Chapter 15

Some Basic Concepts

15.1 Introduction

In Chapters 2 to 4 we began to construct a framework of basic analytic concepts that could be useful tools in analysing, describing, interpreting, comparing and generalising about legal phenomena across legal traditions and cultures. This chapter introduces three further groups of important concepts that might be added to the basic toolkit. The purpose is to illustrate the kind of analytical work that needs to be done on a much broader scale in order to enable us to think and talk generally about law from a global perspective. The first section draws on a body of literature in the classical tradition of Anglo-American analytical jurisprudence dealing with the concepts of relations, subjects, and legal persons and concludes that much of that literature is still of value in demystifying ideas about 'legal personality' in the Western tradition. The second section deals with a group of concepts relating to collectivities – group, class, society, and community. These have been the subject of much debate in the social sciences, but have received relatively little attention in jurisprudence. The third section considers problems of individuating aggregations of norms or rules in terms of systems or orders or codes – all concepts that have been problematic in social science as well as jurisprudence.

These mini-essays are merely beginnings both in respect of the concepts that are introduced and the range of concepts that needs to be considered. One encouraging point is that here we are not writing on a blank slate. Our own heritage of jurisprudence contains a wealth of detailed studies of particular concepts, but these have on the whole been confined to the concepts of law talk ('legal concepts') within a particular legal tradition or more broadly within Western jurisprudence. Two significant books published in 2007, Neil MacCormick's *Institutions of Law* and Denis Galligan's *Law in Modern Society*, carry on the tradition of careful conceptual analysis of the kind that is needed. Both can be said to be contributions to general analytical jurisprudence, even though they focus largely on modern societies.

15.2 Relations, persons, subjects

In ordinary usage, 'relation' refers to connection, association, or interaction between two or more particulars. A relationship is a bundle of relations. In

legal theory it is important to distinguish between normative (such as moral) relations, legal relations, and empirical relations, such as physical, social, political, economic, geographical relations.[1]

A legal relation is a species of normative relation. In orthodox legal analysis, a legal relation exists between X and Y, if their circumstances are covered by a valid rule that is part of an existing legal order.[2] In Hohfeld's classic account all propositions of law, and all legal relations, can be expressed in terms of eight fundamental legal conceptions that are all connected with each other in a system of correlatives, contradictories and opposites.[3]

Of course, not all social relations are covered by law. But in the conception of law presented here law is concerned with ordering relations between legal subjects. Who or what counts as a legal subject is itself governed by law and can vary considerably between legal orders. So law is concerned with ordering relations between whomever or whatever is recognised as being a right-and-duty bearing unit by a given legal order.[4]

Bearers of legal rights, duties and other relations have been variously known in jurisprudence as 'legal units', 'legal subjects', 'legal entities', and 'legal persons'. Not much turns on the choice between these terms, except that the idea of 'person' has associations with philosophical issues concerning human identity, individuality, moral personality, gender, and character that have muddied the waters of the extensive theoretical debates about the nature of legal personality.[5] By treating the individual human being as the paradigm case of the legal subject,

[1] Causal relations are the most problematic of all.

[2] This statement follows Hart's classic analysis of sentences of the kind 'X owes a duty to Y' (Hart (1954)) except in this account the notion of 'legal order' is broader than Hart's concept of a legal system.

[3] See Chapter 2.3(d) above.

[4] See also Dewey (1926) p. 655: '[F]or the purposes of law the conception of "person" is a legal conception: put roughly, "person" signifies what law makes it signify. Here let me anticipate potential objections to this view: By saying that the existence of a legal subject is determined by the relevant legal order is a positivist position that is open to the same objection that was made to the Concessionist (and fiction) theories. That is that they implied, in respect of state law, that only the ruler had the authority to prescribe whom the rules should treat as legal persons. To suggest that only the state can recognize an entity as a legal person is to concede too much to the authority of the sovereign or other body in power.' As Maitland suggested, this plays into the hands of the paternal despot. (Maitland (1903)) My definition is purely formal: it merely states that what are right-and-duty bearing units is defined by the rules of a legal or other normative order, it is whoever or whatever is treated as such a right-and-duty bearing unit by the rules of that order. It says nothing of the grounds (source or authority or justification) for such rules or the processes and incidents of recognition. An argument that natural law, rather than the sovereign, should determine that all human beings should be recognised as legal subjects is not incompatible with a purely formal concept of legal subject.

[5] Dias (1976) Chapter.11, Pound (1959) IV. Ch. 25. John Chipman Gray made the point robustly: 'Jurisprudence need not vex itself about the abysmal depths of personality. It can assume that a man is a real indivisible entity with a body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.' Gray (1921) at pp. 28–9. On philosophical issues see, for example, Ayer (1963), Parfitt (1984). The metaphor of a body, invoking images of human bodies, is an example of the strength

and by focusing attention on the differences between 'natural' and 'artificial' persons there has been a tendency to treat all other legal subjects as extensions or exceptions, whereas in fact various collectives, groups, associations, and corporations in most societies play very significant roles in economic, political, and social life.[6] Conversely, it is not true that all human beings have been treated as legal persons. So much of modern law is expressed in terms of legal personhood, legal persons, and legal personality that it is difficult to avoid these terms altogether.[7] However, I shall here follow the German tradition of using the word 'subject' as a more useful analytical concept.[8]

If one accepts a formal conception of a legal subject as any unit that is treated by a legal system as being capable of bearing rights, duties, and other relations, this need not give rise to many *conceptual* difficulties. There is, for example, no conceptual difficulty about recognising an entity, such as a trade union, for some purposes, but not others, or about treating the state or the monarch as a legal subject. Most of the long-running controversies, when separated from puzzlements about personhood, have involved puzzlements and disagreements about other issues, especially the justifications for the grant of formal recognition as a legal subject, the processes by which recognition is achieved, allocation of responsibility, and theoretical and practical problems arising as a result of such recognition. Anglo-American jurists were probably correct in their judgment that the classical theories of legal personality provided little help to judges with solving a myriad of practical legal problems, for the differences really centred on political or ideological issues about what should be the grounds for recognition or on the implications of being treated as subject (the nature of a legal subject).[9]

A substantial proportion of the literature in analytical jurisprudence up to about 1930 related to the concept of legal personality. In the Anglo-American

of the association of ideas of legal subjects and human persons. See further, Kantorowicz (1957), Cheah, Fraser and Grbich (eds.) (1996).

[6] 'A legal system by its very nature requires units upon which it can bring its influence to bear in the business of regulating relations. These units have been called legal persons. The expression is not a happy one. It is capable of conveying the impression that the only real unit is the human being and that all other units are artificial. In truth, all legal units, including human beings, are artificial. … To assert what may be called legal 'entification' is not primarily predicated upon human personality and does not involve denial of the proposition that law is primarily concerned with regulating the affairs of human beings. The selection of units that are not human beings is simply part of a technique whereby that end may be attained. Legal systems are theoretically free to ascribe significance as legal units to things or ideas as required.' Lloyd (1938) at pp. xx–xxii.

[7] See also Pound (1959) Vol. IV, pp. 195–6. Interpretation Act, 1889 Schedule 1. 'The word "person" shall, unless the contrary intention appears, include a body of persons corporate or incorporate.'

[8] 'Germans distinguish between the Subject and the Object of a right. If Styles owns a horse, Styles is the Subject and the horse is the Object of the right. Then if we ascribe the ownership of the horse to the Crown, we make the Crown a Subject; and then we can speak of the Crown's Subjectivity. And so in political theory, if we ascribe Sovereignty to the Crown or Parliament or the People, we make the Crown, Parliament or the People the Subject of Sovereignty.' F. W Maitland, Introduction to Gierke (1900).

[9] Friedmann (1960) Ch. 33.

tradition, classic essays by Vinogradoff, Wolff, and above all, Maitland are still worth reading today.[10] When I was an undergraduate at Oxford in the 1950s this, along with rights, possession, and ownership, was one of the main topics in particular analytical jurisprudence. A typical essay title was: 'Does English law have a theory of legal personality? Does it need one?' One might start with a fairly cursory review of the main theories of corporate personality – especially the realist, fiction, and concession theories[11] – and then analyse a selection of leading cases from different fields. An essay based on this kind of approach would conclude that English law does not have a general theory of legal personality and is better off without one. Rather it adopts a common sense view of human personality, treats other legal persons as juridical extensions of individual human personality (corporate body, will, property), and approaches practical problems arising from this extension in a pragmatic, largely case-by-case fashion without guidance from or regard to any general theory.[12] During the 1950s and 1960s this kind of particular analytical jurisprudence faded away, being replaced largely by more abstract concerns.[13] A few issues have since surfaced, but without becoming part of the mainstream. For example, some feminists argued that the concept of 'the legal subject' concealed strong masculine biases.[14]

In retrospect, what I encountered as a student was the last throes of a form of particular analytical jurisprudence, which skirted ideological issues in the name of pragmatic practicality. Most English jurists dismissed the classic continental European debates as abstract metaphysics (Maitland was a notable exception). In fact, in the United States the old debates had been declared dead by 1930, partly because of recognition of the fact that corporate power had largely shifted from shareholders to managers[15] and partly because legal personality was one of the indeterminate abstract concepts that had been subject to effective critique by Legal Realists.[16]

[10] For example, Wolff (1938), Vinogradoff (1924) and the essays in Maitland (1936).

[11] A corporation is a real person (realist), a corporation is a fictitious entity (fiction), a corporation is created by the state (concessionist).

[12] This formulation follows Wortley's treatment, which seems to me to be the culmination of this approach – a competent overview of a miscellany of fragments from the English law relating to companies, trade unions, and associations (see Wortley (1967) Chapter 18). Most such accounts focus on case law and rather vaguely treat the practical problems as 'issues of policy'.

[13] Compare the later editions of Salmond (12th edn 1966), Paton (4th edn 1972), and Keeton (1949), which included chapters on legal personality, with a new generation pioneered by Lloyd (1st edn. 1959) and introductory works such as Finch (1970) and Simmonds (1st edn. 1986). Dias's textbook on Jurisprudence lasted until 1985 (5th edn). This decline in interest can be tracked in Dias's *Bibliography of Jurisprudence* (3rd edn 1979) Chapter 12. On the more general neglect by legal scholars of the status of unicorporated bodies in English law since about 1960, see Rideout (1996), but see also Stoljar (1973).

[14] E.g Naffine (1990); Olsen (1990). For a useful critical survey of this and related strains in feminist writing see Lacey (1995). See further Lacey (1998), Naffine (2003).

[15] The classic discussion is Berle and Means (1932).

[16] E.g John Dewey dismissed the classic debates about legal personality as 'a confusion' based on the unwarranted assumption that 'there is in existence some single and coherent theory of personality and will, singular or associated'. Dewey (1926) at p. 669.

Of course, practical legal issues surrounding corporations and other non-human entities continued to trouble specialists in company law, criminal law, labour law, public corporations and latterly in public international law and human rights, but typically without much assistance from legal theory, and without much communication with each other.[17]

Not surprisingly nearly all of the traditional juristic treatments of legal subjects and legal personality related to domestic law. If one adopts a global perspective the problems look rather different. To give just four examples. First, who and what have been recognised as legal subjects in different traditions and cultures and for what reasons is a topic deserving development. Textbook discussions of legal personality contain references to the variety of entities that have been treated as legal subjects – famous examples include Hindu idols, the rats of Autun,[18] Caligula's horse, artefacts, funds, ancestors, ghosts, unborn children, and many forms of human association. These accounts make the point about the openness of the concept of 'legal subject', but they are largely anecdotal. What is needed is a comprehensive comparative analysis of the treatment of legal subjects in all major legal traditions.[19]

Second, it is now generally acknowledged that, partly as a result of 'globalisation', international relations involve a wide variety of actors, including individuals,[20] international organisations, international financial institutions, corporations, 'peoples', non-governmental organisations, alliances, social movements, churches, multi-national corporations, drug cartels, and terrorist organisations and networks.[21] The extent to which such 'actors' are the subjects of rights, duties and responsibilities under public international law is now a topic of considerable importance.[22] As late as 1963, the leading introductory work on the subject still defined international law as 'the body of rules and principles of action which are binding upon civilized states in their relations with one another'.[23] It is now generally accepted that this view is outdated.

Third, there has been considerable debate about who can be subjects of human rights. The right to development, the rights of peoples, language rights, animal rights, and even the 'standing' of physical objects such as trees have all been the subject of extended debate, typically without much reference to the

[17] A significant exception is discussions of corporate criminal responsibility (e.g. Tully (2005)).

[18] Ewald (1995).

[19] On the relative lack of development of concepts of personality in Islamic law see Zahraa (1995), Mallat (2000), Kuran (2003a and b).

[20] Acquaviva (2005) For example, the right of petition under the European Convention on Human rights. Individuals are the main subjects of duties under international criminal law.

[21] A powerful argument in favour of a general theory of the status and responsibilities of subjects of public international law is Acquaviva (2005). Al Qaeda illustrates some of the problems of identifying transnational actors as discrete organisations and units.

[22] E.g. see Alston (ed.) 2005 and references there.

[23] Brierley (6th edn by Sir H. Waldock, 1963). Unfortunately, John Rawls continued long after to rely on this outdated conception of international law as being concerned with relations between sovereign states. See Chapter 5.7(b) above.

classic juristic theories about 'legal personality'.[24] Upendra Baxi is among those who have strongly criticised the trend towards a 'trade-related, market-friendly paradigm' of human rights that attributes *human* rights to multi-national corporations and other institutions of global capital.[25]

Fourth, a great deal of attention is now focused on multi-national corporations – their power and influence, their 'social responsibility' and their use of legal forms to limit their accountability and legal liabilities. It has even been argued that multi-national corporations, despite the economic and political realities, typically are not 'legal persons':

'Multinational and transnational companies do not exist as entities defined or recognized by law. They are made up of complex structures of individual companies with an enormous variety of interrelationships. Globalisation means that the world appears to be a smaller place; goods and people move freely across borders. But companies are legally tied to the country in which they are formed; regulations in other countries cannot have any impact. So-called multi-national companies are a series of companies formed in different countries and tied together in various legal ways, either by holding shares in each other or by various legally binding agreements between them. This legal design is exploited by companies which export their dirty and dangerous business to poor countries where regulations are minimal and not enforced, enabling them to pay low wages and ignore the environmental effects of their operations.'[26]

The interplay of conceptual, ideological, cultural and technical factors is illustrated by Bendedict Kingsbury's analysis of the concept of 'indigenous peoples' in public international law and international relations. A great deal is at stake in respect of who are classified as 'indigenous peoples', but discussions have foundered on attempts to construct a generally acceptable concept.[27] Kingsbury suggests that all attempts to treat this concept as a legal category requiring a precise definition are bound to fail because any such definition is bound to be grossly over-inclusive or under-inclusive because of the variety of situations and justifications that are covered by what is in fact a politically powerful and legally significant category. Rather he suggests:

> The second approach, here termed constructivist, takes the international concept of 'indigenous peoples' not as one sharply defined by universally applicable

[24] Baxi (2007), Christopher Stone (1974), Singer (1990) discussed above at pp. 143–5 and 213–14.

[25] See the satirical Draft Charter of the Human Rights of Global Capital (Baxi (2005) at pp. 258–61).

[26] Dine (2005a) at p. 9, developed in Dine (2005b). Interestingly, Dine talks of companies as legal fictions and argues that 'Multinational and transnational companies do not exist as an entity defined by law.' *Ibid.* See also Blumberg (1993).

[27] 'The controversy about the meaning and application of 'indigenous peoples' as an international concept encompasses conflicting views about the *norms* applicable to indigenous peoples, and their relationships with states and individuals and struggles over the potential role *of international institutions*; but the most fundamental problem is deep-seated differences over the *justifications* for institutional and normative programs based on recognition of a distinct category of 'indigenous peoples.' Kingsbury (1998) at p. 418. See further American Society of International Law, Symposium (1985).

> criteria, but as embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal, and social processes of particular cases and societies.
>
> The concept is, on its own, too abstract and remote to resolve such questions as:
>
> Is a waning traditional authority or a popular but state-created body the proper representative of an indigenous group in a land claim? Are children of a marriage between a group member and a non-member entitled to be full members? Who are the legal successors to a group whose leaders signed a treaty in the eighteenth century? Does the organisation of a new political body by one clan from a larger indigenous community make the clan an indigenous people? Which group is part of which other group for purposes of representation? Who ought to benefit from royalty payments for a therapeutic drug derived from a plant known and used by several groups? Can local villagers close a forest that offers the only supply of fuel for a community of landless migrants nearby? To which groups in a particular country does the World Bank's policy on indigenous peoples apply? Who will be able to represent indigenous peoples, if, as is currently proposed, a permanent forum for indigenous peoples is established in the United Nations? Such questions can be resolved only through specific contextual decisions, often referring to detailed functional definitions, that are influenced by, and influence, the more abstract global concept.[28]

This is a good example of the complexity and variety of practical issues that centre round the concept of legal subjects or persons. As Kingsbury illustrates, these issues have theoretical dimensions. It is not so much the concept of legal subject that is problematic. Rather it is the justifications for recognising or granting subject-hood, the implications of such status, problems of accountability and attribution of responsibility, and the perennial issue of the relationship between external legal form (the *persona* or mask) and the underlying social, political, and economic reality. Such issues have continued to be of concern in specialised fields such as public international law, criminal law, corporate law, and human rights law, but they have moved away from the centre of mainstream legal theory. The time is ripe for the revival of theoretical interest in legal subject-hood from a global perspective. When this happens, it will be worth bearing in mind that some of the best writing in the first half of the twentieth century in analytical and historical jurisprudence focused on such issues. The context and the issues may have changed, but some of the classics are still relevant.

15.3 Group, class, society, community

We have seen that the concepts of legal person or normative or legal subjects are not confined to individual human beings, but can include collectives such as

[28] *Ibid*. at pp. 415–16 (references omitted).

corporations, associations, nations, nation-states, and peoples. There are four related concepts concerning collectives, which are potentially basic concepts of legal theory: group, class, community and society. Each of these terms has been of great significance in the social sciences in a variety of contexts. For example, class is a hotly contested concept in Marxian analysis and, more broadly, in sociology, economics and other disciplines. 'Community' is central to communitarianism, which has been much debated in political theory in recent years.[29] Benedict Anderson's notion of 'imagined communities' has stimulated much discussion, especially in the context of globalisation.[30] Small groups are an important focus of attention in cognitive and social psychology.[31] Lady Thatcher famously denied that there is such a thing as society and, for different reasons some leading social scientists have doubted the continuing value of society as an analytic concept.[32] The meaning and significance of each of these concepts has been disputed in different contexts and they carry a lot of potentially confusing intellectual baggage with them.

These are all useful, perhaps necessary, concepts for general jurisprudence. It is not possible to by-pass all of the controversies in the social sciences, but it can be helpful to identify some broad distinctions in the context of four specific questions:

(i) Are all laws laws of a group? (ii) Is society still a useful concept in legal theory? (iii) Is it appropriate to conceive of humankind as a community or a group or a society, or merely as a class? (iv) What is the relationship between law and community?

(a) Group and class

Tony Honoré and Karl Llewellyn are two jurists who treat the idea of group as fundamental to understanding law, but for different reasons. 'The first question in descriptive legal theory is not 'What is a rule?' but 'What is a group?'', wrote Tony Honoré.[33] The starting-point of Llewellyn's law-jobs theory is the idea of

[29] 'Communitarianism is a social philosophy that favors social formulations of the good. It is often contrasted with liberalism, which assumes that the good should be determined by each individual … [C]ommunitarians view institutions and policies as reflecting in part values passed from generation to generation.' (Etzioni, (2001) at 2336). From the early 1980s communitarianism has evolved through several phases. Charles Taylor, Michael Walzer, Mary Ann Glendon, Roger Cotterrell, and Philip Selznick are among the individual communitarians who have featured elsewhere in this book.

[30] Anderson (1983). The classic example of an imagined community is of readers of newspapers who read on their own, but have a shared identity with other newspaper readers without interacting or being in contact with them. This is clearly significant in the context of 'globalisation' of communication.

[31] Small group research has been influential in socio-legal studies (e.g. jury research). Useful surveys include Hogg (2001) and Sniezek (2001)

[32] Thatcher (1993). On the context of this dictum, see Chapter 2, n 14 above. On scepticism of the value of society as a concept, see below.

[33] Honoré (1987) at p. 33.

human groups: the main task of law-government is to maintain the 'groupness' of the group.[34] Many other jurists and sociologists of law either explicitly or implicitly treat '[human] group' (hereafter 'group') as a basic concept.[35]

As a basic concept in sociology, anthropology, social psychology and other social sciences, 'group' has several different usages and many nuances of meaning within each usage. In the present context it is useful to distinguish between a narrow and a broad primary usage. The following are two examples of a narrow usage:

> A group is a set of three or more persons who engage in joint activity directed to a common goal.[36]

> Groups are defined as a number of people who are oriented toward the same or similar goals and who interact and communicate in order to achieve these goals. All groups share at least three structural features: norms, cohesion, and role differentiation[37]

Such definitions, perhaps appropriate to social psychology, focus on small, largely face-to-face units and emphasise common purpose and cohesion. These are sometimes called primary groups. At the other end of the spectrum, the concept extends to cover larger, more diffuse collectives such as societies, communities, diasporas, even humankind. For example, American society, the European Community, the world community fall under this broad concept, even though they may lack a clear common purpose or strong cohesion or other structural features of small groups.

'Group' in this broad sense is sometimes used as a generic term, of which society, community, association, family and team are species. Even in this broad usage it is possible and useful to distinguish 'group' from 'class'. In this context, a class is a taxonomic concept for categorising entities by reference to one or more shared characteristics and nothing more.[38] The idea of 'group' carries an implication of something else, but whether that is connectedness, common purpose(s), physical proximity, or norms is not always clear. To take two examples: 'human beings' are a class; 'the world community' is sometimes presented as a group; it stretches ordinary usage to call 'humankind' a group, but someone who does might justify their usage by emphasising the connectedness of all human beings by virtue of universal moral principles derived from

[34] See Chapter 4.2 above.

[35] For example, Weber, Ehrlich, Maitland, Gierke, Tamanaha. It is worth bearing in mind that the concept of group causes difficulty in company law, especially in relation to questions about when a group of companies is to be treated as a single entity. See Dine (2005b).

[36] Hogg (2001) p. 6399. Ordinary usage allows for the possibility of two-person groups.

[37] Frey and Brodbeck (2001) p. 6407. Some definitions add a condition of stability over time, thereby excluding the idea of an instantaneous or very ephemeral group. This point is not pursued here.

[38] A great deal of the controversy surrounding social class concerns whether and how differences within a population should be categorised or measured.

a shared human nature or by some idea of empathy – here introducing a strong normative and aspirational element.

For Honoré the concept of group is anterior to the concept of law. To start with the question 'What is law?' or with notions such as rules or commands presupposes too much. This is because '[i]t is an axiom of ordinary and professional speech that all law is the law of a group or complex of groups: for this purpose a society or community counts as a complex of groups'.[39]

'The groups to which laws relate vary in size and importance. It is linguistically correct to speak of laws of the international community, of territorial states, of religious groups, of the participants in certain sports, of revolutionary movements, of tribes. Even when the word 'law' is not used, almost every association tends to have something similar: rules, regulations, statutes, orders. The existence of a group is therefore a necessary and sufficient condition of the existence of laws or something like them.'[40]

Clearly very many laws are laws of a group.[41] But Honoré overstates the case by suggesting that groups always precede laws and that all laws stem from groups. For example, the history of public international law could hardly be written in terms of its emanation from a pre-existing international community; rather it constitutes such a community. Also, Honoré's thesis does not fit situations whereby groups come into existence by virtue of laws and over time develop their own internal norms. So there is not a necessary conceptual link between groups and laws.

Group is also a basic concept in Llewellyn's law-jobs theory, but for a different reason. Honoré and Llewellyn both use the term broadly to include large scale collectivities,[42] as well as small-scale face-to-face units, such as families, schools and sports teams. However, whereas Honoré's main point was conceptual, – that laws, law-like prescriptions and other social norms presuppose the idea of groups, Llewellyn's concerns are different. For him, the main 'jobs' of law or law-government are concerned with group survival and group activity towards

[39] Honoré (1987) at p. 2, see also p. 33.

[40] Ibid., pp. 33–4. Here, Honoré sidesteps the problem of differentiating 'laws' from similar prescriptions, while providing a strong connection between laws and groups. His main concern is to show how the structure of groups reinforces obedience to group prescriptions and only secondarily to show how prescriptions adopted by certain groups come to be called laws.

[41] It is useful to distinguish laws of a group and laws for a group. The former emanate from or belong to a group, the latter govern all its members (although not every law needs to be applicable to every member). Both of these ideas are caught in Jeremy Waldron's normative idea of 'publicness' as aspects of law – laws should be made in the name of a society as a whole (representativeness) and should apply to all members (generality). In this context 'publicness' is best interpreted not as a necessary conceptual aspect of law, but as an aspiration which is one aspect of the Rule of Law. Llewellyn's emphasis on 'the Entirety' and group consciousness is comparable, but it is doubtful whether these are necessary conceptually.

[42] Honoré (1987) Chapter 11, n.2: 'For purposes of this paper both 'society' and 'community' are equivalent to 'group'… But for convenience I use 'society' of the international group composed of sovereign states and 'community' of the group, if there is one, composed of all human beings.'

common ends. Indeed, some commentators interpret the law-jobs theory as a theory about group survival and functioning, rather than as a theory of law.[43]

In *The Cheyenne Way* Llewellyn explained his concept of group as follows: 'By this is meant two or more persons who are engaged in some kind of observably joint and continuing activity, and who recognize themselves in some fashion as being parts of a whole.'[44] This definition was advanced in the context of a relatively small face-to-face society, but in other contexts he emphasised that the law-jobs theory applies to all human groups from a two-child playgroup to a nation-state or the whole world.[45] From these examples one can infer that he did not place much weight on common objectives, stability over time, or structure as necessary elements of the concept of a 'group'.

Three criticisms of Llewellyn's use of 'group' need to be considered here: that it is too vague; that it is too general; and that his account is tautologous.

On the matter of vagueness, it is true that Llewellyn does not give a precise general answer to the question: Under what conditions is it true to say that a 'group' exists? Indeed, as we have seen, he sometimes applied the term to examples that did not quite fit his definition: a two-child playgroup may be ephemeral; citizens of a nation-state may not be engaged in joint activities, nor may they feel that they are part of the whole – they may suffer from alienation. Such points suggest that the definition was too precise, rather than too vague. For the significance of the law-jobs theory depends in large part on the bold claim that it applies to *all* human groups. Like many other social scientists he sensibly chose to leave the concept vague outside a given context.

The broad concept of a group is inescapably vague because interaction, stability, common understandings, group consciousness, shared goals, are matters of degree. Groupness is a relative matter. This suggests that these factors are common characteristics of groups, but none are necessary conditions for the use of the concept of 'human group'. For example, Neil MacCormick uses the notion of queuing to illustrate some basic points about normativity and order.[46] There is no precise test in *abstracto* as to what counts as a queue or when a queue becomes a group. Both terms are usefully vague and there are many borderline cases.[47]

A second criticism is that by employing a broad and vague term Llewellyn lumped together too many disparate entities for generalisation or comparison to be fruitful. Human groups are so varied in respect of so many variables that

[43] Kamp (1995). [44] Llewellyn and Hoebel (1941) at p. 274

[45] Llewellyn (1940) at p. 1374. Llewellyn's emphasis on the sense of 'the Entirety' in this context links to the idea of thinking 'contextually' in terms of total pictures. See Chapter 16.3 below.

[46] MacCormick (2007) Chapters 1 and 2.

[47] An interesting example of a borderline case is what Boissevain called 'coalitions', which the Shorter OED defined as 'a temporary alliance of distinct parties for a limited purpose'. Boissevain, (1971). Boissevain in this article dropped the use of 'quasi-groups' as redundant, but went on to explore in depth different categories of networks, clusters, and coalitions (including cliques, gangs, action-sets, and factions) (Boissevain (1974)).

no worthwhile valid statements can be made about them at such a very general level. This kind of criticism is echoed in scepticism expressed about the suggested comparability of the law-government of a nineteenth-century semi-nomadic society (the Cheyennes) and of the United States in the twentieth century; or of a New Mexican Pueblo and the Soviet Union; let alone a three-person nuclear family and the world community.[48] The claim is indeed bold, but not so bold as to be silly. The claim is that the law-jobs theory provides a framework and set of questions for asking illuminating questions about *any* human group. This provides a starting point for comparing and contrasting law-governance (how the law-jobs are in fact done) in a vast range of contexts.[49]

A more interesting charge is that the law-jobs theory is tautologous. When Llewellyn says '*The jobs, therefore, get themselves done after some fashion* always – or the group simply is no more,'[50] he anticipated this criticism:

> The law-jobs are in their bare bones fundamental, they are eternal. Perhaps they can be all be summed up in a single formulation: such arrangements and adjustment of people's behavior that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on with its job as a society (or a group). But if the matter is put in this inclusive way, it sounds like a tautology – almost as if one were saying that to be a group you must be a group. Whereas what is being said is that to *stay* as a group, you must manage to deal with centrifugal tendencies, when they break out, and you must manage preventively, to keep them from breaking out.[51]

The law-jobs theory is not quite a tautology, in that it is based on the empirical premise that human beings have divisive urges that tend to threaten co-existence, co-ordination and co-operation. But it helps to elucidate 'group' as a concept, for as Llewellyn said: '[T]he law jobs, hold, as basic functions for every human group, from two persons up. They are implicit in the concept of groupness.'[52]

(b) Society

The word 'society' has a great many uses. For example, it means different things in such phrases as a building society, café society, civil society, American society, or a multi-cultural society. Even when a specific context eliminates the ambiguities, the term tends to be quite vague. It has nevertheless been a basic term in sociology, including the sociology of law. One reason for this has been that it is the standard term for delineating geographical reach

[48] Llewellyn made such comparisons in his discussions of the Cheyennes, and the Pueblos, (KLRM 167–8, 180–2, 360–3). The claim only related to the law jobs: all groups have shared problems in this respect. Perhaps the claim can be tested by three questions: Is the theory false in any respect? Is it conceptually adequate? Is it illuminating? On problems of classifying societies, see Deliège (2001).

[49] See Chapter 4.2 and pp. 115–16 above. [50] Llewellyn (1940) at p. 1381 (original italics).

[51] *Ibid*., at pp. 1373, 1387. [52] *Ibid*., at p. 1374.

of an enquiry, most commonly the territory of a country or a nation-state. In this sense a society is a large-scale discrete group unified by culture, language, politics or territory or a combination of these. Many publications with titles such as 'Law and Society' or 'Law in our Society' treat 'society' (meaning country) as the standard social unit, describing the legal order of one society, comparing two societies, and so on.

Recently, largely in response to increasing awareness of globalisation, there has been a strong reaction against this usage of the term 'society'. In 1990 Ingold suggested that the concept of society may be theoretically obsolete.[53] Giddens has strongly criticised the overuse of the term in sociology.[54] Tamanaha has stated that 'the literature on the subject makes it clear that it is not serviceable as an analytical device' and substitutes 'social arena', a term almost devoid of substantive meaning.[55] Such criticism centres on two points: first, it is misleading to treat particular tribes, peoples, or countries as discrete self-contained units. Second, there are other important large-scale groups or groupings in addition to nation-states at both supra-national and sub-national levels. In recent times borders have become more porous, many countries have become more culturally and ethnically diverse, law is recognised as operating at different levels of ordering and jurisdiction is not always defined by territory.

These are important points that have been stressed in earlier chapters.[56] However, there is a danger of an over-reaction. The concept of society is still useful when the focus is on a unit that occupies a particular territory – as with a country or a nation-state or a local people (tribe). 'Society' is still the standard term for referring to countries other large-scale groups viewed from a social perspective and the distinction between state and civil society still has work to do. Nation-states are still the most important legal actors.[57]

(c) Community

Unlike group, class and society, which can be used as relatively neutral analytic concepts, the word 'community' has strong normative associations, suggesting solidarity, attachment, identity, and trust. The concept has become salient, especially because of the new communitarianism in philosophy.[58] Here I shall follow Roger Cotterell who gives 'community' a specific meaning and advances it as a key concept in legal pluralism in that it provides a focal point for law that is conceptually independent of the idea of the nation state.

[53] Ingold (1990). [54] Giddens (1990).

[55] Tamanaha (2001) at pp. 206–8, discussed above at p. 93.

[56] Especially on 'levels' of law pp.69–74 above and in criticising Rawls for treating 'societies' as the basic unit for theories of justice (Chapter 5.7 above).

[57] Indeed, Tamanaha ((2001) at pp. 206–7) while suggesting 'social arena' as a more precise analytical category, continues to use 'society', not only in discussing 'mirror theories', but even in the title of his book.

[58] See above n. 29.

For Cotterrell a community is a species of group. Its distinguishing features are a sense of attachment and a degree of stability over time:

> [C]ommunity is best thought of as a web of understandings about social relations and [that] this web of understandings is built on (in a sense codifies) relations of mutual interpersonal trust… Insofar as these trust relations flourish and strengthen, community flourishes as something subjectively experienced in a sense of attachment and objectively identifiable in stable patterns of interaction.[59]

Cotterrell analyses community in terms of four ideal types correlative to Max Weber's four types of action – traditional, purpose-rational, value rational and affective. A *traditional community*, such as a neighbourhood or linguistic community, is linked by habitual or traditional forms of interaction. An *instrumental community*, such as a typical business community or the European Economic Community, has a convergence of interests, which forms the basis for purposive-rational action towards a common goal or goals. *A community of belief*, such as a religious congregation, church or sect, has solidarity based on shared values. And an *affective community*, such as a family or a group of friends, are united by mutual affection. As these four categories are ideal types, actual groups may only approximate to them (not all family relations involve mutual affection) and may involve combinations of features of the other categories.[60]

Cotterrell's analysis of community as a concept forms the basis for an ambitious vision of the challenges to law in a period in which the nation-state can no longer plausibly claim a monopoly of legal authority and hence of the legitimate use of physical force:

> To adopt an idea of legal closure is to claim that law is self-standing and irreducible or that it has an independent integrity which is normally unproblematic, natural, or self-generated, not dependent on contingent links with an extra-legal environment of knowledge or practice.[61]

As is apparent in Cotterrell's analysis and in the work of Selznick, 'community' is a strongly normative concept.[62] In the context of 'globalisation', it is important to recognise the aspirational aspect of talk of humankind as a community, or our world community, or the community of nations. The idea that human relations at global and other levels should be governed by perceptions of a common heritage, convergent interests, shared beliefs and values, mutual affection, and solidarity is a noble aspiration, which has many eloquent supporters.[63] There have been glimpses of solidarity exemplified by the Universal

[59] Cotterrell (1995)at pp. 87–8.

[60] 'Thus, the ideal types of community conceptualise the various kinds of social relationships that are combined in complex ways in actual group life. … Nevertheless, my tentative argument is that, like Weber's ideal types of social action, the ideal types of community are comprehensive. Together, they encompass *all* the distinct types of collective involvement that can be components of community.' (Cotterrell (1995) at p. 81).

[61] Cotterrell (1995) at p. 91.

[62] Selznick (1992).

[63] See, for example, Honoré (1987) Chapter 11, Singer (2002) Chapter 5, and Selznick (1992).

Declaration of Human Rights, the acceptance of the Millennium Development Goals by all members of the United Nations, and occasional spontaneous outbursts of empathy, as happened momentarily after the Asian Tsunami of 2004. However, a central theme of this book is that one needs to keep clear the distinction between aspiration and reality: so far as the idea of humankind as a community is concerned, it is wise to see this primarily as an aspiration.

15.4 Order, system, code, muddle

The sports club where I swim has a notice posted by the jacuzzi that states: 'No children under 16 are allowed'. At first sight, this looks like an isolated rule. But if one challenges its validity, one would probably find that it is part of a set or 'code' of rules made by the management according to procedures laid down in the club's 'constitution'. If one enquired further about the reason for setting the age at sixteen, one might be given an answer in terms of further rules, such as health and safety legislation, which in turn may have been 'harmonised' with EU law. A different answer might be that this is 'customary' for health clubs, perhaps because it represents an attempt to balance the interests of families with children and older users. Even seemingly isolated prescriptions typically presuppose a network of interlocking rules and other prescriptions, which may not belong to a single code or order or system.[64]

In both juristic and social science usage it is common to talk of systems, orders and codes as referring to discrete entities that are made up of elements that are more or less well-integrated internally. These are useful concepts, provided that they are used with care. In this book I use the term legal system only in connection with state law. I use legal order as a generic term that includes both state legal systems and sets of non-state legal phenomena. In this usage a legal system is a species of the genus legal order, which is in turn a species of normative order.

Ideas like system, order, code have been the subject of a great deal of theorising in both the physical and social sciences. The terms are often used quite loosely and there is a great deal controversy surrounding them. There is, however, quite widespread agreement that such concepts are best treated as cognitive constructs rather than natural categories (even in relation to physical phenomena).[65] That is to say that they are tools for trying to understand the natural or social worlds, but they do not directly represent reality.

Klir, while recognising the ambiguity of the term, defines 'system' usefully as 'a set of things, together with a set of relations defined between these

[64] Galligan uses the example of the practice of lecturing in a university to illustrate the concept of a 'social sphere', encompassing 'webs of conventions and understandings' which provide a sense of identity, in this instance as a lecturer. (Galligan (2007) at pp. 114–17). 'Social sphere' includes, but is wider than, rules.

[65] Molenaar P.C.M. (2001) 'Systems Modeling' *IESBS* 23, 15423l

things'.[66] To talk of a 'system' implies the existence of a discrete entity the elements of which are integrated into a single whole. But the borders may be fuzzy, the degree of integration may be strong or weak and the object referred to may be stable, ephemeral or momentary. Individuation, integration, and stability are all relative matters. When talking about legal systems or legal or normative orders, we need to be on our guard against assuming that we are dealing with well-defined, well-integrated, stable, discrete entities, but it is nevertheless useful for our purposes to individuate them, that is to talk *as if* they are single discrete units.

The term 'legal system' is ambiguous. Among several shades of meaning, it is useful to distinguish two primary usages: a legal system as a system of rules and a legal system as a more or less integrated collection of institutions, rules, practices, processes, and ideas. We may conceive of German private law as a well-integrated system of rules and concepts, but the English legal system is a rather disorderly collection of social institutions and practices. These two categories can be interpreted as corresponding approximately to Dworkin's distinction between the doctrinal and the sociological concept of law.[67]

In constructing pictures of law in the world and in considering inter-legality, we are mainly concerned with the social scientific or empirical concept of legal systems and legal orders. However, it is useful to touch on some basic points about the alleged 'systemic' and 'systematic' nature of legal systems and orders in both senses.[68]

First, can a legal rule or institution exist independently of a system? Jurists differ on this issue. Raz, for example, maintains that it is self-evident that a legal rule can exist only as part of a system.[69] Tamanaha and Honoré disagree, but accept that isolated rules are rare.[70] Although practising lawyers often talk of

[66] *Ibid*., citing Klir (1991). According to Klir 'traditional sciences can be understood as being concerned with things, whereas systems science is concerned with systemhood as reflected by generalized relationships between things'.

[67] See above pp. 27–30.

[68] 'Systemic' here refers to belonging to a system; 'systematic' implies a relatively high degree of integration within a system.

[69] 'This work is an introduction to a general study of legal systems, that is the study of the systematic nature of law, and the examination of the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon Law, or some other legal system.)' (Raz (1980) at p.1)

[70] Tamanaha cites the appeal to offences against Natural Law principles at the Nuremberg trials as an example of a natural law prescription that did not clearly belong to a system (230, 198), but that is open to a different interpretation. Honoré's argument is that a legal system is the institutional system of some group, and that laws can exist prior to or independently of such an institutional system, but that this is rare (Honoré (1987) at pp. 67–8). 'Perhaps – though I cannot think of a convincing example – the word 'law' is sometimes used about customs, usages, conventions, or rules which do not interlock with either remedial or source prescriptions.' (*Ibid*., p. 43) If the validity or legitimacy of an alleged rule is challenged, some reason outside the rule is normally being requested, for rules are not normally self-legitimating or self-validating. See also the problem of self-evidence.

individual rules of law,[71] there is wide spread agreement among legal theorists that the basic unit of analysis is not a legal rule, but a collection or agglomeration such as a code, an order, or a system.[72]

Second, Kelsen and Hart both emphasised the systemic nature of state legal systems.[73] Hart argued that statements of the type 'X has a legal right' presuppose the existence of a valid rule under which X's position is subsumed and the existence of the valid rule presupposes the existence of an effective legal system that is accepted as authoritative by officials of that system. Some of Hart's key concepts – the union of primary and secondary rules, the rule of recognition, criteria of validity, the internal point of view – are part of his account of the systemic nature of law. On one view, Hart's main achievement was to provide a set of concepts for describing and analysing the form and structure of state legal systems.

Third, some of the most important modern contributions to analytical jurisprudence have been concerned with issues concerning the systematic nature of law: for example, whether a legal system must be entirely logically consistent or can accommodate conflicting rules; whether there can be gaps in the law and, if so, how they can be filled; the importance of formal consistency as opposed to substantive reasons; the problem of individuation of rules and of laws;[74] Dworkin's concept of integrity; and so on.[75] These are all important issues that mainly concern the internal relations of a legal system or order.

Systems theory is pervasive in the social sciences. There are three main ways of conceiving social systems:[76] the intellectual heritage of grand historicist theories that view world society as a global system (Comte, Marx, Braudel, Wallerstein); structural-functionalist accounts of society as a system composed of interlocking institutions, in strong form in Radcliffe-Brown and Parsons and in more nuanced form in Merton and Llewellyn; and actionist and interactionist conceptions of social systems, which are particularly influential in economic analysis of law.[77]

[71] In this connection Honoré's analysis of the Rule in *Rylands and Fletcher* as an individuated rule is illuminating (*Ibid.* at pp. 71–2).

[72] Kelsen 'it is impossible to grasp the nature of law if we limit our attention to a single isolated rule' (1945/61)at p. 3.

[73] See *HTDTWR* (1999) pp. 138–43.

[74] One gain from shifting the focus of attention from individual rules or laws to the idea of a system is that the problem of individuation, which troubled Bentham, becomes less important. Questions such as, 'What counts as one law?' 'How can one count the number of laws in a legal system?' can be seen to be no more sensible than asking how many strands there are in this spider's web or how many threads in a closely woven cloth. See generally, Raz. (1980). The question: what counts as a discrete legal order or system remains, see pp. 72–4 above.

[75] Guest (1997) Chapter 4.

[76] Fillieule (2001).

[77] 'Social systems are defined as systems of actions or of interactions from the smallest (two actors) to the largest ones (e.g. the international division of labor). In this paradigm, individual actions are generally considered as rational.' (Fillieule (2001) at p. 15421. Useful accounts of systems theories in relation to law are included in Banakar and Travers (eds.) (2002) especially Chapter 1 by Alan Hunt (Classical Social Theory), Chapter 3 by Klaus I. Ziegert (on Luhmann), Chapter 11 by Max Travers (Symbolic Interactionism). On economic analysis see Posner (2007).

The most salient modern example of systems theory in law is autopoiesis as developed and applied to law by Luhmann and Teubner. This treats law as a binary system of communication:

> [W]hat occurs within modern society is the growth of specialist languages. This is a system of differentiation. But the differentiation is not at the level of role or function (law is a dispute resolution mechanism, politics is a decision-making system etc.), but in language. Different systems of communication encode the world in different ways. The legal system encodes the world into what is legal and illegal. Medicine encodes the world into what is healthy and unhealthy. Science encodes the world into true or false. Accountancy constructs the world into debits and credits. The economy perceives the world in terms of profits and losses. … The differences between systems of communication lie not in the task that they carry out, or the ideal that they appear to strive towards, but in the fact that they communicate about events using different codes.[78]

In counterpoint to systems theory are system-sceptics who challenge the reification and reductionism of suggestions that law is both systemic and systematic. In a classic article Brian Simpson argued that Hart's concept of law as a system of rules just did not fit the common law:

> We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law.[79]

Simpson's argument is that it is historically and sociologically unrealistic to depict the methods of the common law as orderly and the outcome as systematic. 'As a system of legal thought the common law then is inherently incomplete, vague and fluid'.[80] The outcome does not consist of a logically complete system of rules that can be articulated in authoritative form.[81] Rather what we know as the common law was an untidy set of professional practices given some institutional cohesion by a guild-like profession. Bentham declared the common law not to be law, but rather 'a fiction from beginning to end' stemming from judicial usurpation of power.[82] Simpson believes the common law to be

[78] Teubner, Nobles, and Schiff, (eds.) (2002) at p. 898. This is not the place to go into detail about the controversy surrounding this complex theory. While recognising that it can produce illuminating insights, I am personally sceptical about reducing forms of discourse to sets of binary polarities. As will be obvious from other parts of this book, I incline towards scepticism about systems theory. For a balanced assessment see Baxter (1998). MacCormick (2007) and Galligan (2007) also treat systems theory quite sympathetically, but selectively.

[79] Simpson (1986) at p. 24; see also. Simpson: 'Put simply, life might be simpler if the common law consisted of a code of rules, identifiable by reference to source rules, but the reality of the matter is that it is all more chaotic than that, and the only way to make the common law conform to the ideal would be to codify the system, which would then cease to be common law at all'. (*Ibid.* at p. 15).

[80] Simpson (1986) 17.

[81] 'And nobody, I think, can claim that rationality in the common law can be reduced to rules. ' (id.15)

[82] Bentham (1970) Ch. xvi; (1977) .

law and any theory that cannot accommodate it, such as Hart or Dworkin's, must be defective.

At a more abstract level, Sampford has forcefully criticised sociologists, especially Parsons and Luhmann, for conceiving of 'society' as being in any way systematic. Nor does law have the quality of a 'system' attributed to it by jurists, such as Kelsen, Hart, and Dworkin:

> [L]ike society, law is partially organized into institutions but it does not have an overall structure, the shifting paths of the many chains of relations defying attempts to define one.[83]

Sampford's main point is that legal orders, governments and societies are in practice much less closely integrated, internally consistent and orderly than use of these terms tends to suggest.[84]

Theorising about the problems of empirically describing a particular legal system or order is much less developed than theorising about the systemic nature of law in relation to doctrine, reasoning and interpretation of rules. For example, most books on 'The English Legal System' are atheoretical introductions to randomly selected institutions and processes mainly connected to the administration of justice by courts.[85]

In *Globalisation and Legal Theory* I suggested that the problems of describing a legal order are similar to those of giving an account of a city and that the literature of urban sociology might be suggestive in this regard.[86] That literature is replete with contested concepts, competing images, long-standing controversies and multiple perspectives. It contains a number of suggestive parallels to the legal literature: for example, the theme that all cities are similar, yet each is unique; that the literature has been dominated by top-down perspectives, neglecting the viewpoints of users and subjects; that the systemic nature of the phenomena is regularly contested; and deep ambivalences (strong pro- and

[83] Charles Sampford, *The Disorder of Law* (1989) p. 261. Sampford's main targets are strong older versions of systems theory, especially Parsons and Bredemeier; he criticises Luhmann at pp. 128–32.

[84] In this context it is sometimes useful to distinguish between a systematic, methodical or orderly approach or process and a tidy, well-ordered, or well-integrated outcome or state of affairs. Simpson empasises the approach of the common law ('muddling through'?) but does refer to 'the common law system' (Simpson (1986) at 8); Sampford is more concerned with the social melee as a state of affairs: 'Perhaps these words can best be distinguished by contrasting them with their opposites, as here considered. Systematic is opposed to random, methodical to haphazard, orderly to chaotic, and regular to eccentric.' Other antonyms listed include chaotic, disorganized, messy, unruly.

[85] Cownie, Bradney and Burton criticise a number of leading texts for being rule-oriented, state-centric with selection of topics determined more by fashion and convention rather than by any articulated theory. Their own textbook, which uses dispute prevention and dispute settlement as the main organising categories, broadens the focus to include institutions and processes of 'private justice'. However, they do not attempt to elucidate basic concepts such as institution, process, dispute, court, and profession. Fiona Cownie, Anthony Bradney, and Mandy Burton, *English Legal System in Context* (3rd edn. 2003). Chapter 1. See also *GLT* 167

[86] *GLT* 168–73.

anti- urban views) are endemic. Particularly pertinent for legal theory is Peter Langer's suggestion that there are four distinct images of the city as 'organized diversity': Bazaar, Jungle, Organism, Machine.[87] All of these images can apply to a legal system or legal order, reflecting different perspectives. Each raises different issues about the applicability of the idea of system.[88]

If we wish to construct a picture of law in the world and to map relations between different legal orders we need to find a way to individuate them. A global perspective brings out the importance of differentiating levels of law, the significance of non-state law, of taking normative and legal pluralism seriously, and hence of 'interlegality'. 'Globalisation' is said to have made national boundaries more permeable, but we are a long way from becoming a borderless world. Maps of the world show countries with well-defined borders. They often make the boundaries more precise than they really are and gloss over the facts about disputed territories and borders. Municipal legal systems are generally linked to relatively well-defined territories (countries, states, provinces) and a map of the state legal systems of the members of the United Nations need not be very different from ordinary maps of the world. While most national legal systems have relatively clear territorial boundaries, this is not the case with many other normative and non-state legal orders. As we have seen, they are often more like waves or clouds than hard objects such as rocks or billiard balls.

Concepts such as system, order or code are tools for description and analysis that are useful, sometimes necessary, for understanding legal phenomena. There are dangers when their confident use may give a false impression of stability or internal unity or precision or fixity of their outer boundaries. But we often have to talk *as if* a legal order is a stable, integrated, discrete unit in much the same way as cartographers represent streams, fields, marshes or cities using discrete symbols, which may suggest that their boundaries are more precise and fixed than they really are. As Santos reminds us 'maps are 'organized misreadings of territories that create credible illusions of correspondence.'[89]

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[87] Langer (1984). [88] *GJB* 1.

[89] Santos (1995) at p. 458. See also *GLT* Chapter 6.

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