracional proposta é consistente, porque (i) identidade ao longo do tempo é a reconstrução retrospectiva das condições de validade de tais razões (*second-personal legal reasons*), (ii) sistemas jurídicos satisfazem essas condições quando fornecem relações de *guidance* e *accountability* entre cidadãos e governantes; (iii) sistemas jurídicos apenas conseguem fornecer relações de *guidance* e *accountability* entre cidadãos e governantes por meio do respeito ao Estado de Direito. Logo, (iv) sistemas jurídicos continuam os mesmos na medida em que concretizam o Estado de Direito. O último e sexto objetivo é responder as possíveis objeções a esse argumento.

Palavras-chave: sistemas jurídicos; identidade; estado de direito

Abstract: This work addresses the problem of continuity, that is, what it means to say that legal systems persist and what features explain their ability to do so. It distinguishes the identity of legal systems as a type of normative system from the identity of specific legal systems. More specifically, its focus is on what preserves the latter kind of identity over time. The reason is that continuity becomes a subject of reflection after major transformations and instability in specific legal systems. To answer that problem, this work argues for "the aspirational view", according to which legal systems continue to be the same to the extent that they realize the rule of law. The argument for this claim requires methodological and substantive contentions. Accordingly, this dissertation aims: first, to define the empty question objection as a challenge that any adequate response to the problem of continuity must meet. Given that this problem is considered in light of high-stakes political changes, such as revolution, coups d'état, and redemocratization processes, the identity of legal systems must be as important as those matters. Second, to reconstruct and criticize what has been the predominant way of framing and responding to the problem of continuity, which is called the reidentification approach. Reidentification investigates whether temporally distinct momentary legal systems are parts of a non-momentary legal system. Moreover, it only focuses on how official behavior establishes the identity of legal systems. The distinction between momentary and non-momentary legal systems is criticized for being flawed in three ways: it is confusing, unclear, and it leads to inconsistent answers to the question of what continuity/persistence conditions are conditions of. The third goal of this work is to propose an alternative approach that investigates the diachronic identity of a legal system in the discursive context in which legal claims, pleas, reproaches, and accounts are made. Under that context, one needs to delimit the resources from which to address the legal subject's question: "But how can that be law for me?" Fourth, to show that the legal subject's question cannot be adequately answered without understanding the rule of law. Fifth, to clarify what the rule of law is by exploring the ideas of guidance and accountability in connection with reasons that render claims interpersonally valid. The upshot expected is that it will be clear that the version of the aspirational view put forth in this work is sound because (i) identity over time is the retrospective reconstruction of the felicity conditions of those reasons (second-personal legal reasons), (ii) legal systems can fulfill those conditions if they provide guidance and accountability relations between citizens and rulers; (iii) legal systems can only provide guidance and accountability relations between citizens and ruler by respecting the rule of law. Therefore, (iv) legal systems remain the same to the extent that they realize the rule of law. The last and sixth goal is to address possible objections to this argument.

Keywords: legal systems; identity; rule of law.

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Introduction:

The idea of a legal system and its features are still causing philosophical puzzlement. After all, "it is by no means obvious why we should find it natural to assume that law exhibits the properties of a system, what those properties might be, or how their significance should be construed" (Simmonds, 2001, p.271). Therefore, it is not completely clear what a legal system is and to what kind of practical or theoretical problems such a concept can be relevant.

A pre-theoretical definition of a legal system is that it consists of an ordered set of norms that are created and enforced by public institutions. How those norms are created, what kinds of norms are created, and how they are ordered, are topics in need of clarification. But my purpose in this text is more modest: I aim to further the understanding of the idea of legal systems by explaining what it means for them to persist and what features explain their ability to do so.[1] This is the problem of continuity. My preferred response to this problem is "the aspirational view", according to which legal systems continue the same to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). The argument for this claim can be outlined as follows.

Following Quine (1950, p.622), I assume that "identity" is a concept that performs a function in discursive contexts. We need to establish the diachronic identity of a legal system in the discursive context in which legal claims, pleas, reproaches, and accounts are made. Under that context, we need to delimit the resources from which one can address the legal subject's question: "But how can that be law for me?" (Dyzenhaus, 2022, p.2). An adequate response will be backed up by reasons "whose validity depends on presupposed authority and accountability relations between persons and, therefore, *on the possibility of the reasons being*

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[1] In the argument that follows this Introduction, I present two alternative ways to respond to the problem of continuity, each assuming a very different notion of a legal system. I avoid providing a complete definition of a legal system for now because the view I favor (the "aspirational view"), unlike its opponent (the "reidentification view"), does not sever the explanation of what a legal system is from its ability to continue over time. Hence, it contends a connection between identity over time and the addressing of the legal subject's question, "But how can that be law for me?". Alternatively, if one is searching for my definition of a legal system, it is better to see what my position on the problem of continuity is. I think this is in line with what Lon Fuller told Samuel Mermin in a private correspondence dating back to 1972, when he said: "I am not concerned with offering precise definitions of legal phenomena, but with analyzing the basic processes that constitute an entity of somewhat vague outlines that we call 'a legal system." See: Winston, 1986. p.91. Fuller says something interestingly similar when addressing why the relationship between law and morality is a philosophical problem. To characterize Law as the *enterprise* of subjecting human conduct to the governance of rules, as he does, "[…] admittedly leaves uncertain the precise point at which a legal system can be said to have come into being". Nevertheless, Fuller believes that "there is little point in imposing on the situation some definitional fiat" since "the difficult problem is rather that of defining *the proper relationship* between what is unquestionably an established and functioning system of law, on the one hand, and general standards of morality, on the other". See: Fuller, 1969, p.131, emphasis added.

addressed person-to-person" (Darwall, 2006, p.8, emphasis added). Identity over time is the retrospective reconstruction of the felicity conditions of those reasons (second-personal legal reasons). Legal systems can fulfill those conditions if they provide guidance and accountability relations between citizens and rulers. Legal systems provide guidance and accountability when they respect the rule of law. Therefore, legal systems remain the same to the extent that they realize the rule of law.

Each of the premises above is controversial, and in this work, I shall defend each of them. My claim contrasts with traditional responses to the problem of continuity – such as Raz's and Kelsen's – not only in substance but also in how they conceive of identity over time. So, part of the debate is not just a dispute on the connection between identity over time and the rule of law, but also a dispute about what the relevant notion of identity is when we are talking about legal systems.

In this introduction, I shall introduce the problem of continuity with two cases from which it is possible to grasp the problem's general outline. Second, I take methodological inspiration from debates about personal identity in ethics to highlight the practical concerns associated with the problem of continuity of legal systems. By doing so, I hope to pave the way for presenting identity as performing a function, that is, explaining some practical concerns we have in thinking about legal systems. Before presenting my preferred account, however, I argue that any successful account of the continuity of legal systems must first answer to an adapted version of Derek Parfit's (1984, pp.261-266) objection that identity is explanatorily irrelevant for continuity. Third, I reframe the practical concerns that motivate investigating legal systems' diachronic identity as jurisprudential topics, to give them a more systematic presentation. Finally, I present a quick roadmap of the next chapters.

1.2 Two tales about identity over time

The following two cases help us to understand what is at stake with the problem of continuity. The first case describes changes that not only alter the norms and the allocation of official power but leave it unclear to citizens if there are any norms by which they may guide their conduct. The second shows the dispute between local and imperial powers over the legal right to rule a territory.

1.2.1 “Legal Revolution”, the old and new in authoritarianism

The military dictatorship that ruled Brazil from 1964 to 1985 had as one of its defining features the strategy of presenting acts of force as legally justified (Paixão, 2020, p.229). This scenario came about through the coexistence of two kinds of high-level meta-norms: constitutional norms and a second class of norms called Institutional Acts (henceforth IA). Constitutional norms were positive laws establishing the allocation of official power, the ordinary legislative process, and fundamental rights. Institutional acts were solemn enactments issued with no authorization from a higher-level norm and without any limit to their derogatory powers, with a view to establishing norms that the military government announced as necessary to the success of their coup d’état. To justify these enactments, the military government claimed that the break from the previous democratic order was a revolution that conferred constituent power to the leaders of the revolutionary movement. Moreover, a peculiar conception of “constituent power” was developed, since the military government conceived revolution as a continuous process rather than an isolated political event.[2] This unorthodox reading of a juridical concept reveals a dual strategy: politically, it was necessary to depict the shift from the previous democratic order to the military regime as a radical departure, making it plain that a change had come about. However, that change could not be too radical; otherwise, the military regime would not have the support of those who defended the coup as an extraordinary remedy and believed normality would soon be reestablished (Pauer-Studer, 2020, pp.50-51).

[2] As stated in the Preamble for The Institutional Act number 1: “What has taken place and will continue to take place at this moment, not only in the spirit and behavior of the armed classes but also in national public opinion, is a genuine revolution”. Similarly, the Preamble to The Institutional Act number 2 says: “It has not been said that the revolution has been, but that it is and will continue to be”. For the originals see: Brasil, 1964 and Brasil, 1965.

For this reason, great effort was made to show the legality of the so-called revolutionary process.[3]

Identity over time seems central in cases like this, wherein authoritarian regimes try to present themselves as continuous with a past legal order to gain greater support. But, as the facts below describe, despite referring to constitutional norms, these regimes exercise the kind of power that is illegal according to the very same constitutional standards (Pauer-Studer, 2020, p.49). Consequently, identity appears to be lost over time.

Even though the IA n. 1 formally kept the 1946 democratic Constitution and its procedure for amendment in force, it also conferred on the President of the Republic (who was nominated by a Military Junta) the prerogative to change its norms at will (Paixão, 2020, p.231). The tension between these two provisions made it unclear which norm was hierarchically superior. The institutional acts were immune from judicial review, and, for that reason, were not subject to constitutional standards. At the same time, the Executive sometimes proposed amendments to the Constitution, instead of rewriting it by fiat.

Another moment of uncertainty was when the IA n.4 called Congress to draft a new Constitution. As we saw above, the Institutional Acts are based on the constituent power conferred on military rulers by the so-called Revolution. Still, when they took power, these rulers claimed the previous constitutional order, established by the 1946 Constitution, would be maintained. The IA n.4 confused things even more, because it meant the Executive branch unilaterally conferred constituent powers to the Legislature. Moreover, the resulting text, the 1967 Constitution, ratified all previous institutional acts (Paixão, 2020, p.234). Thus, the Constituent Power responsible for drafting the 1967 Constitution was conferred by an institutional act, and, once enacted, the 1967 Constitution ratified the legal force of previous institutional acts.

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[3] According to Cristiano Paixão, there is a striking similarity in the arguments employed by Francisco Campos, the intellectual author of the institutional acts, who provided legal advice to the military government, and the arguments Nazi jurists put forth in defense of Hitler's dictatorship as a replacement for The Weimar Republic. For him, in both cases, it was thought that revolution and legality had to be coupled, so legislative enactments and references to the previous constitution were used as tools for achieving authoritarian goals. Consequently, self-characterization as a legal revolution was crucial in 1930s Germany after Hitler, and in 1960s Brazil after the military coup d'état. However, as Paixão also stresses, the respect to legal forms was a mere pretend because what was in place was a complete change in the procedures for creating law and allocating power. For a more detailed account of how The Nazis argued for the legality of their so-called revolution by referring to article 48 of The Weimar Constitution, see: Pauer-Studer, 2020, pp. 45-53. Cristiano Paixão's argument is a comment to Pauer-Struder's book, which was presented and debated in The UFMG Legal Philosophy Seminar Series. The presentation by Pauer-Struder and the comments that followed can be accessed at: https://www.youtube.com/live/ZJ8r18EE9lE .

The IA n.5 reproduced previous dynamics in declaring the maintenance of the 1967 Constitution while allowing governmental acts that were plainly against constitutional norms, such as declaring parliamentary recess and suspending citizens' political rights and habeas corpus. Nevertheless, unlike IA n.1 and n.2, IA n.5 had no provision circumscribing how long it was valid. So, at any time, those in power could interrupt the constitutional order (Paixão, 2020, p.235). Indeed, that was the case as the dictatorship became harsher in its oppressive policies.

The facts above show how diachronic identity is often taken for granted. It also challenges some common assumptions about legal diachronic identity. Usually, legal systems are judged as authoritarian or democratic in their origins, and their norms as just or unjust in their content. All these practices are possible only because legal systems have an identifiable structure or accommodate practices that persist over time (Fuller, 1958, pp.644-645). Given that a legal system can change some of its norms and remain the same system, it is conceivable that it can change how just it is without turning into a different system or something else.[4] However, cases like "legal revolution" do not simply exemplify a scenario where a legal system has changed the content or the hierarchy of legal norms. Rather, there seems to be something else: norms are produced and the allocation of power changes as those in power find best, leaving unclear if there is a hierarchy of norms or any norms at all. This raises questions about the very characterization of a continuous legal system. Are we searching for a norm that remains unchanged despite changes in many other norms? If so, what kind of norm must it be? Has it to be a constitutional norm or an open-ended statement, like an Institutional Act suffices? Can we talk about a persistent legal system even when constitutional norms are violated? That is, when does a usurper change a legal system? Can a legal system survive if every change in its norms is solely made to avoid obstacles for those in power? Similarly, does a legal system persist when its norms and allocation of power change so radically that citizens who used to know the norms and officials to which they are subject no longer can do so?

[4] I am assuming that even non-positivists distinguish between legality and justice, or consider the former non-reducible to the latter. For a good example, see how Jeremy Waldron explains the distinction Dworkin draws between justice and integrity: Waldron, 1997, pp.9-14. Moreover, even those who argue for a thesis like "lex iniusta non est lex" tend to circumscribe its scope to extreme cases. See how Nigel Simmonds reads Gustav Radbruch's famous thesis in: Simmonds, 2019, pp.175-199. John Finnis also reads the maxim "lex iniusta non est lex" as compatible with the distinction between legality and justice, since for him the natural law tradition never contended that morally iniquitous demands are in no sense law or that there cannot be an unjust law. Rather, according to Finnis, natural lawyers argue that an "unjust law is not law in the focal sense of the term 'law' (i.e. simpliciter) notwithstanding that it is law in a secondary sense of that term (i.e. secundum quid)." See: Finnis, 2011b, pp. 363-366.

The preceding questions are not only relevant to understanding the subtleties of past authoritarianism, but they also help us in investigating current controversies about illiberal constitutionalism. Illiberal constitutionalism challenges contemporary constitutional scholarship by employing notions associated with democratic constitutionalism to entrench authoritarian rulings. To what extent this is compatible with constitutionalism is a matter of debate. For present purposes, what matters is that this debate is often framed as a debate over the meaning and extension of constitutional identity. Constitutional identity must be distinguished from the identity of a constitution. The latter is established by a proper understanding of the constitutional clauses, while the former results from a mixture of legal norms, institutional factors, and cultural perceptions (Drinoczi; Meyer, 2022). This mirrors the legal philosophical debate, which, in tackling the problem of continuity, foregoes identifying a single norm or a set of norms as what establishes the identity of legal systems (Finnis, 2011a, pp.425-429). Moreover, the constitutional debate suggests that the identity of complex legal practices, be it a constitutional order or a legal system, is a matter of political controversy. Appeals to constitutional identity have served both as a means of shielding liberal democratic frameworks from unconstitutional constitutional amendments and as a tool to invalidate obligations arising from supranational and international frameworks. The first use can be seen in the reasoning of constitutional courts in India, Kenya, and Colombia. The best illustration of the second use can be found in the government and the politically aligned Hungarian Constitutional Court, which instrumentalized constitutional identity to justify domestic legal measures that defy the EU legal order and entrench illiberal rule (Drinoczi; Meyer, 2022).

Nevertheless, constitutional theorists seem to agree that there is no universally applicable theory of constitutional identity. While I appreciate the sensitivity to context and the acknowledgement of how contestable identity can be, my work aims to provide a vocabulary that, even if not universally applicable, helps us understand why those controversies arise over the notion of legal/constitutional identity and how we can adjudicate between competing positions.

1.2.2 Revolution or devolution?

Before 1965, the Rhodesian Constitution was an Order in Council made under a power conferred by a British statute (Barber 2006, pp.318-319). The Rhodesian Parliament had considerable independence but was not authorized to alter entrenched provisions of the Constitution. However, on November 11th, 1965, the Rhodesian Prime Minister made a Unilateral Declaration of Independence by announcing a new constitution. This document provided that no Act of the United Kingdom Parliament would apply to Rhodesia unless extended to Rhodesia by the Rhodesian Parliament. Moreover, it removed the right of appeal to the Privy Council when the Declaration of Rights was applicable. The United Kingdom Parliament responded with the Southern Rhodesian Act 1965, which reasserted Westminster's control over Rhodesia. This sparked a dispute over two conflicting understandings: one identified the Westminster Parliament as the highest source of law in the system, and the Privy Council as the highest adjudicative body. The second identified the Rhodesian Parliament as the highest source of law, and the Rhodesian High Court as the supreme adjudicative body (Barber, 2006, p.321).

The judges who were admitted before The Unilateral Declaration of Independence and stayed in office after the declaration had to decide about the continuity of Westminster's rule over Rhodesia. Considering the relevant issues, the judges had three possible actions when judging the legality of the revolutionary government: (a) complete non-recognition; (b) partial recognition; and (c) complete recognition (Christie,1968, p.404).

It is worth noting that the eligibility of each option depends on what notion of diachronic identity one favors, for this is the basis upon which one can adjudicate whether the Unilateral Declaration of Independence created a new legal system or was not enough to dispel an explicit devolution by the British Empire.

1.3 Why bother about identity over time?

The cases above illustrate some issues that require an account of what gives legal systems diachronic identity. However, a more systematic treatment is needed. As a first step, it is worth looking at other areas where diachronic identity was discussed. Philosophers interested in personal identity and ethics share the following methodological assumption: the plausibility of a theory of identity[5] heavily depends on how well it accounts for our practical concerns (Shoemaker, 2021). From this methodology, philosophers consider how our practices and concerns seem to assume notions of continuity and identity. For instance, our practices of moral responsibility are anchored in the idea that someone can only be responsible for *her* actions (Schechtman, 1996, p.14 and Shoemaker, 2007, p.318). Also, fairness requires that someone be compensated only for *her* sacrifices and with benefits that accrue to *her* (Schechtman, 1996, p.14 and Shoemaker, 2007, p.318). Moreover, it matters whether I am about to die, or shall live for many years because the person who lives or dies is *me* (Parfit, 1984, p.215). Therefore, given that "facts about identity are important to us, a theory of personal identity should thus make sense of this; the relation that defines identity should be important in the ways identity is" (Schetchtman, 1996, p.15). I favor a similar approach in thinking about the continuity or the identity of a legal system over time. That is why we can say that identity is a notion that performs a function.

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[5] It is worth noting that most of the literature considers personal identity synonymous with sameness. Hence, personal identity is not just continuity but non-branching continuity. For an interesting exception, see: Schechtman, 1996. Thus, PI = Continuity + Uniqueness. However, as such, identity presupposes continuity as a necessary condition. Accordingly, the discussion about personal identity is not just about what a person is or how persons are distinguished from other beings or entities. Rather, it is about the preservation or end of something that defines a single person. Similarly, an account of personal identity is tested by how well it explains continuity and why a person does not branch. For instance, one early objection to Locke's account was that identity, conceived as sameness, cannot be based on a relation (consciousness) that changes from moment to moment. See Shoemaker, 2021, available in https://plato.stanford.edu/archives/fall2021/entries/identity-ethics/. As for the non-branching feature, the challenge is bigger, and it is at the core of Parfit's contention that identity does not really matter. For a paradigmatic introduction to the problem, see his exposition of the fission case in: Parfit, 1984, pp.254-258. See also how he reflects on the matter: ibid., pp. 266-273. As I show below, the terms are slightly different for legal philosophers who use identity in discussing continuity. For them, identity can be divided into momentary and non-momentary. So, if we focus solely on the former, we can think of identity apart from discussions about continuity. This, however, comes at a price, as I will argue. Considering this difference in vocabulary, I prefer to use continuity as a more encompassing term. To avoid confusion, I shall prefer talking about a conception of identity over time or diachronic identity as responses to the problem of continuity. Another option I endorse, mostly in chapter 2, is saying that we can be concerned with what makes a given X *continue as the type of thing it is*, or *as the token it is*. This formulation attempts to show that not any relation of continuity suffices, but only those that preserve identity.

Before providing further details, three caveats must be borne in mind. First, the personal identity literature only provides some methodological inspiration to organize the debate and unveil the relationship between legal systems' diachronic identity and relevant practical matters. Of course, I could have suggested a similar connection without referring to a different topic. However, the connection between continuity, identity over time, and practical concerns is shored up once we realize a similar movement has been made in other fields of inquiry. Apart from that, the personal identity literature deals with topics quite distinct from legal systems, and any substantive approximation would be too difficult if not unsuccessful right from the start.[6]

Second, there is still room to say that identity over time might have other facets that are unrelated to our practical concerns. In the personal identity debate, this has been stressed by some defenders of what has been known as animalism, i.e., the view that personal identity is a matter of biological or physical connections. They argue for the metaphysical correctness of their claim despite its apparent unworkability to explain practical concerns (Shoemaker, 2007, p.322).[7] I do not deny that something similar can happen in theorizing about legal systems, but, as I intend to show, I do not think any meaningful response to the problem of continuity has given away explaining practical concerns.[8]

Finally, and most importantly, legal theorists may gain from considering something similar to Derek Parfit's (1984, pp. 261-266) contention that identity does not really matter. For Parfit (1984, p.275), the practical concerns associated with personal identity can be properly explained by continuous facts and relations even when we do not know if identity over time holds. If that is correct, continuity is different from diachronic identity, and, most importantly,

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[6] Moreover, one important question prevents hasty translations. As individuals, each of us gives special attention to the various pleasures, pains, and desire-satisfactions we may have in our distinct lives. We care to the point that it sounds right to say that each of us ought to maximize well-being in our lives. However, it does not seem to follow that the best way to govern society is to maximize well-being. Further philosophical argument is required. This suggests a disjunction between the intrapersonal and interpersonal domains. See: Shoemaker, 2007, pp.318 and 335. See also: Rawls, 1999, pp.19-24.

[7] According to animalism, X at t1 is identical to Y at t2 just in case X and Y are (stages of) the same biological animal. This position can be severed from practical concerns if we take it as David Degrazia does: "The biological view is a theory of human identity, of our persistence conditions. As such, it is a metaphysical and conceptual theory. Strictly speaking, then, it is not responsible for tracking all of the concerns we tend to associate with identity". Quoted in Shoemaker, 2007, p.322.

[8] Benjamin Spagnolo seems to explicitly endorse this when he proposes reflective equilibrium as the best way to assess theories about the continuity and discontinuity of legal systems. In his own words, "[…] systematically applying theoretical accounts to a concrete instance not only tests the accounts, but simultaneously tests our understanding of the concrete case in issue — the light of theory reveals fresh questions and prompts us to re-evaluate historical and doctrinal orthodoxies. Examining the explanatory success of an account and understanding the instance to which it is applied cannot reasonably be dissociated: the relationship between these activities is captured by something approximating the Rawlsian notion of 'reflective equilibrium'. In asking whether the depiction of Australian legal systems presented by a given theory [of continuity or discontinuity] achieves an adequate fit, it proves necessary to reconsider our intuitive judgements — say, in relation to the role of the Westminster Parliament at a given point in time. See: Spagnolo, 2015, p.5.

identity is an empty question. An empty question is one we can answer either positively or negatively, or one in which the different contenders are only different descriptions of the same outcome (Parfit, 1984, p.260). Whether the diachronic identity of legal systems is an empty question depends on how we conceive identity. In what follows, I return to “Revolution or Devolution?” to adapt Parfit’s contention about personal identity to the context of the debate about the identity of legal systems. After that, I identify the practical concerns from which a response to Parfit’s challenge can be worked out.

1.3.1 Is the continuity of a legal system an empty question?

There are two ways in which a question may be empty (Parfit, 1984, p.260). First, questions are empty when they have no true answers. We can decide to give these questions answers. But any possible answer would be arbitrary. Second, questions are empty when they do not describe different possibilities, any of which might be true, and one that must be true. Instead, these questions merely give us different descriptions of the same outcome. To illustrate, in 1881, the French Socialist Party split. One could then ask: did the French Socialist Party cease to exist, or did it continue to exist as one or other of the two new Parties? According to Parfit (1984, p.278), solely looking at the relevant facts, there is no right answer to the question, but we can understand everything that was done. For Parfit, that makes identity an empty question.

Parfit’s contention becomes especially appealing when a spectrum is considered. Recall the three options of the judges in “Revolution or Devolution?”. When judging the legality of the revolutionary government, they could: (a) refuse to recognize the legal norms created under the revolutionary government; (b) partially recognize those norms; or (c) fully recognize the norms created during that time (Christie,1968, p.404). The situation can be presented as a spectrum with total recognition at one extreme, partial recognition at the middle, and non-recognition at the other extreme. This must be the case, given that there is a difference between a colony and an independent legal system, and this difference matters. Is that a difference explained by the notion of identity over time? A working hypothesis is that a colony becomes an independent legal system when the imperial legal system to which it once was subject no longer continues as broad as it once was. However, for Parfit*, if that difference relates to identity,* there must be a sharp borderline, that is, a clear-cut explanation of when a colony becomes independent. There

must be a place in the spectrum where partial recognition is no longer possible, and the judges would inevitably take one of the extreme options.[9] Absent any evidence of where this borderline is, it is questionable that there is any such line (Parfit, 1984, pp. 238-239). At the same time, we are told there is enough information to understand that the judges had to decide whether the colonial relationship between Rhodesia and the United Kingdom continued.

Is there anything in the jurisprudential literature close to Parfit's contention? I believe a Hartian reading further suggests that we are dealing with an empty question here.[10] For Hart (1994, p.100), the rule of recognition is the foundation of a legal system. For such a rule to exist in a society, officials must engage in a general practice of using authoritative criteria for identifying legal rules (Hart,1994, pp. 101 and 110). When the dispute between the revolutionary government and Westminster is open, we are told we are dealing with uncertainty in the rule of recognition. According to Hart (1994, p.153), when courts settle this kind of question, "they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success". Under those terms, the dispute about the identity of the Rhodesian legal system, its contours, and its history, is an empty question in the first sense. In other words, it is a question with no correct answers.

After the dispute is settled, there are two independent legal systems. The Hartian response is that it does not matter whether the parent legislature "retire[d] from the scene by removing legislative power over the former colony", or whether there was a revolutionary 'break' by violence (Hart, 1994, p.121). In either case, "the ultimate rule of recognition now accepted and used [no longer includes], among the criteria of validity, any reference to the operations of legislatures of other territories". In other words, we are told we can understand all the relevant facts without dwelling on the beginning of the Rhodesian Legal System. The same outcome can be described in different ways. We have an empty question in the second sense.

However, Hart (1994, p.121) acknowledges that things might be a bit more complicated. English courts could have denied that Rhodesia had an independent legal system with its own

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[9] For the sake of the argument, assume full recognition of the revolutionary government can be achieved without the judges endorsing every single norm it produces.

[10] Eliminativism is another position amenable to Parfit's objection. As Liam Murphy explains, for eliminativism, disputes about what is the law in force have no important consequences to legal practice and social life generally. So, the eliminativist concludes, the question about what the law in force is "must be paraphrased into a moral question about what a person ought to do or a descriptive question about the state's likely responses to people's decisions". See: Murphy, 2014, pp.89-90. I preferred to engage with Hart in the lines above because he clearly addresses some of the questions a theory about the continuity of legal systems is concerned with. However, Murphy's response to eliminativism is helpful in many ways and I will try to adapt it at the beginning of the next sub-section to highlight what a successful response to Parfit's contention must be.

local, ultimate rule of recognition. Given that the facts point to a rule of recognition independent of Westminster, there will be two legal systems where English law insists that there is only one. "But, just because one assertion is a statement of fact and the other a proposition of (English) law, the two do not logically conflict." The problem with this account is that cases like this are not mainly about the compatibility of propositions or descriptions, but practical conflicts.

What is at stake here? The two cases with which the discussion started provide a rough idea of what practical issues make legal systems' diachronic identity relevant. The empty question objection presses one to account for how those practical issues necessarily assume a notion of identity over time. However, this objection assumes identity is provided by a definitive test that allows the distinction of one legal system from the other. Absent such a test, we are told we should look at the relations that continue or come to an end. But maybe identity is nothing amenable to such a test. Moreover, there are reasons to believe we can only explain the relevant relations if we work with a different notion of identity. After all, for the citizens of a former colony, one consequence of independence is *their* legal system coming into being. They are not just concerned with the end or beginning of a relationship, but also with how the relationship is theirs, that is, how they are bound by the same norms and how this makes them enjoy a basic equal status.[11] Now is the time to provide a more systematic presentation of those matters and show how past jurisprudential accounts have dealt with them.

[11] I make a full articulation of that idea in chapter four, section 4.4, when I argue for accountability as a central part of the rule of law and as instantiating a basic form of equality.

1.3.2 What are we talking about when we are talking about continuity?

The discussion about what gives legal systems their identity over time must be important because it is politically and morally important to know when a given legal system continues in the face of a series of changes.[12] I will try to show that by highlighting practical concerns that seem to assume legal systems maintain their identity over time. Alternatively, I will argue that it is hard to understand significant political/legal questions if we apply something like Parfit's contention about identity to legal systems.

A legal system's diachronic identity reveals what a political community has done and what it can do in the future. Thus, in explaining the practical concerns that motivate investigation into the problem of continuity, I stress the backward and forward-looking dimensions involved. I start with the most concrete issues. A careful look at the jurisprudential literature shows some common themes:

1) "Revolution [or coup d'état], where rival claims to govern are made from within [a political community]" (Hart, 1994, p. 118; see also Finnis, 2011a, p.408-412 and Raz, 1980, p.102-103);

2) Enemy occupation, where an external force presses a rival claim to govern and thus challenges the authority of an existing system (Hart, 1994, p. 118).

3) Regimes that declare respect to legal norms but in practice violate legality to remain in power, disregarding their own enactments, enforcing unpublished norms, creating vague, retroactive norms, etc. (Fuller,1958, pp.650-655).

4) Lawful devolution, where a new legal system emerges from an old one (Hart, 1994, p. 119; Finnis, 2011a, p. 412-421 and Raz, 1980, p. 102-104).

5) Common law adjudication governed by precedent (Postema, 2004, p.214).

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[12] This paragraph partially adapts Liam Murphy's argument against eliminativism. The original argument is that: "[…] the dispute about the nature of law must be important because it is important to know the content of the law in force." In a similar statement, Murphy says: "My point is the very general one that eliminativism would make it impossible to discuss what appear[s] at first glance to be significant political/legal questions." See: Murphy, 2014, pp.88 and 98.

The first two concerns invite backward-looking analysis. Imagine a government returns from exile on the expulsion of occupying forces or the defeat of a rebel government. As Joseph Raz (1982, p. 83) acknowledges many different questions can be asked after that:

> Are previous laws still in force? Do persons who previously held high office still hold it or should they be renominated? Can the new regime or state claim taxes and debts owed to the old one? Can a person who committed an offence before the change be prosecuted after it has occurred? And so on.

The third concern has a backward-looking dimension as citizens can no longer identify to which norms they are subject and the competence of the authorities to which they respond. Normally, a legal system can change some of its norms and remain the same system. Accordingly, citizens can judge that *that* legal system could be better in its norms or the power it allocates. However, as the example of "legal revolution" aimed to show, officials' indifference to offering guidance leads to changes that undermine the very ability of citizens to understand what norms bind them, what their content is, and what powers are allocated to authorities. For citizens, the changes have been so profound that the legal system they were used to assessing (and sometimes complying with) has been replaced by random manifestations of ruling power. The backward-looking dimension invites one to investigate what was previously in place for the citizen and what led to its end.

The fourth concern has both backward and forward-looking aspects. At its core, the question is whether a new rule and constitution could be repealed by the old authority from which it was born (Finnis, 2011a, p.414). The backward aspect comes into the picture because we want to know whether or not a new legal system emerged from another, that is, whether or not a people is subject to its own legal system. The forward-looking aspect is in place because we want to know under what conditions the new rule and constitution can be changed or replaced.

The fifth and last concern is a clear example of how backward and forward-looking aspects can be integrated. When we are talking about Legal Systems in The Common Law tradition, it is worth noting that precedent "[…] involves attention to present circumstances, memory of past decisions, and anticipation of the direction in which the rule or ratio is moving" (Postema, 2004, p.214). The constraints precedent imposes on judges do not prevent the death of old rules and the creation of new rules and practices in their places. Change, however, is incremental (Postema, 2019, p.12). This incremental aspect suggests continuity with the past is relevant to justifying precedent. Moreover, Common Law adjudication helps us to see that the

problem of continuity is not just limited to extraordinary circumstances. Rather, it explains distinctive features of at least one type of legal system.

Considering issues like the above, Joseph Raz (1982, p.85) ponders that proposing a reasonable and systematic solution to legal problems of the type enumerated is a possible aim of a legal theorist. However, it is not an aim that has been important in the history of jurisprudence. Instead, Raz advocates for reconceiving the problem of continuity in general terms. From these remarks, we can take the list above as contexts that show the relevance of diachronic identity and break down the problem of continuity into the following questions:

1*) The relationship between Law and State: An end to the existence of a state is the end of its legal system. Therefore, diachronic identity is affected by the relation of state and law (Raz, 1982, p.99). What changes in the configuration of a state change its legal system?

2*) Legal change: what kinds of change can a legal system undergo in its norms without ceasing to be the same legal system?

3*) Reasons for action over time: Law aims to guide action and ascribe responsibility by relating the past to the present. Past institutional decisions and practices are taken as sources of reasons for actions. Those actions will happen now and produce effects in the future (Finnis, 2011a, p.425). Does the identity of a legal system explain the diachronic aspect of those practices of responsibility and interaction?

These general questions can encompass the five applied concerns presented above and can perhaps even be extended to further cases. Therefore, identity over time is not just relevant to analyzing extraordinary circumstances that raise jurisprudential curiosity. Rather, the questions above call attention to features that are taken for granted in the regular existence of legal systems.

In the next two chapters, I elaborate on how those general questions can be answered within a jurisprudential framework. I present and contrast two approaches distinguished by how they think of diachronic identity: the reidentification approach and the aspirational view. Each of them focuses on different aspects (backward and forward) of the concerns above. However, I will try to show that only the aspirational view can answer the questions it addresses and thus face up to the challenge posed by the empty question objection.

1.4 A quick roadmap

This work addresses the jurisprudential problem of continuity, that is, what it means to say that legal systems persist and what features explain their ability to do so. I claim that legal systems remain the same to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). As previously acknowledged, this claim contrasts with traditional responses to the problem of continuity, not only in substance but also in how it conceives of identity over time. Accordingly, the case for my claim engages in methodological and substantive disputes, and is structured as follows. The first two chapters deal with methodological matters, chapter 3 and 4 provide my substantial position, and chapter 5 addresses possible objections to my account. Those interested in jurisprudential methodology will probably prefer the beginning, while those more inclined to political and evaluative discussions may prefer the second part, where I discuss the common law doctrines on coups d'état, the meaning of the rule of law, and its connections with practical reason.

In Chapter 1, I introduce and criticize a paradigmatic presentation of the problem of continuity: the reidentification approach. That name was chosen because this approach suggests that diachronic identity is a matter of establishing whether temporally distinct momentary legal systems can be reidentified as parts of a non-momentary legal system. To properly understand what it means, I distinguish between the identity of legal systems *qua legal* systems—as a type of normative system— from the identity of *a single* legal system as the *same* legal system. One of the main tenets of the reidentification approach is that it connects both discussions. Accordingly, a significant part of the chapter is dedicated to exposing how Joseph Raz, one of the most representative proponents of Reidentification, understands legal systems as unique institutionalized normative systems before asking how they maintain the features that make them unique. I submit that this approach answers some important questions, but that it does so despite its terms and preferred methodology. Thus, I criticize the momentary/non-momentary distinction for being flawed in three ways: it is confusing, unclear, and leads to inconsistent answers to the metaphysical question of what continuity/persistence conditions are conditions of. I conclude by advocating for a pragmatic alternative that asks what vocabulary we *should* adopt to explain what is at stake in the problem of continuity. For me, this provides a better response to the empty question objection than employing categories amenable to objects, as Reidentification does.

Chapter 2 explains the methodological commitments of the aspirational view. Other legal philosophers have suggested this view, though its application to the problem of continuity is an innovation of this work. To illustrate, recall Ronald Dworkin's (2008, pp.1-5) distinction between the doctrinal, sociological, taxonomic, and aspirational concepts of law. The doctrinal concept is the concept of law people use to make claims about what the law requires, prohibits, permits, or creates, and unveil assumptions about the kinds of arguments that are relevant in defending such claims (Dworkin, 2008, p.2). Debates about legal content are about the best doctrinal concept. The 'sociological' concept, by contrast, focuses on the institutional features of a distinctive type of social structure (Dworkin, 2008, pp.2-4). Usually, legal systems are discussed here. Nevertheless, there are different ways to analyze these concepts. One of them is to prioritize the sociological concept and think of it as a taxonomic concept, that is, as one that contrasts legal standards with moral, customary, or other kinds of standards (Dworkin, 2008, p.4). I read the Reidentification Approach as presupposing such a concept, as it conceives legal systems' diachronic identity in tandem with a theory about what gives identity or distinctiveness to a legal system. Another way, and the one I favor, is to argue that the doctrinal concept of law figures among the boundaries of the sociological concept (Dworkin, 2008, p.4). Thus, empirical and normative questions should be treated together; that is, we cannot understand a legal system as a distinctive institutional structure unless it makes sense to ask what rights and duties the system recognizes. However, this requires that the institutional structure comply with some requirements: it must produce general, enforceable, clear, and prospective rules, enforced by adjudicative institutions following certain procedures, etc. Therefore, a proper analysis of the doctrinal and sociological concepts of law requires considering what Dworkin calls the aspirational concept, that is, the rule of law. I circumscribe the aspirational view to a thesis concerning what makes a legal system the same over time. From this, we can ask questions like: Is a legal system's ability to assign rights and responsibilities dependent on how much it is compliant with the rule of law? Moreover, if we start from the context in which legal claims, pleadings, accounts, and practices of responsibility occur, we can ask: Is the identity of a legal system over time dependent on how it preserves the Rule of Law? Chapter 2 is the first step in clarifying how the aspirational concept can be translated into an explanation of what gives a legal system its identity over time. The previous questions are an integral part of the explanation to be provided.

As I shall explain, my concern is primarily with legal systems as tokens. I find this appealing because it expresses a bottom-up method, that is, one that begins with ongoing practices and judgments in particular cases and moves beyond only to the degree needed for

relating them and understanding what is at stake (Wilson, 2001, p.4). This seems a sensitive response to the fact that continuity and identity over time become subjects of reflection after major transformations and instability in specific legal systems. The aspirational view is also presented as a more nuanced explanation of the practical perspective of citizens and officials who rely on legal rights and duties to justify claims. Under this approach, the legal point of view can be taken as a rational point of view from which the acts of treating legal norms as valid (justified) can be understood in light of ideals and purposes. The upshot is that when institutions depart from their ideals and purposes, they acquire a different practical significance for those engaged in the legal point of view, losing their continuity with past practices and becoming something else. Further, I draw parallels between the aspirational view and positions advanced in other debates about identity over time, especially personal identity. Accordingly, another goal in this chapter is to make clear how different versions of this view understand the relation between numerical and qualitative identity, with an eye to how moral qualities may or may not affect identity over time.

Chapter 3 considers that the aspirational view can be developed in many different ways. From this, I argue that we cannot account for some important considerations if we do not read it as centered on the rule of law. I begin by elaborating that at the core of the rule of law lies the requirement of mutual subordination to law, which implies that my claim is: a legal system remains the same to the extent it realizes the same conception of mutual subordination to law, that is, to the extent it preserves the same guidance and accountability relations between citizens and rulers. I proceed to assess three alternative readings: state-necessity, efficacious coup d'état, and strict constitutionalism. All of them were introduced when common law courts had to judge the legality of regimes that abrogated the constitutions under which the same courts were constituted. I argue that, though incomplete, strict constitutionalism is the most illuminating thesis. So, we profit from fleshing it out. One promising way to do it is by considering a much more robust thesis, which contends that a legal system remains the same to the extent that it preserves the principles of legality from which it answers the legal subject's question 'But, how can that be law for me?' (Dyzenhaus, 2022, p.2). I argue that strict constitutionalism and the principles of legality thesis are clarified by an account of the rule of law based on guidance and accountability.

Chapter 4 is dedicated to advancing the core of my case for the claim that a legal system remains the same to the extent that it realizes the rule of law. I elaborate on that idea by showing how a conception of the rule of law is made of guidance and accountability relations between citizens and rulers. I distinguish three notions of guidance— rationalistic guidance, guidance as

self-application, and a hybrid model of guidance — to clarify the connection between the rule of law, formal principles of legality, and guidance. The three notions differ in how they conceive the relation between reason-giving and practical reasoning. The upshot is that formal principles of legality define conditions without which citizens cannot understand the reasons legal norms attempt to address and thus exercise guidance as self-application. Second, I warn that one should not confuse rationalistic guidance and guidance as self-application with normative and motivational reasons. I then emphasize second-personal reasons, one type of normative reason that is defined by the deliberative role it can perform, arguing that guidance as self-application presupposes this (Darwall, 2006, p.8). Having introduced second-personal reasons, I submit that formal principles of legality make second-personal legal reasons accessible and that practices of accountability central to the rule of law are nothing more than demands for second-personal legal reasons. After clarifying the meaning of the rule of law, I focus on the relation between a legal system's existence and its diachronic identity to conclude that we should not be content with theories that exclude the point of view of citizens. From this, I address the empty question objection, arguing that the legal subject's question— "But how can that be law for me?"— is only intelligible and can be adequately answered by assuming that legal systems persist in one sense. Hence, identity over time is a concept that performs a function in the discursive context in which legal claims, pleas, reproaches, and accounts are made. More precisely, the identity of a legal system over time is established by delimiting the resources from which one can address the legal subject's question. That being established, we can reassert that: (i) guidance and accountability are the felicity conditions of the reasons that address the legal subject's question; (ii) guidance and accountability are part of the rule of law. All that being provided, a legal system remains the same to the extent that it realizes the rule of law.

Finally, Chapter 5 compares the account provided in the last chapters with Anna Lukina's paper *Making Sense of Evil Law* (2025), Benjamin Spagnolo's book, *The Continuity of Legal Systems in Theory and Practice* (2015), and Li-kung Chen's paper, *The Continuity of a Legal System* (2023). These comparisons allow us to judge whether there are cases of continuity and discontinuity for which the rule of law makes no difference.

Chapter 1: Identity as reidentification

In its most general form, the problem of continuity is about what makes a legal system the same at different times. To avoid the empty question objection — as seen in the previous chapter —one has to show that a legal system's diachronic identity is politically and morally important. The issue is whether there is a significant role for a theory about legal systems' identity over time, such as explaining concepts like coup d'état, revolution, and devolution, and assessing how political action affects institutions.

An important attempt to provide such a theory was made by Joseph Raz, in whose theory we can distinguish two different ways of addressing the problem of continuity:

1) *Type identity*: Legal systems continue as the type of normative system they are to the extent they preserve the features that make them unique institutionalized normative systems (Raz, 1982, p.115 and 1999, pp.132-141);
2) *Token identity*: A non-momentary legal system continues when temporally distinct momentary legal systems are different stages of its development (Raz, 1982, p.81 and 1980, p.187).

Each thesis addresses distinct questions, which can be understood in light of the type/token distinction. As Linda Wetzel (2018, section 1.1) explains, "[t]he distinction between a *type* and its *tokens* is […] one between a general sort of thing and its particular concrete instances". Applied to Law, we can discuss individual laws and legal systems at the type level ("all laws belong to a legal system," "legal systems are institutionalized normative systems") or at the token level ("the traffic law requires you to drive on the left," "the legal system of Brazil") (Ehrenberg, 2016, p.19). As expressed above, the first thesis concerns the continuity of legal systems as the type of normative system they are. That is, what it takes for any legal system to continue being a *legal* system over time. The second thesis concerns the continuity of concrete legal systems: what it takes for, say, the *current Brazilian* legal system to continue being the same system over time.[1]

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[1] Interestingly enough, this distinction has been employed by common law courts tasked with judging the validity of legal orders born out of illegal extra-constitutional usurpations. In *Bhutto v. Chief of Army Staff*, 1977, the Pakistani Supreme Court was careful enough to distinguish a constitutional rupture from discontinuity of law to argue that, once a new legal order was in place, the judiciary retains the important role of reviewing the functioning of a usurper regime. The Court said: [I]f it is assumed that the old Constitution has been completely suppressed or destroyed, *it does not follow that all the judicial concepts and notions of morality and justice have also been destroyed*, simply for the reason that the new Legal Order does not mention anything about them. On the contrary, I find that the Laws (Continuation in Force) Order makes it clear that, subject to certain limitations, Pakistan is to

This distinction does not preclude theoretical efforts to connect both discussions; rather, it provides a starting point to see the intricacies of the problem of continuity. Raz, for instance, presents the continuity of *a* legal system (token) as presupposing an account of what distinguishes legal systems as a *type*. For him, a momentary legal system is a legal system at a particular point in time, while a non-momentary legal system is not situated in a specific time but encompasses different moments. Accordingly, Raz conceives one version of the problem of continuity as "[…] the search for criteria providing a method for determining whether two momentary legal systems are part of one, continuous, legal system" (Raz, 1982, p.81). Under this approach, a partial account of the identity of legal systems as a type must be provided to identify momentary legal systems. Consequently, such an account is necessary for laying out the features that give identity to a specific legal system over time. Moreover, this approach assumes that existing legal systems fulfil the relevant identity criteria. As Raz (1982, p.81) defines it, the problem of continuity concerns "the various ways in which a legal system ceases to exist and is replaced by a new [legal] system." This implies that the problem of continuity only makes sense once there are existing legal systems[2], and we want to investigate whether they can be connected as stages of development of legal systems with a history, that is, that have endured changes without giving room to new legal systems or some other form of governance.

The philosopher committed to that approach investigates whether temporally distinct momentary legal systems are parts of a non-momentary legal system (token identity). We can find a parallel to this position in the theories of personal identity that focus on what Marya Schechtman (1996, p.8) calls "the reidentification question", that is: "what relation must hold between two 'person-stages' (or 'person time-slices') to make them stages or slices of the same person?" Given that last feature, I will call this approach the reidentification approach.[3]

The parallel with theories of personal identity can be further extended to other metaphysical discussions, like the persistence conditions of composite objects. This seems to suggest that the reidentification approach is a version of the unity approach in metaphysics, according to which, by fulfilling certain conditions, a plurality of particulars brings into existence a new, previously non-existent unity, e.g. a composite object (Franken, 2024, pp.13-

be governed as nearly as may be in accordance with the 1973 Constitution, and all laws for the time being in force shall continue. *These provisions clearly indicate that there is no intention to destroy the legal continuity of the country, as distinguished strictly from the Constitutional continuity*." (emphasis added). Cited in: Mahmud, 1994, p.129, note 537.

[2] As we shall see, one difficulty this approach faces is to clarify whether the legal systems that must exist to make the problem of continuity intelligible are momentary or non-momentary.

[3] Sometimes I call it just "Reidentification".

14). We will see in detail how this shows problems with Reidentification as an account of identity over time.

In this chapter, I present the main theoretical commitments of this approach, its merits, and its shortcomings. In the next two sections (1.1 and 1.2), I shall elaborate on the idea that legal systems are unique institutionalized normative systems to highlight the notion of "system" assumed by the reidentification approach. To do that, I compare institutionalized normative systems with other practically relevant normative systems. From this discussion, I also suggest a few guidelines that advocates of the reidentification approach can offer to think of the continuity of legal systems as the *type* of normative systems they are. The third section is dedicated to shedding light on the methodological commitments and theoretical goals of the reidentification approach. One of the upshots of this discussion is elucidating the goal of providing a general and analytical theory of legal systems and its compatibility with similar attempts to investigate the nature of law. Next, the discussion changes from the continuity of legal systems *qua* legal systems or as institutionalized normative systems to the continuity of *a* legal system *as the same* legal system. The distinction between momentary and non-momentary legal systems is then refined and applied to the backward analysis of cases of legal interruption (revolution and coup d'état) and Legal Devolution. In the fifth section, I take issue with the distinction between momentary and non-momentary legal systems. As I try to show, it is flawed in three ways: it is confusing, unclear, and, in trying to reproduce the unity approach in metaphysics, it leads to inconsistent answers to the question of what continuity/persistence conditions are conditions of. Finally, I point out some explanatory routes the reidentification approach calls our attention to but does not pursue fully, given its methodological commitments.

1.1 Normative systems and the different notions of system

As I said above, for the reidentification approach, a partial account of the identity of momentary legal systems must be provided before laying out the features responsible for legal systems' identity over time. Accordingly, a theory of reidentification starts by addressing the continuity of legal systems as a type. So, it focuses on the features that distinguish legal systems from other normative systems. Joseph Raz (1999) defines legal systems as unique institutionalized normative systems. In what follows, I shall analyze each term in this definition. By doing that, we can understand the notion of "system" assumed by the reidentification approach and how it suggests criteria for the continuity of legal systems as a type of normative system.

Let me begin with the idea of a normative system. In the broadest sense, normative systems are groups of norms (Raz, 1999, p.107). Clear examples are the rules of football, the rules for admission to a university, the Brazilian environmental law, the laws of Brazil, Britain, Suriname, and so on. This variety of groups is due to the fact that norms can be grouped by different criteria and for various purposes. Some groups are more interesting than others for those concerned with practical philosophy. Groups of norms are of interest only if their reunion in a group is normatively relevant, that is, if it has normative consequences (Raz, 1999, p.107). With that in mind, we can list at least four types of normative systems: systems of interlocking norms, systems of joint validity, autonomous systems, and institutionalized systems. As said above, the reidentification approach conceives legal systems as institutionalized systems. So, for our purposes, it suffices to characterize the first three types of normative systems in contrast to institutionalized systems and then emphasize the uniqueness of legal systems.

Systems of interlocking norms are sets of internally related norms (Raz, 1999, p.113). A norm is internally related to another when the existence of the one is part of a sufficient condition for the existence of the other or when the content of one norm can be fully explained only by reference to another (Raz, 1999, p.112). To illustrate, imagine that a law confers power on immigration officers to issue or refuse stay permits to foreigners. Another law may impose on them a duty to issue stay permits under some conditions. The latter norm prescribes conduct that can only be described by presupposing a power-conferring norm. These two norms are thus internally related. Similarly, a norm may give the police power over persons if they violate

other norms (Raz, 1999, pp.111-112). Norms that are interrelated in this way have unity and interdependence, forming a normative system (Raz, 1999, p.113). However, they do not necessarily form larger normative systems and thus can be reduced to a small set of internally related norms (Raz, 1999, p.113). In this aspect, they differ from institutionalized systems.

Systems of joint validity consist of norms that share a common justification and that cannot be individually valid, which means that one can only comply with one norm if one complies or intends to comply with all the relevant norms (Raz, 1999, p.114). For instance, normally, there is no point in following one rule of a game unless one follows them all. This is one of the reasons why games form normative systems (Raz, 1999, p.114). For Raz, the main difference between systems of joint validity and institutionalized systems is that the former is analogous to norms that are valid only if practiced. In those cases, a norm may be valid for each of its subjects if practiced or when each subject intends to practice it regularly, or only if all its norm subjects regularly practice it (Raz, 1999, p.114). In contrast, as we will see, under institutionalized systems, there is only a group of norms that is valid because practiced, and it only matters that some officials endorse and practice them (Raz, 1999, p.126).

Finally, autonomous systems are those composed of norms that constitute the reasons for their own validity. In other words, the reason for following these norms cannot be explained independently of the norms themselves (Raz, 1999, p.114). Games are the paradigmatic case here: games are played when people regard winning and avoiding defeat as values; however, what it means to lose or win can only be defined by reference to the rules of the game. At the same time, the values establish the validity of the rules for people who want to win (Raz, 1999, p.121). For Raz (1999, p.148), the difference with institutionalized systems is that the institutions that distinguish the latter exist even when officials do not endorse the values of the system. They can very well follow the rules without having any beliefs about why they are justified in doing so, or for prudential, or even for moral reasons, based on their moral rejection of the system. Accordingly, for the reidentification approach, changes in how much officials value the norms of their system may not be relevant to its identity as an institutional normative system. This does not mean, as we shall see, that official attitudes towards their system are irrelevant for type-identity. Rather, it guides us in distinguishing between the official attitudes that affect identity and those that do not.

1.2 Institutionalized Normative Systems

To explain the features of institutionalized normative systems, it is worth beginning with a definition and then elaborating on the contrasts we anticipated between institutionalized and other normative systems. Institutionalized systems are sets of norms that either (i) set up norm-creating or norm-applying institutions or (ii) are internally related to these (Raz, 1999, pp. 126 and 132).

The first feature worth noting is the common assumption behind the classification of normative systems: normative systems are sets of norms. This is an important commitment underlying the idea of a "system" employed by the reidentification approach and one of the reasons why it offers a general theory of legal systems. I shall talk about methodology later in this chapter. For now, it is important to keep in mind that the defender of the reidentification approach assumes that it is a fact that every law necessarily belongs to a legal system. Accordingly, examining the presuppositions and implications underlying this fact amounts to a theory that claims to be true of all legal systems (Raz, 1980, p.1).

Secondly, institutionalized normative systems are not just a reunion of different sets of interrelated norms. Rather, as pointed out above, they are larger normative systems, and this is so because of the institutions that shape them. So, it must be clarified how the presence of norm-creating or norm-applying institutions turns a set of norms into a normative system (Raz, 1999, p.124). The normative significance of legal systems and other institutionalized normative systems can be analyzed by considering what is conveyed in references to "the law of the community C" or "the rules of C". These expressions refer to the normative system practiced in C, or, which means the same, the normative system in force in C. There would be no need to distinguish an institutionalized normative system from its norms if all norm subjects accepted all norms as binding and guided their behavior accordingly (Raz, 1999, p.124). This is rarely the case. At the same time, there is a difference between a normative system in force today and a legal system that was once in force in the Roman Republic, or one that a revolutionary group tries to establish in a community. So, where lies the difference?

Raz (1999, p.126) agrees with Hart about the conditions under which legal systems exist and extends the same reasoning to other institutionalized normative systems. For Hart (1994, p.116), there are two minimum conditions sufficient and necessary for the existence of a legal

system. First, norm-subjects generally conform to the legal norms. This behavior is compatible with not accepting legal norms as binding and guiding their behavior accordingly. Second, those who occupy the official roles set up by the laws of the system endorse and follow them. To be more precise, they accept those norms as common public standards of official behavior. Nevertheless, as the distinction between institutionalized systems and autonomous systems showed, even though officials accept and practice the relevant norms, they can do that without having any beliefs about why they are justified in doing so, or for prudential, or even for moral reasons, which are based on their moral rejection of the system (Hart,1994, p.203). In sum, one major trait of institutionalized normative systems is that their existence is not the same as all their norms being practiced. Moreover, their existence greatly depends on the activities of officials and institutions that endorse norms for recognizing other rules (Raz, 1999, p.126). This is what distinguishes institutionalized normative systems from systems of joint validity.

1.2.1 Taking stock: normative systems and the continuity of legal systems

Before specifying the relevant institutions and how they relate to the other norms of institutionalized normative systems, I want to suggest some guidelines that an advocate of the reidentification approach can pursue after the comparison between normative systems. In brief, the guidelines below help us understand the conditions for the continuity of legal systems as a type of institutionalized normative system.

The first guideline is about legal systems as normative systems. If there are changes that turn a legal system into a haphazard collection of norms without any structure or unity, it is no longer a legal system because there is no system. The second guideline is that if an advocate of the reidentification approach wants to ascertain the identity and continuity of a legal system as a set of norms, she must have criteria for identifying the norms that belong to it and how they are related to the structural features of a legal system. As a type of institutionalized normative system, the norms of a legal system are identified by their relation to the institutions that characterize them (Raz, 1999, pp.126-127). This is only possible because the institutions create and apply norms, and the other norms of the system are properly related to them. The continuity of a legal system as a legal system is compromised whenever those conditions are undermined. Finally, given the two conditions for the existence of institutionalized normative systems—general compliance from norm-subjects and the endorsement of fundamental norms by

officials—, the continuity of legal systems as the type they are is tied to the continuity of general conformity by subjects and acceptance by legal authorities.

Up to this point, thinking of the continuity of legal systems as a type of normative system is not something clearly distinct from thinking of the conditions for their existence. In fact, we are told that the conditions for the existence of legal systems provide criteria for establishing their identity as a type of normative system. It is not until we change the subject to the continuity of legal systems as tokens that we can properly relate identity over time with practical concerns and address the empty question objection. Addressing the empty question objection requires not restricting ourselves to comparing types of normative systems. After all, this objection is pressing when the question is the continuity of *a* legal system (token); that is, how can we tell whether legal system X in t1 is the same legal system in t2? This becomes an empty question when a decisive answer is unavailable, not for lack of pertinent information, but simply because there is no fact of the matter and any description suffices (Parfit, 1984, p.260 and Schechtman, 2014, p.31). We will be able to judge whether the criteria provided by Reidentification lead to that result once we look carefully at the distinction between momentary and non-momentary legal systems. But one should note that we cannot even begin to evaluate the merits of Reidentification's response to the empty question if we stop at the discussion about types of normative systems.

Before considering the momentary/non-momentary distinction, I will complete my exposition by pointing out how Reidentification distinguishes legal systems from other institutionalized normative systems. So, I will analyze what official roles matter for institutionalized normative systems and what attitude of acceptance we are told officials display in a legal system. After this, I conclude the discussion about type-identity for the reidentification approach by examining its methodological commitments and implications.

1.2.2 Legal systems, systems of complete discretion, and the legal point of view.

Recall that institutionalized normative systems are sets of norms that either (i) set up norm-creating or norm-applying institutions or (ii) are internally related to these (Raz, 1999, pp. 126 and 132). Two conditions must be fulfilled for their existence: norms subjects are generally compliant, and officials display an attitude of endorsement of the system (Hart, 1994, p.116).

When differentiating types of normative systems, one needs to look at institutionalized systems with an eye to how the relevant institutions endorse the norms they create or apply. The first step is to define the appropriate institutions for better analysis. Joseph Raz prioritizes one type of norm-applying institution—primary organs— but other versions of the reidentification approach can be proposed by prioritizing other norm-applying institutions or even norm-creating institutions. Since Raz addresses the problems we are concerned with very clearly, I shall focus on his preferred response but leave it open whether the argument below precludes other versions of the reidentification approach.

Raz's argument begins by investigating how norm-applying institutions illuminate the main features of institutionalized systems. The argument starts from the conditions for the existence of institutionalized systems (Raz, 1999, p.131). Again, we are told institutionalized systems can be in force even when their norms are not endorsed and practiced by everyone. It only matters, so the argument goes, that those norms are endorsed and practiced by some institutions yet to be specified. But the defender of the reidentification approach does not stop at this point. He adds that when in force, institutionalized systems affect their norm-subjects. Consequently, we cannot say an institutionalized system is in force simply because it is acceptable to those who lay down its rules. The best way of explaining both aspects is to consider that norm-applying institutions ensure that the norms will be applied to subjects. So, by focusing on norm-applying institutions, Raz (1999, p.131) is trying to rely on facts that are relevant to the behavior of the norm-subjects, even when they do not accept the norms to which they are subject.

Among the norm-applying organs, however, one should "try to identify a subclass of norm-applying institutions […] the presence of which is necessary in all institutionalized normative systems" (Raz, 1999, p. 133). For Raz, primary organs qualify as such. Primary norm-applying organs are institutions (a) with the power to determine the normative situation

of specified individuals, (b) that are required to exercise these powers by applying existing norms, and (c) whose decisions are binding even when wrong (Raz, 1999, p.136). In other words, primary norm-applying organs are those with the power to make an *authoritative*[4] determination of people's rights and duties (Raz, 1999, p.134-135). Despite some hesitance,[5] Raz seems to associate them with courts, and I shall proceed that way.

Focusing on primary norm-applying organs allows for discussing the attitude officials display toward the norms of institutionalized systems. This attitude can be understood by comparing normative systems centered on primary organs with a hypothetical system based on a different dispute-settling method. Call this alternative a system of complete discretion. The defining characteristic of a system of complete discretion is that its tribunals decide cases solely based on what they take to be all things considered valid reasons (Raz, 1999, p.138). So, they do not apply legislated, customary, or any other standards, nor do they have to follow their own precedents. Because of that, such a system does not provide any guidance to individuals about the behavior that entitles them to a decision in their favor. After all, "[d]ifferent tribunals may believe in the validity of different reasons. The same tribunal may change its mind at any time. There is no requirement of consistency over time imposed on the tribunals, and litigation before them always involves, at least potentially, questions of ultimate values" (Raz, 1999, p.138). This stands in contrast to legal and similar systems, which contain norms determining the rights and duties of individuals that primary institutions are bound to apply.[6] Consequently, institutionalized systems centered on primary organs guide individuals as to their rights and duties before the primary organs (Raz, 1999, p.138). By the same token, institutionalized systems centered on primary organs give rise to evaluations from the point of view of the system (from a legal point of view, etc.). That is, evaluations based on the standards that the primary organs of the system are bound to apply (Raz, 1999, p.142). We are talking about systems that

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[4] Many readers may know Raz for his theory of authority. Originally, in the passage quoted above, "authoritative" is a term employed assuming his account of authority. For Raz, authority is a practical concept. This means that questions of who has authority over whom bear on what one ought to do. More specifically, Raz thinks authority is the power to create a special kind of reason called a "protected reason." A protected reason is a reason for an agent to act in a certain way without regard to other reasons for and against doing so. Nevertheless, even if one disagrees with Raz on that matter, there is still some room to accept Reidentification as a promising approach to the problem of continuity. For this reason, I did not dwell on Raz's theory of authority. For more details on that topic, see: Raz, 1982, pp.9-40 and Postema, 2011, pp. 353-378.

[5] See: Raz, 1999 [1ªed. 1975], p.136.

[6] Over the years, Raz has qualified his contention that courts are duty-bound to apply the law, giving more emphasis to straightforward moral reasoning. He thus introduces the distinction between (a) reasoning about the law—that is, reasoning that attempts to establish the content of the law—and (b) reasoning according to law—that is, reasoning that seeks to establish how the cases should be settled. For a clear exposition of this change, see: Postema, 2011, pp.380-388. For my exposition, I stick to the first formulation, which I believe is more promising for thinking of the identity of legal systems.

contain norms guiding behavior and institutions for evaluating and judging behavior. Moreover, the evaluation is based on the very same norms that guide behavior (Raz, 1999, p.139). This evaluation amounts to acting as if the norms of the system were valid (justified), referring to them as valid, and applying them to particular cases (Raz, 1982, p.142).

To explain how this plays out for legal systems, Raz introduces the legal point of view. We are told that this attitude is not the same as considering law as exhaustive of personal morality or law to be just. Rather, we should understand this attitude as characteristic of officials, lawyers, and practitioners who adopt and express a professional point of view (Raz, 1982, pp. 142-143). So, we are told that judging what ought to be done from a certain point of view is just asserting what is the case from the relevant point of view as if it were valid (Raz, 1982, p.157).[7] Accordingly, a judgment from a point of view is only a partial judgment of what ought to be done, and thus a judgment from the legal point of view is only a judgment of what ought to be done according to law (Raz, 1999, p.143). So, legal systems can be distinguished by their characteristic point of view. This point of view can be fully understood only by considering that legal systems aim to provide the general framework for the conduct of all aspects of social life and claim authority to regulate other institutionalized systems (Raz, 1999, pp.150-151). The content of these claims and the conditions for their correctness are beyond the purposes of this work.

Finally, when it comes to legal systems, the legal point of view is important for continuity in two aspects: it helps to establish momentary identity and provides one last guideline about the continuity of legal systems as a type of institutionalized normative system. As for momentary identity, the introduction of primary organs affects the criterion for membership in the system, given that the rules of a legal system are identified by their relation to the institutions that characterize them (Raz, 1999, p.126-127). At the outset, one may think this means that a legal system must be regarded as containing only those norms that its primary organs are bound to apply (Raz, 1999, p.142). However, a defender of the reidentification approach might ponder that primary organs also recognize the applicability of norms they are not under a duty to apply, but that allow for the maintenance and support of social groups.

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[7] Raz further details the legal point of view in ways that I believe are consequences of his theory of practical reason. I do not think those commitments are required to defend the Reidentification. So, I avoid exploring them in depth in the main text. One should note that, for him, the legal point of view and the point of view of any other institutionalized system are exclusionary points of view. See Raz, 1999, p. 145. This means that anyone adopting that point of view "both regards his judgment as based on a partial assessment of the valid reasons and as justifying action." In other words, "he regards himself as justified in acting on some reasons to the exclusion of others." So, "though it is true that judgment from the legal point of view is a partial and incomplete judgement, it serves as a basis for action because this point of view includes an exclusionary reason requiring one not to act on reasons which do not belong to it."

Examples are the upholding and enforcement of contracts, agreements, rules, and customs of individuals and associations, and of rules for solving conflicts between the laws of the land and laws of other countries (Raz, 1999, p.153). The conclusion is that a legal system must be regarded as containing all the norms that its primary organs are bound to apply and that they recognize as binding. Moreover, the primary organs that are to be regarded as belonging to one system are those that mutually recognize their determinations as binding (Raz, 1999, p.147).[8]

All this implies that if a legal system changes to the point its officials no longer recognize themselves as bound by norms, it is no longer a legal system but something else—perhaps a system of complete discretion.[9] Moreover, this attitude of mutual recognition between officials suggests that the criteria of type-identity over time rest on relations internal to institutions. If those relations change but not to the point of changing the type of normative system in force, there is, at best, a change of tokens, that is, a legal system x becoming a legal system y. Similarly, if there are changes in a legal system but no changes that affect the pivotal relations internal to institutions, the legal system continues. Perhaps this is the route a defender of the reidentification approach should pursue. Of course, there will be a need to explain what this mutual recognition amounts to. However, we will see that the use of the momentary/non-momentary distinction does not address how the legal point of view is maintained or jeopardized over time, not even how legal officials recognize the status of their peers over time. This is a direct consequence of the methodological commitments and the concept of law with which Reidentification is more compatible. Now is the time to address those methodological matters.

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[8] Raz talks about primary organs that mutually recognize the authoritativeness of their determinations. For reasons similar to those presented in the previous note, I avoid using that term.

[9] Hart illustrates something along these lines when talking about a game of score's discretion. See: Hart, 1994, pp.141-145. However, note that in that example, what changes a game like cricket or baseball to score's discretion is the player's tolerance with bizarre decisions by the official scorer. Ibid. p. 144.

1.3 Methodological features of the reidentification approach

The previous discussion shows that the reidentification approach requires a clear account of what distinguishes legal systems from other normative systems before discussing the identity of specific legal systems over time. This two-step strategy[10] implies that the methodology for studying the continuity of legal systems as tokens is a consequence of how one discusses the identity of legal systems as a type. For this reason, I elaborate on the methodological features implicit in the previous sections before working out how the reidentification approach thinks of continuity.

As I mentioned before, the comparison with other normative systems starts from the assumption that every law necessarily belongs to a legal system (Raz, 1980, p.1). Alternatively, we are told that the existence of a system of laws entails the existence of the laws belonging to it (Raz, 1980, p.45). Examining the presuppositions and implications underlying these facts leads to the study of the systematic nature of law (Raz, 1980, p.1). The continuity of legal systems as a type of normative system is part of a broader inquiry: the study of the systematic nature of law, which in turn is a significant part of the inquiry into the nature of law. The connection between these investigations becomes clear once we see the implications of conceiving legal systems as institutionalized normative systems, as Reidentification does.

Again, as a type of institutionalized normative system, the rules of a legal system are identified by their relation to the institutions that characterize them (Raz, 1999, pp.126-127). This relation can be between officials and the norms they are bound to apply, given their endorsement of other rules—i.e., rules of recognition— or between officials and the norms they

[10] This strategy is strikingly similar to how Robert Brandom characterizes Carnap's idea of the relation between the institution and application of conceptual norms. According to that reading, Carnap thinks that institution and application "are distinct, sequential phases in a process requiring both. First, one fixes the contents or meanings of one's concepts, and then one looks to see which applications of them are correct, given those meanings." Similarly, "Defining a language is associating meanings with expressions. Then, and only then, the language is available to formulate a theory, by finding out which expressions are made true by the world, given their meanings." Likewise, when it comes to legal systems, Reidentification proposes that we first have a clear grasp of the concept of legal systems, policing the boundaries between them and other normative systems; secondly, we examine how our concept fares in explaining periods of transition and apparent discontinuity in the relevant legal system. Brandom ascribes to Quine an alternative model, which rejects a strict separation between the institution and application of conceptual norms. For this second model, there is only one thing we do with natural languages: use them to reason and make claims. Thus, all there is to make our expressions meaningful is the use we make of them in reasoning and judging. The version of the aspirational view I develop resonates with this second model. Still, a complete argument for these semantic commitments is beyond the scope of this work, which only addresses one topic in the theory of legal systems. For a more detailed account, see: Brandom, 2014, pp. 22-23.

have recognized as applicable. In each case, there is the assumption that legal norms and the structure for their use can be traced to an action or a series of actions by the relevant institutions. Because of that, we are told discussions about the structure, content, and continuity of legal systems revolve around factual questions, on issues susceptible to objective determinations to which one's moral or political views are essentially irrelevant (Raz, 1982, p.152 and Raz, 1999, pp.164-165). Briefly, the study of the systematic nature of law is considered to be a descriptive task. But how can we tell which description is more accurate from the perspective of the reidentification approach? The goal is to provide a general and analytical theory of legal systems. General because it claims to be true for all legal systems, and analytical because it attempts to elucidate the concept of a legal system (Raz, 1980, p.1). In other words, the goal is to provide propositions about legal systems that are necessarily true and that always explain the distinctiveness of legal systems (Raz, 2009, p.17).

Having this theoretical goal in mind, a defender of the reidentification approach proposes criteria that single out legal systems as a special sort of social institution, an institution to be found as an important component of many social systems and that differs significantly from other social institutions (Raz, 1999, p.165). The outcome is a theory centered on the notion of identity that can be judged by how precisely it explains our concept of "Legal System." This assessment assumes that, despite not being reducible to the nature of the things of which they are concepts, concepts help us understand the nature of things. The reason for this is that concepts "are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other." (Raz, 2009, p.19). So, successful theories must unveil the criteria by which we use the concept of 'Legal System' "to mark a social institution with which we are all, in various ways, and to various degrees, familiar and that occupies a central role in our understanding of society" (Raz, 2009, p.31). If that is accomplished, the theory is adequately analytical and general by explaining an institution designated by a local concept—Legal System—but which can exist even in societies that do not have this concept (Raz, 2009, pp.38 and 41).

Working up a descriptive, general, and analytical theory of legal systems, which accounts for the continuity of legal systems as a type, is compatible with contemporary versions of legal positivism. Of course, what this label means is far from consensual, but representative versions are compatible with the reidentification approach. By legal positivism, we can understand the theory that claims that "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits" (Gardner, 2012, p.19). Or, in an even narrower version, the legal positivist argues that:

"In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)" (Gardner, 2012, p.21). Whatever the version, one should note the emphasis on the action of legal institutions and the goal of providing a general descriptive account of their importance to legal systems. This makes legal positivism compatible with the reidentification approach's concern with explaining law as a type of normative system. Nevertheless, nothing has been said so far about what Reidentification says about the continuity of specific legal systems (tokens) and whether what it says about tokens is compatible with legal positivism. For now, it is an open question whether a legal positivist can adhere to reidentification only regarding the continuity of legal systems as a type while rejecting it as an account of the continuity of legal systems as tokens.

1.4 Momentary and non-momentary identity applied

My goal in this section is to elaborate on the distinction between momentary and non-momentary identity, explaining its meaning and role in addressing some of the practical concerns presented in the introduction. The first thing to notice is that from now on, the discussion is not about the continuity of legal systems *qua* legal systems or institutionalized normative systems. Rather, it is about the continuity of *a* legal system *as the same* legal system. This assumes that a single legal system can have different stages of development over time. The distinction between momentary and non-momentary legal systems aims to explain how that plays out. Having a clear grasp of the distinction and its uses, I argue in the next section that it should be abandoned for being distracting, unclear, and inconsistent.

For Joseph Raz (1982, p.79), the momentary identity of a legal system "is found in the criterion or set of criteria that determines which laws are part of the system and which are not". In other words, momentary identity is equated to the question of the scope of a legal system (Raz, 1982, pp. 81 and 82). Since the reidentification approach considers legal systems to be institutionalized systems, it claims that the norms of a legal system are identified by their relation to characteristic legal institutions (Raz, 1999, pp. 126-127). Non-momentary identity is established by considering the constituting features of those institutions and what they maintain despite changes over time. In other words, the question of continuity is framed as: to what extent legal changes affect the identity-making features of existing legal systems? (Raz,

1982, pp.80-81). We can have a clearer grasp of what that means for Reidentification by looking at how it engages with some of the practical concerns we listed in the introduction.

One important way it does so is by a backward-looking investigation into revolutions, *coups d'état*, and enemy occupation. Those questions are problems about the relationship between Law and State because it is assumed that (1) the end of a state is the end of its legal system[11] and (2) a law that is not a law of a state is not part of its legal system[12] (Raz 1982, p.99). Given that (3) a coup d'état and enemy occupations are menaces to the integrity of a State, (4) one way of knowing how destructive those events were in a given case is to ask whether the criteria of validity endorsed by a legal system's primary organs apply to norms created during that period. We are told that if the validity criteria can be thus extended, then identity over time holds.

The backward aspect of Legal Devolution suggests one more case in which one would benefit from the same approach. We seem interested in looking back to know whether a new *non-momentary legal system* had emerged from another. In other words, we want to know whether a break in continuity gave rise to two independent legal systems. The relationship between Law and State comes back again. As I said above, given that legal systems are institutionalized systems, it is assumed that the end of a state is the end of its legal system. By the same token, we want to know how the creation of a new legal system is tied to a newborn state. The reidentification approach answers that a legal system's criteria of validity may change, but are always tied to the institutions of the state to which it belongs.

The last practical concern – and the outlined approach to it – is recurrent in continuity debates. For instance, Finnis and Raz criticize Kelsen's theory for its inability to account for the independence of legal systems whose origins go back to lawful devolution. For Kelsen (1945, pp.115-6), momentary legal systems are part of the same non-momentary legal system when their creation is authorized by the "historically first constitution" or by a constitution that was thus authorized. Raz (1980, p.108) reads Kelsen as accepting a version of the principle of origin, according to which "the membership of laws in a system, and the identity of the system, are completely determined by the origin of the laws" (Raz, 1980, p.18). Finnis (2011a, p.407) seems to share the same diagnosis in attributing to Kelsen the contention that "every illegal change in the constitution of a state is a revolution, and that a revolution overturns the entire

[11] This results from considering legal systems as institutionalized normative systems.
[12] This contention is compatible with norms of private international law, but leaves unclear how other norms of international and customary law fit this framework. I briefly come back to that in commenting on the methodological limitations of Reidentification. For a more substantial treatment of the issue, see Bustamante, 2024, pp. 479–510 and Bustamante, 2023, pp.117-156.

legal order, replacing it with a new system." The problem is that one cannot adopt such a position without denying the independence of legal systems that are consequences of legal devolution and not unlawful revolution[13] (Finnis, 2011a, pp.412-415 and Raz, 1980, p.103-108). This is counterintuitive for the defender of Reidentification, since it denies the independence of legal systems that work just like any other independent legal system. Thus, the debate about legal devolution reveals that chains of validity are incapable of providing identity criteria (Raz, 1980, p.105).

The paragraphs above then show the explanatory strength of the reidentification approach. We can then summarize its force by recalling all it has to say about the continuity of legal systems. Legal systems can either continue as the type of normative systems they are— institutionalized normative systems— or continue as the same legal systems with distinct stages of development— the object of the momentary/non-momentary distinction. We saw in sections 1.1 and 1.2 that the reidentification approach posits four guidelines for understanding the continuity of legal systems as the type of normative systems they are. Then, we saw how this approach deals with two cases in which there are doubts about the continuity of a legal system as the same legal systems: first, the backward analysis of cases of legal interruption (revolution and coup d'état). Second, cases concerning the backward aspect of Legal Devolution, that is, situations in which we are interested in looking back to know whether a new non-momentary legal system had emerged from another. Nonetheless, the reidentification approach employs notions that lead to confusion. Consequently, the notion of diachronic identity it assumes is bound to be unresponsive to practical concerns.

1.**5** Some problems with the momentary/non-momentary distinction

All my objections to Reidentification take issue with the momentary/non-momentary distinction. I believe this is where the approach is most vulnerable as a theory of identity over time. I have three criticisms of the use of these concepts. First, it is confusing, since it leads us

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[13] In thinking about those matters, Finnis asks: "Can the identity of a legal system be changed without violating some existing rule?" More concretely, "save by way of a breach of a former constitution, how can the Pakistani legal system have managed to separate from the Imperial (British) legal system?" If there was not a breach of a former constitution, "[c]ould the Imperial Parliament reassert its authority over Pakistan?". Finnis thinks Kelsen would reply negatively to the first question and thus positively to the last one. See his Finnis, 2011, p.414. Finnis further acknowledges that other theorists, like Alf Ross, tried to avoid Kelsen's conclusion "by arguing that a constitution […] cannot be wholly replaced in accordance with its own stipulations". Therefore, "purported replacements are really 'legal camouflage' for a 'peaceful revolution' in which the replacement is a break with the past, accomplished by 'universal consent', or transfer of allegiance". See Ibid., p.415.

to other debates before addressing the problem of continuity. Second, a key term for The Reidentification Approach—non-momentary legal system— is unclear and unstable, given the goal of providing a general and analytical theory of legal systems. Third, the distinction between momentary and non-momentary identity leads to inconsistent answers to the metaphysical question of what continuity/persistence conditions are conditions of.

1.5.1 It is a distraction from debates about continuity

As it is, Reidentification requires an account of type-identity before an explanation of token-identity is offered. This may sidetrack us to another debate, i.e., the debate about legal content, before we clearly understand identity over time (either as type or as token-identity). For instance, one topic of dispute in that debate is whether Raz (1982, p.81) was correct in suggesting that legal philosophers must provide criteria for a complete description of any legal system. A description of a legal system is given in terms of the set of normative statements that are true only by virtue of the norms that belong to the system. A complete description refers to all the norms that belong to a given system (Raz, 1982, pp.80-1). The relevance of these contentions for the problem of continuity is that Raz considers that the momentary identity of a legal system "is found in the criterion or set of criteria that determines which laws are part of the system and which are not" (1982, p.79). Critics contest the possibility of identifying beforehand all the norms that belong to a legal system, because, for them, we can only ascertain legal norms by engaging in arguments about institutional responsibility and its specification in doctrines of precedent and statutory interpretation (Dworkin, 1977, pp.40-41 and Bustamante, 2024, p.491). We are told these matters require interpretation in light of the situation to which the norms are relevant. For our purposes, however, I will not delve into this debate and follow Gerald Postema's (2004, p.207) suggestion that we can sidestep such a disagreement for a moment and seek a different path, one that starts from questions concerning the legal system's continuity and identity over time. However, this does not amount to denying possible intersections between the debate about legal content and theories of legal systems, but rather to choosing a mode of presentation that gives pride of place to one topic, i.e., legal systems' identity over time. I think this provides the first reason for rejecting the term "momentary legal system" and consequently the use of "non-momentary legal system".

1.5.2 It is unclear and does not respond to the empty question objection

Second, the distinction between momentary and non-momentary legal systems is far from clear, as I argue below. Consequently, its relevance is not evident, making the theory that uses it vulnerable to the empty question objection. As presented in the introduction, the empty question objection tells us that the practical concerns associated with identity can be properly explained by continuous facts and relations, even when we do not know if identity over time holds. I tried to show how the reidentification approach might help address the backward aspects of legal interruption and devolution. However, one might wonder what work the notion of a "non-momentary" legal system is doing in the explanation. Without clarity in that matter, one could say that a legal system's non-momentary identity is an empty question in one of two senses. First, questions are empty when they have no true answers, so we can answer them as we wish. Second, questions are empty when they do not describe different possibilities, any of which might be true, and one which must be true. Is that actually the case? An analysis of how Raz understood the idea of a non-momentary legal system over the years might help confirm or negate this objection.

One traditional way of thinking about the problem of continuity is asking whether the legal system L is the same legal system at both t1 and t2. This is not what the distinction between momentary and non-momentary legal systems expresses. Instead, it is introduced to ascertain whether two momentary legal systems, *say Lm1* and *Lm2,* are part of a non-momentary legal system *Lnm.* But what is a non-momentary legal system?[14] As I show below, Raz has explained that idea in different ways over the years, trying to reconcile it with his methodological commitments to a general and analytical theory. These different formulations left one wondering whether the notion of a non-momentary system is really helpful and whether we would not do better in presenting the problem of continuity more simply.

[14] There is one possible answer Raz does not formulate which I mention briefly here. Some might conceive non-momentary legal systems as ontologically ideal entities. Ontologically ideal entities are immaterial. Numbers, stories, and games are familiar examples. Even though they are things that may have material manifestations in books or on digital screens, they are distinct from these. I take this general notion from: Kaehler, 2024, pp.214-219. Conceived along these lines, non-momentary legal systems are abstract, do not have physical properties, are not empirically identifiable, and, what is crucial, they persist over time without gradually deteriorating. This would stand in contrast with empirically identifiable momentary legal systems. One should note this is not how Raz thinks of the relation between non-momentary and momentary legal systems. Moreover, this would also require arguing that non-momentary legal systems are not dependent on any space, which defies common assumptions about the identity of legal systems. I think the latter is a good reason to reject such an idea, but see my comment in note 6 about the position called animalism in personal identity and ethics.

The first formulation is a reaction to what Finnis and Raz diagnosed as problematic in Kelsen's theory. Finnis and Raz have suggested that we should move our attention from the highest legal norms in a hierarchy to the social practices that make them possible. For Raz (1980, p.189), "The identity of legal systems depends on the identity of the social forms to which they belong." As for Finnis (2011a, p.428), "[…] 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".

At face value, this seems like an acceptance of something like Hart's rule of recognition. Remember that for such a rule to exist in a society, officials must engage in a general practice of authoritatively identifying legal rules. Using Raz's terminology, one could say that one necessary condition for momentary legal systems being part of one continuing legal system is: the changes that had occurred between them occurred in conformity to the rules of change identified by the rule of recognition (Barber, 2006, p.317). Even if this is correct, Hart does not give much thought to the diachronic dimension. Accordingly, he did not address the following question: which changes are consistent with the continued existence of the rule of recognition, and which changes compel the admission that a new rule has replaced the old one? (Raz, 1982, p.98; Finnis, 2011a, p.428 and Postema, 2004, p.222-23). Hart did not provide an answer to this question because he did not ask it (Raz, 1982, p.98). We must thus look somewhere else to understand what Raz[15] means by a non-momentary legal system.

In his earliest consideration of the matter, Raz (1980, p.189) took the dependence of non-momentary legal systems on social forms as a reason to confine his investigation to the identity of momentary systems. As we said when commenting on methodology, the goal was to provide a general and analytical theory of legal systems. This led Raz to strictly separate legal philosophy from the sociology of law; for him, "[s]ociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies [while l]egal philosophy has to be content with those few features which all legal systems necessarily possess" (Raz, 1982, p.104). Therefore, if one can only understand the characteristics that are of the essence of legal systems by studying momentary identity, that is all one must study as a legal philosopher. Notice that, if that were the case, non-momentary identity could easily become an empty question. Non-momentary identity would depend solely on empirical facts, and empirical facts are often indeterminate in their significance. That being the case, if we have

[15] I think the attitude of endorsement that, according to Hart and Raz, officials display to the rule of recognition is a promising idea for explaining continuity under The Reidentification approach. However, this is not what Raz had in mind. So, I explore this possibility after the limits of his theory are adequately exposed.

enough empirical information to understand the practical issues at stake but do not know whether non-momentary identity holds, non-momentary identity becomes an empty question. However, the disagreement Raz had with Kelsen about legal devolution is not about an empirical matter. Rather, it is about how a proper understanding of a practical issue precludes the adoption of certain notions of identity over time— one based on the principle of origin or chains of validity.

One could ponder that a better reading of Raz is that, for him, continuity, identity over time, and non-momentary legal systems are jurisprudential topics, but peripheral and exceptional. Legal devolution and the practical concerns we listed in the introduction would be, as Hart (1994, p.118) characterizes, breakdowns in the complex congruent practice referred to when we contend a legal system exists. They would be explained only after the nature of legal systems is sufficiently clear. The multiple normative changes within a legal system are accounted for when they do not seem to affect identity; when they appear to do so, we are told we are going beyond standard cases. As such, the notion of a non-momentary legal system has a distinctive role since it explains some breakdowns in our normal assumptions. Conceived along these lines, that concept would not guide us in establishing when identity holds over time but would name a situation in which a normal assumption— legal systems have identities— is no longer in place. Once again, the empty question objection seems correct. One problem is that our list of practical concerns suggests that facts about identity over time are important to legal subjects and officials, and not just peripheral. Therefore, a theory of the identity of legal systems should make sense of this, or, if it denies this task altogether, it should at least make its goals clearer.

Another option is also provided by Raz (1982, p.100) when he thinks through the relationship between legal systems and the state. For him, (1) a state is the political organization of a society. This implies it is a political system. (2) The legal system is only part of the norms constituting the political system; most political systems include numerous nonlegal norms.[16] (3) The continuity of a legal system is tied to the continuity of the political system. From that, we might conclude that the non-momentary legal system is affected by the non-legal norms that happen to form part of the political system concerned. Two details about this account matter for our purposes. First, "[…] continuity depends on the interaction of legal and non-legal norms,

[16] For instance, in democratic regimes it is not just common practice but often a matter of significant importance that losing candidates recognize the result of the election they lost and support peaceful transition to the new administration.

and the extent and manner of their change. Second, "[…] among the legal norms concerned some are more relevant than others" (Raz, 1982, p.100).

This is a substantial change from previous formulations. At the same time, the proposal still does not answer why we need the concept of a "non-momentary legal system". Moreover, it also leaves open which non-legal norms are relevant and how they interact with the legal norms that give identity to legal systems according to the reidentification approach— those that create and structure primary organs. One cannot help but wonder whether those non-legal norms have a diachronic aspect and how that plays out. In other words, it is not clear how Raz's account does not suffer from the problem he points out in the rule of recognition and from the accusation that it is trying to answer an empty question.

Also, it is striking how Raz (1982, p.99) speaks of the state without thinking much about International Law. He takes for granted that Kelsen's putative mistake about lawful devolution is enough to prove that the state is not a legal construct. However, more argument seems necessary to establish that.[17] Someone interested in the reidentification approach can start by filling out those gaps.

1.5.3. It is inconsistent with metaphysical accounts of persistence/continuity

The third and last objection to the reidentification approach is that the momentary/non-momentary legal system distinction is not just confusing for the lack of clarity of its terms, but it also provides a bad metaphysical account of diachronic identity. The end result is an incoherent answer to the metaphysical question of what continuity/persistence conditions are conditions of. Generally speaking, any physical object has a trajectory that stretches over a period of time, a trajectory we can think of as comprised of a temporal succession of momentary stages. Nevertheless, not just any succession of object stages corresponds to a single persisting object; some do, and some do not. Object stages only add up to a single persisting object when they are related in some special way. An account of their identity over time aims to establish that (Franken, 2024, pp.12-13). Applied to legal systems, this reasoning resonates with Raz's understanding of the problem of continuity: a non-momentary legal system stretches over time as a temporal succession of momentary legal systems. Accordingly, not any succession of momentary legal systems amounts to a non-momentary legal system, and the legal philosopher,

[17] For more on Kelsen's theory of international law, see Bustamante, 2024, pp.494-510.

at least for the reidentification approach, must provide criteria for distinguishing when this is so.

But what kind of answer are we looking for when facing such a problem? In metaphysics, one answer to the problem of the continuity/persistence of objects is the unity approach (Franken, 2024, p.12). According to the unity approach, persistence conditions are conditions of temporal unity, which means that an object's persistence conditions are necessarily correlated with this object's sort (Franken, 2024, p.13). To illustrate with personal identity, for person-stages to compose a person, they must be temporally interrelated in ways specific to personhood, which might be distinct from how the temporal stages of books relate to each other over time. Moreover, the unity approach assumes that, by fulfilling certain conditions, a plurality of particulars brings into existence a new, previously non-existent unity, e.g. a composite object (Franken, 2024, pp.13-14). Since the parts of this composition occupy distinct moments, an object's conditions of composition amount to its conditions of persistence. Moreover, and most importantly, the object's conditions of persistence are, at once, the (complete or partial) conditions of this object's *existence*. An object's persistence conditions are (partial) conditions of this object's existence parts (Franken, 2024, pp.13-14). Perhaps it can be thought that the momentary/non-momentary distinction assumes the unity approach, but I argue it cannot do that without falling into contradiction.

At the outset, this may seem the right way of reading Raz's contention that the problem of continuity is about knowing whether two momentary legal systems are part of a non-momentary legal system. That is, a non-momentary legal system would not exist before temporally distinct momentary legal systems relate to each other in ways relevant to the nature of a non-momentary legal system. If that is the case, the answer to the problem of continuity also defines the conditions for the existence of non-momentary legal systems. However, the unity approach has other commitments that conflict with the momentary/non-momentary distinction.

Dirk Franken (2024, p.22) warns that the explanatory power of the unity approach is clear for explaining events but not so for explaining objects. Whatever the merits of that qualification, the unity approach's main tenets are different from the reidentification approach. Think of a party that consists of the following sequence of events: arrival and greeting of the guests, first course, main course, drinking and chatting, and farewell. Suppose this sequence is essential for dinner parties as compositions. This temporal structure has some important features. First, the shorter events composing this structure are themselves (temporally) composed of various shorter events. Second, the events realizing the structure vary in their

kinds and, presumably, stand in different relations to each other. Third, the realization of the temporal structure does not allow for the continuous repetition of specific kinds of components or of specific substructures. The second and the third features are incompatible with the idea of temporally distinct momentary legal systems (Lsx at t1, Lsy at t2…). After all, we are talking about a sequence that is a continuous repetition of the same kind, i.e., momentary legal systems. Accordingly, momentary legal systems cannot be related in ways that form a composition.

So, what is a non-momentary legal system if not a new entity brought about by composition? Is it something that already exists, and whose persistence/continuity is identified in stages named by the concept of momentary legal systems? Once we distinguish the conditions of existence of something from its conditions of persistence, we have to admit that something may exist and not persist (Franken, 2024, pp.20-21). However, by definition, existing without persisting is impossible for what Raz calls non-momentary legal systems. Therefore, in the absence of a clear and coherent answer, it would be better for us to leave this notion aside.

The cause of this bad metaphysical explanation is framing the identity of a legal system as analogous to the persistence of an object.[18] If we assume that the best way to explain the nature of social phenomena is by elucidating their concepts, we can ask whether, under litmus conditions, we can still call a given legal system the same as we had under normal conditions. This amounts to conceiving "metaphysical modal claims […] as object-language correlates of the constitutive semantic rules governing our terms or concepts" (Thomasson,2017, pp.105-106). For Reidentification, a sound theory of legal systems engages in this conceptual work, combined with empirical work or the empirical results of the sciences (Thomasson, 2017, p.107). Nonetheless, as Amy Thomasson warns, even if we want "to limit the proper work of metaphysics to conceptual work (perhaps combined with empirical work), we can do more than simply analyse how our concepts actually work." Another option, and one that is not rare, is to

[18] Perhaps this is a symptom of deeper philosophical commitments, akin to what Wilfrid Sellars calls the Myth of the Given. As he explains: "One of the forms of the Myth of the Given is the idea that there is, and indeed must be, a structure of particular matter of fact such that (a) each fact can not only be noninferentially known to be the case, but presupposes no other knowledge either of particular matter of fact, or of general, truths; and (b) such that the noninferential knowledge of facts belonging to this picture constitutes the ultimate court of appeal for all factual claims – particular and general – about the world". See: Sellars, 1997, §32. One way of falling into this idea is to think that we can only obtain true knowledge about objects and phenomena amenable to the explanatory tools we have developed to learn about them. Accordingly, we devise theories that reproduce the general terms we employ to understand objects, even if the metaphysical features of our subject suggest we should not. Reidentification might reproduce that outlook. However, the import of Sellars' analysis to legal theory is something that still needs careful argument, which I do not have the space or the ability to provide in this work. I thank Robson Gonçalves Valadares Filho for helping me understand that Sellars' argument is circumscribed to the foundations of empirical knowledge, requiring some further steps to make it applicable to practical knowledge, and even more additional steps to apply it to jurisprudence.

work on determining what vocabulary we *should* adopt for some purpose or other (2017, p.108). In that sense, depending on the purposes we have, we will have a working notion of diachronic identity and of what preserves it for legal systems. Similarly, Quine (1950, p.622), inspired by Hume, contends that "identity" is a concept that performs a function in discursive contexts. For Quine (1950, pp.621-622), when it comes to objects, identity serves the purpose of resolving a problem, that is, that various similar impressions separated in time are mistakenly treated as identical.[19] For the reasons above, I submit that if our purpose is to explain practical matters, especially those related to the practices of guidance and responsibility under legal norms, we should avoid employing categories amenable to objects, even if complex objects like compositions. Our purposes are others; so, must be our conceptual framework. Later on, I shall defend that we need a notion of identity that delimits the resources from which we can adequately respond to the legal subject's question, "But how can that be law for me?" (Dyzenhaus, 2022, p.2). For now, it suffices to say that concepts applicable to objects cannot do that work.

The reidentification approach might be appealing to some, given how it tries to connect the continuity of something to its nature. Intuitively, a notion of identity is required to know what identity over time is. However, things get more complicated once we focus on the continuity of legal systems as tokens. The distinction between momentary and non-momentary legal systems that Raz proposes is more confusing than helpful. On the one hand, the concept of "momentary legal systems" comes as a distraction from the debate about what it means for a legal system to persist, leading us to debates about legal content. On the other hand, the concept of a "non-momentary legal system" in none of its formulations is apt to put to rest the empty question objection. At its best, it leaves many questions open, like its resemblance and differences to a Hartian rule of recognition. At its worst, it is incoherent with metaphysical theories about conditions of persistence and how they relate to conditions of existence. Perhaps the main tenets of Reidentification can be preserved despite the momentary/non-momentary distinction, but it is up to its defenders to show how that can be so. Be that as it may, the approach is interesting and suggests some important features of legal systems, even if it does not address them fully. This is the topic for the next section.

1.6. Paths not taken

[19] I explain Quine's argument in detail in section 4.5.2.

The aspirational view starts where the reidentification approach stops, so I would like to finish this chapter by presenting some explanatory routes that the latter suggests but does not pursue, given its methodological commitments and how they have been developed so far. As we saw, given its goal of providing an account of type-identity before talking about token-identity, the reidentification approach puts forth two conditions for the existence of momentary legal systems. First, norm-subjects must be generally compliant with the system's norms. Second, those who occupy the official roles set up by the norms of the system endorse and follow them (Raz 1999, p.126). Under legal systems, this attitude of endorsement from officials is the legal point of view, that is, the professional point of view from which the norms of the system are treated as valid (justified), referred to as being valid, and applied to particular cases (Raz, 1982, pp. 142-143). In what follows, I point out three possible routes the reidentification approach leaves open for further consideration, which cannot be adequately dealt with within its framework. The first two of them concern the relationship between the legal point of view and identity over time. The third concerns the role ascribed to norm-subjects in the explanation.

First, although a central role is ascribed to the legal point of view, no consideration is given as to how it can change or persist over time. I believe this is due to the adoption of an overinclusive descriptive methodology. When describing the legal point of view and the reasons for adopting it, some theorists are very permissive and avoid prescribing why one should adopt such a point of view or how one must act under it. For instance, Hart and Raz present the legal or internal point of view in opposition to the point of view of the man who merely complies with legal norms to avoid punishment. However, after this differentiation is done, no further specification is made and the legal point of view is considered as an amalgam of very different viewpoints: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do (Hart, 1994, p.98 and Raz, 1999, p.148). Consequently, the theorists are still left with disparate phenomena that do not share a clear unity or common operation. So, the legal point of view thus conceived offers no basis from which one can judge whether legal systems persist over time. The idea of a legal point of view is designed to explain a practical point of view— one concerned with deliberation and action. Thus, a more discriminating choice of the relevant point of view might further clarify differences that any actor engaged with legal norms would count as practically significant and thus clarify the practical difference a continuous legal system makes to people's lives (Finnis, 2011b, pp.12-13).

Second, we were told that the primary organs that are to be regarded as belonging to the same legal system are those that mutually recognize their determinations as binding (Raz, 1999,

p.147). However, the reidentification approach does not offer an account of what this recognition means. As Finnis and Raz warned when criticizing Kelsen[20], we are not looking for a norm that occupies a superior place in a chain of validity. But if it is not that, then what are we looking for? Alternatively, if we limit ourselves to an overinclusive descriptive methodology, we might just say that "The identity of legal systems depends on the identity of the social forms to which they belong" (Raz, 1980, p.189). Likewise, we may say that the continuity of legal systems as a type depends on the interaction of legal and non-legal norms and the extent and manner of their change (Raz, 1982, p.100). But this is not all that should be said. A theory of continuity that gives a prominent place to official roles and officials' mutual recognition is not complete until it asks whether, and if so, how officials can be wrong in recognizing other agents as officials. One possible account of this other facet is the following.

If ascribing official status is something that can be done correctly and incorrectly, theorists can codify the conditions of correct ascription in a second-level rule that tells us how to interpret power-conferring rules (Decat, 2020, p.163). Since this new rule can also be applied correctly or incorrectly, the process of rule formulation and application would go on indefinitely, if it were not for the fact that in practice, "at some point there is a *nonrulish*, albeit normative, responsible, exercise of judgment." (Postema, 2008, p.114). The dependence of continuity on social forms would then be a product of three factors: (i) the centrality ascribed to primary organs, (ii) the dependence of their normative status on nonrulish judgements, and (iii) the continuity of the conditions under which these judgments occur. If that is the case, we should go beyond the reidentification framework, because a complete explanation requires attention to what competent agents must acknowledge as correct and incorrect conceptual uses (Decat, 2020, p.167). Many more details would be necessary to develop this alternative, but for now, it suffices that it sheds light on the limits of the reidentification approach.

Third, we were told a legal system might exist even if citizens do not endorse and follow legal norms; they only have to display compliance. Also, what distinguishes legal systems and systems of complete discretion is that the former contains norms determining the rights and duties of individuals, and these are the very same norms that its primary institutions are bound to apply. Together, these considerations imply that legal systems may exist even when they provide no guidance for citizens, but only for officials. But do legal systems continue if that happens? This is not asked, and we have reasons to believe this should have been asked. By doing that, we can begin to offer a more promising response to the empty question objection.

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[20] See section 1.4.

In the next chapter, I will develop the alternative presented by the aspirational view. An advocate of the reidentification approach may bite the bullet and say that a more general explanation should be preferred to the richness of detail I am requiring. Still, it should be clear that this option comes at the cost of severing our theoretical explanations from our practical concerns. To be sure, a theory cannot decide how we should deal with our practical challenges, but this does not mean it cannot clarify what is at stake when a decision is called for.

1.7 Conclusion

In this chapter, I presented the main theoretical commitments of the reidentification approach. As I presented at the beginning of this chapter, this position can be distinguished into two different theses about the identity of legal systems over time:

> *Type identity*: Legal systems continue as the type of normative system they are to the extent they preserve the features that make them unique institutionalized normative systems (Raz, 1982, p.115 and 1999, pp.132-141);
>
> *Token identity:* A non-momentary legal system continues when temporally distinct momentary legal systems are different stages of its development (Raz, 1982, p.81 and 1980, p.187).

In the first two sections (1.1 and 1.2), I focused on how Reidentification thinks of the continuity of legal systems as a type of normative system, i.e, unique institutionalized normative systems. This allowed us to highlight the notion of "system" assumed by this approach. From this discussion, I suggested four guidelines advocates of Reidentification can offer to think of the continuity of legal systems as the *type* of normative systems they are.

The previous discussion, especially the distinction between the continuity of legal systems as types and as tokens, is illuminating because it shows when it is correct to equate a theory of legal systems with a general theory of law. The goal of providing a general and analytical theory of legal systems— which includes continuity of type— is closely related to contemporary versions of legal positivism, as I tried to show in the third section.

In the fourth section, the discussion changed from the continuity of legal systems *qua* legal systems or as an institutionalized normative system to the continuity of *a* legal system *as*

the same legal system. At this point, Reidentification shows its strength in explaining what is at stake in cases of legal interruption (revolution and coup d'état) and Legal Devolution. However, the distinction between momentary and non-momentary legal systems does not contribute to that. Indeed, as I argued, this distinction makes the reidentification approach flawed in three ways: it is confusing, unclear, and leads to inconsistent answers to the metaphysical question of what continuity/persistence conditions are conditions of. This mistake is instructive, however, because it shows that a pragmatic explanation is available by determining the conceptual scheme we *should* adopt for our purposes (Thomasson, 2017, p.108). I submit that if our purpose is to explain practical matters, especially those related to the practices of guidance and responsibility under legal norms, we should avoid employing categories amenable to objects, even if complex objects like compositions. Finally, I pointed out three explanatory routes the reidentification approach calls our attention to but does not pursue fully, given its methodological commitments.

Chapter 2: The aspirational view

This chapter introduces my preferred approach to the problem of continuity. I favor a particular conception, according to which legal systems continue to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). This claim is an instance of a more general approach I call the aspirational view, for which legal systems continue only to the extent that they realize certain purposes or ideals.[1] This view can be broken down into two:

3) *Type identity*: Legal systems continue as the type of normative system they are to the extent they realize a purpose, ideal, or a family of ideals;
4) *Token identity*: A legal system continues to be the same to the extent it realizes the same conception of its purpose, ideal, or family of ideals.

In this work, I defend a version of the aspirational view about *tokens* of legal systems. So, for much of this chapter, I will focus on the first thesis only to the extent that it illuminates the second. My choice of the second thesis is an attempt to explain legal system's diachronic identity by employing a bottom-up method, that is, one that begins with ongoing practices and judgements in particular cases and moves beyond only to the degree needed for relating them and understanding what is at stake (Wilson, 2001, p.4). The chain of reasoning is thus from the inside-out, so to speak, as it begins with discrete problems forced upon us in our practices by political or historical events— like revolution, democratic transitions, and so on—, and moves to broader and more abstract questions to better understand the more concrete (Dworkin, 2006,

[1] One may note a similarity between this general statement of the aspirational view and intepretativism, as the position according to which legal theories provide different readings of the general purpose of Law. For Ronald Dworkin, the concept of which competing legal theories are conceptions tells us that "the most abstract and fundamental point of legal practice is […] that force [should] not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." See: Dworkin, 1986, p.93. Dworkin's concept of law is relevant to address the problem of continuity, but some qualifications— such as the difference between continuity of type and token— make it clearer how his ideas can be used for present purposes. I do not think this departs much from his initial thoughts, but only makes them directly applicable to the problem at issue. Reinforcing that first impression, when Dworkin is most clear about his preferred way of doing legal philosophy, he seems committed to providing a theory of tokens. In his words: "The central issue of jurisprudence [is] analysing or accounting for what might be called the sense of propositions of law." In other words, jurisprudence must answer the question "What sense should be given to propositions of law?" See: Dworkin, 1987, p.9.

p.54). This methodology is especially suited to respond to the empty question objection, as it shows how certain concrete issues cannot be dealt with without working up an account of token identity. Moreover, much of this is implied by the pragmatic conceptual approach favoured in my objections against the momentary/non-momentary distinction.[2]

To be sure, I do not think we should forego theorizing about the nature of law. Rather, I think one way of turning around the deadlocks we often find in legal philosophical debates is to go more concrete. So, given the problems with the momentary/non-momentary distinction, I try to present a better account of token identity when it comes to legal systems. If the account to be given is convincing, the next step is to articulate it fully as a theory about the nature of law.[3] The present thesis should be taken as the first step, not as the whole enterprise.

The discussion in this chapter is thus divided: in the first section, I clarify how we can distinguish the purposes that enlighten what legal systems are from those that the theorist only ascribes to them. I also qualify the scope of my defense of the aspirational view by using the focal sense methodology advanced by John Finnis. In the second section, I emphasize the

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[2] See section 1.5.3.

[3] Moreover, significant works have already been done to argue for positions akin to the aspirational view on the continuity of legal system as a type. Most famously, Lon Fuller's tale of King Rex tells us that the ineptitude of Rex does not make a working legal system into a bad one; in fact, it results in something that "is not properly called a legal system." See: Fuller, 1969, pp.33-39. Jeremy Waldron argues similarly when stressing the importance of procedures to legal systems. For him, "[m]ost people, I think, would regard hearings and impartial proceedings, and the safeguards that go with them, as an essential rather than as a contingent feature of the institutional arrangements we call legal systems. Their absence would for most people be a disqualifying factor…" Alternatively, for Waldron, we cannot call a system legal if it is based on Star Chambers, proceeding *ex parte* without any hearing or on secret decisions condemning people to death for violating laws. See: Waldron, 2008, pp.21 and 22. We can find another argument like this in Nigel Simmonds' criticism of Hart's rule of recognition. For him, "derivability from such a rule confers legal status only if the rule of recognition is part of a system of law; and it will not be a system of law unless it to some extent approximates to the ideal of the rule of law." Accordingly, Simmonds presents the following argument "[…] suppose that the rules stemming from the rule of recognition set out sufficient conditions for the use of sanctions against citizens, but not necessary conditions, with the result that officials feel free to deploy the state's coercive apparatus against individual citizens whenever they consider that desirable as a way of advancing governmental objectives […] In systems of this sort, citizens would not guide their conduct by reference to rules but by the prediction of official sanctions. We would, I think, hesitate to describe these systems as systems of law." See: Simmonds, 2007, pp.50 and 127. Finally, David Dyzenhaus takes a similar approach in his book *Hard Cases in Wicked Legal Systems: Pathologies of Legality* since he is concerned with answering the questions "Does either the example of particular immoral law or that of an immoral legal order raise questions about the legality of the law or the legal order, such that one has reason to deny to either the title of "law"?. See: Dyzenhaus, 2010, pp. ix-x. In a later book, Dyzenhaus seems to accommodate both questions of type-identity and token-identity. On one hand, he contends that "Law's authority is due to the fact that legal order affords to its officials resources which enable adequate answers to legal subjects who ask 'But, how can that be law for me?'" See: Dyzenhaus, 2022, p. ix. On the other hand, he is concerned with how the rule of law can be hollowed out from within. Dyzenhaus then employs Fuller's idea that legal orders can be more or less compliant with the rule of law, but must remain largely compliant, to explain how a legal system can change into another and how this process can be carried on in different ways. Some of those changes, he argues, are compatible with legality, while others are closer to unlimited discretion, which amounts to something that is not law. See: Dyzenhaus, 2022, pp. 32-33, 311, and 323.

differences between the aspirational view and the reidentification approach regarding the legal point of view. The upshot is that the aspirational view's thesis about tokens allows us to see the legal point of view as a rational point of view from which criticism can be made, not just as a descriptive feature that distinguishes legal systems. This raises doubts about how numerical and qualitative identity are related under the different versions of this theory, so I clarify this relation to make it clearer how moral considerations play a part in establishing whether a given legal system continues. Finally, I provide a two-step argument to show that the aspirational view is not vulnerable to the empty question objection.

2.1 Legal systems, purposes, and theory.

The aspirational view, either as a view on legal systems as types or as tokens, requires clarification of how one can reasonably ascribe purposes to legal systems. Legal philosophers who try to understand those phenomena should not arbitrarily stipulate what those purposes are. One way to avoid arbitrary ascriptions is by having an attentive look at the object of jurisprudential investigation. Jurisprudence is a social science; its object is "constituted by human actions, practices, habits, dispositions, and by human discourse" (Finnis, 2011b, p.3).[4] Consequently, the phenomena suitable for jurisprudential analysis can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, for the people who performed or engaged in them (Finnis, 2011b, p.3 and Simmonds, 1984, pp.29-30). Yet, the practical concerns and the self-interpretations of the people are not uniform (Finnis, 2011b, p.4). So, no coherent picture will result from merely asking what the participants in the practice are disposed to call a legal system or why their legal system is a legal system. At the same time, we will have an impoverished understanding if we only stick to a common denominator. The solution is to acknowledge the distinction between interpreting the acts and thoughts of participants one by one and interpreting the social practice in which they are part, i.e., what they do collectively (Dworkin, 1986, p.63). Adopting the second idea allows us to proceed on the assumption that the extension of the term "legal system"

[4] In other words, "[…] legal theory deals with an object that is already theorised. A legal system consists of a complex body of practices, particularly practices of reasoning and justification. It includes elaborate conceptual structures of doctrines and principles, explicit and sophisticated forms of reflection and criticism". Simmonds, 1984, pp. 1. That being the case, one may reasonably ask: "How can we distinguish between the way in which law is conventionally thought of, spoken and practiced, from the 'real' nature of law […]" See: Simmonds, 1984, p.88.

cannot be adequate without a clear principle or rationale elaborated from a practical point of view (Finnis, 2011b, p.10).

With this in mind, I focus on the practical perspective of citizens and officials who rely on legal rights and duties to justify claims, demands, and excuses.[5] Therefore, my goal is not to describe political features that set legal systems apart from other normative systems. Rather, it is to explain the institutional structures that allow people to use past political actions as a basis for making public claims and arguments. In this sense, I focus not on a general explanation of legal systems (type-focused theory) but on the legal systems (tokens) that can be characterized as providing, even if precariously, forums for accountability through fully public argument (Postema, 2022, p.43). I hope it will become clear that these legal systems are distinguished by the quality of the governing relationship expressed in their forms and procedures (Rundle, 2012, p.92).

By choosing this approach, we can understand the features that characterize legal systems that facilitate guidance and public debate. I start with the assumption that, under such legal systems, people make and debate claims about what the law permits or forbids, referring to past institutional acts— statutes, precedents, etc. (Dworkin, 1986, p.13 and Simmonds, 2007, p.10). I use this as a reference point and then investigate how those legal systems can be conceived as frameworks in which past political actions are taken as sources of rights, duties, and permissions that bind diachronically. In the next chapter, I will argue that the identity of these legal systems over time depends on satisfying a substantive notion of the Rule of Law that conceives subjects as bearers of rights and duties. So, the development and maintenance of frameworks to claim legal rights and duties parallels the development of legal systems, which may be born, then exist without independence from their creators (colonies), enjoy a healthy independent existence, later decay, and finally die (Hart, 1994, p.112).

One may object that not all legal systems can be characterized as conceiving subjects respectfully or as allowing for their guidance and public argument. This, so the critic goes, is only true of Western modern legal systems. But this is no embarrassment once we acknowledge

[5] In choosing that point of view, I slightly depart from Finnis. For him, as theorists, our preferred practical point of view should be that of those for whom legal obligations are, at least presumptively, moral obligations, and who consider the institutions of the Rule of Law as at least presumptive requirements of practical reasonableness. See: Finnis, 2011b, pp. 14 and 15. Appealing as it is, this selection does not stress enough that legal systems provide people with a framework within which they interact and press claims against each other. Since I think this interactional aspect is quite important to understand how legal systems work in the practical lives of subjects, I preferred the formulation above. Moreover, I leave the idea of justification as open as I can, so that it is compatible with some degree of self-interest, with prima facie moral reasons and full moral justification. I do not want to take a position about the metaethical credentials of legal justification. I only want to consider how legal justification works as a form of public argument.

that the focus is on some tokens of the type "legal system", i.e., legal systems in which legal rights and duties provide standards for judging the correctness of actions by reference to how they came about (Simmonds, 1984, p.27). I do not deny that the concept of "legal system" can be extended to cover other instances.[6] Still, I think the aspirational view is the best way to explain legal systems that enable litigation and public argument by reference to legal rights and duties.[7] In that sense, as it focuses on ubiquitous legal systems, the inquiry is not so concerned with "foundations"— what makes a normative order a legal system in all possible cases—, but rather with producing coherence in our self-understanding and in our theorization of current legal systems (Simmonds, 1984, p.7).

Moreover, the methodology adopted has the merit of not neglecting dysfunctional legal systems and institutions. As we compare the latter with legal systems that enable public argument by reference to rights and duties, we have a rationale for judging them as "watered-down versions of the central cases, or […] exploitations of human attitudes shaped by reference to the central case." (Finnis, 2011b, p.11). They are united as tokens of the same type— legal systems— but are strikingly different in how they reproduce the features that make them into legal systems. This may come to the point that what we first thought were degenerate tokens of legal systems no longer deserve the name after comparison with central cases.

In the last chapter, we saw that the reidentification approach starts from the assumption that legal norms and the structure for their use can be traced back to an action or a series of actions by institutions. Because of that, we are told discussions about legal systems revolve around factual questions, on issues susceptible to objective determinations to which one's moral or political views are essentially irrelevant (Raz, 1982, p.152 and Raz, 1999, pp.164-165). This view is compatible with legal positivism, especially when presented as a theory about the continuity of legal systems as a type of normative system. The aspirational view, in turn,

[6] The legal systems I am concerned with are those that try to define and delimit the legitimate spheres of conflicting interests, that is, of fair and unfair forms of cooperation and competition. This feature evinces that those legal systems are creatures of market society, that is, one in which "property is distributed by means of innumerable individual transactions between consenting parties and which is pervaded by relationships of an essentially limited, contractual and often transitory nature", that is, relationships in which persons are not considered in their 'total social personality' but as property owners, right-bearers, and promisors. See: Simmonds, 1984, pp.28-29. See also Lon Fuller's reluctant agreement with Hayek and Pashukanis that it is only under capitalism that the notion of legal duty can reach its full development in: Fuller, 1969, pp. 24-27.

[7] Here, I find inspiration in Ronald Dworkin's remark that his idea of "principles", and the concept of law with which it is associated aims to cover the standards that provide for the rights and duties that a government has to recognize and enforce. This, he concedes, does not deny that the concepts of "law" and "legal standards" cannot be extended to include just what officials and lawyers conventionally identify. It is just that a conventional definition of those standards and practices does not properly explain the contexts in which law and legal standards are used for arguing and justifying claims. See: Dworkin, 1977, p.47

stresses the purpose of maintaining legal systems and, consequently, accommodates legal theories that are not circumscribed to the relations between institutions, giving a more prominent role to citizens and how they reason. The difference is between theories that explain what political features distinguish the legally relevant norms (statutes, judicial decisions, constitutional provisions, etc.), and those that explain what is involved in using those past political actions, supplemented by other considerations (moral and otherwise), in planning action and resolving disputes (Bix, 2012, p.42). The aspirational view is more compatible with the latter group of philosophical theories about law.

The point above is also important for reconciling the specific version I preferred with the general characterization of the aspirational view. Given my interest in explaining how the continuity of given legal systems (token) depends on the continuity of the legal point of view, I opt for focusing on the practical perspective of citizens and officials who rely on legal rights and duties to justify claims, demands, and excuses. However, the aspirational view only contends that legal systems continue as they are only to the extent that they realize certain purposes or ideals. Consequently, different versions of this view can be elaborated depending on the purposes or ideals one takes as a reference and the conceptions one favors. For instance, there seems to be a difference between comprehensive moral purposes and those that are specific to legal systems, e.g., those that apply to any social institution or human action, e.g., justice, relational equality, respect, and the rule of law. I do not deny that the latter can instantiate specific versions of those other values. Still, be that as it may, the rule of law has a distinct content. Given this last feature and allowing for different conceptions of each purpose, we can envisage different versions of the aspirational view.

2.2 The legal point of view and continuity

The last section was the first step in clarifying the scope and claims of the aspirational view, i.e, the thesis that legal systems continue as they are only to the extent that they realize certain purposes or ideals. I attempted to make clear how purposes or ideals can be ascribed to legal systems and what legal systems are more amenable to the purposes that the aspirational view focuses on. In this section, I take the second step and focus on the theoretical consequences of adopting the aspirational view on the continuity of legal systems as tokens. I will try to show that the thesis advocated by the aspirational view regarding tokens answers to the limits of the reidentification approach. The upshot is that the differences between the approaches go deep in

how they explain one central notion — the legal point of view— and this leads to differences in how each theory thinks of the relation between existence and continuity.

At the end of the last chapter, I argued that, given its goal of providing a general analytic descriptive account of legal systems, the reidentification approach had three shortcomings. First, it does not consider how the legal point of view can change or persist over time. Second, it does not ask whether, and if so, how officials can be wrong in recognizing other agents as officials after positing official recognition as a criterion for the identity of legal systems. Third and last, primary organs are conceived as giving identity to legal systems because of how they settle disputes concerning citizens' legal rights and duties. Moreover, we were told that citizens do not need to endorse those norms for a legal system to exist. The problem these shortcomings signal is that this analysis of the legal point of view focuses only on what distinguishes legal systems as a type, and we are left in the dark about whether the same holds for their continuity in both versions (type and token). Moreover, as we saw at the end of the last chapter, the distinction between momentary and non-momentary legal systems does not remedy that defect. In this section, I will only show how the aspirational does not suffer from the first two shortcomings since it considers how the legal point of view is relevant for the diachronic identity of legal systems, as the tokens they are. The third shortcoming can only be addressed after discussing in later chapters how I understand the rule of law.

The first shortcoming of the reidentification approach, i.e., how it overlooks the ways the legal point of view may evolve or persist over time, can be traced back to adopting a descriptive, general, and analytical theory of legal systems. By describing the features of legal systems, theorists avoid prescribing why one should adopt the legal point of view or how one should act within it. This approach, combined with the effort to explain the fundamental features of legal systems wherever they exist, results in the legal point of view becoming a mix of diverse perspectives. Calculations of long-term interest, a disinterested concern for others, an unreflective adherence to tradition, the desire to conform to others' actions—all this is included in the scope of the legal point of view. (Hart, 1994, p.98 and Raz, 1999, p.148). The token version of the aspirational view does not commit to that result since it is primarily concerned with legal systems that realize their purposes or ideals to a certain extent. Thus, the legal point of view acquires a whole different meaning: it represents a rational point of view from which the acts of treating legal norms as valid (justified), referring to them as being valid, and applying them to particular cases are understood in light of ideals and purposes. More precisely, the attitude of endorsement of discrete norms is explained by reference to the good instantiated by the system to which they belong. Apart from this normative structure, institutions acquire a

different practical significance for those engaged in the legal point of view, losing their continuity with past practices. Ultimately, the idea is to capture differences that any actor in the field (whether a subversive anarchist or an ideal law-abiding citizen) could count as practically significant in their relation to institutions (Finnis, 2011b, p.13).

Similar reasons apply to address the second shortcoming of the reidentification approach, i.e., its silence on whether officials can be wrong in recognizing other agents as officials. This problem is mostly felt when thinking of the continuity of a legal system as the same legal system. From a rational point of view, the legal point of view is justified by systemic ideals and purposes. Consequently, the endorsement of legal norms is liable to criticisms and errors if there is no reference to the relevant ideals. This applies even at the most fundamental levels. To understand the last remark, consider, for instance, Hart's contention that the authority of courts to deal with uncertainties in the scope of the rule of recognition may not be provided by preexisting rules (Hart, 1994, p.152). In response, he claims that courts may get their authority to decide after the questions have arisen and a decision has been given (Hart, 1994, p.153). Assume that, after being tempted to govern by extralegal means, officials settle that they should stick to legal means and can finally agree to mutually recognize the scope of their authority. The reidentification approach only explains what has happened to continuity after this mutual recognition has taken place. The aspirational view is different since it adopts the point of view of those who consider their legal systems as a framework in which past political actions are taken as sources of rights, duties, and permissions that bind diachronically. As it is, the aspirational view tries to uncover the conditions that give content to the following idea: "If I want to preserve my legal system and the practices of argument that it enables, how should I proceed?". Thus, the practical attitude of endorsing legal norms is explained by going beyond the processes of rule formulation and application to include normative exercises of judgment. Among those exercises of judgment, there are judgments about the correctness of ascribing and denying authority in light of the purposes that specific legal systems instantiate. The identity of such legal systems over time is then connected to this practical attitude. But how can identity depend on practical attitudes and judgments? The last remark prepares the discussion to unveil some presuppositions of the aspirational view on the continuity of legal systems as tokens.

2.3 Numerical, qualitative identity and morality

At the outset, one could say that the aspirational view on the continuity of legal systems as tokens assumes that numerical identity depends on qualitative identity, at least to a certain extent. The main versions of the aspirational view, so it seems, may even contend that numerical identity depends on preserving some moral qualities. I do not think this reconstruction is entirely correct, so it is worth examining what it gets right and where it is inaccurate.

There are different notions of identity over time. Imagine that two sisters, Jennifer and Carrie, buy two identical goldfish at a fair (Starmans, 2022, p.37). Usually, by identity over time, philosophers mean numerical identity, that is, sameness. The fish Jennifer bought at the fair and the one she held all the way home are the same. There is also qualitative identity, which means being exactly alike. So, the fish Carrie brought home is qualitatively identical to Jennifer's. Things get more complicated when we consider the claim that certain qualitative changes destroy numerical identity. In personal identity debates, this means, for instance, that "[i]f certain things happen to me, the truth might not be that I become a very different person. The truth might be that I cease to exist— that the resulting person is someone else" (Parfit, 1984, p.202). Among the qualitative changes a person might go through, special attention is given to changes in character, by which we should understand not just habits and dispositions but moral opinions and the principles one holds dear.[8]

One could object that the claim above runs into two difficulties that show why we should not apply it to legal systems. First, the objection is that, as it is, this position tells us that identity is a *certain magnitude* of similarity between earlier and later things/individuals/practices (Tobia, 2015, p.398). Identity becomes dependent on the degree to which a certain relation holds, but, absent further details, the relation may hold at any degree. Therefore, this account is easily vulnerable to the empty question objection, according to which identity is just an arbitrary stipulation. Second, in personal identity debates, it seems counterintuitive to say that someone who undergoes major qualitative changes, even morally relevant changes, loses numerical identity and ceases to exist. Think of Bob, aged twenty, the sweetest of people, who undergoes some sort of change so that, by age thirty, he has become a mean, selfish, and psychopathic person (Starman, 2022, p.43). Is it correct to say that the moral degradation of Bob literally led

[8] Derik Parfit finely illustrates this idea with the case of the Nineteenth Century Russian, according to which: "In several years, a young Russian will inherit vast estates. Because he has socialist ideals, he intends, now, to give the land to the peasants. But he knows that in time his ideals may fade. To guard against this possibility, he does two things. He first signs a legal document, which will automatically give away the land, and which can be revoked only with his wife's consent. He then says to his wife, 'Promise me that, if I ever change my mind, and ask you to revoke this document, you will not consent.' He adds, 'I regard my ideals as essential to me. If I lose these ideals, I want you to think that I cease to exist. I want you to regard your husband then, not as me, the man who asks you for this promise, but only as his corrupted later self. Promise me that you would not do what he asks.' See: Parfit, 1984, p.327.

to his *death*? It does not seem right. However, this last objection loses its force if we think that the changes in Bob's character make him a different *kind of person*, i.e, a bad person. Applied to legal systems, this implies that moral qualities can be taken as relevant to type-identity[9], even if one is unsure whether those qualities matter for token-identity. As for token identity, the versions of the aspirational view that link continuity to general moral principles might be more comfortable with the option presented in this paragraph, despite the objections listed. My preferred version is based on the rule of law, so it proposes a different argument, which I present at the end of this section. It should be noted that my argument will not propose an unqualified connection between numerical and qualitative identity.

Another option is to strictly distinguish numerical from qualitative identity. We can illustrate what this means by looking again at personal identity. There would be two different senses of identity: First, "a basic, literal question about whether the person to whom I am pointing now is the same person as some earlier person […]", and, second, after individuating persons, we ask if they are faithful to principles they hold since youth, whether they keep their promises, etc. The latter, while significant for us, on this view, concern "identity" in only a metaphorical sense and do not actually speak to the individuation and persistence of individuals (Schechtman, 2014, p.4). One could try to apply similar considerations to think of the continuity of legal systems as tokens and contend that the aspirational view is only concerned with a metaphorical sense of identity: for instance, whether legal systems consistently recognize rights and duties and protect the procedures for claiming those entitlements. However, if that is the case, this view cannot answer whether legal system X in t1 is the same as legal system Y in t2 because it does not address this question. This makes it unsuitable to deal with complex jurisprudential puzzles, like the ones brought about by revolutions, democratic transitions, decolonization. Although one could develop such a version, I do not think this is the best version of the aspirational view. So, I propose one last alternative below.

Again, we profit by comparing how personal identity relates to practical concerns. There is a difference between an action's being attributable to a person in a basic, literal way and her being rightly held responsible, or punished, for it. Jane might be the one who broke her grandmother's favorite lamp but still does not deserve any punishment since she hit the lamp during a seizure (Schechtman, 2014, p. 14). Yet, we should not strictly separate identity from practical judgments about responsibility. After all, personal identity must be defined in such a way that it makes sense that it is persons about whom these judgments are made (Schechtman,

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[9] For works arguing for that position, see note 3 of this chapter.

2014, p. 16). The result is a model that is inherently tied to practical concerns without being automatically coincident with particular practical judgments (Schechtman, 2014, p.20).[10] Applied to legal systems, we have a version of the aspirational view claiming that the identity of a legal system over time does not depend on fully complying with particular norms or satisfying all relevant moral principles. Rather, it depends on maintaining the fora and procedures that allow subjects to publicly claim their rights and hold each other accountable—in brief, it depends on how it satisfies one basic moral idea: the rule of law. Under my account, as we shall see in the next chapter, satisfying the rule of law amounts to recognizing subjects as claim-makers, and this practical attitude is prior to settling what specific rights they have. What matters for identity over time is how this plays out in a particular legal system and the practices of accountability that follow.

Other practical judgments are enabled once this structure is in place, like justice-related concerns about how rights and duties should be distributed, formal justice concerns about how the norms are applied over different groups, respect-related concerns about what those norms express toward certain groups, etc. My goal here was to introduce that last reading rather than defend it. It is not until the next chapter that the argument for its defense will be offered. Since I did not provide the argument for my conception of the aspirational view, I am afraid the lines above are still too abstract. Perhaps it helps if we look at the practical concerns the aspirational view can deal with before considering the details of my conception in the next chapter.

2.4 The aspirational view in practice

For a start, just like any account of identity over time, the aspirational view has the burden of responding to the empty question objection. Remember that the empty question objection tells us that the practical concerns associated with identity can be properly explained by continuous facts and relations even when we do not know if identity over time holds. If that is correct, questions about identity over time become empty in at least two senses. First, they are empty because they do not have true answers, so we can answer them as we wish. Second,

[10] Applied to personal identity, this model distinguishes the forensic unit from the moral self. The first considers the limits of a single person as the limits within which questions about responsibility and self-interest are appropriately raised. The second thinks of the limits of a person as the actions and experiences for which she is held rightly accountable. Moreover, this model posits that the identity of the forensic locus “is inherently bound to practical concerns because it is a requirement that the unity of this locus be defined in terms of a relation that makes it an appropriate unit within which to raise particular kinds of questions”. See: Schechtman, 2014, p.20.

they are empty because they do not describe different possibilities, any of which might be true, and one which must be true. To show how the aspirational view is not vulnerable to this objection[11], I consider some practical issues that suggest ideas of identity over time within the aspirational framework.

The first case— Rhodesia— illustrates the first thesis of the aspirational view: legal systems continue as a type to the extent they realize a purpose, ideal, or a family of ideals. The last three cases— Authoritarian regimes that debase legality, legal devolution, and common law adjudication—illustrate the second thesis: a given token of legal system continues to the extent it realizes the same conception of its purpose, ideal, or family of ideals.

In the introduction, I presented the case of Rhodesia after the 1965 Unilateral Declaration of Independence that proposed creating a new state, independent from the imperial powers of Westminster. Back then, it was controversial whether the domestic courts should recognize the revolutionary government. The judges on the bench partially recognized the revolutionary government and a break from the Imperial legal system. What is interesting is why they recognized a legal system was in force.

A judge decides disputes between people appealing to public and general standards (Christie, 1968, p.404). In Rhodesia, after 11th November 1965, some people supported the revolutionary government, some supported the governor who responded to Westminster, and some had not taken a position. Rhodesians continued to have disputes, sometimes with each other and sometimes with the police. Moreover, a negotiation for settlement was in course (Christie, 1968, p.404-405). Judges would have been in the best position to do their work if they could maintain the confidence of all the parties involved (Christie, 1968, p.405). By showing allegiance to the Law and resolving disputes by reference to legal rights and obligations, rather than partisan interests, the Judiciary upheld the perception of its integrity, even during debates about the supreme adjudicative authority. This reveals that even though the dispute between Westminster and The Revolutionary Government left uncertain the boundaries of the Rhodesian Legal System, there was no doubt that citizens had institutional forums to claim and enforce rights and commitments. Therefore, a legal system was still working because disputes were decided respecting citizens as sources of rights and duties. In

[11] Of course, the ability to deal with the cases presented vary depending on the details of each version of the aspirational view. The versions that claim there is an unqualified connection between moral qualities and numerical identity are less promising as theories of what gives tokens identity over time, as we saw in the last section.

brief, there was a legal system to the extent that a moral ideal— respect for persons or public accountability[12]— was instantiated by public institutions.

I now consider the second thesis of the aspirational view: a legal system continues to be the same only to the extent it realizes the same conception of its purpose, ideal, or family of ideals. For this purpose, the first case worth our attention is the backward-looking aspect of regimes that violate legality to remain in power, disregarding their own enactments, enforcing unpublished norms, creating vague, retroactive norms, etc. (Fuller,1958, p.650-655). As previously said in the introduction, legal systems are judged as authoritarian or democratic in their origins, and their norms as just or unjust in their content. All these practices are only possible because legal systems have an identifiable structure that persists over time (Fuller, 1958, p.644-645). In the legal systems I am most interested in, this structure is given by decision-making procedures, like adjudication, that exist for giving concreteness to ideals like addressing disagreement about rights and, like legislation, that aims to furnish citizens with reliable guideposts for self-directed action (Fuller, 1969, p.229). Authoritarian regimes dedicated to the destruction of legality try to put an end to that. They do so by presenting their rule as continuous with previous liberal legal systems to gain greater support, but in effect, exert the kind of power that is illegal according the same constitutional standards they claim to respect— this is especially the case with the procedures for legal amendment (Pauer- Studer, 2020, p.49). The analysis of whether that destruction was successful and the extent to which the previous legal system still provides normative resources to oppose authoritarianism is something the aspirational view can help with.

I consider now the forward-looking aspect of lawful devolution. Usually, in cases of lawful devolution, the main question is whether a new rule and constitution could be repealed by the old authority from which it was born (Finnis, 2011, p.414). Under the reidentification approach, the backward-looking aspect of this issue served as a test case for theories of the identity of legal systems. The result was the rejection of theories centered upon validity chains, like Kelsen's. This precludes some answers to the forward-looking aspect of the matter. The forward-looking aspect of lawful devolution focuses on the conditions under which a new rule and constitution can be changed or replaced. The last question is an important specification of the problem of legal change: what kinds of change can a legal system undergo in its norms

[12] At this point, I do not want to defend what is the relevant purpose or ideal served by public institutions under a legal system. My goal is only to illustrate how different versions of The Aspirational View might explain why Rhodesia still had a legal system.

without ceasing to be the same legal system? Whatever the account offered, a theorist cannot restrict her attention to legal texts and power-conferring rules.

Raz (1982, p.100) was on the right track when he contended that (1) “continuity depends on the interaction of legal and non-legal norms and the extent and manner of their change” and (2) “[…] among the legal norms concerned some are more relevant than other”. Nevertheless, he does not go beyond this acknowledgment and leaves unclear which non-legal norms are relevant and how they interact with legal norms like custom. We can clarify those matters by understanding how legal systems aim at ideals.

To illustrate, assume a legal system is a set of public and general norms ordered and structured as a good-faith attempt at doing justice (Simmonds, 2023, p.60). The nature of justice is controversial, but one generally shared assumption is that justice is only relevant under circumstances in which agents need to cooperate but are limited in their altruism (Rawls, 1999, p.4 and 109). Accordingly, justice is defining the appropriate distribution of the benefits and burdens of social cooperation and assigning rights and duties under the basic institutions of society (Rawls, 1999, p.4). It is also fair to stipulate that the practice of those in cooperation matters to establish what is just. This gives room to customary law, understood as conventions whose practical force depends neither on authority nor on enactment, but on the fact that they find “direct expression in the conduct of people toward one another” (Fuller, 2001, p.232 and Postema, 1994, p.363). The posited norms of a legal system try to lend greater determinacy to conventional/customary understandings about justice while, at the same time, deriving their meaning in part from those understandings (Simmonds, 2023, p.60).

Once all that is provided, constitutional power-conferring rules can be conceived as trying to capture and elaborate notions of legitimacy widely held in a community. They are pivotal to legal governance because of their connection to justice and the tacit expectations people nurture regarding the exercise of power (Fuller, 1969, p.217-218). Two other comments are worth making about those norms. On one hand, they might miss their mark and be replaced by rules that better articulate entrenched notions of justice. In that case, a change of rules may not alter the legal system. On the other hand, new legal rules can trigger or stimulate ongoing changes in conceptions of justice. In the most radical cases, this might be the beginning of a change in the legal system.

Finally, Common Law adjudication also illustrates the explanatory power of the second thesis of the aspirational view. The first step is to recognize that citizens can only exercise their judgment and apply general legal provisions to their particular circumstances when they can understand the relevance of these norms to their lives. Having this understanding, citizens will

use legal norms as reasons if they can fit as parts of a practically coherent framework, that is, as a system (Simmonds, 2007, p. 163). However, this practical framework is not given but rather is understood as legal norms are applied over time, and here is where continuity comes in. Common law adjudication provides an institutional setting in which this is acknowledged and taken as an incremental and joint task. It is incremental because it requires "attention to present circumstances, memory of past decisions, and anticipation of the direction in which the rule or ratio is moving." (Postema, 2004, p.214) The task is a joint activity because each related decision is a temporal part of a normatively meaningful whole played out over time by different but intimately related decision-makers (Postema, 2004, p.215). When this joint activity is successfully pursued, "rules, at first rough and clumsy, are refined over time, softened to fit the contours of the community's daily life". As they become part of citizens' public life in that sense, they are practiced and used, and their persistence over time is taken as a sign of their reasonableness (Postema, 2002, p.174-175). Common law adjudication then elucidates the continuity of conceptions in legal practice.

2.5 Normative tasks

This chapter was dedicated to presenting the methodological features from which I shall develop my account. As part of a theory about legal systems, the methodology employed intends to be sufficiently encompassing and clear. Yet, whatever its epistemic merits, before proceeding, I would like to point out a practical lesson that we, as citizens, can draw from what has been said about authoritarian regimes dedicated to the destruction of legality. Again, those regimes present their rule as continuous with previous liberal legal systems to gain greater support, but in effect, exert the kind of power that is illegal according to the same constitutional standards they claim to respect (Pauer- Studer, 2020, p.49). As a consequence, a constant reference to legal vocabulary is made, and the entrenchment of power is often hidden in disputes that seem circumscribed to legal experts. The lesson to be drawn is that, as disputable as legal norms may be, we as citizens must be suspicious of authorities that come to power by challenging institutional measures and nonetheless widely use legal norms for promoting their political agenda. We thus take the legal point of view as a rational point of view, from which the acts of treating legal norms as valid (justified) are explained by reference to the good instantiated in the system to which they belong. Our institutions are not just mere forms of domination, and one that challenges them must prove why this is justified. Moreover, one

cannot choose to opt in and out of legal systems at will; that is, one cannot arbitrarily choose which norms to commit (Bustamante, 2023, pp.154-155). Being vigilant on those matters is a way to identify important deviances from legal norms, even when lip service is made to legality, and to ensure that occasional noncompliance does not amount to a wholesale rejection of the rule of law. Of course, the layperson may struggle at first with the terms of the legal debate, and lawyers and legal experts have a heavier responsibility to make these disputes accessible. Still, the debasement of legality is a matter that all should be concerned with. The reasons for this will become clearer as the rule of law is detailed in later chapters.

The approach presented is still incomplete. More has to be said about my preferred reading of the aspirational view, especially how exactly the rule of law contributes to identity over time. I hope, however, that the chapter has shown both that an answer to the problem of continuity bears on important practical issues and that the aspirational view shows some promise in answering it in ways the reidentification approach cannot.

2.6 Conclusion

In this work, I defend a particular conception, according to which legal systems continue as they are only to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). This contention, however, can be read as a specific version of a general approach called the aspirational view, for which legal systems continue as they are only to the extent that they realize certain purposes or ideals. This chapter was dedicated to introducing that approach, and we saw that the latter can be broken down into two parts:

1) *Type identity*: Legal systems continue as the type of normative system they are to the extent they realize a purpose, ideal, or a family of ideals;
2) *Token identity:* A legal system continues to be the same to the extent it realizes the same conception of its purpose, ideal, or family of ideals.

This chapter was dedicated to explaining the methodological commitments of the aspirational view. My initial goal was to circumscribe my defence of the aspirational view to the second thesis, that is, the one concerning legal systems as tokens. I find this appealing since it employs a bottom-up method, that is, one that begins with ongoing practices and judgments in particular cases and moves beyond only to the degree needed for relating them and

understanding what is at stake (Wilson, 2001, p.4). Given that continuity and identity over time become subjects of reflection after major transformations and instability in specific legal systems, it seems more correct to address those experiences, instead of starting with the most abstract accounts. Other theoretical gains come with this choice.

Another advantage is that giving special attention to the practical perspective of citizens and officials who rely on legal rights and duties to justify claims allows me a more nuanced treatment of the legal point of view. Under this approach, this point of view can be taken as a rational point of view from which the acts of treating legal norms as valid (justified) can be understood in light of ideals and purposes. The upshot is that when institutions depart from their ideals and purposes, they acquire a different practical significance for those engaged in the legal point of view, losing their continuity with past practices and becoming something else. This makes the aspirational view immune to the shortcomings of the reidentification approach.

The aspirational view is also strengthened by its parallels with other debates about identity over time, especially personal identity. Accordingly, another goal in this chapter was to make clear how different versions of this view understand the relation between numerical and qualitative identity, with an eye to how moral qualities may or may not affect identity over time. The parallel with the discussions about how character and moral responsibility affect personal identity was drawn to present the implications of each version.

Finally, I used four cases to show how the aspirational view contributes to our understanding of practical issues, not falling into the difficulties pointed out by the empty question objection. The first case introduced— Rhodesia after UDI— illustrates the first thesis, which concerns the continuity of legal systems as types of normative systems. The last three cases— Authoritarian regimes that debase legality, legal devolution, and common law adjudication— illustrate the second thesis, which concerns the continuity of legal systems as tokens. In the next chapter, I will do some groundwork to evince that the best version of the aspirational view is one that ties diachronic identity to the rule of law. In chapter 4, I fully articulate what I mean by the rule of law.

Chapter 3: The Aspirational View on Token-identity.

The last chapter introduced the main features of the aspirational view. In this chapter, I argue that the best version of this approach is the one for which a specific connection to the rule of law establishes token identity. As we saw before, in general terms, the aspirational view contends that legal systems continue as they are only to the extent that they realize certain purposes or ideals. We also saw that this view can be broken down into two theses:

> *Type identity*: Legal systems continue as the type of normative system they are to the extent they realize a purpose, ideal, or a family of ideals;
> *Token identity*: A legal system continues to be the same to the extent it realizes the same conception of its purpose, ideal, or family of ideals.

As the discussion about the connection between numerical and qualitative identity in the last chapter aimed to show, important differences follow depending on how we conceive the purposes, ideal or family of ideals that give content to the aspirational view. Here, I am not only concerned with showing those differences. Rather, I purport to show that, in light of them, the version that centres on the rule of law provides a superior explanation of token identity. Accordingly, I shall defend that:

> *R.L. token identity:* A legal system continues to be the same to the extent it realizes the same conception of the rule of law.

Nevertheless, theorists have worried that the phrase "rule of law" became meaningless due to ideological abuse and general overuse (Shklar, 1987, p.1). This makes the thesis above too vague to give us a notion of identity over time. To avoid these concerns, I start from the assumption that at the core of the rule of law lies the requirement that "both sides of the political relationship — the rulers and the ruled, the government and the governed— [...] be subordinate to the demands of the law" (Rundle, 2023, p.5). This is the requirement of mutual subordination to law. Two notions are central to this requirement: guidance and accountability, so we can restate *R.L. Token identity* as saying that

*R.L. token identity**: A legal system continues to be the same to the extent it realizes the same conception of mutual subordination to law, that is, to the extent it preserves the same guidance and accountability relations between citizens and rulers.

To defend *R.L. token identity** against alternative readings of the aspirational view, my argument is divided into the following manner: the first two sections consider four different readings of the aspirational view. First, I pay attention to three readings, i.e., state-necessity, efficacious coup d'état, and strict constitutionalism. All of them were assessed when common law courts had to judge the legality of regimes that abrogated the constitutions under which the same courts were constituted. I argue that, though incomplete, strict constitutionalism is the most illuminating thesis. So, we profit in fleshing out the idea that a court could not sit to determine whether the constitution under which it was created had disappeared. The second section focuses on a much more robust thesis, which contends that a legal system continues to the extent that it preserves the principles of legality from which it answers the legal subject's question 'But, how can that be law for me?' (Dyzenhaus, 2022, p.2). I argue that strict constitutionalism and the principles of legality thesis are clarified by an account of the rule of law based on guidance and accountability. I end this chapter by emphasizing the relevance of these notions and the improvements they bring to the discussion. These notions will be the focus of the next chapter, where, having grasped their relevance, we can properly explain their meaning.

3.1 Revolutionary ideals and token identity

From the early decades of the second half of the 20th century until the 1980s, many emerging nations with a common law tradition faced illegal changes in governmental power—Pakistan, Uganda, Zimbabwe (Southern Rhodesia), Nigeria, Cyprus, and Seychelles, to name a few. One conspicuous feature of those political upheavals was that they only affected the rules governing the succession of persons to legal office. Hence, the judges on the highest courts survived a new government's annulment of the written constitution under which they had been appointed (Hassan, 1984, p.195). Moreover, they had to judge the validity of the coups in response to citizens who claimed rights entrenched in the previous constitutions. In other words, there was no revolution, understood as a complete metamorphosis that affects both civil society

and the entire state to the point that the legitimacy of the new order is completely autonomous from the old order (Mahmud, 1994, p.102). Given the dependency on the previous legal order, there was a need to clarify to what extent the new regimes could depart from what was in place, especially when rights were affected. In that sense, questions about token identity were entangled with citizens' concerns about keeping the protections afforded by the previous constitutions.

For some, the aspirational view seems relevant for such cases, but only in favor of usurpers. After all, it is not rare for usurpers instigating a coup d'état to portray the legal system in force as irredeemably dysfunctional. By doing that, they rationalize their illegal actions, advocating that the assumption of power is the panacea to the immoral, decadent, or unjust conditions allegedly plaguing their society (Hassan, 1984, p.197). In its most general form, the aspirational view holds that legal systems continue only to the extent that they realize certain purposes or ideals. This, so the critic concludes, gives resources for those seeking to impose their values at the expense of the current legal system. I do not think this is correct. At least, not if we defend the aspirational view of token identity in connection with the rule of law. To argue for the last point, I begin by considering two alternative readings that are overinclusive in implying that usurpers' actions are compatible with maintaining a legal system.

Many empirical and practical issues beyond the purposes of the present work led common law courts to judge coup d'états as valid changes in the legal system.[1] Still, the theses employed in their reasoning were suitable for validating the new regimes and recognizing the unfettered legislative power of the usurpers (Mahmud, 1994, p.105). So, I assess their merit as contentions about token identity. Two theses were recurrent across emerging common law nations: the doctrine of state necessity and one interpretation of Kelsen's contention on the legality of revolutions. Given that the last thesis had a life of its own, quite distant from Kelsen's first formulation, I prefer to call it "the doctrine of efficacious coup d'état".[2]

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[1] In brief, the problem was that after a coup d'etat, the existence and the very power of the courts in terms of enforceability rested substantially on the support of the usurpers. Accordingly, "[…] the judiciary, realistically speaking, [had] little real choice but to sanctify the usurper's assumption of power to preserve some recognized continuity and harmony within the governmental infrastructure. It is arguable that although the usurper's constitutional behavior [was] an egregious wrong, contesting the acquired power would be even more detrimental as it would facilitate further upheaval and instability". Likewise, the judges on the bench had to judge in ways that allowed them to remain in power, given the risk that, were they to leave office, the new rulers would pack the courts with sympathetic or supportive judges. See: Hassan, 1984, pp. 191-258, pp.236 and 237. See also: Mahmud, 1994, p.104.

[2] We will see in due course how this doctrine was employed. However, it is worth noting already that in *Jilani vs Government of Punjab* (1972), the Pakistani Supreme Court made clear why this doctrine should not be associated with Kelsen. On that occasion, the court argued that Kelsen's theory is a descriptive theory of law, not a normative principle of adjudication. In its own words: "[Kelsen] was only trying to lay down a pure theory of law as a rule

3.1.1 State necessity and 'salus populi suprema lex'

The doctrine of state necessity can be summarized in the maxim '*salus populi suprema lex,* which means "the safety of the people is the supreme law." Historically, this maxim was a device of public law that justified extraordinary governmental action in emergencies. Under unpredictable and highly sensitive contexts, property rights and individual liberty might be sacrificed for the public good. The doctrine of state necessity and the maxim it implies sought to assure that this would be done according to the legal system in force. In brief, they were the common law remedy for those exceptional circumstances (Hassan,1984, p.201). Notice that in its original formulation, the doctrine was a consequence of ideals of good governance and sensitivity to the needs of the people without giving away legality altogether. In that sense, it is compatible with the aspirational view, even though it is not yet a thesis about identity over time, since it does not focus on the legal system as a whole. However, under the pressures of usurpers, the doctrine was refashioned to cover not just particular interventions in individual rights but to authorize *complete control* over an *entire country*. This change makes the doctrine of state-necessity a thesis about token identity; at the same time, it makes it implausible, as we shall see. The usurpers claimed that their interventions in the succession of power were needed to avoid a complete societal breakdown and to maintain the legal system then in force (Hassan, 1984, p.201). They claimed this was crucial to restore or keep the basic institutions of governance, without which utter chaos would arise (Hassan, 1984, p.201). In other words, usurpers claimed their ideals and professed principles should be enforced to preserve the legal system from so-called corrupting forces.

One illustrative case of this broad use of state necessity is *Bhutto v. Chief of Army Staff.* On July 5th, 1977, the Pakistani military declared martial law, removed and detained the Prime Minister, and then dissolved the Parliament. Considering that subversion of the Constitution was considered treason under Article 6 of the 1973 Constitution, the military regime held that

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of normative science consisting of 'an aggregate or system of norms.' He was propounding a theory of law as a 'mere jurist's proposition about law.' He was not attempting to lay down any legal norm or legal norms which are 'the daily concern of judges, legal practitioners or administrators." For this argument and the full reasoning of the court, see: Mahmud, 1994, p.74. Correct, as it is for some of Kelsen's work, the reading above is not correct for all of his arguments, which seem to give a less prominent role to the idea of purity in the science of law. For instance, he argues: "if the system of positive legal norms, reared upon the basic norm, is to be a meaningful whole, a comprehensible pattern, a possible object of cognition in any sense (an inevitable assumption for a juridical science which for the purpose of understanding uses the hypothesis of the basic norm), then the basic norm must make provision for it. It has to establish not a just, but a meaningful order. With the aid of the basic norm the legal materials which have been produced as positive law must be comprehensible as a meaningful whole, that is, they must lend themselves to a rational interpretation." See: Kelsen, 1945, p.402.

"the Constitution [had] not been abrogated. Only the operation of certain parts of the Constitution [had been] held in abeyance" (Mahmud, 1994, p.79). In *Bhutto v. Chief of Army Staff,* the detention of the Prime Minister under Martial Law Order was challenged before the Supreme Court as a violation of fundamental rights entrenched in the Constitution. The court reasoned that the coup d'état was "an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people" (Mahmud, 1994, p.80). Consequently, for the court, the new regime was considered "a phase of constitutional deviation dictated by necessity." Moreover, the Court held that the legislative capacity of the military regime included the "power to amend [the 1973 Constitution]." This, coupled with the validation of acts that allegedly advanced the good of the people, amounted to bestowing unfettered legislative power on the extra-constitutional regime (Mahmud, 1994, p.80).

The case above shows that, conceived as a thesis about what preserves a legal system based on a constitution, the broad use of state necessity is questionable. In its original formulation, state necessity was a legal device connecting the interventions of an administrative state to a constitutional legal system, making the case that the same legal system was in force even in emergencies. Accordingly, criteria were developed to circumscribe unfettered state power to the needs, duration, and proportion of the emergencies faced. However, as the doctrine of state necessity was extended to cover the reconfiguration of public power, it became concerned with the validity of usurpers' actions after they had successfully seized power. The validity of such acts is still assessed by reference to the pre-coup legal system, but no longer by reference to its constitution. Rather, validity is assessed by reference to abstract values that the usurpers claim the legal system satisfies. As such, state necessity becomes the thesis according to which

> *Token identity as salus populi*: a legal system continues to the extent that rulers seek the good of the people, the latter being defined by reference to the subjective values of those who seize power.

Conversely, all legal norms may change, and even the balance of power between rulers and ruled may change without altering the legal system. It suffices that those in power keep seeking the good of the people.

The problem is that the doctrine thus defined is too permissive in being content with subjective ideas of what is good for the people and the emergencies that disturb this good. The criteria for taking exceptional measures are then lost, as they become increasingly dependent

on personal and subjective beliefs about whether an existing emergency actually existed. Initially, ascertaining such an emergency was important to justify exceptions to the normal operation of the legal system, while still respecting its norms. Now, the emergency is more elusive, and thus the number of exceptions to the pre-coup legal system grows, especially concerning the allocation of powers and the individual rights of citizens. These changes in the previous legal system are too sensitive, and the emergency that would justify them becomes too dependent on the usurper's personal beliefs to say that the pre-coup legal system is still in force as a system of public norms.

3.1.2 Efficacious coup d'état

For the reasons above, the doctrine of state necessity was distorted to cover changes in political power. No serious attempt was made to narrowly circumscribe who could exercise such power in emergencies, to what ends, and for how long. The doctrine of the efficacious coup d'état was better suited for validating extra-constitutional regimes, because it proposed conditions under which the previous legal system was no longer in effect. So, there was no need to make hypocritical references to the legal system then in force. For present purposes, this doctrine deserves our attention because it may seem compatible with the thesis that the rule of law provides token identity. However, the way that it is presented sidetracks us from discussing the rule of law. The doctrine seems to hold that token identity does not depend on the rule of law, but on the maintenance of peaceful interaction. We are told that legal systems ensure peaceful interaction and that the features responsible for this are not those associated with the rule of law, because they are more general and encompassing. Accordingly, we are told that successful coups change the identity of a legal system over time because they change the conception of peaceful cooperation in force. However, I shall argue below that (i) a coup can be successful even when it maintains the conception of peaceful interaction in force; and that (ii) a modern legal system is only designed to ensure peaceful interaction when it respects the rule of law.

Despite being inspired by Hans Kelsen's contentions[2], the doctrine of efficacious coup d'état owes its classic formulation to the case of *State v. Dosso*. To understand the significance

[2] The relevant quotations seem to be: "A revolution […] occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. [As such] the phenomenon of revolution […] clearly shows the significance of the basic norm. Suppose that a group of individuals attempt[s] to seize power by force, in order to remove the legitimate government in a hitherto

of *Dosso,* we must draw a tentative distinction between revolutions and coups d'état. In both cases, the authority of a legal system is challenged, raising questions about identity over time. However, revolutions are not restricted to legal and political institutions. In a revolution, the deposition of officials serves a larger purpose, i.e., the wholesale transformation of the social foundations upon which official power rests. A coup d'état, in its turn, only refers to usurpations of power that violate rules of succession and political power-conferring rules (Hassan, 1984, p.196). To be sure, a coup d'état can still be quite violent (historically, they often have been), as the usurpation of governmental power may be backed up by military force or other coercive means. Still, revolutions are so profound that they leave no doubt that the legal system no longer continues. In contrast, coups d'états, even when brought about by violent means, may only promote subtle changes in the legal system. Therefore, in the latter case, there is a genuine question about the conditions under which a coup puts an end to a legal system. This was the subject of *Dosso*, and later common law cases took its ruling as precedential.

On October 7th, 1958, President Iskandar Mirza abrogated the Pakistani Constitution, dissolved the National and Provincial Assemblies, declared martial law, and appointed the Commander-in-Chief of the army as the Chief Martial Law Administrator. In *State v.Dosso,* the Supreme Court of Pakistan examined the validity of the coup by considering four criminal appeals (Mahmud, 1994, p.54). The Court ruled that the efficacy of a coup d'état is the basis of its validity. Moreover, the court considered the 1959 coup to be successful, that is, as satisfying the test of efficacy and becoming a "basic law creating fact" (Mahmud, 1994, p.55). In other words, the opinion was that, in the aftermath of a successful coup, a new legal system emerged, and its validity rested on the new law-creating organ. Therefore, under the new legal order, there would be no restriction on the coup makers' law-making power. Neither entrenched individual rights nor any other limits expressed in the pre-coup constitution would apply to the new regime (Mahmud, 1994, p.56).

The idea of an efficacious coup d'état giving birth to a new legal system can be presented as a negative thesis about token identity, in the following terms:

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monarchic state, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, [that is,] a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm." See: Kelsen, 1945, pp.117 and 118.

> *Efficacious coup d'état:* A legal system is supplanted by another when it is displaced through a successful coup d'état.

A great deal depends on how one understands efficacy and measures the success of a coup d'état. This was the major challenge for common law courts that applied *Dosso* as a precedent. In *Dosso,* the Court pronounced the usurpation efficacious without pointing out any facts to warrant such a determination. Interestingly enough, the validated regime was overthrown within a day of the court's pronouncement. Yet, on other occasions, common law courts declared the coups successful based on self-serving affidavits furnished by the usurpers or other public officials under the control of the usurpers (Mahmud, 1994, p.134). Just like the doctrine of state necessity, the doctrine of efficacious coup d'état is fragile to preferences and value choices in ascertaining token identity. However, there is one alternate reading of it, which makes it a better contender.

For this reading, a coup d'état is successful when the new regime redefines the basis for peaceful interaction by altering the norms that delimit the acceptable forms of cooperation and competition or by validating them on a different foundation. In the terminology of the aspirational view, this can be expressed as follows:

> *Token identity as an efficacious coup d'état:* A legal system remains the same to the extent that it upholds the same conception of peaceful interaction.

The first challenge this thesis must address is that not every successful coup appears to alter the shape of peaceful cooperation that can be articulated in a given political society. To illustrate, an example provided by Finnis (2011b, p. 409) is on point. When the Yorkist Edward IV seized the throne in 1461, the Lancastrian kings from Henry IV to Henry VI were officially regarded as usurpers who had overthrown the true line of succession. Later on, lawyers had to answer whether the acts of the Lancastrians were legally valid. They argued that:

> It is necessary that the Realm should have a king under whose authority laws will be held and upheld, and though [Henry VI] was in power by usurpation, any judicial act done by him and touching Royal jurisdiction would be valid, and will bind the rightful king when the latter returns to power.

The argument above can be restated as saying that there is a 'realm' in which 'authority' is exercised by the 'king' by way of 'judicial acts' of 'Royal jurisdiction'. Usurpers illegally

insert themselves into the structure of offices or jurisdictions that serve the realm. Still, their legally unwarranted acts disturb only the rightful monarchs, but not the monarchy, since the realm wherein the monarchy has a place remains the same. The point to bring home is that the rules of succession to office are built on political practices that may remain unaltered even when those rules are violated. It is up to the theorists to ascertain whether the identity of a legal system over time depends on the rules of succession or the underlying practices. Kelsen chose to focus on the former, while Raz, Finnis, and I take the other way. Thus, I argue it is not correct to say that "a legal system is supplanted by another when it is displaced through a successful coup d'état", because a coup can be successful, that is, bring usurpers to power and make their acts binding over time, without altering the legal system. Briefly, usurpers can be successful in achieving their purposes by just violating the rules of succession to office. When that is the case, there is no change in the legal system, provided the underlying practices are preserved. The distinct claim that I make is that the underlying practice is the rule of law, not just general political norms. I intend to clarify how that can be the case in the next chapter. What is important for now is that the rule of law should not be equated with mere compliance with rules of succession to office.

A second challenge is saying how a legal system is designed to ensure peaceful interaction. If our conception of peaceful interaction is based on law-abiding behavior, then it is reasonable to say that violating the rule of law compromises peaceful interaction. After all, under the rule of law, law counts, and it is widely expected and assumed to count for each agent (Krygier, 2010, pp.137-138). However, one could ponder that not every feature of a legal system is connected to the rule of law. Thus, so the argument goes, peaceful interaction is not provided by the rule of law, but by more general features of a legal system. I think a careful analysis reveals something different. That is, the features of a legal system that ensure peaceful interaction are connected to the rule of law.

Assume that a system of mutual forbearance is the most effective means to ensure peaceful interaction. Further, assume that Hart (1994, pp. 197-198) is correct in saying that submission to a system of mutual forbearances would be foolish if there were no way to deter those who, given human psychology, would take advantage of the system without submitting to its obligations. Provided all that, there must be resources for publicly making and assessing claims of what people owe one another. Morality can perform this task. Yet, there are other things required for peaceful interaction that morality is not suitable to do on its own. There must also be devices enabling reciprocity and publicity in compliance. What is required of each agent

must be sufficiently clear[3] from the outset so they can adjust their plans to their obligations. Similarly, it must be sufficiently clear when they behave as they ought to. I said sufficiently clear, because even when there are public common norms, there may still be controversies about what is required for compliance and what is permitted. Consequently, there must also be room for reaching agreements (even if provisional) as to what is required. Therefore, there must be occasions for arguing and proving claims on a basis that guarantees a public understanding of what is required.

A legal system that respects the rule of law ensures an adequate level of reciprocity and publicity in at least two ways:[4] first, by designing legal norms that allow self-directed action. Citizens can only understand and apply to their circumstances norms that are general, non-retroactive, public, possible to comply with, and not subject to constant change. Legal norms become then practically relevant in a specific sense, not just to the extent that they alter the social or natural environment of action, but as attempts to influence behavior by influencing deliberation (Postema, 1994, p.370). Moreover, legal norms thus designed make deliberation a social concern to the extent that they allow self-directed action among agents in concert (Postema, 1994, p.371). In other words, checking whether a person is fulfilling their obligations and holding them accountable requires norms designed in accordance with rule of law principles. Second, reciprocity and publicity in compliance are further promoted by upholding institutions where the obligations ascribed to an individual can be discussed and properly assessed. The rule of law is not governance by justice or morality; that is, that which is rational, reasonable, or right. Rather, the rule of law is "governance by disciplined deliberative *reasoning*, by the disciplined giving, taking, and assessing of reasons" (Postema, 2022, p. 42). Forums for legal argument provide discipline of reasoning to the extent that they allow people to give public meaning to their actions, presenting evidence and arguments for their rights and duties (Postema, 2022, 42). Consequently, people can publicly understand their obligations and hold each other accountable.

If peaceful interaction depends on having resources for publicly assessing what people owe to each other, the best way a legal system can do that is by respecting the rule of law. The upshot is that a conception of peaceful interaction in itself cannot be what gives a legal system

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[3] This does not mean that legal norms are uncontroversial. Some level of understanding of what a norm prescribes or allows must be possible before any disagreement initiates. I am concerned with the conditions for satisfying that threshold level, that is, with conditions without which it is impossible to hold someone accountable.

[4] Here, I assume a specific conception of the rule of law, the one I favor. This conception has many levels of specification: it can be presented in its most abstract form— its normative core; it can also be conceived as a set of general institutions and guidelines for creating legal norms and, finally, as something instantiated in actual legal systems. In the lines above, I focus on the second level of specification.

its identity over time. Without the rule of law as a mediator, there is no clear link between the features of a legal system and peaceful interaction. This suggests a stronger claim: peaceful interaction does not provide token identity because it is only ensured by a legal system that displays such identity. Following the rule of law ensures a continuous legal system. Having a continuous legal system has many advantages, one of which is consolidating conditions for peaceful interaction. The whole argument for this stronger claim has not been advanced so far. A clear connection between identity over time and the rule of law must still be proposed. Yet, the defects of the doctrine of efficacious coup d'état are illuminating.[5]

3.1.3. Strict constitutionalism

The doctrine of strict constitutionalism holds that a court that derives its existence from a constitution cannot give effect to anything that is not law when judged by that constitution (Mahmud, 1994, p.124). The underlying thought is that courts lack the power to determine their existence because they come into being not on their own, but rather upon the legal system of which they are a part (Mahmud, 1994, p.124). This seems reasonable enough. The challenge lies in determining whether a court, when it chooses to continue after a coup d'état, remains the "old" court under the "old" constitution. Therefore, we cannot understand the status of the remaining courts without an account of token identity. The common law cases show this has a

[5] There is another possible reformulation. I shall not pursue this in length but suggest here the resources from which it could be developed. One could find inspiration in early social contract theorists to refine the idea that peaceful interaction provides the identity of a legal system over time. In John Locke's thought, the connection between peaceful interaction and law is in how the latter helps to overcome the limits of the state of nature. For Locke, in the state of nature, each man is a free, absolute lord of their own persons and possessions, equal to the greatest, and subject to nobody. However, the enjoyment of this condition is very uncertain and is constantly exposed to the invasion of others. After all, there is no "established, settled, known law, received and allowed by common consent to be the standard of right and wrong […]", nor "a known and indifferent judge, with authority to determine all differences according to the established law" and, finally, there is no organized power to back and support individual's judgment about what is right. See: Locke, 1980, p.66. So, for Locke, the enjoyment of properties in peace and safety is the great end of men's entering into society, and the instrument and means for that are laws and legal institutions. Alternatively, for him, "[a]bsolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government [because] men would not quit the freedom of the state of nature […] were it not to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet" in Locke, 1980, p.72. These remarks become relevant for token identity when Locke says that "it is in their legislative […] that the members of a commonwealth are united, and combined together into one coherent living body", Locke, 1980, pp.107-108 Consequently, "[t]he delivery […] of the people into the subjection of a foreign power, either by the prince, or by the legislative, is certainly a change of the legislative, and so a dissolution of the government." Locke, 1980, p.109 Locke also has something to say about type identity when he contends that "when he who has the supreme executive power, neglects and abandons that charge, so that the laws already made can no longer be put in execution. This is demonstratively to reduce all to anarchy, and so effectually to dissolve the government.", Locke, 1980, p. 110.

practical relevance because it clarifies whether citizens can rightfully claim rights from the pre-coup constitutions and to what extent a legal system is preserved in the face of political turmoil.

An account of this sort could start by considering the connection between courts and the constitution they enforce in normal circumstances. Again, courts do not come into being on their own, but rather upon the legal order of which they are a part. So, it is more promising to inquire into the connection between a legal system and its constitution. In suggesting that route, strict constitutionalism presents itself as the most interesting alternative in the common law treatment of coups d'état. However, as stated so far, it is incomplete. To be sure, it suggests that the identity of a legal system over time is connected to the maintenance of its constitution. This seems to be on the right track. Still, no clear argument can be formulated from those scant remarks. These matters are complex and deserve careful attention, as we saw in the critiques Raz and Finnis made of Kelsen.[6] One important outcome from that discussion is that we should not confuse a constitution with that from which it takes its normative force. A constitution is often a sign of what gives a legal system its identity over time, not the answer. What seems to be doing the work is a conception of the rule of law, as I will elaborate fully later. For now, I provide a summary argument for that contention.

Under a "healthy" legal system— one that tends to continue—citizens often accept rules as common standards of behavior and acknowledge an obligation to obey them (Hart, 1994, p.116). However, if a constitution and its subordinate laws, have a claim to our respect even when their content is suboptimal, then the legal system of which they are part must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when its particular norms seem inadequate to our individual preferences (Fuller, 1958, p.632). My explanation of what this means ties the features of a legal system to the moral values, or demands, that enable those features to be maintained (Rundle, 2012, p.41 and Fuller, 1969, p.97). So, the aspirational view I defend is primarily concerned with answering what work a legal system is doing, not just in the instrumental sense relevant to the ends being pursued through it, but in terms of shaping the lives, roles, expectations, and agency of those participating within it (Rundle, 2014, p.134). The rule of law then becomes relevant, because we are thinking of identity over time as the maintenance and flourishing of the ethos that constitute the distinctiveness of the lawgiver's role, as well as the nourishing of the legal subject's capacity to be 'a responsible agent, capable of following rules, and answerable for his defaults' (Rundle, 2014, pp. 136-137 and Fuller, 1969, p.162). The

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[6] See section 1.4 in Chapter 1.

notions of guidance and accountability are central to further specify these ideas, which are so far nothing more than possible implications of a constitutional doctrine.

Before unpacking those ideas, however, we should consider one more contention that shows promising ways of accounting for token identity but stops short of doing that to the extent that it only assumes notions of guidance and accountability. After that, we can gather the features my conception must present and how it fully addresses concerns so far only hinted at.

3.2 Identity over time in the spectrum of legality

In *The Long Arc of Legality (2022)*, David Dyzenhaus proposes that a careful analysis of modern legal systems shows that an illegitimate legal authority is a contradiction. While acknowledging that law does not provide legitimacy all things considered, Dyzenhaus (2022, p.33) thinks legality can confer some legitimacy to political regimes. His task is to explain how this can be so. He argues that what makes law authoritative is that the officials who speak in its name can answer satisfactorily the legal subject's question 'But, how can that be law for me?' (Dyzenhaus, 2022, p.2).[7] The implications of this question for the identity of a legal system over time become clearer when Dyzenhaus exposes the details of his account of law's authority. I will argue that this account, just like the ones previously exposed, advances our knowledge of what gives identity to legal systems over time, but in ways that can be better exposed and further developed. To be fair, the account explored in this section is much more fleshed out than the doctrines of state necessity, efficacious coup d'état, and strict constitutionalism. This is a direct implication of its attempt to tie the identity of legal systems to the rule of law. Still, the way it proceeds, though engaging with the topic of token identity, leaves many loose ends.

Dyzenhaus' account starts from assumptions that have a direct bearing on type identity. First, his account explains legal authority as compliance with fundamental principles of legality. Second, it assigns officials a role in interpreting enacted law in light of such principles. Considering both, Dyzenhaus claims that putative legal norms that are not interpretable in light

[7] Dyzenhaus acknowledges that he finds inspiration in what Bernard Williams called the 'Basic Legitimation Demand'. In his words, that is "the demand which every modern legal state must satisfy if it is to show that it wields authority, rather than sheer or unmediated coercive power, over those subject to its rule. To meet that demand, Williams said, the state 'has to be able to offer a justification of its power to each subject'". See: Dyzenhaus, 2022, p.213, and for the original argument see Williams, 2005, p.1.

of those principles have a questionable claim to authority. Crucially, he argues that if enough dubious laws are enacted, the order begins to shift from one of legal right to one of unmediated coercive power (Dyzenhaus, 2022, pp.2-3). Thus, to be legal, a norm must be interpretable in a way that respects the fundamental principles. We are told that when laws are interpretable in this way, legal officials can adequately answer the question 'But, how can that be law for me?' Consequently, legal systems are normative systems whose norms provide an adequate answer to that question.

The framework above is also employed to account for token identity, even if more obscurely. Dyzenhaus (2022, p.32) ponders that the satisfaction of principles of legality allows for gradation. Accordingly, one might say that it is not always clear whether a legal system continues or not, because this is a matter of moral debate. Be that as it may, Dyzenhaus seems committed to the claim that, even though unclear in a specific case, there is a determinable answer to the problem of continuity. Moreover, allowing gradations in the satisfaction of principles of legality accommodates local and historical differences across modern legal systems. In other words, the identity of a legal system over time is not equated with maintaining a specific norm or set of norms, but with more flexible arrangements, as the practices of argument that take hold within each legal system. In each jurisdiction, and perhaps even beyond national legal borders, this can acquire different shapes.

This last implication deserves careful attention. Dyzenhaus (2022, p.32) coins the concept 'continuum of legality' to claim that all modern legal systems comply with the principles of legality but may differ in their levels of compliance. So, we have many instantiations of a type of normative system (legal system), which differ (giving rise to different tokens) to the extent that they comprise different ways of satisfying the legal subject's question. We can compare their degree of compliance, keeping the legal subject's question in mind:

> [t]he closer a state is to the end of the continuum where there is largely compliance with legality, the more adequate will be the answers to the legal subject's question. Correspondingly, the closer it is to the other end, to ceasing to be a legal state […], the less adequate such answers will be (Dyzenhaus, 2022, p.32)

I want to examine whether we can say that a legal system continues to the extent that it preserves principles of legality. We cannot do that without: (i) fully explaining what principles of legality are; (ii) what it means to respect them over time. Dyzenhaus' account aims to answer both questions, but it does not do that satisfactorily, or so I claim. This is not a minor issue, as

it determines whether citizens can rightfully claim rights from pre-coup constitutions and to what extent a legal system is preserved in the face of political turmoil. The limits of Dyznehaus' proposed account of token identity become clear when he talks about unjust legal systems.

For him, officials have many different ways to place individuals or groups of individuals beyond the reach of the law. He thus proposes ideal types to compare each form of subordination (Dyzenhaus, 2022, pp.322-335). One important ideal type is what he calls the Dual State, that is, one in which two orders coexist: (1) the normative state, which is governed by law, and (2) the prerogative state, where discretion rules as the officials in power find best. What distinguishes The Dual State is that the law of the normative state governs only so long as those in power do not find such government inconvenient (Dyzenhaus, 2022, p.322). To illustrate, the Nazis were not just political actors, but a violent social movement that enforced their wishes through coercion and harassment whenever laws were no longer convenient to their political purposes.

It is highly controversial whether Nazi Germany had a legal system. The burden is to explain what the principles of legality are and how the violence characteristic of Nazi Germany, for instance, was not a definitive compromise of those principles. However, Dyzenhaus only argues for the legality of Nazi law by citing Ernest Fraenkel's Preface to the 1974 German edition of The Dual State, which describes the final phase of his legal practice in Berlin. In Fraenkel's words:

> […] I regarded it [as] an essential part of my efforts to ensure that a given case was dealt with under the auspices of the 'normative state', and not end up in the 'prerogative state'. Colleagues with whom I was on friendly terms confirmed that they, too, had repeatedly worked towards making sure that their clients were punished in a court of law.

From this, Dyzenhaus (2022, p.325) concludes that "it was still possible to enforce the law and the rule of law in Nazi Germany in the late 1930s, though that enforcement was a precarious business because it was contingent on decisions in the prerogative state." But why? What is being preserved despite all political upheavals and the injustice of the political regime that has conquered power? How was the legal subject's question answerable in that arrangement? Dyzenhaus does not address those questions as clearly as he does when he considers type identity.

The thesis under consideration is not so different from the thesis that I favor. Remember that I first put my preferred thesis in the following terms

R.L. token identity: A legal system continues to be the same to the extent it realizes the same conception of the rule of law.

From the previous paragraphs, Dyzenhaus seems to hold the same thesis, provided that principles of legality and the institutions that preserve them are considered a central part of the rule of law. Still, as I also mentioned at the beginning of this chapter, we should provide the details of what we mean by “rule of law”. To do that, I rephrased my preferred thesis as follows:

*R.L. token identity**: A legal system continues to be the same to the extent it realizes the same conception of mutual subordination to law, that is, to the extent it preserves the same guidance and accountability relations between citizens and rulers.

In the next chapter, I will argue that the notion of guidance can illuminate why the legal subject’s question is only answerable by respecting principles of legality and how that is central for the identity of a legal system over time. Once these matters are clarified, a substantive notion of the rule of law centred on accountability follows, and we can also understand what practices are in place when a legal system persists. Before doing that, I take stock to make it clear where my conception differs from previous attempts.

3.3 Conclusion

The many possible interpretations of the aspirational view revealed that the existing conceptions are insufficient. The key seems to be in a reading that connects token identity with the rule of law. The major lesson to be learned is that a complex mixture of attitude-independent and attitude-dependent normative phenomena provides this kind of identity. Therefore, we should be cautious of theories that attempt to reduce the identity of a legal system to either wholly objective or subjective aspects.

Early on in this work, we saw how Kelsen’s theory exaggerates the attitude-independence of legal systems. His theory starts from the correct assumption that a legal system is a system of legal norms. From this, he argues that the identity condition lies in the validity relations between legal norms, in which the basic norm provides a common thread that stretches over time. However, as cases of legal devolution show, a statute from an imperial power can

make a subordinate normative system into an independent legal system. In those cases, we have an apparent preservation of the basic norm, while there is discontinuity of the imperial legal system, which creates two new legal systems: (i) the imperial legal system minus the new municipal legal system, and (ii) the new independent municipal legal system. What is missing in Kelsen's explanation is the practical difference a new legal system makes in the lives of subjects and officials. In other words, the dependence of legal systems on the normative attitudes of those who are guided by its norms (attitude-dependence).

The mirror image of this mistake is exaggerating the attitude-dependence of legal systems. There are good reasons for emphasizing the attitudes of those who are governed and who act in the name of a legal system. As Andrew Yu acknowledges, "[i]t seems that if no one recognizes that a legal system continues to exist, then it is dubious that the legal system does continue to exist" (2025, p.25). Nevertheless, we should not reduce the identity of a legal system to the beliefs and attitudes of a group. We discussed *Token identity as salus populi,* the thesis according to which a legal system continues to the extent that rulers seek the good of the people, the latter being defined by reference to the subjective values of those who seize power. The upshot was that this thesis could only serve authoritarian leaders with disingenuous commitments to a legal system. In other words, the respect for norms that were not dependent on their will was missing. The doctrine of *Efficacious coup d'état* led to the same dead ends. For this doctrine, a legal system is supplanted by another when it is displaced through a successful coup d'état. In common law cases, the main issue was what makes a coup successful. Since courts were eager to approve the usurper's regimes, the success of their coups was also defined solely by reference to subjective beliefs and preferences.

A refinement is made once we think of identity over time as a matter of realizing a normative conception. The realization of a conception is dependent on people's attitudes, at the same time that a conception is a normative idea or set of principles. This is reinforced by the methodological commitments I endorsed in my version of the aspirational view. Recall that I started from the assumption that the phenomena suitable for jurisprudential analysis can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, for the people who performed or engaged in them (Finnis, 2011b, p.3 and Simmonds, 1984, pp.29-30). In that sense, there is an explanatory role for people's attitudes. Yet, given that the practical concerns and the self-interpretations of the people are not uniform, I also acknowledged the distinction between interpreting the acts and thoughts of participants one by one and interpreting the social practice in which they are part, i.e., what

they do collectively (Dworkin, 1986, p.63). This last feature tracks the idea that some attitudes are not consistent with maintaining a legal system, even if the subjects acting say otherwise.

Efficacious coup d'état as token identity introduced us to one instance of this way of conceiving identity. But, as we saw, that thesis cannot be intelligibly advanced without a defense of the rule of law. After all, the features that it takes as identity-making are not general features of every conceivable legal system, but only of legal systems that enjoy a great level of publicity. David Dyzenhaus makes an even more significant contribution to finding an adequate balance between attitude dependence and independence in explaining identity over time. Dyzenhaus connects type-identity to respect for principles of legality, because he takes the respect for those principles as sufficient to answer the legal subject's question: "how can that be law for me?". Later, Dyzenhaus introduces the notion of a spectrum of legality to apply the same framework to token-identity. Yet, he is not entirely clear about what work those principles are doing and how they can preserve a legal system over time. In what follows, I aim to address those shortcomings, keeping in mind the need to balance attitude dependence and independence. To do that, I will explore the common association between the rule of law and guidance, arguing that one notion of guidance can illuminate why the legal subject's question is only answerable by respecting principles of legality. Moreover, I shall argue that the legal subject's question is not just asked when citizens want to know what to do, but also in holding each other and public officials accountable. This brings the notion of accountability to the discussion as an integral part of the rule of law. I aim to show how the rule of law has both attitude-dependent and attitude-independent aspects, allowing us to take it as what gives identity to a legal system over time.

Chapter 4: Token-identity and The Rule of Law

In this chapter, I present the core of my case for the claim that a legal system remains the same to the extent that it realizes the rule of law. I elaborate on that idea by showing how a conception of the rule of law is made of guidance and accountability relations between citizens and rulers. I conceive guidance and accountability as felicity conditions for the reasons expressed in legal claims, pleas, and accounts, showing how principles of legality address the legal subject's question: "But how can that be law for me? That being clear, I argue that identity over time is the notion that allows us to delimit the resources from which we respond to the legal subject's question. All that being provided, we can say that the rule of law establishes identity over time.

To accomplish that, I will proceed as follows: first, I distinguish three notions of guidance— rationalistic guidance, guidance as self-application, and a hybrid model of guidance — to clarify the connection widely accepted between the rule of law, formal principles of legality, and guidance. The three notions differ in how they conceive the relation between reason-giving and practical reasoning. The upshot is that formal principles of legality define conditions without which citizens cannot understand the reasons legal norms attempt to address and thus exercise guidance as self-application. Second, I warn that one should not confuse rationalistic guidance and guidance as self-application with normative and motivational reasons. I then emphasize second-personal reasons, that is, one type of normative reason that is defined by the deliberative role it can perform, arguing that guidance as self-application presupposes this. Having introduced second-personal reasons, I shall argue that formal principles of legality make second-personal legal reasons accessible and that practices of accountability central to the rule of law are nothing more than demands for second-personal legal reasons. By doing that, we can have a complete appreciation of what the rule of law means.

After clarifying the meaning of the rule of law, I built my conception of token identity on the previous arguments. I start by ascertaining the relation between the existence and the identity of a legal system over time, to conclude that we should not be content with theories that exclude the point of view of citizens in the explanation of legal systems. From this, I address the empty question objection, arguing that the legal subject's question— "But how can that be law for me?"— is only intelligible and can be adequately answered by assuming that legal

systems persist in one sense. Hence, identity over time is a concept that performs a function in the discursive context in which legal claims, pleas, reproaches, and accounts are made. More precisely, the identity of a legal system over time is established by delimiting the resources from which one can address the legal subject's question. Those conditions, however, are not detached from the arguments that subjects present to each other; so, a proper description of what they are trying to achieve must be offered. Thus, I focus on the facilities a legal system gives to interacting agents, showing how their cooperation translates into a practice of reciprocal recognition based on guidance and accountability.

4.1 Three senses of guidance

There is a wide consensus that formal principles of legality are required by the rule of law (Fuller, 1969, pp.33-41; Finnis, 2011b, pp.270–1; Hayek, 2011, pp.308-328; Marmor, 2007, pp.7-33; Rawls, 1999, pp.208–10; Raz, 1982, pp. 214–18; Rodriguez-Blanco, 2018, pp. 216-217; Simmonds, 2007, pp.65). The reason for this is the role they play in guiding citizens (Fuller, 1969, p.162). Yet, guidance is not a univocal idea; so, we should clarify what guidance is and how principles of legality may ensure it.

The assumption that legal systems aim to guide conduct and, to a certain extent, guide conduct has been widely accepted in jurisprudence. Famously, H.L.A. Hart (1994, pp.38-39) argues that jurisprudential theories that give centrality to sanctions fail to see that the primary social function of law is "to designate by rules certain types of behaviour as standards for the guidance of citizens". We are told guidance occurs when citizens understand the rules and see that the rules apply to them without the aid or intervention of officials. Similarly, Jeremy Waldron (2011, p.8) contends that "the law strains as far as possible to look for ways of enabling voluntary application of its general norms and many of its particular decrees". Moreover, for Waldron (2011, p.8), this pervasive emphasis on self-application is "definitive of law, differentiating it sharply from systems of rule that work primarily by manipulating, terrorizing, or galvanizing behavior." I think both authors are correct, but their arguments require clarifying what guidance is. Three understandings of guidance must be considered*: rationalistic guidance*, *guidance as self-application,* and *a hybrid model of guidance*.

The relevant senses of guidance can be elaborated by investigating the relationship between guidance and reasons for action. One general, uncontroversial feature about legal systems, law, and legal norms is that they are normative phenomena. Another common

assumption in contemporary jurisprudence is that the normativity of legal phenomena can be profitably explained in terms of its relationship to the normative phenomena of reasons (Pike, 2023, p. 97). Discussion about guidance is a result of those assumptions, since it is safe to assume that for something to be a reason, it must be capable of guiding a substantively rational person. This last remark is what must be clarified in discussing the guidance provided by legal systems.

What is common between the different notions of guidance is that all of them conceive guidance as providing reasons for action. However, there is a great difference between conceiving reasons for action as reasons for conformity and as reasons for compliance. People *conform* with a reason for a certain act if they perform that act in the circumstance in which that reason is a reason for its performance. Briefly, they act as prescribed. People *comply* when they not only act as prescribed but also do so *because there is a reason* they must act that way (Raz,1999, p.178). The view that reasons for action are reasons for compliance seems to flow from the idea that practical reasons guide action. If one does not employ the relevant reasons in deciding what to do, it seems one is not guided by them (Raz, 1999, pp.179-180). Moreover, if one is not guided by them, then one is failing to behave as someone with appropriate sensitivity would. The alternative view that reasons for action are reasons for conformity seems less connected to guidance, because if reasons for action are understood as reasons for conformity, one may still talk of reasons for action as guides for behavior, but only in the sense that they may justifiably figure in one's practical reasoning (Raz, 1999, p.179). Notice that they *may* figure in practical reasoning, which means that one may use them, but does not have to. People do not even have to be aware that the relevant reasons exist. What matters is that the act for which the reason is a reason gets done. In other words, it does not necessarily matter if the agent acts motivated by this or some other (good) reason (Raz, 1999, p.180).

Guidance as self-application understands the guidance legal systems provide as the offering of reasons for compliance. R*ationalistic guidance* conceives legal guidance exclusively as a matter of offering reasons for conformity. The *hybrid model* comes as a compromise between the two, but, as we will see, this moderate alternative is not relevant for discussing the identity of a legal system over time. The difference between *guidance as self-application* and *rationalistic guidance* can be further elaborated by addressing the question: if legal systems exist to be reason-giving, then what is the point of doing so, if not thereby to guide people by getting them to use those reasons in their practical reasoning?

For *rationalistic guidance*, the point is that legal systems aim to be that in virtue of which some fact is a reason (Pike, 2023, p.101). To make sense of this idea, reasons are

conceived as guides only in the sense that they may justifiably figure in one's practical reasoning (Raz, 1999, p.179). We should note that reasons are not just what guide us to normative conclusions in our practical reasoning. Reasons are also what determine the normative valence of our actions, beliefs, and feelings (Pike, 2023, p.101). The reasons to which we are subject may remain the same even when we do not use them in our practical reasoning.[1] Similarly, it is unimportant for rationalistic guidance what makes citizens conform to legal norms, as long as they do. In that sense, a legal system that attempts to be reason-giving—to make it the case that we ought to do what it requires of us, whether robustly or only legally—is not deficient *qua legal system* if it only seeks to affect people's behavior through non-normative means (Pike, 2023, pp.104-105). Consequently, principles that enable people to use legal norms in their practical reasoning are deemed irrelevant for guidance and for the identity of a legal system over time. Consider, for instance, the principle of legality that requires publicity and promulgation.

Suppose a legislature agrees to create a new legal norm. Suppose further that the norm is justified, in the sense that it provides reasons for action. However, instead of promulgating the new rule of conduct, the legislature induces in the populace a behavior consistent with the rule it favors by employing sophisticated techniques of subliminal advertising (Marmor, 2007, p.16). There is no compromise of rationalistic guidance here because reasons for action were provided, and people conformed to them. The fact that people comply with that answer is just an extra. Conversely, the fact that the norm is not used in people's practical reasoning and its observance is induced does not affect rationalistic guidance.

The notion of citizens' self-application of legal norms assumes something different, since it focuses on reasons as premises in our practical reasoning. Accordingly, designing general norms for citizens' self-application implies that citizens can control and regulate their actions based on their own understanding of the relevant norms and reasons (Waldron, 2011, pp. 2-3). A different notion of guidance emerges: guidance is not just providing reasons, but providing the conditions for citizens to employ legal norms as reasons in their practical reasoning (Pike, 2023, p. 98). Consider again the principle of legality that requires publicity and promulgation. Those principles enable guidance as self-application because people must be able to know which norms apply to their circumstances, and then use those norms when reasoning about what to do. This can only be achieved if the norms adopted by the legislature are properly communicated to the citizenry.

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[1] In that sense, guidance is attitude-independent.

One word is needed about guidance as self-application and the conceptual features of legal systems. This notion of guidance can be defended as the paradigmatic idea of guidance even among theorists from different jurisprudential positions. The reason is that it is compatible with either saying that (i) normative systems that do anything other than guide in that sense are not legal or are deficient *qua legal systems*, and (ii) that a normative system is only legal if it guides subjects, but it is in no way deficient if it also secures conformity by other means. *The hybrid model* favors the last option. As it is, it is a thesis about what is in place whenever a legal system exists. So, it goes beyond my purposes. Remember that I am only concerned with the diachronic identity of modern legal systems, which allows me to emphasize *guidance as self-application* and its import to the rule of law. Other means of ensuring compliance then become details that may figure in a complete description of legal systems as a kind of normative system, but which are not crucial to the continuity of modern legal systems, conceived as a group of tokens of this general type.

Another consideration worth our attention is that one could say my analysis so far is too focused on the formal principles of legality and their import to guidance. This, one may object, is a poor explanation of the rule of law. My emphasis is not an accident, since satisfying formal principles of legality constitutes guidance as self-application. Yet, as we will see in due course, the identity of a legal system over time also depends on practices of accountability enabled by this sense of guidance. The formal principles are preconditions for ascertaining the identity of a legal system over time, but are not what give it its identity. This is because the rule of law is not just those formal principles. Therefore, we need a full picture of what is required by the rule of law. In the next two sections, I shall further clarify the type of reason used in guidance as self-application. This will give a better understanding of how principles of legality enable practices of accountability, before we properly explore identity over time.

4.2 Guidance, normative, and motivating reasons for action:

It might be tempting to understand the distinction between rationalistic guidance and guidance as self-application as mirroring the distinction between normative and motivating reasons. But, as the distinction between conforming and complying suggests, this is not entirely correct. It is worth emphasizing why this is a mistake. Roughly, normative reasons are those that favor, support, make a case for, or help justify a course of action. Motivating reasons are those for which someone acts (Alvarez; Way, 2024). The distinction is useful because there are different questions concerning the reasons for an action. On one hand, there are questions about whether there is a reason favoring someone's action (normative); on the other hand, there are questions about the considerations in light of which someone acted (motivating). When legal subjects comply with a legal norm in a given case, we can say that such a norm provides motivational reasons because citizens treat the relevant rules as reasons and then behave accordingly. In other words, what is happening is guidance as self-application. However, guidance as self-application is not reducible to motivational reasons, since this sense of guidance is also relevant for explaining some legal normative reasons, the existence of which depends on satisfying the rule of law. What is important to keep in mind at this point is: (i) guidance as self-application is concerned with motivational reasons, but not only; (ii) what must be added to the picture are some normative reasons that are not intelligible apart from their use in practical reasoning, as I will show below.

Normative reasons play at least two roles. First, they play a *deontic role* to the extent that they establish an action's deontic status for someone—that is, whether, all things considered, she ought, must, or may do that thing (Alvarez; Way, 2024). Rationalistic guidance refers *exclusively* to this deontic role. When we consider legal reasons in that sense, we suppose there are cases in which legal normative reasons are not considered as potential motivating reasons, but only as considerations that favor or disfavor an action (Pike, 2023, pp.101 and 106). They might also be motivating reasons, but this is not something that defines them. Second, normative reasons can also play a *deliberative role* when they are things one must consider in reasoning (Alvarez; Way, 2024). The deliberative role of normative reasons makes them potential motivating reasons. This feature is clarified by the interaction of first and second-order reasons in cases of compliance with reasons. Consider the example below.

Jane struggles with her homework and needs her partner, Derek, to stay at home for support (Raz, 1999, p.178). If giving Jane support while she struggles with her homework is a reason for Derek to stay at home, then he conforms to that reason if he does stay at home. He conforms even if he stays because he fell asleep or wants to watch TV while Jane is doing her homework. If Derek not only stays at home but does so because he realizes Jane's need and that it is a reason for him to do so, then we would say that he complies with the relevant reasons (Raz, 1999, pp.178-179). What is the difference in our assessment of Derek's actions in each case? In the first situation, Derek fails to display a proper sensitivity to Jane's needs. This is a failure in having a proper attitude, not a failure to give her support by staying at home. Had he been sensitive to Jane's needs, he would have been motivated by her need for support (Raz, 1999, p.179). In other words, he should have been motivated by her need for support. Therefore, *he had reason not only to give Jane support but also to do so because of her need for it*. Jane's need is not reducible to a reason for conformity because it combines a first-order reason to give her support with a second-order positive reason to do so for the reason that she needs it (Raz, 1999, p.179). This type of second-order reason is based on what one owes another. This requires an explanation, especially in the legal context.

To better explain that, I emphasize second-personal reasons, that is, one type of normative reason that is defined by the deliberative role it can perform. Guidance as self-application presupposes this. Having done that, I will argue that the formal principles of legality make second-personal legal reasons accessible and thus make them resources in replying to the question "How can that be law for me?". We can then see that practices of accountability central to the rule of law are nothing more than demands for second-personal legal reasons.

4.3 Guidance as self-application and second-personal reasons

For Darwall, "[a] second personal-reason is one whose validity depends on presupposed authority and accountability relations between persons and, therefore, *on the possibility of the reason's being addressed person-to-person"* (2006, p.8, emphasis added). This kind of reason would not exist but for the possibility of the second-personal address involved in claiming or demanding (Darwall, 2006, p.9). Reasons addressed in orders, requests, claims, reproaches, demands, promises, contracts, and in the act of consenting exemplify this type of reason. In other words, second-personal reasons are not intelligible apart from the attitudes of agents.[2] In

[2] They are not entirely dependent on people's attitudes, though. I stress that point below.

the example above, the consensual relationship between Jane and Derek entails that each has the rightful standing to hold the other accountable for their insensitivity to the other's needs for support.

Second-personal reasons are then combinations of a first-order reason with a second-order positive reason to do so because another has the status to claim an action or response. In that sense, second-personal reasons can be characterized as distinct from impersonal reasons. Another ordinary example may help here. Imagine someone causes you pain by stepping on your foot. One way to present him with a reason to remove his foot is to make him feel sympathetic concern for you. He should see inflicting pain on you as a bad thing, that is, a state of the world that there is reason for him (or, indeed, for anyone able) to change. In desiring that you be free of pain, he would see this possible state of affairs as a better way for the world to be. Crucially, his desire that you be pain-free does not work as the source of his reason, but as a form of access to a reason that is there anyway, regardless of the person his action affects. In other words, the reason would not be *for him* to stop hurting *you,* as it would exist for anyone who is in a position to affect your relief. By chance, he was well placed to do so (Darwall, 2006, pp. 5-6). Another type of argument is available, though. A second-personal reason for him to remove his foot is that he must do so *because of what is required of him in his relation with you* (Darwall, 2006, p.7). Note how different this is from considering him as someone who happens to be in the position to alter the regrettable state of someone who is causing pain to another. If the latter were the case, and if he could stop, say, two other persons from causing gratuitous pain by keeping his foot firmly planted on yours, things would turn out to be morally right if he continued stepping on you. However, the claim-based (hence second-personal) reason would not recommend that he do so. Rather, it would be addressed to him as the person causing gratuitous pain to you, something we normally assume we have the authority to demand that persons not do to one another (Darwall, 2006, p.7).

The example shows that second-personal reasons are normative reasons for acting that depend on practices of claiming and demanding. In that sense, they are dependent on people's attitudes. Still, making a valid claim or demand to someone presupposes the authority to make it (Darwall, 2006, p.11). This authority is part of the normative felicity conditions of second-personal reason, that is: "what must be true for second-personal reasons actually to exist and be successfully given through second-personal address" (Darwall, 2006, p.4). When duly authorized, the claim creates a second-personal reason. Accordingly, and this is what distinguishes second-personal reasons from impersonal agent-neutral reasons, the authority to

demand implies not just a reason for the addressee to comply, but also his responsibility for doing so (Darwall, 2006, pp. 11-12).

When someone attempts to give another person a second-personal reason, she presupposes her standing as a relevant authority to her addressee. In other words, what is assumed is that the merits of first-order reasons are combined with the second-order reason that the latter should be considered, given who is addressing them. Applying that to legal reasons, one could ask: what does it mean to say that the addresser and the addressee of legal reasons are in a normative relation that the addressee can be expected to accept?

It means that legal subjects can reasonably expect an adequate answer to the question 'But, how can that be law for me?'. Such an answer is provided to the extent that subjects are recognized as members, that is, as agents and not just as objects that must move in the direction prescribed by officials. Conditions for conformity do not suffice in this case, so the analysis must focus on conditions for compliance. The latter are provided when subjects are recognized as agents because legal norms not just provide first-order reasons one can conform to, but also second-order reasons according to which one must follow the norms produced by a government that respects them as agents.

The connection with guidance flows from the paragraphs above. Recall that *guidance as self-application* is not just providing reasons, but providing the conditions for citizens to employ legal norms as reasons in their practical reasoning (Pike, 2023, p. 98). In that sense, the guidance that legal systems provide is dependent on reasons for complying. Second-personal reasons call our attention to practices of claiming, addressing, and holding accountable. Those practices thus invite questions about whether the addressee enjoys a status that makes her claims backed up by second-personal reasons. When that is the case, the content of a legal norm or the interpretation of its content can be used to answer the question: "But how can that be law for me?" If that is the case, guidance as self-application is established.

Still, one could ask, what does it mean to recognize the addressees of legal norms as members, making it the case that they have a second-order reason to comply with legal norms? To answer that question, I shall develop how principles of legality and the accountability they enable play a crucial role in transforming political might into right. Briefly, the answer is the rule of law.

4.4 Second-personal reasons and the rule of law

What impact does the rule of law have on the quality of political relationships? It must be a significant difference that creates second-order reasons for complying with legal norms. In a basic formal sense, the rule of law establishes conditions that must be respected for citizens to understand the first-order reasons legal norms aim to provide, and this is what respect for members requires. By doing this, formal principles also support accountability relations based on legal reasons. I provide below an argument to make sense of these ideas.

As we saw, legal reasons can only be meaningfully addressed if they are presented in a way that allows them to be used in practical reasoning. Thus, legal norms must be general, public, non-retroactive, intelligible, consistent, possible to comply with, and there must be congruence between declared rule and official action (Fuller, 1969, pp.33-41). Nevertheless, these principles do not stand on their own and must be constantly interpreted in the light of the basic idea they try to realize (Fuller, 1969, p.104 and Raz, 1982, p.218). The basic commitment that holds them together is that subjects are, or can become, responsible agents, capable of understanding and following rules, and be answerable for their defaults (Fuller, 1969, p.162). In other words, respecting those principles expresses respect for people's "capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behavior in relation to norms that they can grasp and understand." (Waldron, 2011, p.7).

However, this set of practical skills is not exercised in isolation. Rather, those skills flourish when people develop a critical reflective attitude to certain patterns of behavior as common standards. This attitude takes hold when standards are used for criticism (including self-criticism), demands for conformity, and acknowledging that such criticism and demands are justified (Hart, 1994, p.57). Often, this leads to controversies about what the law requires. Under such circumstances, a commitment to the subject's agency implies that people are capable of a view or perspective of their own regarding the application of legal norms (Waldron, 2011, p.12). In brief, the rationale for formal principles of legality must be supplemented by an account of how claiming and defeating legal positions is a matter of argument. This evinces the connection between the rule of law and second-personal reasons. Principles of legality are an integral part of the rule of law because they allow identifying the reasons that are presented in response to the legal subject's question, "But how can that be law for me?". In other words, the difference those principles make is to situate the government and citizens in the business of providing second-personal legal reasons. This evinces a minimal form of respect; one that is not in place when citizens are just goaded into conformity.

Being thus situated, the rule of law can also be defined by reference to second-personal reasons to the extent that it requires strong and effective institutions empowered to hold the exercise of power accountable, institutions that are themselves likewise accountable. The common association between the rule of law and the demand of universal subjection to law, often sloganized as "No one is above the law", is meant to express that feature (Postema, 2022, p.56). But what is accountability?

By accountability, we should understand not an agent's *ability* to give an account, but rather the agent's *liability* to another party's *demand* for an account. (Postema, 2022, p.48). As such, accountability has four distinctive features (Postema, 2022, pp. 48 and 70). First, it is an interpersonal activity. At least two parties— an accountability holder and an account giver— engage in an asymmetrical relationship concerning a domain of the giver's activity. It is asymmetrical because the account giver must provide an account of her actions, and the holder must offer an assessment of the account given. Second, accountability is discursive: the holder demands reasons connecting the giver's actions to standards that might provide a warrant and grounds for what has been done. Third, the relationship is normatively structured. Norms entitle the holder to an account, making the giver liable to be called out (Postema, 2022, p.48). Some normative conditions must be fulfilled for someone to be *liable* to account for her actions to another, just like for someone to be *entitled* to an account from her. Fourth, accountability is a mutual activity, i.e, there is no unaccountable accountability holder. Although accountability-holding is asymmetrical between the holder and the giver, the holder is also liable to give an account to another holder, perhaps for calling the initial giver to account. These connections form a network rather than a hierarchical chain (Postema, 2022, p.70).

Why must one consider accountability as part of the rule of law? As argued above, accountability explains ideas commonly associated with the rule of law, e.g., equal subordination to law. Another reason is that including accountability strengthens our explanation of the rule of law as a political value, going beyond its connection with respect for people's agency. At this point, I follow Ronald Dworkin (2006, p.155), for whom one of the tasks of a theory dedicated to explaining a political value is to explain why it is a value. One might ask how we can do that without begging the question. Dworkin (2006, p.156) envisages two options. First, treating the value as detached from and fixed independently of our concern to live well. We must respect it simply because it is, in itself, something of value that we do wrong or badly not to recognize. Or, second, we might suppose that it is a value because accepting it as a value enhances our life in some other way. This last option is the integrative approach, the one Dworkin favors. Thus, the integrative approach to value allows for a more

accurate articulation of the rule of law's significance, insofar as it reveals its contribution to broader moral and political values.

Mutual accountability contributes to equality by calling for laws that are common, can be universally applied, and uniformly enforced. For citizens, this means they are subjects of a common body of laws and that, rather than being subject to the unaccountable power of others, they can make law-based demands by asking, "But how can that be law for me?". In other words, as integral parts of a network of accountability, subjects are recognized and protected as members (Postema, 2022, p.94). Having this status, subjects enjoy a basic level of equality, not equality of possession (the concept employed to measure what one has in comparison to others), but rather a core sense of relational equality, which measures the quality of political relationships among members (Postema, 2022, p.89). The problem addressed is not "being treated differently [in the allocation of resources and opportunities], but being treated as an inferior, as one excluded from the association of peers and equal regard, and thus made publicly invisible" (Postema, 2022, p.90). To put it simply, subjects are political peers in a very basic sense when they are considered sources of claims that must be considered just because of their standing as members of a common enterprise.

Freedom also becomes relevant once we include mutual accountability in the rule of law. For freedom is not just threatened by an agent's actual or likely interference in the actions of another. Similarly, freedom cannot always be equated with the availability of a range of choices. It is conceivable that a free man might have fewer options available to him than a slave. This makes the connection between slavery and a restricted set of options a contingent matter. Yet, we do not think that slavery is only contingently connected with freedom, since we consider slavery a paradigmatic case of unfreedom (Simmonds, 2007, p.101). Why is that? The reason lies in the fact that the conditions under which a slave enjoys an extensive range of options are fully dependent upon the will of the master. We can then distinguish two different dimensions of freedom: one concerning the range of options available to us without interference, and the other concerning the degree to which that range of options is itself dependent upon the will of another (Simmonds, 2007, p.101 and Petit, 1997). Applying that to political matters, we can see that mutual accountability prevents the subordination of citizens to the will of their rulers. Citizens are subordinate whenever rulers are *in a position* to unilaterally exercise their will (Postema, 2022, p.86). Subordination is a denial of freedom because subjects are not considered as self-originating sources of claims, that is, as entitled to consideration on account of their interpersonal authority, independently of the merits of their claims (Rawls, 1985, p.242 and Petroni, 2022, pp.161-162). Under the rule of law, *mutual*

subordination *to law* asserts, rather than denies freedom, because rulers must show a legal warrant for how they treat citizens. Citizens are entitled to an account based on common norms because they are equally subject to these standards— remember the legal subject's question. This entitles them to a consideration of their claims, based not exclusively on the merits of the first-order reasons they address but crucially on the second-order reason that they deserve the respect due to members.

For the reasons above, the rule of law is not reducible to principles of legality, as it includes practices of mutual accountability. Together, principles of legality and practices of mutual accountability show that the rule of law can also be defined by reference to second-personal legal reasons. Second-personal reasons would not exist but for the possibility of the second-personal address involved in claiming or demanding (Darwall, 2006, p.9). So, second-personal legal reasons are not intelligible apart from the attitudes of agents. Yet, not any legal claim or request is backed up by a reason, because felicity conditions must be fulfilled for a second-personal reason to exist. So, there are attitude-independent features that should be added to the picture. Among them is the respect for principles of legality and the instances of equality, freedom, and membership that mutual accountability brings about. Now it is time to show how these features have a diachronic dimension that establishes identity over time.

4.5 The rule of law as identity-making

In this section, I use my conception of the rule of law to argue for my version of the aspirational view on the problem of continuity. Remember that I defend that

> *R.L. token identity**: A legal system continues to be the same to the extent it realizes the same conception of mutual subordination to law, that is, to the extent it preserves the same guidance and accountability relations between citizens and rulers.

The last section aimed to show how principles of legality and practices of mutual accountability give rise to a conception of the rule of law centered on second-personal legal reasons. Similarly, by connecting principles of legality and mutual accountability to second-personal reasons, my conception highlights how the rule of law allows an adequate answer to the legal subject's question, "But how can that be law for me?" In this section, I will argue that the features that constitute second-personal legal reasons have a diachronic dimension, and that this is what gives a legal system its identity over time. To do that, I shall build my argument upon the idea that second-personal reasons combine the merits of first-order reasons with the second-order reason that the latter should be considered because of who is addressing them. This last idea draws our attention to practices of recognition that underlie legal systems in which people can use past political actions as a basis for making public claims and arguments. Those practices are marked by argumentative exchanges that assume agents petitioning for acknowledgement as addressees of reasons and become addressers by acknowledging others over time.

I hope the benefits of my version of the aspirational view on the problem of continuity will become clear as the argument for it unfolds. However, I believe there are some standards one can use to judge whether it meets its goals. First, the conception to be presented must, at the very least, suggest how the conditions of existence and identity over time are related. Second, it must address the empty question objection and consider why we should be concerned with questions about the identity of legal systems over time. Third, as a theory of identity over time, it must provide clear answers while accommodating the complexity of the subject. I think appealing to moral features and practices helps, since at least some moral questions can be positively answered, and people seem to consider the most urgent questions as answerable even when they are complex (the morality of murder, torture, etc). Plainly, people can also be wrong

about morality, just like they can be wrong about identity over time. In both cases, one promising way of checking where the mistake lies, or so I argue, is by engaging in arguments. Finally, an explanation of what gives a legal system its identity over time should not be alien to discussions about identity over time in other fields of inquiry. More specifically, my conception has the burden of explaining how identity over time can be connected to qualitative moral aspects without becoming too eccentric. The focus on the rule of law, and not morality as a whole, plays that role in my argument.

My argument is based on assumptions that are worth recalling. Two clarifications were made on the previous chapters. First, by "a legal system," I mean the institutional structures that allow people to rely on legal rights and duties to justify claims, demands, and excuses. In this sense, my goal is not to provide a general explanation of legal systems (type-focused theory) but rather to explain the legal systems (tokens) that can be characterized as providing, even if precariously, frameworks in which past political actions are taken as sources of rights, duties, and permissions that bind diachronically.[3] Briefly, I want to study those legal systems that have resources[4] to answer the legal subjects' question, "But how can that be law for me?". Second, we can better understand what "the rule of law" means once we assume that at its core lies the requirement that "both sides of the political relationship — the rulers and the ruled, the government and the governed— […] be subordinate to the demands of the law" (Rundle, 2023, p.5). This is the requirement of mutual subordination to law. Two notions are central to this requirement: guidance and accountability.

I argued that guidance is not univocal, depending on how we link reason-giving to practical reasoning. Whenever the reasons offered require agents to use them as premises in practical reasoning, *Guidance as self-application* becomes relevant. Many features associated with the rule of law are only intelligible in the light of this notion of guidance. In other words, determining the normative valence of our actions does not suffice. *Rationalistic guidance* is not as pivotal to the rule of law as *Guidance as self-application* because it cannot account for the attitude-dependence that characterizes the rule of law. Still, the rule of law is not wholly dependent on citizens' attitudes, because accountability takes hold whenever there are conditions for guidance as self-application. By accountability, we should understand the exchange of second-personal legal reasons, that is, normative reasons for acting that depend on legal practices of claiming and demanding. The emphasis on reasons and their felicity

[3] See section 2.1. on methodology.
[4] I do not want to make the stronger claim that my theory focuses only on legal systems that provide an answer or even an adequate answer to the legal subject's question.

conditions allows accommodating the attitude-independent elements that make up the rule of law. But how does all that play out over time?

4.5.1 Existence and identity over time

The relation between existence and identity over time is a promising start. For the sake of the argument, assume that modern legal systems can exist even when citizens only conform to legal norms.[5] Hart (1994, p.116), for instance, holds that:

> [t]here are […] two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.

What is interesting in the passage above is the difference between the attitudes of officials and citizens that Hart claims one should expect in determining the existence of a legal system. Obedience occurs even when people do not believe that the action is the right thing for them and others to do (Hart,1994, p.115). While not necessarily a thoughtless response, it suffices for obedience that the prescribed action is carried out, even if only for personal gain. In that sense, each citizen acts for their part only, and we can say that citizens' conformity is enough. For Hart, things are different in the official realm. The law-making, law-applying, and law-identifying activities require that officials consider the ultimate rule defining validity criteria as a public, common standard of correct official behavior, rather than as something each official merely obeys for their part alone (Hart, 1994, pp. 61 and 116). So, though officials may deviate from these rules, they must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. Conformity does not suffice; compliance is required, and officials are accountable for their failure to adhere to those norms. For present purposes, the question to be asked is whether the distinction between official and

[5] I do not think that is correct, but my response to the problem of continuity shows its force if it succeeds even for one who advocates for such a position. Being thus successful, my argument can provide a basis for revising mistakes in theories about the existence of legal systems, to the extent that the problems of existence and continuity communicate. For a critical assessment of Hart's thesis about existence, see the works cited in note 3 in chapter 2 above.

lay attitudes makes sense when talking about the identity of a legal system over time. My claim is that it does not.

The matter becomes clear once we consider rules conferring private powers on individuals. A Hartian philosopher could insist that the minimal conditions for the existence of a legal system accommodate those powers, because citizens can be ignorant of the ultimate criteria of validity while acquiescing in the results of official action. Accordingly, citizens may still conform to the legal norms that are identified according to the foundational validity criteria, even if ignorant of the ultimate foundations of their legal system. Moreover, we are told that citizens can also make claims and exercise powers conferred by those legal norms (Hart, 1994, p.61). However, this concession does not include private powers and their exercise among the features that must be in place for a legal system to exist. Those powers typically involve more than mere obedience, as they imply the practices of claiming, addressing, and holding accountable, based on the voluntary commitment citizens incur by contracting, exchanging, and promising. Consequently, this explanation labels as contingent "some of the chief amenities which law confers [to citizens]", such as "the making of wills, contracts, transfers of property, and many other voluntarily created structures of rights and duties which typify life under law" (Hart, 1994, p.96). Similarly, a theory that disregards the way citizens typically employ legal norms in practical reasoning cannot account for rules that confer private powers, because these rules can only be understood when looked at from the point of view of those who exercise them (Hart, 1994, p.41). This raises the question: how should we include those amenities in our theory of legal systems, if we are to properly explain the difference legal systems make to the lives of citizens?[6] At least two solutions are available: (i) alter our theory on the existence of legal systems; (ii) include those amenities in an explanation of the identity of legal systems over time.[7] I should follow the second option, because it privileges the point of view of the citizens and how official statuses are dependent on their recognition.

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[6] One option is tracing the genetic relation between legal norms by emphasizing power-conferring norms. Genetic relations illustrate the normative connection between laws that confer power and those created through the exercise of that power. This approach would be useful if it makes sense to say that power-conferring norms exist in every legal system or that some power-conferring norms distinguish different legal systems. In that sense, a response is given to what Raz calls the problem of structure, that is: Is there a structure common to all legal systems, or to certain types of legal systems? Are there any patterns of relations among laws belonging to the same system that recur in all legal systems, or which mark the difference between important types of system? It is arguable whether we can subtract the point of view of those who exercise those powers and still give them a promising explanation, or whether tracing back genetic relations is an adequate representation of how legal subjects engage with those norms. Briefly, it is unclear what kind of explanatory gain is added by providing an analysis of genetic relations, a matter which is, at best, trivial. For an explanation and justification of its use, see: Raz, 1980, pp. 2 and 182-183.

[7] Again, as mentioned previously, those options do not exclude each other. We can opt for the second strategy in the hopes that a stronger basis will be offered to revise our current theories of existence. This is clearly the case when we ask: "is it saying that a legal system lost its identity over time the same as saying it ceased to exist?"

I hope that in the next two sections, it will become clear what my argument is for accommodating the legal point of view in a practice of recognition alongside official power (see especially section 4.5.3 below). For now, I want to anticipate that, as I understand, legal officials and experts will be references concerning what private rights and duties people have, only if their pronouncements are reasons that people must respond to. However, given the connection between private powers and people's practical reasoning, official pronouncements will provide reasons only if people must employ them as premises when deciding what to do (Decat, 2025, pp.100-101 and Bustamante, 2025, p.35). Briefly, officials cannot establish their normative statuses by fiat; they must acquire that status by being entitled to citizens' recognition. However, the same dynamics apply for citizens: they should be considered as apt recognizers to the extent that they can judge whether officials are correct about what private powers citizens have. This is a continuous process; one that continues whenever a legal system has an identity that persists over time.

Before proceeding, it is worth seeing that the discussion above provides the initial assumptions for the claim that the rule of law is what gives diachronic identity to legal systems. The rule of law, guidance, and accountability name different but related ways in which law makes a difference in the lives of citizens. It is worth repeating that principles of legality are an integral part of the rule of law because they allow identifying the reasons that are presented in response to the legal subject's question, "But how can that be law for me?" In other words, they allow us to conceive a legal system as "a complex of rules designed to rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity." (Fuller, 1969, p.9) The specific way in which that is carried out is by "providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system." (Fuller, 1969, p.210). This framework of interaction is largely made of rules that assign private powers. One conspicuous way the government safeguards the baselines of interaction is by providing public forums in which individuals are held accountable and required to justify their actions under the law. Those notions name processes whose identity over time is pivotal to how a legal system affects people's lives. However, we should be clear about what we mean by identity over time. As explored below, the questions one is trying to answer and the context in which they are pressed matter a great deal.

4.5.2 Identity over time and the legal subject's question

Remember that I explore identity over time in tandem with practical concerns. This compels me to address the empty question objection, according to which all practical problems associated with identity can be properly explained by continuous facts and relations, even when we do not know whether identity over time holds (Parfit, 1984, p.275). If that is correct, identity is empty in one of two senses (Parfit, 1984, p.260). First, questions are empty when they have no true answers. We can decide to give these questions answers. But any possible answer would be arbitrary. Second, questions are empty when they do not describe different possibilities, any of which might be true, and one that must be true. Instead, these questions merely give us different descriptions of the same outcome. I argue below that the legal subject's question is only intelligible and can be adequately answered by assuming that legal systems persist in one sense of identity over time.

I follow Quine (1950, p.622), who, inspired by Hume, contends that "identity" is a concept that performs a function in discursive contexts. When it comes to objects, identity serves the purpose of resolving a problem, that is, that various similar impressions separated in time are mistakenly treated as identical. To solve that, we can change our description. The result is saying that some momentary events are encompassed by a non-momentary object. For example, *a* is a momentary stage of the River Cayster in 400 B.C., while *b* is another momentary stage of the Cayster in 1950. Plainly, *a* and *b* are not identical. Still, at both occasions one can say "This is the Cayster", because both are parts of the *same* river (Quine, 1950, pp.621-622). There is a gain in being able to make this last remark, because "[a]s long as what we may propose to say about the river Cayster does not in itself involve distinctions between momentary stages a,b, etc., we gain formal simplicity of subject-matter by representing our subject-matter as a single object, Cayster, instead of a multiplicity of objects […]" (Quine, 1950, p.625). In chapter one, we saw the problems with simply applying such a framework to legal systems, as the reidentification approach proposes. Yet, identity over time can be profitably considered as a concept that performs a function in the discursive context in which legal claims, pleas, reproaches, and accounts are made. What is this context?

Some general expectations are conspicuous whenever the legal subject's question arises. One crucial expectation is that the legal subjects' understanding of legal norms will influence their decisions and actions. It is further assumed that citizens often treat legal norms as

providing reasons[8] in their deliberations, rather than mere features of the environment in which deliberation takes place (Postema, 1994, pp.369-370). Briefly, it is expected that they will comply, not merely conform, with legal norms. That is why they ask, "How can that be law for me?". Rules that confer private powers are central to substantiate those assumptions, because they recognize subjects not just as duty-conforming, but as agents. Looked at from the point of view of those who exercise private powers, those rules appear as "an additional element introduced by the law into social life over and above that of coercive control" (Hart, 1994, p.41). Thus, they recognize subjects as competent to determine the course of the law within the sphere of their contracts, trusts, wills, and other structures of rights and duties which they are enabled to build (Hart, 1994, p.41). In other words, norms that confer private powers provide baselines for self-directed action, not detailed sets of instructions for accomplishing specific objectives set by the lawgiver (Fuller, 1969, p. 210).

Nevertheless, this is not exclusive to power-conferring norms, since customary norms also recognize subjects as competent to determine the course of the law. By customary norms, I mean norms that arise from mutual accommodation and adjustment between agents who need reliable expectations of others' behavior and thereby coordinate their interactions (Fuller, 2001, p.233). Recognizing their force is recognizing subjects as competent to shape the course of law and change the scope of official authority, in a way that is more suitable to interaction. In any case, when the meaning of those baselines for interaction— either created by custom or private powers— is in dispute or when they are unduly hampered by official action, there is a basis for introducing the legal subject's question.

Under the context painted above, identity over time has the function of delimiting the resources from which one can address the legal subject's question. To be more precise, identity over time is the retrospective reconstruction of the felicity conditions of second-person legal reasons. It is retrospective because we cannot ascertain it before the practices of guiding, claiming, addressing, and holding accountable take hold (attitude-dependence). That is, as the practices unfold, we can establish the legal reasons that officials and fellow citizens present to each other. This is why I emphasized guidance and accountability. The fact that identity over

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[8] This, of course, is compatible with reducing legal reasons to reasons for acting in a certain manner. Consequently, I do not defend nor rule out the possibility that legal norms are partial reasons, needing to be filled out with some specification of the end of the action. If that is the case, legal norms may provide reasons for choosing to pursue one's end in one way rather than another, but, of course, one would not have reason to act in the legal way at all if one did not have one's end in sight. Be that as it may, notice how this expectation is articulated by the notion of guidance as self-application. After all, what is being implied is that modern legal systems work on the assumption that citizens can grasp the practical import of legal norms, work out their correct applications, appreciate the reasons presented, and adequately relate legal reasons to other reasons. See: Postema, 1994, p.370.

time is taken as a reconstruction of the validity conditions of certain reasons makes it a product of rational reconstruction. Legal claims, accounts, and judgments are potential sources for understanding what gives a legal system its identity, because each of them provides an opportunity to make explicit the second-personal reasons that underlie legal arguments. Thus, we can present past legal decisions and practices as giving rise to a shared tradition built upon the exchange of commonly accepted reasons (Brandom, 2019, pp.17-18). Similarly, not all legal arguments and claims equally matter for identity (attitude-independence). Conversely, even though the identity of a legal system over time is not wholly independent of people's attitudes, people can be mistaken about whether the same legal system persists.

For example, from 1988 to 2001, the Brazilian Constitution expressed that congressmen could only be prosecuted for crimes if a majority of the legislature approved the opening of investigations. In 2001, an amendment abolished that requirement, making the legal responsibility of a congressman a less demanding task. For many, this was just an amendment to the Constitution. Still, in 2025, a new proposal was made to go back to the pre-2001 arrangement. This started a debate about whether this was consistent with the current Brazilian legal system. If the current legal system were created in 1988, it might be compatible. If it has changed its identity over time, perhaps the reason is with the lawyers who argue that the Brazilian officials have an obligation not to retrocede in the advancement of democracy.[9] The last interpretation being correct, the former is a mistake about the identity of the Brazilian legal system over time.

The identity of a legal system over time is framed as a matter of argument, just like any moral question. Still, my focus on guidance and accountability aimed at circumscribing the scope of the discussion to what could address the legal subject's question. So, there is one perspective from which the questions here explored should make more sense, that is, any qualitative change in a legal system will be identity-changing only to the extent that it affects the quality of the answer to the legal subject.

4.5.3 Recognition and identity over time

[9] I am not saying my theory solves any specific dispute. Rather, I argue that a sound theory of identity over time provides resources that, together with many doctrinal details, can respond to legal controversies.

The remarks above and the example provided, however, may still be too obscure to make a case for my understanding of identity over time. The problem, one could say, is that the connection between reason and people's attitudes remains unclear. There is a suggestion of paths to follow, so the objection goes, but there is no conciliation between the attitude-dependent and attitude-independent features at the center of my account. In other words, I am told my theory does not provide an account that avoids the suggestion of reason's transcendence while nevertheless enabling us to affirm the distinction between reason and unreason (Simmonds, 2023, p.68). That objection can be answered by showing how the felicity conditions of second-personal legal reasons are tied to practices of recognition. Once that is in place, the case for an account that takes identity over time as the reconstruction of those conditions strengthens.

Practices of recognition are highlighted when the baselines for interaction a legal system provides— custom or private powers— are in revision or in dispute. I shall focus on revisions to explain how recognition displays between citizens and enacted law to explain how it displays between officials and citizens.

Parties engaged in interaction frequently face new situations and practical problems (Postema, 1994, p.365). This raises the question: what conditions maintain the identity of the interacting framework over time? In the face of new circumstances, parties must adjust, reinterpret, or even replace existing customs or private arrangements based on legal norms. This is not a wholesale departure from what was in place, provided that the rationale for previous norms is in force. The question is how previous answers to the legal subject's question, "But how can that be law for me?", may settle how new cases should be addressed (Decat, 2020, p.176). A solution can be found in cases where subjects were recognized as competent to shape the scope of their obligations and to define the expectations they could legitimately have. Revisions are possible because the interacting agents keep petitioning for recognition as competent to shape their legal obligations. By recognition, I understand attributing a normative deontic status to someone by acknowledging them (Brandom, 2009, p.70). In other words,

> The core of the notion of recognition is the idea that normative statuses [competent, authoritative, responsible, entitled, committed to] are in principle unintelligible apart from consideration of the practical attitudes of those who *hold* each other responsible, *acknowledge* each other's authority, *attribute* commitments and entitlements to one another (Brandom, 2009, pp.3-4.

For present purposes,[10] I am only concerned with recognition as that which constitutes the practice of exchanging second-personal legal reasons.[11] Remember that making a valid claim or demand to someone presupposes the standing to make it (Darwall, 2006, p.11). This standing is part of the normative felicity conditions of second-personal reason, that is: "what must be true for second-personal reasons actually to exist and be successfully given through second-personal address" (Darwall, 2006, p.4). Felicity conditions, however, are not something external to the practices of claiming and holding each other responsible. When agents advance arguments concerning what can be reasonably expected in an interaction, they claim they have a standing that other parties should recognize: i.e., they are competent to understand the standards that bind them and to claim respect for their interpretation of those standards. At the same time, by doing that, they recognize others as capable of *holding* them responsible or *acknowledging* them (Brandom, 2009, p.70). Briefly, in petitioning for recognition, one ascribes a certain kind of standing to others. But they have that status only to the extent that one grants it to them through recognition. In the legal context, the interdependence of interacting agents translates into reciprocal recognition once one is committed to cooperating.

What is crucial here is that legal subjects be recognized and recognize each other as capable of understanding the legal reasons being addressed (guidance), use them in practical reasoning, and require compliance with all its implications (accountability). Nevertheless, these practices of recognition will be held only as long as principles of legality are respected and forums for public accountability are maintained. Briefly, addressing second-personal legal reasons is only possible by respecting the rule of law. Recall that I take identity over time as the retrospective reconstruction of the felicity conditions of second-person legal reasons. Therefore, a legal system continues to be the same to the extent that it preserves the same conception of the rule of law, that is, the same guidance and accountability relations between citizens and the government.

The dynamics of petitioning for recognition and acknowledging also explain the role of enacted law in a continuous legal system. Guidance and accountability are still relevant, then. We can see that by looking at how reasonable expectations shape the meaning of enacted legal norms, allowing for guidance as self-application and practices of mutual accountability.

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[10] Brandom extends his arguments to encompass all concepts. While I find his reasoning compelling, I will focus on applying his ideas to practical issues for now. This is because I do not believe I have enough arguments to fully agree or critique his views on empirical and descriptive concepts.

[11] For an explanation of second-personal reasons, see section 4.3 above.

To be successful in guiding citizens, officials must shape the rules they enact and interpret in anticipation of how citizens are likely to understand, and expect their fellow citizens to understand the language they use and the decisions they make (Postema, 1994, p.372). Accordingly, officials exercise power over citizens and petition for their recognition. Interpreting officials petition for recognition, trying to establish what reading of past legal norms is more consistent and sensitive to the relevant social context (Fuller, 1969, p.229). From this, it follows that officials attempt to produce usable legal rules, that is, rules that guide people's deliberation and shape their dispositions, beliefs, and expectations. Officials can only succeed in that task if they properly grasp the solutions that were adopted in the past. In other words, they must establish continuity of the present practice with the past. Yet, what counts as continuous with the past depends heavily on what present subjects and officials should consider reasonable projections from past practices (Postema, 2002, p.175). For this reason, we can say that current officials seek recognition and are liable to answer, "But how can that be law for me?" Simultaneously, following enacted rules shapes citizens' dispositions, beliefs, and expectations, which, in turn, will argue for the legal warrant of their actions. So, citizens also petition for recognition of their status as legal subjects to officials. A practice of mutual accountability then follows as officials are submitted to the scrutiny of citizens, and the latter are evaluated as compliant or non-compliant with the law.

The preceding arguments stress the cooperative features involved in maintaining a legal system. Fuller (1969, p.91) calls our attention to that when he says:

> The problem of interpretation […] reveals, as no other problem can, the cooperative nature of the task of maintaining legality. If the interpreting agent is to preserve a sense of useful mission, the legislature must not impose on him senseless tasks. If the legislative draftsman is to discharge his responsibilities he, in turn, must be able to anticipate rational and relatively stable modes of interpretation. This reciprocal dependence permeates in immediately less obvious ways the whole legal order.

One should not underestimate the complexity of maintaining a legal system in a cooperative context. Again, Fuller helps us when he says that “law is not a datum, but an achievement that needs ever to be renewed” (Fuller 1954, 467). The renovation and continuity of this achievement is ongoing whenever there is a practice of petitioning for recognition and acknowledging the normative statuses of members. This should be the case to the extent that legality depends on moral argument. To illustrate, “No one is above the law” when the rule of law is in place. In other words, citizens’ “allegiance is to the law, not to any particular person’s view of what the law is.” (Dworkin, 1977, p.185). From this, it follows that “a determination by a court may make a difference to what the law [of a given legal system] is, as a matter of precedent. But the difference it is supposed to make is itself a matter of moral argument” (Waldron, 2004, p.326). The solution lies in the felicity conditions of second-person legal reasons we can reconstruct. In other words, we can establish identity over time by engaging in legal and political arguments.

Is that sound and convincing enough? In the next chapter, I shall address possible objections to my view and how it fares in comparison with other accounts, mainly The Reidentification approach and other forms of connecting the identity of a legal system to the social forms to which it is integrated. I argue that my account, in highlighting the rule of law, adds important details to accounts that answer the problem of continuity by focusing on social forms, and that reformulations of Reidentification are not immune to the problems signaled in chapter 1.

4.6 Conclusion

The chapter was dedicated to presenting the core of my case for the claim that a legal system remains the same to the extent that it realizes the rule of law. My first step was an exercise in clarifying the relevant ideal, what it means, and what it requires. Generally speaking, it means mutual subordination to law, that is, that "both sides of the political relationship — the rulers and the ruled, the government and the governed— […] be subordinate to the demands of the law" (Rundle, 2023, p.5). This, in turn, acquires a specific meaning once we clarify what guidance and accountability mean.

I distinguished three notions of guidance— rationalistic guidance, guidance as self-application, and a hybrid model of guidance — to clarify the connection widely accepted between the rule of law, formal principles of legality, and guidance. The three notions differ in how they conceive the relation between reason-giving and practical reasoning. The upshot is that formal principles of legality define conditions without which citizens cannot understand the reasons legal norms attempt to address and thus exercise guidance as self-application. Accountability explains ideas associated with the rule of law, like "no one is above the law", and also explains how this ideal communicates with equality, freedom, and membership.

Together, guidance as self-application and accountability, evince how the rule of law can also be defined by reference to second-personal reasons, that is, reasons "whose validity depends on presupposed authority and accountability relations between persons and, therefore, *on the possibility of the reasons being addressed person-to-person"* (Darwall, 2006, p.8, emphasis added). Principles of legality are an integral part of the rule of law because they allow identifying the reasons that are presented in response to the legal subject's question, "But how can that be law for me?". Moreover, accountability is a demand for these reasons, and only flourishes within strong and effective institutions empowered to hold the exercise of power accountable, institutions that are themselves likewise accountable.

Wherein those ideas are minimally mature, legal claims, pleas, reproaches, and accounts are made. Under that context, we need to delimit the resources from which one can address the legal subject's question: "But how can that be law for me?" (Dyzenhaus, 2022, p.2). Identity over time is then established by retrospectively reconstructing the felicity conditions of second-personal legal reasons. Legal systems can fulfill those conditions if they provide guidance and accountability relations between citizens and rulers. Legal systems provide guidance and

accountability when they respect the rule of law. Therefore, legal systems remain the same to the extent that they realize the rule of law.

Chapter 5: Addressing objections

After a long time without receiving much attention, the problem of continuity started to be reconsidered by legal theorists. In this trend, three recent works are worth special attention: Anna Lukina's paper *Making Sense of Evil Law* (2025); Benjamin Spagnolo's book, *The Continuity of Legal Systems in Theory and Practice* (2015), and Li-kung Chen's paper, *The Continuity of a Legal System* (2023). In this chapter, I compare the account provided in the last chapters with those works to see whether there are cases of continuity or discontinuity for which the rule of law is indifferent. Each of these works was chosen for a reason, which I detailed below. Nevertheless, all of them seem to share the assumptions of the reidentification approach, which I rejected in the preceding chapters. Hence, this chapter is one more attempt to argue for the superiority of my account and the methodology it assumes when compared to Reidentification. The questions and the context might be new, but the deadlocks remain as one insists on inadequate methodological assumptions.

My engagement with evil law aims to clarify whether my theory can account for dysfunctional legal systems. Under evil legal systems, large sects of society are deemed inferior, and their lives are threatened by legal norms that order their subjection or exempt those who inflict harm. On the face of that, my focus on the rule of law may sound too idealistic and thus insufficiently comprehensive. In one sense, I admit that I do not want to provide a general explanation of legal systems (type-focused theory). Rather, my concern is with the legal systems (tokens) that can be characterized as providing, even if precariously, forums for accountability through fully public argument. Yet, the challenge of evil law is whether there are cases in which legal systems operate reasonably well, despite their officials deliberately ignoring citizens who ask, "But how can that be law for me?" Suppose that is the case. Can we transition from one evil legal system to another without foregoing all that has been defended in this work? Lukina's work argues for the distinction of evil law and engages directly with the works of Lon Fuller and David Dyzenhaus on Nazi Law. Given its clarity and insightfulness, I take it as a reference.

The comparison with Spagnolo is justified because he carefully reconstructs Raz's claim that "The identity of legal systems depends on the identity of the social forms to which they belong" (1980, p.189) and sheds light on its implications by applying it to Australian Constitutional history in the period of 1788 and 2001. Besides a rich description of the political

turmoil of this period, Spagnolo identifies three tests that Raz's claim implies, and I think that adding the rule of law to his analysis resolves some obscurities in his work. The most important one is why Raz contends that changes to constitutional and administrative laws, being political laws, are more relevant than changes to other laws in evaluating the continuity of the political system and therefore of the legal system, which is part of it. The reason, I argue, is that those norms sensibly change the network of legal accountability in a political community.

In chapter 1, we saw that it is not always clear what Raz defends as the answer to the problem of continuity. One possibility was what I called The Reidentification approach. Li-kung Chen clearly defends such an approach, arguing that we should develop Raz's remarks on momentary identity to provide an account of non-momentary identity (2023, p.384). Chen thus argues that the continuity of a legal system is given by the unity of officials' law-recognizing practice, that is, officials' identification of the legal system whose laws they are recognizing and applying (2023, pp. 393 and 388-389). For Chen, this provides a superior account, especially compared to those that tie continuity to social forms, since it better explains the replacement of one legal system with another in a persisting state (2023, p.365) and the change of a municipal legal system from a sub-state legal system to a state legal system (2023, p.366). I shall argue he is wrong in both aspects.

5.1 Lukina's account of evil legal systems

One possible objection to my account is that it cannot properly explain the diachronic identity of evil legal systems, especially changes from one evil legal system to another evil legal system. This is embarrassing, so the objection goes, because I favor the focal case methodology, and any sensible use of this method should accommodate at least some marginal cases, among which evil legal systems are the most interesting. The force of this objection can be highlighted once we remember that this methodology can be broken down into two parts.

First, it acknowledges the importance of adopting a point of view in selecting what is of importance in jurisprudential analysis. As previously introduced,[1] the phenomena suitable for jurisprudential analysis can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, for the people who performed or engaged in them (Finnis, 2011b, p.3 and Simmonds, 1984, pp.29-30). Yet, the practical

[1] See sections 2.1 and 2.2.

concerns and the self-interpretations of the people are not uniform (Finnis, 2011b, p.4). So, no coherent picture will result from merely asking what the participants in the practice are disposed to call a legal system. Moreover, we will have an impoverished understanding if we only stick to a common denominator. Therefore, the theorist must select what the relevant point of view is.

Second, there is the choice of the perspective we take as a reference for building our theory and the substantive argument for taking this point of view rather than another. I chose to focus on the practical perspective of citizens and officials who rely on legal rights and duties to justify claims, demands, and excuses. My general goal is to explain how the operation of a legal system over time provides citizens with reasons for compliance, and not just for conformity. Thus, I argued that, if we disregard the way that citizens typically interact with legal norms in practical reasoning, we cannot account for some of the chief amenities a legal system provides, that is, those rules that can only be understood when looked at from the point of view of those who exercise them.

Once we adopt the focal point methodology and choose our relevant point of view, there will be some latitude in our analysis to include dysfunctional legal systems and institutions. The latter are "watered-down versions of the central cases, or […] exploitations of human attitudes shaped by reference to the central case." (Finnis, 2011b, p.11). We could say that those marginal cases provide a criterion for judging which selections of point of view improve and which hamper our understanding of legal phenomena. With this in mind, I consider evil legal systems to test my claim that legal systems continue the same to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). Are evil legal systems marginal instantiations of the rule of law? Or, are they not legal systems at all? If we choose to call them legal, can we transition from an evil legal system to another evil legal system?

I start with a definition of evil legal systems. For Anna Lukina, "evil law *is law, which, if interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves"* (2025, p.14). As it seems, her definition is not limited to discrete statuses and acts, encompassing how they relate in a normative system, as she says:

> Evil law subsumes a variety of cases that go beyond laws that command that intolerable harm be inflicted (that I will call duty-imposing rules)
> […]
> one should keep in mind that in addition, evil law can give discretionary powers that will be later be used for inflicting intolerable harm (power-conferring rules)
> […]

> Moreover, evil law can justify, distract from, or hide this infliction of intolerable harm – not causing it, but removing disincentives to inflicting it by minimizing the consequences for the wrongdoer (legitimating rules) (Lukina, 2025, p.13)

One challenge raised by Lukina's definition is whether I would call evil legal systems legal in the first place, and if so, how their evil features should be considered in establishing their diachronic identity and individuation. I think the answer requires retrieving another important point Lukina calls our attention to, and which I considered when introducing Dyzenhaus' idea of a spectrum of legality.[2] The paradigmatic case of evil law, Nazi Law, was not as clear-cut as critics sometimes assume. A more thorough analysis shows that it was a Dual State, rather than a lawless state wherein principles of legality were wholesale dismissed.

Remember that a Dual State is one in which two orders coexist: (1) the normative state, which is governed by law, and (2) the prerogative state, where discretion rules as the officials in power find best. When it comes to the latter, arguments like Fuller's, for whom Nazi law was not law at all, were especially compelling, given that there was a 'rupture' from legality. The prerogative Nazi state openly defied such requirements as non-retroactivity – as illegal executions were later made 'legal' by retroactive ordinances – or publicity – as there were "repeated rumours of 'secret laws'" (Fuller, 1958, p.651 and Lukina, 2025, p.17) Moreover, as Fuller notes, Nazi laws were often 'bypassed' by judges and other officials if they became inconvenient (Fuller, 1958, p.652 and Lukina, 2025, p.17). "In other words, Nazi law was not legally binding even from the internal point of view" (Lukina, 2025, p.17). From this, two questions can be asked: (1) Does a Dual State qualify as a legal system, even if an evil one? If so, (2) how does its diachronic identity relate to the interaction between the normative and the prerogative states?

Responding to the first question, I submit that a Dual State is, at best, a marginal or dysfunctional legal system. I will argue below that the features that make it marginal give us a reason to avoid dwelling on classifying these normative orders as legal or not legal. The first step is to acknowledge that the classification of a normative order as legal or not legal depends on which point of view we take. This also applies for a Dual State: perhaps, from the point of view of an Aryan, German, politically indifferent or deferent citizen, Nazi Law provides guidance. It enacts public, general, non-retroactive, enforceable norms that define conditions by which he can celebrate contracts, acquire property, and be protected from all sorts of physical and moral violence. Moreover, if another citizen violates his rights, he can hold her accountable

[2] See section 3.2.

for not having the proper sensitivity to his claims (a distorted sort of second-personal legal reasons) and follow the judicial procedures that The Normative state provides. However, can one claim respect for a putative reason that only favors his group at the expense of and oppression of others? Can legal reasons be presented that way? It is highly doubtful that the highly exclusionary arrangement of a Dual State can be portrayed as an instantiation of a normative order centered on second-personal reasons. If appropriate, the legal mark here is ascribed only because not every agent is legally unaccountable, as there is a small (perhaps a very small) class of citizens who can take legal norms in the normative state as reasons for compliance. If that is correct, those citizens can also hold some authorities accountable for not complying with the reasons that back up their claims. Another way to put it is to say that, under evil legal systems, not every authority is an unaccountable accountability holder, but at least one authority is unaccountable, as it has ample discretionary powers to inflict intolerable harm on victims. That is why, from the point of view of Aryans, there is a dysfunctional legal system, and for the victims, there is no law whatsoever. This last remark provides a strong reason to reduce the relevance of the very question of whether this normative order is legal or not, as I will argue below. So, even if the correct explanation is that the Dual State is a legal, albeit dysfunctional, legal system, there is reason to consider other questions that evil legal systems bring to our attention.

To respond to the second question— how does an evil legal system's diachronic identity relate to the interaction between the normative and the prerogative states ?—, we should first see how the normative and the prerogative are not independent from each other. Lukina claims that "political terror did not always assume a 'prerogative' form and was often supported by the normative state." For her, "[d]espite its obvious immorality, the early Nazi anti-Jewish legal program before the Kristallnacht was 'law' even under Fuller's view." (2025, p.19). Even if that claim is correct, it does not mean that those legislations were *fully* compliant with the rule of law, conceived as comprising principles of legality and accountability relations. The reason is that what holds principles of legality together is a respect for persons. As I tried to explain earlier,[3] legal reasons can only be meaningfully addressed if they are presented in a way that allows them to be used in practical reasoning. Thus, legal norms must be general, public, non-retroactive, intelligible, consistent, possible to comply with, and there must be congruence between declared rule and official action (Fuller, 1969, pp.33-41). Nevertheless, these principles do not stand on their own and must be constantly interpreted in the light of the basic

[3] See section 4.4.

idea they try to realize: that subjects are, or can become, responsible agents, capable of understanding and following rules, and be answerable for their defaults (Fuller, 1969, pp.104 and 162). Briefly, subjects are taken to be sources and receivers of second-personal reasons. This is not what is assumed under the Dual state, not even in the normative state. The normative state only existed because Nazi rulers thought it convenient. Consequently, the scope of the normative state was not just like any other legal system; rather, it was a matter of what was the most effective way of entrenching power and exterminating those deemed inferior.

It follows, crucially, that it does not really matter whether Jewish German people were denied basic rights through secret legislation or by clear, prospective, public, general legislation, but whether legal mechanisms were used in debasing their status. Whatever the technique employed, the result was the same, i.e., not considering them as addressers of the question "but how can that be law for me?" either by denying they were deserving of reasons or by giving discretionary powers that exempted crass violations of their rights. The lesson we can draw from this is that the diachronic identity of an evil legal system is not established by how much the prerogative state dominates the normative. Instead, an evil legal system changes its identity depending on how the discretionary powers it assigns change and who is excluded from networks of accountability. An evil legal system becomes another when those matters change without changing the fact that we have a normative system *which, even when interpreted in its best light, will inflict or enable intolerable harm (including atrocities) to victims themselves* (Lukina, 2025, p.14).

One should note that in this last case, there are stronger reasons to sustain that diachronic identity is an empty question, since, whatever the answer to the question of individuation, we still have an intolerable evil legal system. Even though the transition from an evil legal system to another is of minor practical difference, the theoretical questions involved are still worth pursuing, and not just easy cases that we can dispense with. After all, it is not "somehow given, pre-analytically, whether people in Nazi Germany had legal rights and obligations or not, so that we can reject out of hand any theory that gives an answer contrary to what we 'know' about that situation" (Dworkin, 1984, p.260). We need a theory to establish whether there were legal rights in Nazi Germany and to what extent that impacts our understanding of that normative order as legal or not. "Wicked legal systems should be treated, that is, like hard cases that turn on which conception […] is best rather than easy cases whose proper resolution we already know and can therefore use to test any particular conception for adequacy." (Dworkin, 1984, p.260)

There is one difference that remains practically relevant, though: the distinction between an evil legal system and an extremely unjust one. A paradigmatic case of an extremely unjust legal system is perhaps Apartheid South Africa. As I mentioned in section 4.5.3, in Apartheid South Africa, black South Africans were recognized as legal subjects for some purposes but not for others. Moreover, the Constitution in force back then had a declaration of rights in which equality occupied a pride of place. Consequently, the parts of the law that seem to relegate black people to inferior status were put into question by those parts that did not (Dyzenhaus, 2022, p.311). From this, an extremely unjust legal system can be defined as *law that will inflict or enable intolerable harm (including atrocities) to victims themselves, but when interpreted in its best light, may provide guides for legal changes and transitional justice through legal means*.

Therefore, whereas the transition from an evil legal system to another may be practically indifferent— thus, an empty question—, the transition from evil to extremely unjust legal systems may have a practical import we should not miss.

5.2. Spagnolo's reading of Raz

The problem of continuity was a theoretical response to some of the main 20th-century political turmoil. I think the "Grudge Informer Case" and the earliest exchanges in the Hart-Fuller debate already suggested some outlines for the problem.[4] Yet, it was not until legal philosophers started to consider the effects of the Statute of Westminster 1931 and the juridical status of the newborn states that the problem was refined as a philosophical question worth considering. Theories were judged as sound or obscure depending on how well they explained the complexities involved in legal devolution and revolution. That being the case, we saw how Joseph Raz, in one of the many versions of his account on diachronic identity, proposes a framework tying a legal system's identity to the political community to which it belongs.[5] In this work, my attempt is similar, but without worrying about the proper boundaries between legal and other normative systems, which implies an account substantively different, focused on the rule of law. We now turn to how Benjamin Spagnolo tries to flesh out the bones laid out by Raz to apply his account. The result is a very capacious theory, one that could even convince some that there are no conceptual questions left, but only questions concerning its application to new phenomena. I shall argue that this is not entirely correct. Spagnolo's reconstruction clarifies what Raz meant and shows the force of some of his contentions, but there are still some minor obscurities that we could avoid by relying on the concept of the rule of law.

Remember that Kelsen's solution to the problem of continuity was not adequate in the face of legal devolution. Finnis and Raz criticize Kelsen's theory for its inability to account for the independence of legal systems whose origins go back to lawful devolution. For Kelsen (1945, pp.115-6), momentary legal systems are part of the same non-momentary legal system when their creation is authorized by the "historically first constitution" or by a constitution that was thus authorized. Raz (1980, p.108) reads Kelsen as accepting a version of the principle of

[4] See: Hart, 1994, pp.207-212. For instance: "[…] after revolution or major upheavals, the Courts of a system have to consider their attitude to the moral iniquities committed in legal form by private citizens or officials under an earlier regime", ibid. p.208. Fuller formulates the issue as follows: "When we recognize this simple fact of everyday legal experience, it becomes impossible to dismiss the problems presented by the Nazi regime with a simple assertion: 'Under the Nazis there was law, even if it was bad law.' We have instead to inquire how much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule, and what moral implications this mutilated system had for the conscientious citizen forced to live under it." See: Fuller, 1958, p.646.

[5] See section 1.5.2.

origin, according to which "the membership of laws in a system, and the identity of the system, are completely determined by the origin of the laws" (Raz, 1980, p.18). Finnis (2011a, p.407) contends that for Kelsen "every illegal change in the constitution of a state is a revolution, and that a revolution overturns the entire legal order, replacing it with a new system." The problem is that we cannot account for the fact that there were new legal systems born out of a statute enacted by imperial powers in Westminster. One alternative path is to go beyond chains of validity. This sounds promising because it is quite unlikely that the Statute of Westminster 1931 was the sole factor in turning the then-colonial legal systems into independent ones. The statute was a final concession to political upheavals that had been in place for some time before its enactment. The question then becomes how the political and the legal domains interact in the creation of a new legal system and the discontinuity of the Imperial Legal System.

For Raz (1980, p.189), "The identity of legal systems depends on the identity of the social forms to which they belong." More precisely, Raz (1982, p.100) considers the problem of continuity to be a subtopic concerning the relationship between legal systems and the state. For him, (1) a state is the political organization of a society. This implies it is a political system. (2) The legal system is only part of the norms constituting the political system; most political systems include numerous nonlegal norms. (3) The continuity of a legal system is tied to the continuity of the political system. Spagnolo explains how that differs from Kelsen:

> Raz 's account does not hold that the existence of an (effective) law that cannot be depicted within the genetic structure of a pre-existing legal system […] establishes discontinuity. Nor does it hold that the existence of genetic relations establishes continuity (2015, p.181).

Giving away focusing on genetic relations, Raz is more concerned with the nature, extent, and manner of legal change (Spagnolo, 2015, p.182). Accordingly, "continuity is only interrupted by a 'constitutional law of great importance', whether or not that law has a genetic relation with pre-existing laws." (Spagnolo, 2015, pp.181-182). Yet, there is no clear metric of importance. Spagnolo thinks that, for Raz, importance is, at least in part, content-based: "[…] constitutional and administrative laws, being political laws, are more relevant than changes to other laws in evaluating the continuity of the political system and therefore of the legal system, which is part of it." (2015, p.182). Two objections can be raised at this point.

First, sometimes legal norms that were not clearly political become or reveal themselves as political, casting doubt on whether they are capable of changing the legal system. For instance, one could reasonably say that the German Legal system turned from a constitutional

legal system into an evil legal system not after changes in its constitutional clauses, but after legislation that sensibly altered the status of German Jewish citizens. Think of the two laws known collectively as 'Nuremberg Laws'. As Anna Lukina (2025, p.2) remembers, one of them, the Law for the Protection of German Blood and German Honour, forbade marriages and extramarital intercourse between Jews and Germans. The other, the Reich Citizenship Law, stripped Jews of German citizenship. From this, I submit that what matters for diachronic identity (continuity/discontinuity) is not the branch of law (constitutional, administrative law, private law) changed by new legislation. Rather, what matters is the ability of the rulers to provide an adequate response to the legal subjects who ask, "but how can that be law for me?". This, as I argued, requires respecting principles of legality and providing normative resources to build networks of accountability. In brief, we need a conception of the rule of law.

Second, not every constitutional and administrative law is politically relevant to the definition of a legal system. For instance, the Brazilian 1988 constitution defines a percentage of how much resources states and municipalities should invest in public education. Important as it is, it seems incorrect to say that the Brazilian legal system will change if there is an amendment that preserves this obligation but that changes the relevant percentage. Therefore, the content-based test provided by Raz and emphasized by Spagnolo is not enough. We need clearer standards. Again, the rule of law seems to be the relevant concept, as it focuses on what responsibilities rulers have in addressing norms to citizens (principles of legality and guidance) and how accountable they are in chains of responsibility (accountability).

Perhaps the claims above are too hasty. We should note that "Raz's model includes a social parameter: legal systems are always part of political systems, themselves subsystems of broader social systems" (Spagnolo, 2015, p.183). So, we could say that the legal norms that we should keep in mind are not just norms of constitutional and administrative law, but also those that are politically relevant to the point of changing the identity of the political system. To assess that claim, consider first the identity of the broader political system to which a legal system belongs.

For Spagnolo, "The social forms [Raz] assumes legal systems are part are 'complex forms of social life, such as religions, states, regimes, tribes, etc '. (2015, p.183). Those social forms have political norms that form a subsystem on which the legal system depends. That being the case, "[…] for the purposes of considering identity, the relevant norms of a political system are those that establish the common enterprise of the participants in the system and those that comprise the associated shared understanding" (Spagnolo, 2015, p.184). In other words, "Raz accords weight to commonality — and continuity — of substantive considerations of

value in the non-legal norms of the political system" (Spagnolo, 2015, p.186). These considerations are important because we are told that the continuity of the legal system is tied to the political system. This invites attention to the impact of (changes to) laws on nonlegal norms and that of (changes to) non-legal norms on laws (Spagnolo, 2015, p.188).

At this point, Spagnolo improves Raz's account. For the former, talking about the impact of one system on another will become relevant when "the laws and non-legal political norms overlap in some respect […]". Moreover, "[i]n areas of overlap, laws and non-legal political norms may be (or changes to one or both may render them) compatible or incompatible with one another" (Spagnolo, 2015, p.188). Continuity and discontinuity will then turn upon the nature, manner, and extent of the incompatibility (Spagnolo, 2015, p.188).

Spagnolo (2015, p.189) tries to further clarify that idea by proposing a test similar to the one Raz advanced when talking about the dispute between two legal systems. The test can be put as follows: in cases of incompatibility between legal and non-legal political norms, what are people's attitudes and actions towards the state, the regime, or the other form of social organization of which the legal system concerned is an integral part? Does the population defy or disregard the legal system concerned because of its allegiance to one regime rather than another? Moreover, how does that conflict affect the efficacy of major constitutional laws, i.e., the operations of the important law-applying and law-creating organs, and the efficacy of other laws that possess a political character?

All in all, we have a very robust account. Still, its relevance depends on the overlap of laws and non-legal political norms. When will that occur, and why is that overlapping practically important? Can we explain the same phenomenon without assuming that legal systems are unique institutionalized normative systems that must be distinguished from other parts of the political system, as Raz does? I think we gain clarity about what is at stake when putting the incompatibility relation between legal and non-legal norms as an inquiry into the rule of law. After all, it seems we are asking questions like: to what extent respecting the rule of law is reducible to following enacted legal norms? Is the rule of law a collective enterprise that requires a moral commitment from citizens and authorities alike? If the rule of law is a moral value, how can it be harmonized with other political values, like justice, democracy, and community?[6] In this sense, we can trace compatibility and incompatibility relations, understanding how the persistence of legal systems implies the continuous upholding of values, while sometimes compromising others we hold dear.

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[6] For my answer to this question, see section 4.4.

5.3 Chen's two test cases

In Chapter 1, I presented the reidentification approach (or just "Reidentification", for short) to the problem of continuity. I call this approach Reidentification because it investigates whether temporally distinct momentary legal systems are parts of a non-momentary legal system. By proceeding that way, it parallels theories of personal identity that focus on what Marya Schechtman (1996, p.8) calls "the reidentification question", that is: "what relation must hold between two 'person-stages' (or 'person time-slices') to make them stages or slices of the same person?" Thus, the reidentification approach to the problem of continuity. Having identified this account, I proceeded to lay out its main features.

One important feature is that the reidentification approach aims to ascertain the identity and continuity of a legal system as a set of norms. Accordingly, there must be criteria for identifying the norms that belong to a legal system and to ascertain how they are related to the features that distinguish this system from other normative systems. In explaining momentary identity, Raz claims that legal systems are institutionalized normative systems. Institutionalized systems are sets of norms that either (i) set up norm-creating or norm-applying institutions (call these primary organs) or (ii) are internally related to these (Raz, 1999, pp. 126 and 132). From this, we are told we should consider that a legal system contains all the norms that its primary organs are bound to apply and which they recognize as binding.

Moreover, the primary organs that are to be regarded as belonging to one system, rather than another, are those that mutually recognize their determinations as binding (Raz, 1999, p.147). This attitude of mutual recognition between officials suggests that the criteria of identity over time rest on relations internal to institutions. If those relations change but not to the point of changing the type of normative system in force, there is, at best, a change of tokens, that is, a legal system x becoming a legal system y. Similarly, if there are changes in a legal system but no changes that affect the pivotal relations internal to institutions, the legal system continues.

I tried to reconstruct Reidentification as a viable approach to the problem of continuity by emphasizing its main features and the need to forego the momentary/non-momentary distinction. Yet, it was a reconstruction, since Raz hesitated between this proposal and the one considered in the last section. Fortunately, Li Kung-Chen's paper "The Continuity of a Legal System" (2023) straightforwardly argues for a version of what I called the reidentification approach. Moreover, Chen raises doubts as to whether it is correct to say, as Raz sometimes

does and as Finnis clearly does, that the continuity of a state's legal system is dependent on and must coincide with the continuity of a more comprehensive social system. In brief, Chen (2023, p.365) rejects that a continuous legal system is equivalent to the legal history of a particular community. In this section, I shall assess his main arguments for this rejection and contend that they are unpersuasive in light of my account.

Chen considers two test cases: (i) the replacement of one legal system with another in a persisting state and (ii) the change of a municipal legal system from a sub-state legal system to a state legal system. For Chen (2023, p.366), those cases "foreground the possibility that the continuity of a municipal or a state legal system does not coincide with and depend on the continuity of the social system in which it operates". Given that supposed failure, Chen goes on to argue for the claim that the best explanation is that the continuity of a legal system is a function of legal officials' unity in the law-recognizing practice. Official unity is a hybrid of the official's concurrent, conventional, or joint actions, and it involves, as a crucial element, the official's express or implied identification of the particular legal system in which they act (Chen, 2023, p.366). This echoes Raz's contention that the attitude of mutual recognition between officials suggests criteria for establishing momentary identity. Chen adapts the latter claim to make it relevant to diachronic identity. Does that make sense? How can we assess Chen's argument? In what follows, I shall only contest the alleged insufficiency of the "social system model" by showing that my account explains the two test cases above.[7] If successful, my argument shows that there is still no sound basis to argue that the reidentification approach is superior.

The first test case covers situations in which a new constitution is made with the intention of signing a new legal beginning. To illustrate, Chen (2023, p.372) mentions an ancient political community, like China, that replaced its traditional legal system with a Western-style legal system. The intuition is that a political community or a state may persist even though it has changed its legal system. In Chen's words, "a state may fundamentally rearrange its legal structure either to rectify past deficiencies or just to adapt to changing circumstances, and there is good reason for relying on existing law to order such change". (Chen, 2023, p. 372). What is missing in this reasoning is a clear exposition of why law or a Western-style legal system is suited for the task, that is, of why something once deemed unnecessary becomes needed. Of course, many historical reasons may be presented; however, we can try to ascertain the possible mutual interaction between legal and non-legal political

[7] For a more general appraisal of Reidentification, see section 1.6 above.

norms. The upshot is that it is questionable whether a state or a political community remains the same even after its legal system has changed from a traditional to an impersonal rule of law version.

I submit that a Western-style legal system stimulates changes that were embryonic in the political community and which required nourishing practices of public accountability. We can see that by recognizing the role played by legal rules in making morality effective (Fuller, 1969, p.205). Consider the moral precept "do not take what belongs to another". How can we decide what belongs to each and what actions amount to trespassing? In a more traditional setting, there is no divisive disagreement about what is right, so the expectations concerning others' behavior are more or less shared. As social groups become, for whatever reasons (migration, war, economic changes), more complex, moral requirements become more controversial with a consequent loss of the "reciprocity and publicity of right-demanding and right-respecting behavior." (Postema, 2022, p.44). To be sure, the moral precept "do not take what belongs to another" may still be widely accepted, but there is disagreement about whether a constitution should protect individuals from the Government's interference into their properties, as to what an entitlement is, how to transfer property, what is the best liability arrangement, whether distributive concerns should be considered in the definition of property, or if we should value merit and the labor one attaches to its possessions. Moreover, each may prefer that these matters be settled even in a way that he or she opposes, if the alternative is no public definition of property, or a law confined to the most basic uncontroversial cases (Waldron, 2004, p.105).

Western legal systems provide what is needed by creating norms that comply with principles of legality (promulgation, clarity, non-retroactivity, enforceability, etc.) and by building publicly available structures and institutions wherein the necessary publicity, recognition, and reciprocity can take place in networks of accountability (Postema, 2022, p.44). More generally, the result is the transition from a traditional community into an impersonal, public-oriented one. The interaction between legal and political norms can also go the other way. When the transition from a traditional to an impersonal society is almost complete, legal norms enacted without attention to their effects on public impersonal interaction can backfire as ineffective requirements. Briefly, they do not speak to people's public-oriented mind and are thus defects for which authorities are held accountable based on other norms (perhaps a constitution). For all the previous reasons, I remain unconvinced that the example provided by Chen shows that a political community can change its legal system while remaining the same. I now turn to his second test case.

The second test case asks whether we can have a colonial legal system turning into an independent legal system while remaining the same. At first, this sounds puzzling, but Chen (2023, pp.373-374) wonders whether independence may not be the result of changes solely in the political community. If that is the case, we can have the same legal system persisting despite a change from one political community to another. I do not think that makes much sense either.

We can see why we should reject Chen's second claim by complementing Spagnolo's reading of Raz with my own account. We saw that, for the former, a legal system's continuity turns upon the nature, manner, and extent of the incompatibility between legal and non-legal political norms (Spagnolo, 2015, p.188). In the face of such conflicts, Spagnolo (2015, p.189) proposes that we should ask: what are people's attitudes and actions towards the state, the regime, or the other form of social organization of which the legal system concerned is an integral part? Does the population defy or disregard the legal system concerned because of its allegiance to one regime rather than another? I propose we reformulate these questions as: (1) what resources can be used to address the legal subjects' question, "but how can that be law for me"? (2) Are the answers given to the legal subject's question generally accepted, or is there a consensus that they are not capable of legitimating official action? (3) Were the answers provided reasonable?

The answer to the first question is different when a nation becomes independent. Citizens and officials are no longer accountable to imperial powers. That is, imperial powers no longer have the last say about what is an adequate answer to the legal subject's question, and the imperial legal system no longer provides resources to address this question. Of course, imperial powers may still try to answer the legal subjects' question for citizens and officials of the newborn nation. However, the question is no longer addressed to them. We can then answer the second question by saying that citizens and officials no longer seek recognition from imperial powers because the latter are not recognized as parts of chains of accountability. This reflects something else, which answers our third question: even if there is no change in their content, power-conferring norms acquire a different meaning in the context of the rupture from imperial powers, because they now exclude imperial powers, rendering them usurpers when they try to answer the legal subject's question. Consequently, what once was a reasonable response to the legal subject's question cannot do the work now. Neither the imperial powers' responses to the legal subjects are recognized as reasonable by citizens and officials. Thus, the change in the legal system is not separate from the change in the political system. Chen's second test case also cannot prove that an account like mine is insufficient.

5.4 Conclusion

This chapter was dedicated to appreciating the force of recent contributions to the problem of continuity. With that purpose, I considered Anna Lukina's paper *Making Sense of Evil Law* (2025); Benjamin Spagnolo's book, *The Continuity of Legal Systems in Theory and Practice* (2015), and Li-kung Chen's paper, *The Continuity of a Legal System* (2023). All of them had something to say about what our focus should be when there is an apparent change in the legal system in force. Moreover, they start from assumptions akin to the reidentification approach, so I wanted to test whether their arguments provided enough reasons to reject my claims. The result was, I believe, clarifying as it showed the force of my account and how it explains topics as different as the transition from an evil legal system to another; how the rule of law avoids difficult questions about the overlap between legal and non-legal political norms, and finally, whether a political community can persist while its legal system changes and whether a colonial legal system can remain the same even when its nation ceased to be a colony.

Chapter 6: Concluding Thoughts

This work was dedicated to the jurisprudential problem of continuity, that is, what it means to say that legal systems persist and what features explain their ability to do so. I claimed that legal systems remain the same to the extent that they realize the rule of law (Fuller, 1969, pp. 39 and 131; Simmonds, 2007, p. 65). My claim contrasts with traditional responses to the problem of continuity, not only in substance but also in how it conceives of identity over time. Accordingly, the case for my claim engages in methodological and substantive disputes. Before recalling the details of those specific disputes and where my account departs from previous attempts, I would like to leave a message for the reader.

If anything close to a lesson can be learned from the previous pages, it is that the problem of continuity is worth studying. Moreover, the response to this problem is not, contrary to what theorists like Hart (1994, p.118) first thought, a reaction to extraordinary circumstances that raise jurisprudential curiosity. If that were the case, we could sever the explanation of the nature of legal systems from the problem of continuity, which would become relevant only when the latter was more or less clear and practical challenges arose. That is not correct. The problem of continuity, just like similar debates in personal identity, entangles metaphysical and practical questions. Consequently, this problem investigates features that are taken for granted in paradigmatic legal systems. In brief, the problem of continuity is part of the broader agenda of explaining why we assume that law exhibits the properties of a system, what those properties might be, and how their significance should be construed (Simmonds, 2001, p.271). So, if my contentions are unconvincing to the readers, I invite you to put into question my method, my conclusions, or both, but with the awareness that this task is worth our scarce time and academic resources. I think the problem of continuity has the credentials to make it worthy.

The introduction expresses the concerns above by calling attention to political changes that demand an inquiry into the continuity or discontinuity of legal systems. Challenges like revolution, legal devolution, authoritarian debasement of legality, and processes of redemocratization leave serious doubts about whether a previous legal system remains the same or if a whole new legal system has taken place. For some, these events are more important than jurisprudential concerns, which, in the face of all the stakes involved, are rather empty. Echoing this sensible objection, I define that any sound account of what gives a legal system its identity over time should address Derek Parfit's objection that identity is an empty question. There are

two ways in which a question may be empty (Parfit, 1984, p.260). First, questions are empty when they have no true answers. We can decide to give these questions answers. But any possible answer would be arbitrary. Second, questions are empty when they do not describe different possibilities, any of which might be true, and one that must be true. Instead, these questions merely give us different descriptions of the same outcome. For instance, there is a difference between a colony and an independent legal system, and this difference matters. Is that a difference explained by the notion of identity over time? A working hypothesis is that a colony becomes an independent legal system when the imperial legal system to which it was subject no longer continues as broadly as it was. However, for Parfit*, if that difference relates to identity,* there must be a sharp borderline, that is, a clear-cut explanation of when a colony becomes independent. Absent any evidence of where this borderline is, it is questionable that there is any such line, and identity does not really matter (Parfit, 1984, pp. 238-239).

I think one way of addressing the empty question objection is by being clear about what point of view we are taking as a reference in our explanation. That is, the sharp borderline we are asked to provide may have different edges depending from where we start. To put it differently, a theorist concerned with describing legal systems as a distinct type of normative institutionalized systems (type-focused theory) will provide an explanation rather different from the one sought by a theorist that only wants to explain those legal systems (tokens) that can be characterized as providing forums for accountability through fully public argument (Postema, 2022, p.43). I tried to make this difference clearer in the first two chapters dedicated to methodological matters. The methodological chapters should not be read only as attempts to present the problem of continuity as worthy of our attention, though. They are preliminary steps in my argument, which can be summarized as follows.

Following Quine (1950, p.622), I assumed that “identity” is a concept that performs a function in discursive contexts. We need to establish the diachronic identity of a legal system in the discursive context in which legal claims, pleas, reproaches, and accounts are made. Under that context, we need to delimit the resources from which one can address the legal subject’s question: “But how can that be law for me?” (Dyzenhaus, 2022, p.2). An adequate response will be backed up by reasons “whose validity depends on presupposed authority and accountability relations between persons and, therefore, *on the possibility of the reasons being addressed person-to-person”* (Darwall, 2006, p.8, emphasis added). Identity over time is the retrospective reconstruction of the felicity conditions of those reasons (second-personal legal reasons). Legal systems can fulfill those conditions if they provide guidance and accountability relations between citizens and rulers. Legal systems provide guidance and accountability when

they respect the rule of law. Therefore, legal systems remain the same to the extent that they realize the rule of law.

The practical perspective of citizens and officials who rely on legal rights and duties to justify claims, demands, and excuses — the ones that ask "but how can that be law for me? — has not received much attention in connection with the problem of continuity. The traditional way of addressing this problem was what I called the reidentification approach. Thus, Chapter 1 was dedicated to exposing and characterizing this approach. Its explanatory force and the relatively peripheral place assigned to the problem of continuity impaired its proper assessment for a long time. I tried to fill this gap by emphasizing how Reidentification ties the identity of legal systems as a type of normative system to their identity as tokens of this more general type. This led theorists to focus on finding criteria that allowed distinguishing legal systems as a set of norms from other normative systems, and then asking how this plays out over time. The result is hesitation between leaving diachronic identity aside as a peripheral topic or something to be delegated to empirical social sciences. At other times, we have distinctions like the momentary/non-momentary identity that do not add up when confronted with parallel discussions in metaphysics, like the debate on what persistence conditions are.

Chapter 2 departs from the limits of the reidentification approach and outlines the approach I find most promising. I called it the aspirational view. I claim that the aspirational view is capable of addressing the empty question objection, proposing a suitable notion of identity over time, and providing an attractive account of what gives legal systems their identity over time. To elaborate it, I favor John Finnis' focal point methodology, in that I accept that the phenomena suitable for jurisprudential analysis can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance, for the people who performed or engaged in them (Finnis, 2011b, p.3 and Simmonds, 1984, pp.29-30). Moreover, I adopt a practical point of view as a reference from which we can extract a principle or rationale that governs the extension of the term "legal system" (Finnis, 2011b, p.10). To be more precise, I focus on the practical perspective of citizens and officials who rely on legal rights and duties to justify claims, demands, and excuses. I called this the aspirational view because I assume that the acts of treating legal norms as valid (justified) can be understood in light of ideals and purposes. The upshot is that when institutions depart from their ideals and purposes, they acquire a different practical significance for those engaged in the legal point of view, losing their continuity with past practices. Moreover, I focus primarily on legal systems as tokens, responding to the fact that continuity and identity over time become subjects of reflection after major transformations and instability in specific legal systems.

Chapter 3 put those considerations into their first test: explaining common law controversies regarding the legality of successful coups d'état. I considered three doctrines courts elaborated to deal with these cases: state-necessity, efficacious coup d'état, and strict constitutionalism. What is interesting to note is how the courts' conclusions required a better refinement of what they meant by a legal system's identity over time. To be more precise, common law courts struggled with the complex mixture of attitude-independent and attitude-dependent normative phenomena at the core of the issues presented before them. I presented each doctrine as a version of the aspirational view. The result was that the many possible interpretations of the aspirational view were insufficient. It became clear that a capacious version of the aspirational view had to connect token identity with the rule of law, because only this value allows the right balance between attitude-dependence and independence. The question "but how can that be law for me?", first introduced by David Dyzenhaus, nicely expresses this felt need and thus became a reference to the rest of my argument.

In Chapter 4, I presented the core of my case for the claim that a legal system remains the same to the extent that it realizes the rule of law. My first step was an exercise in clarifying the relevant ideal, what it means, and what it requires. Generally speaking, I took it as meaning mutual subordination to law, that is, that "both sides of the political relationship — the rulers and the ruled, the government and the governed— […] be subordinate to the demands of the law" (Rundle, 2023, p.5). This, in turn, acquired a specific meaning when I clarified what guidance and accountability mean when citizens ask, "but how can that be law for me?" Principles of legality are an integral part of the rule of law because they allow identifying the reasons that are presented in response to the legal subject's question. Moreover, accountability is a demand for these reasons, and only flourishes within strong and effective institutions empowered to hold the exercise of power accountable, institutions that are themselves likewise accountable. Where guidance and accountability are minimally mature, practices of recognition take place, and legal claims, pleas, reproaches, and accounts are taken seriously. Under that context, we need to delimit the resources from which one can address the legal subject's question. Identity over time is then established by retrospectively reconstructing the felicity conditions of second-personal legal reasons. Legal systems can fulfill those conditions if they provide guidance and accountability relations between citizens and rulers. Legal systems provide guidance and accountability when they respect the rule of law. Therefore, legal systems remain the same to the extent that they realize the rule of law.

Finally, Chapter 5 showed that my account can properly respond to different test cases, whether the transition from an evil legal system into another, the conflicts between legal and non-legal political norms, political communities that transition from traditional legal systems to Western Legal systems, or colonial legal systems that are converted into independent municipal legal systems.

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