



Why the State?

A Speculative Reflection

The Question

- Why do so many jurisprudential theories focus on the state? And what is it about the State that gives it a special place in our social arrangements?
- Possible rewards:
 - Rejection of the paradigm
 - Modification of the paradigm
- The building blocks

Anticipation

- Theorists take the most comprehensive legally-based social organization of the day as their focus. We are used to legal theory focusing, sometimes exclusively, on the State because for quite some time now the State has been, or was assumed to be, the most comprehensive law-based social organization in the contemporary world.
- The State's standing depends on the combination of two factors (1) an extensive responsibility within the organization's domain and (2) freedom from external legal constraints.

Building Blocks

- Practice Based Rules
 - Pre-legal
- Some features:
 - Both in the life of individuals, and in the history of societies, people learn that there are rules, addressed to them, before they acquire the ability to understand their point, and the possibility that they are not justified
 - Habituation and implicit knowledge
 - Embedded in real relations - family

Practice-based rules (cont.)

- Their content is fixed by a social practice.
- Being a practice consists of patterns of behaviour that are fairly general and known to be known to be general.
- They include behaviour conforming to the rule, and behaviour expressing (sincerely or insincerely) attitudes that imply that the rule is to be taken as binding, and as providing a strong reason for action, by those to whom it applies and to be acknowledged as binding by others.
- It is not implied either that the rule derives truth, validity or justification from being practice-based.
- Motivation bound up with attitudes to life experience

Building Blocks: Institutions

- The traditional view sees the new element in the institutional aspect that is essential to anything legal.
- They are rule governed, ultimately governed by practice-based rules that determine at least the most important aspects of their constitution.
- The most elementary powers legal institutions have are enforcement and adjudicative powers. Where these powers are wide-ranging and their exercise regular, the activities of these institutions inevitably affect the content of the rules that they apply, leading to, and constituting, changes in the content of these rules.

Institutions (cont.)

- The mark of institutions is that their decisions bind even if mistaken or ill judged.
- In advanced cases there are hierarchies of institutions constituted by hierarchies of inter-related rules.
- Legal systems are sets of rules under the jurisdiction of an inter-related set of institutions.
- This is an inflationary characterisation of legal systems, allowing for many types of inter-relationships and for rules to be part of more than one system at a time.

Institutions (cont.)

- Once we come to law-like institutionalised systems of rules, the connection between the rules and social practices changes.
- Even without legislative institutions, and certainly with them, the rules applied by institutions change through their activities, and not merely as a result of changes in social practices.
- (Whether the changed rules are or become backed by practices of following the changed rules, is a contingent matter).
- The formation of attitudes of pride, identification, loyalty, and the like towards the central institutions of legal systems is now mediating between people and the law-like rules.

The Most Comprehensive LS within its domain

- (1) an extensive responsibility within its domain
- (2) freedom from external legal constraints

An extensive responsibility within its domain

- relative to a domain
- a) **normative powers** (to issue binding decrees, to change rules, enforce and apply them, to adjudicate their application etc.)
- (b) **coupled with duties to exercise them** in certain circumstances or for certain purposes
- (c) **that are accepted as legitimate** by those subject to them (regardless of why they are so acknowledged).

Freedom from external legal constraints

- a normative legal condition
- can exist to various degrees (conflict of law rules)
- generally recognised beyond the system (the analogue of common acknowledgement of those subject to the system)

Why the state? – The Past

- The need to ask separately about past & future
- The past: independence – the Westphalia regime
- The past: extensive responsibility – developing gradually, and continuing to develop

Why the state? – The Future

- We need to (a) identify the relevant developments (b) assess their prospects (c) interpret their significance
- Prospects: globalisation
- Trends: First, the emergence of international organisations with independent law-making powers that are not conditional on consent by states subject to them. Second, changes in the way new international law rules emerge. Third, the extended range of agents with powers of action in international law, including individuals.

On the theory of state law

- States face change but not displacement
 - No institution likely to replace them
 - Is the EU an exception?
- Does the change require revising theory of the state?
- Two main components: Legitimacy & Sovereignty

Legitimacy

- A legitimate government not only oversees a sensible and good legal system. We all have reason to respect the good laws not only of our country.
- Legitimacy is a special relationship between a government and those subject to it. It places the subjects under an obligation of allegiance to their government and an obligation to obey its legitimate laws.

Sovereignty

- Three main components:
 - (a) the characterisation of types of acts or other measures that are invasive or inappropriate interference in matters relating to the sovereign state
 - (b) the characterisation of kinds of bodies that may not take those measures
 - (c) a general international legal recognition (either in international law, or in the domestic laws of various states and other organisations) of these limits.
- Sovereignty can admit of degrees
- It is common to think that there is a basic standard of sovereignty that is enjoyed or possessed by all states.

Relations between Sovereignty & Legitimacy

- Perfect Match Theory
- Legitimacy with limited sovereignty
- Sovereignty exceeding legitimacy

Rethinking the theory

- More constrained legitimacy
- Reduced sovereignty
- States remaining focal

The Good and the Bad

- HRs: Common standards of humane conditions
- Increased individual power?
- Changing allegiances?
- Risks of uncomprehending institutions eroding diverse forms of life
- The problem of legitimation