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Chapter 9

On an 'evolutionary' theory of legal systems

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Abstract: The ideas that law is (or can be regarded as) a legal system, and that law evolves over time in adaptation to its context, are two of the most widely shared and presupposed ideas in contemporary legal theory. However, even if much interest has been dedicated in legal theory and legal dogmatics to the evolution of specific legal concepts or institutions, as well as legal norms in particular, not so much attention has been dedicated to the evolution of legal systems in themselves. In this chapter, I will try to offer an overview of the evolution of the concept of legal system and critically analyse whether an *evolutionary* theory of legal systems –*i.e.*, a theory about the evolution of legal systems– can be reconstructed and laid down for the analysis both of the past, the present, and the future of legal systems.

Keywords: legal systems, legal evolution, evolutionary theory, systematic character of law, legal rules, division of normative labour

I. INTRODUCTION

The ideas that law is (or can be regarded as) a legal system, and that law evolves over time in adaptation to its context, are two of the most widely shared and presupposed ideas in contemporary legal theory. Linguistic expressions and metaphors about both the systematic character of law and the evolutionary character of its changes over time are ubiquitous in legal discourse and thought, both theoretical and practical. However, on the one hand, there have been persistent disagreements about what exactly this claim would mean and what it would entail, and even today what the concept of legal system would be is still to be a topic of important debate. On the other hand, much attention in legal theory and legal dogmatics has been paid to the evolution of specific legal concepts or institutions, and to legal norms in particular, but not so much to the evolution of legal systems *per se* (see v.gr. Elliott 1985).

In this chapter, I will try to offer an overview of the evolution of the concept of legal system and critically analyse whether an *evolutionary* theory of legal systems –*i.e.*, a theory

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about the evolution of legal systems– can be reconstructed and laid down for the analysis both of the past, the present, and the future of legal systems. I will proceed as follows. In Section 2, working definitions of legal evolution and theory of evolution will be offered. Section 3 will be devoted to a brief overview of the evolution of the concept of legal system in the Golden Age of its development, showing how its changes can be seen as "evolution" on different variables. Section 4 will be devoted to the reconstruction of an evolutionary theory of legal systems, departing from the critical analysis of the proposals of H.L.A. Hart and N. MacCormick, and then trying to draw out some evolutionary principles from them. Finally, in Section 5, I will try to show how the conclusions of Section 4 can be applied to assess some challenges faced by contemporary legal systems and to conceptualise possible next stage(s) in the evolution of legal systems.

II. THE CONCEPT OF EVOLUTION AND THE CONTENT OF AN EVOLUTIONARY THEORY

Evolution is, undoubtedly, a very complex concept – complex even in the biological sciences where its use has been first made prominent by the works of C. Darwin (especially, 1859 and 1874). Evolution is associated to changes in biological types within a population over time, with Darwin's idea of "natural selection" being considered to be the most prevalent form of evolution[1]. Based on the assumption that every organism struggles for existence, natural selection is a complex process that results in the survival of the organisms with variations that make them fitter for and/or adaptable to their changing context, and the demise of those that are less fit and/or adaptable (see Gildenhuys 2019). As such, it is possible to understand "natural selection" as synonymous with "selection by environment", and "survival of the fittest" –an expression introduced by H. Spencer (1864)– to simply mean "survival of the most or best adapted to the environment".

Following a similar vein, a folk understanding of evolution sees it as process of change or transformation over time, not necessarily restricted to living organisms. This "change", which implies the alteration of certain characteristics while preserving the overall identity of the subject, follows the idea of "natural selection": firstly, it can be explained by the better position in which the subject finds itself after the change, and secondly, it can be explained as

[1] Albeit not the only one: see Millstein 2021.

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caused and/or correlated to other changes in the context and/or circumstances of the subject. Moreover, "process over time" seems to imply that evolution involves change with these characteristics: gradual, non-sudden (as opposed to revolution); spontaneous or natural, unplanned or directed (as opposed to planification[2]); with potentially infinite continuity (limited only by the ability of changes to be conductive to the continued existence or survival of the subject). Finally, evolution appears sometimes conflated with development and/or progress: it is taken to be linear (only one possible direction), to be positive (going towards "the better"), and/or to have a non-regressive quality (always going forward). However, these associations are highly contested (see e.g. Brown 1920, Beadke & Gilbert 2020), especially when development and being "developed" are considered as the basis for value-judgements.

While accepting the folk concept of evolution as a departing point, albeit with some refinements (see Olivecrona 1971), in this chapter I will use 'evolution' in a more neutral, non-evaluative sense. Evolution will here be understood as referring to a gradual, unplanned process of change or transformation of a subject over time, in direct relation to its context, which can be explained or reconstructed for theoretical purposes as an indefinite dynamic sequence of definite static stages[3]. A theory of evolution, in this case legal evolution, will be conceived as an enterprise of identifying patterns of change, describing their causes and direction, and analytically reconstructing this dynamic sequence. In doing so here, the reconstruction and ordination of these stages is not (necessarily) linked to value-judgements about their order and/or content. The assumption or postulation of an "end" or "purpose" of the subject, either to establish its overall identity and/or a criterion for unifying the sequence of stages, is not associated with a moral or otherwise practical endorsement of that end or purpose. Moreover, when analysing of the evolution of a certain subject, several factors, and their own evolutions (context, other subjects, and so on) are to be taken into consideration, since its evolution might only be explained with reference to these factors. Finally, the universality in the explanations of evolution of a certain subject is not necessarily presupposed.

With 'evolution' thus defined, let's now turn to a brief account of the theory of legal systems and the evolution of the concept of legal system.

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[2] Planning here is understood from a macro-perspective. This is perfectly compatible with the existence of conscious agents involved in planning their own actions. See v.gr. Haack 2016: 198.

[3] This, undoubtedly, might be seen as a simplistic view or reconstruction to evolution – especially, if both stages and direction are considered to be only one and the same for every instance of the subject. See Elliott 1985: 48. However, I think even a simplistic view is of use – at least, as a departing point of debate.

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III. A BRIEF OVERVIEW OF THE EVOLUTION OF THE CONCEPT OF LEGAL SYSTEM

As I mentioned above, while there is widespread agreement on the idea that law is (or can be regarded as) a legal system, there is also ubiquitous disagreement about what exactly this claim would mean and what it would entail. Departing from the very question of what a legal system is, the disagreement has ranged to include all four basic problems that Raz famously identified as something a theory of the legal system would need to address: existence, identity, structure, and content (Raz 1997: 1-2). Moreover, the very correlation between 'law' and 'legal system' has been contested, especially with regard to international law (see e.g. Hart 2012, Kelsen 2005). Finally, further disagreement can be found as to whether this systematic character is inherent in law in itself or whether it is a product of descriptive and interpretative activity of legal actors (Ratti 2008: 75, Alchourrón & Bulygin 1971: ch. IV & V).

For the present purpose, it is not necessary to answer these questions: a generic concept of legal system as a departing point will suffice. A 'system' is defined as a set of elements that are functionally interrelated, where the requirements for a set to be a system would be the presence of (i) a set of elements, (ii) a relationship or order between the elements, and (iii) a unifying criterion or principle to which the components of the system (as well as the recurring relationships between them) can be traced (Ratti 2008: 3-4). A legal system would thus be a set of elements that are related to and/or ordered between each other in some way according to a unifying principle or criterion and identified as 'legal' by a (different) principle or criterion (related to the characteristics of the elements and/or the set in itself). It is worth noting that, in addition to unity, completeness, consistency and independence have also been conceived as (ideal) formal properties of (legal) systems (Alchourrón & Bulygin 1971: 43 ff).

Let us now briefly sketch what might be understood as the evolution of the concept of legal system, especially in its Golden Age of theoretical analysis, the 20th century[4]. Indeed, at least in analytical legal philosophy, the succession of theories offering a concept of legal system can –in a sense– be understood as an evolution. Most authors claimed to offer a theory that surpassed some earlier theories in at least some aspects, even while retaining others at the same

[4] Authors like Pérez locate a foundational moment for the concept of legal system in the 17th and 18th century, represented by the rationalist natural law school (Pérez 2006: 34). Interestingly, as we will see below, MacCormick takes the changes in the idea of natural law around the same historical time as the moment when the first rules of change emerged.

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time, and both some of the changes and the success of the theories can be attributed to non-theoretical, changing circumstances[5].

As such, in relation to the concept (and conceptions) of legal system, I think important changes can be traced in four main variables: Consideration of change [1]; Consideration of time dimension [2]; Types of elements [3]; and Status of the elements [4]. Based on these variables, let us briefly and schematically analyse the proposals of J. Austin, H. Kelsen, H.L.A. Hart, R. Dworkin, J. Raz, and C. Alchourrón & E. Bulygin[6].

[1] Austin presented an image of a legal system as a complete, *static* set of elements, ready to be immediately applied, and without any attention given to the process of their incorporation or elimination. Kelsen criticised this view, claiming that a legal system is a normative system that –unlike others such as morality– regulates its own creation; in this sense, legal systems are *dynamic*. Hart, Raz, and Alchourrón and Bulygin followed him and stressed the importance of this dynamic approach.

[2] Of those who emphasised the dynamic aspect in [1], Raz was the first to point out that the expression 'legal system' was ambiguous and could mean either "momentary" legal system (any legal system at a given point of time) or "non-momentary" legal system (a continuous sequence of "momentary" legal systems). Alchourrón and Bulygin refined the notion and used 'legal system' to denote a static set of norms and 'legal order' to denominate the dynamic sequence of sets of norms. Kelsen and Hart did not pay explicit attention to this distinction, and it is an open question whether their approaches could be understood as referring to one or both of these meanings (see Ratti 2015).

[3] According to Austin, a legal system is a set of *commands* issued by a sovereign. Kelsen and Hart criticised this view and argued that a legal system is a composed by *norms* or *rules*. The former famously claimed that there is only one (real) type of norm, while the latter criticised this position and claimed there are two types of rules. The idea of the elements of the legal system consist only of *rules* has been criticised in two ways. Dworkin famously claimed that a legal system is composed by rules, principles, and policies (*all normative standards*), while Raz and Alchourrón and Bulygin held that it is composed by both *normative and non-normative standards.*

[5] For an overview of conceptions of legal system in 20th century legal positivism, see Ratti 2015.
[6] I will base this very brief overview on Austin 1995, Kelsen 2005, Hart 2012, Dworkin 1978, Raz 1997, and Alchourron & Bulygin 1971.

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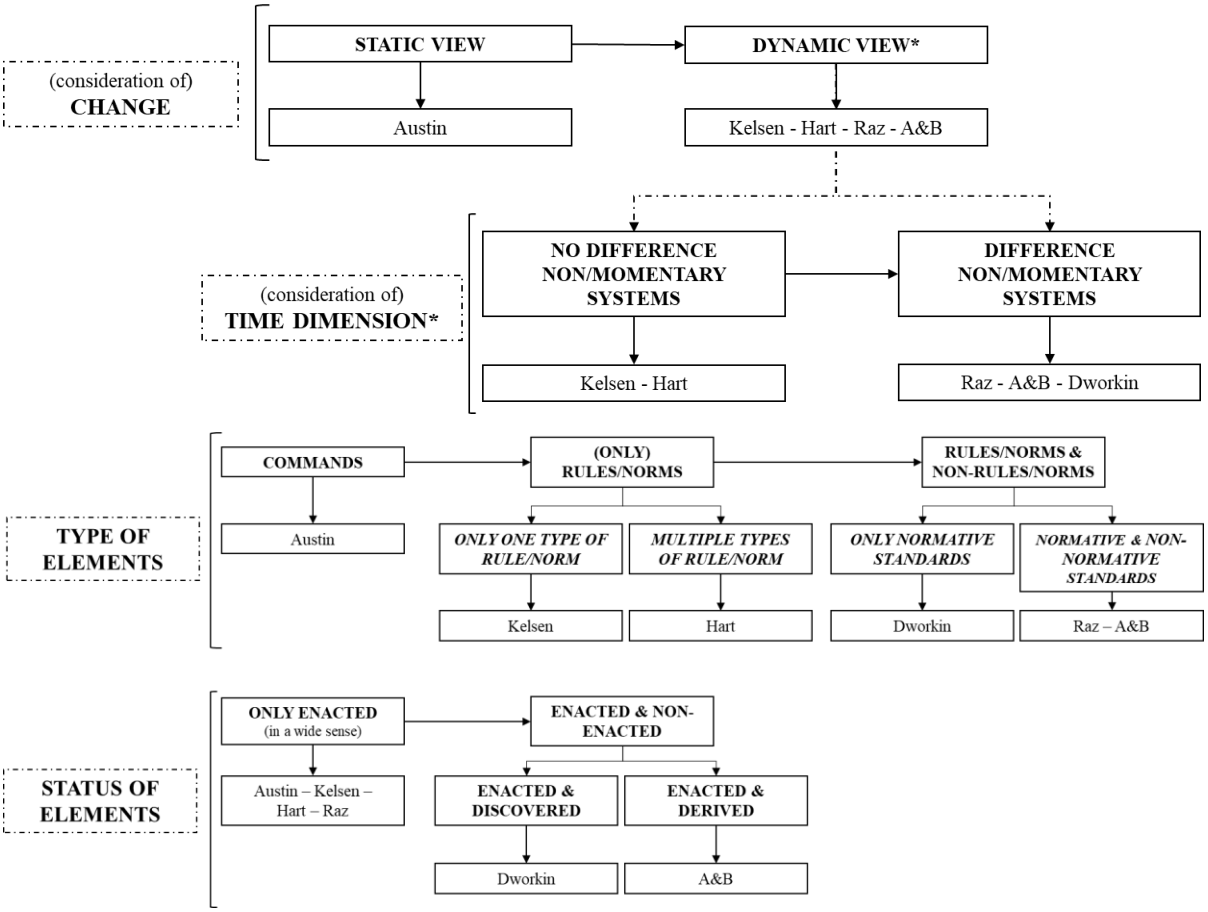
[4] According to Austin, Kelsen, Hart and Raz, all the elements of a legal system are the product of direct human action (they have been *enacted* in a wide sense, thus including their recognition). Dworkin famously criticised this view and claimed that, in a legal system, there are both *enacted* and *non-enacted* elements. Alchourrón and Bulygin, for their part, famously argued that a legal system is composed by both *enacted* and *logically derived (from the enacted)* elements.

We can represent it graphically as follows, where evolution from left to right, following the arrows:



IV. RECONSTRUCTING AN EVOLUTIONARY THEORY OF LEGAL SYSTEMS

Having dealt with the theory of legal systems and the evolution of the concept of legal system, let us turn now to the enterprise of trying to reconstruct an *evolutionary* theory of legal systems. As we saw in Section 2, this enterprise involves an effort to identify patterns of change,

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describe their causes and direction, and analytically reconstruct the dynamic sequence of change. In relation to legal systems, this can be attempted by focusing on some of their allegedly most important features: that they are normative, institutionalised, and coercive (Raz 1997: 2). In particular, as we shall see, it can prove extremely fruitful to focus mainly on the feature of institutionalisation, as it also reflects the other two features. In this sense, evolution in legal systems can be seen through the lens of the emergence of institutionalisation – in the particular sense of official specialisation in the performance of normative labour within a social group (see also Lefkowitz 2020: 24). Let us look at this in detail.

4.1. Famously, H.L.A. Hart's argument for law as a union of primary and secondary rules departed from a thought experiment on the evolution of human society (2012: 91 ff). He argued that the shortcomings of other definitions of law that only considered it to be composed by either commands and/or only one type of rule –like Bentham's, Austin's, and Kelsen's– could be seen and understood by looking at the changing circumstances and different needs of human groups through their changes over time. The assumption that human social evolution and legal evolution are inextricably linked is very strong in Hart's argument. Based on the idea that the survival of human groups is based on cooperation and that securing this cooperation implies the need of some kind of social control, Hart tries to show how the evolution of human groups triggers the evolution of their means of social control, thus explaining the emergence first of rules and then of different kinds of rules, and the evolution of law from sets of primary rules to systems of primary and secondary rules. Let us look at this in more detail.

Hart proposes to depart from imagining a "primitive" human group or society. It would be a closely-knit group with kinship ties, small, stable, socially, and ideologically united, probably isolated from other groups (2012: 227). The group and its members strive for survival, and this survival is made possible through cooperation[7]. This is so because of how human beings are (2012: 194 ff). Humans are vulnerable to each other and approximately equal. They have limited altruism, competing needs to be met with scarce resources, and limited understanding and strength of will. Therefore, belonging to a group with at least some division of labour and a system of mutual forbearances provides an environment in which survival would be much more plausible. To ensure cooperation, Hart argues, rules are needed, *i.e.*, standards of behaviour that are considered to be a justification for performing the behaviour, criticising its non-performance, and undertaking and/or not criticising the exercise of pressure for

[7] Hart even talks about a «perennial need for cooperation» (2012: 197).

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conformity. Mere habits would not suffice, since no social pressure to conform arises from them, and there can be no justified expectations of conformity. And the kind of rules that a society with these characteristics would need for these purposes are just duty-imposing rules.

Thus, a *primitive society* would need only what Hart calls a *simple regime of law*. This simple regime would be exclusively composed by duty-imposing rules, with a minimum content regarding protection for persons, property and promises[8]. These rules would be created spontaneously by custom and sustained and enforced by the general practise of conformity and decentralised pressure against non-conformity. There would be no doubts about their existence and scope: they would be self-evident to everyone through their intuition[9]. As such, no further rules or structures would be required: this discrete, unconnected set of primary rules of obligation would suffice. This *primitive society* would be a *pre-legal society*, with a *simple regime of law*.

However, the initial conditions are bound to change over time: The society might increase in size and territory, successful cooperation might lead to a further division of labour or the emergence of life-changing techniques or technologies (such as writing), the environmental conditions might take a turn for the better or worse, isolation might be broken, and so on. Then the *primitive society* becomes more complex and transforms into a *simple society*, with different needs and challenges. Whatever the cause, these changes would reveal defects in this simple regime consisting only of duty-imposing rules: Uncertainty (difficulty in knowing the identity of the rules and/or their exact scope), stasis (impossibility of deliberate change to adapt the rules to ongoing changes) and inefficiency (lack of a final and authoritative determination on the violation of rules of obligation[10]). A society without an adequate regime, in the end, would not survive.

These complexities require what Hart calls "remedies": the introduction of a different kind of rules, «supplementing» the primary rules, which would specify «the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined» (2012: 94). There are three (kinds of) 'secondary' rules: a rule of recognition (to eliminate uncertainty), rules of change (to eliminate stasis), and rules of adjudication (to eliminate inefficiency). Rules of adjudication empower certain persons to make authoritative determinations about the violation of a primary rule. Rules of change

[8] See Hart's assertions on the minimum content of natural law (2012: 193 ff).
[9] On this point, see Carlson 2009.
[10] The potential lack of centralised social pressure is deemed by Hart as a less serious defect, to be in any case fixed by further complexity of institutionalisation.

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empower certain persons to introduce and eliminate primary rules. The rule of recognition, in turn, provides an authoritative mark or criterion for the conclusive determination of the primary rules of obligation. The introduction of the rule of recognition marks the transition from *set* to *system*, Hart argues, even if the transition from *law* to *legal system* does not occur until all secondary rules have been introduced. At that moment, this *simple society* has transformed into a *legal society*, with a *simple legal system* (2012: 106).

This *simple legal system* would suffice to fulfil its purpose for a *simple society*. In addition to the primary rules of obligation, this society would only need 'simple' secondary rules establishing a simple division of normative labour (separating law-making, law-applying, and law-identifying) (Hart 2012: 61). In this sense, rules of change need only designate those who are to legislate, without setting limits and/or procedures. Rules of adjudication need only designate those who are to authoritatively decide on violations of primary rules and how, without empowering them to apply penalties or centralise social pressure. Finally, the rule of recognition can just refer to an authoritative list or text of rules, without the need to refer to a general feature possessed by primary rules and/or multiple criteria and/or multiple sources of primary rules. All members would know about this rule of recognition: Knowledge and understanding of the sources would be widespread (Hart 2012: 114).

However, a further increase in complexity within the social group may again render a simple legal system obsolete or inadequate: for example, a sharp division of labour, a very large number of people in vast territories, the loss of kinship ties and the increase in heterogeneity, further discoveries and developments in technology, and so on. Moreover, the functioning of this simple legal system itself can well lead to more complexity: A new source of primary rules may arise from the adjudicator's decisions, problems regarding procedure to legislate may arise when the legislator becomes plural, determinations of violations of primary rules may well be ineffective without a centralised social pressure apparatus, and so on. Finally, the very existence of this simple legal system introduces at least one change in the social composition: it introduces a difference between a small group of officials (with special legal status, with legal authoritative status) and the rest of the members[11].

Thus, if this *legal society* is to survive, the transition from *simple society* to *complex society* would require a corresponding transition from a *simple legal system* to a *complex legal*

[11] Following Sandro, it breaks the state of *isonomia* (see 2022: ch. 1).

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system. Or, in Hart's words, a transition from a *less developed legal system* to a *more developed legal system*.

This transition from a *simple* to a *complex legal system* has nothing to do with its core structure, but with the increasing complexity of its secondary rules. In this sense, the core structure of a union of primary and secondary rules is maintained, as there is no indication of any other type of rules required to solve the challenges posed. These challenges only require further refinement of the secondary rules in order to improve the law-making, law-applying and law-identifying labours. Therefore, the rules of change will now include detailed and rigid procedures, and possibly other types of substantive restrictions on the content of legislation. The rules of adjudication will now also include the exclusive power to direct centralised social pressure and the application of sanctions for violation, i.e., to adjudicate punishment. Finally, the rule of recognition will now refer to identifying criteria related to some general feature possessed by primary rules, will have multiple criteria that identify several sources of primary rules, and will arrange these criteria in a hierarchical order to have a supreme criterion. This highly complex rule of recognition would not be widely known to the members of the complex society, but generally only to a small group of them: (public) officials and (private) experts. According to Hart, this *complex society* with a *complex (more developed) legal system* corresponds to the contemporary modern society and the contemporary modern state.

Now we can fully appreciate how the assumption that human social evolution and legal evolution are inextricably linked underlies Hart's vision of the evolution of law (and legal systems). Departing from the aim of survival and the basic truths about human beings, the transition from *law (set)* to *simple legal system* to *complex legal system* (legal evolution) perfectly corresponds to the transition from *primitive society* to *simple (tribal) society* to *complex (modern) society* (social evolution).

Since legal evolution is inextricably linked to social evolution, Hart is very clear about the unnecessariness –and even danger– for some types of societies to have some types of law and/or legal systems. He explicitly states that "the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the

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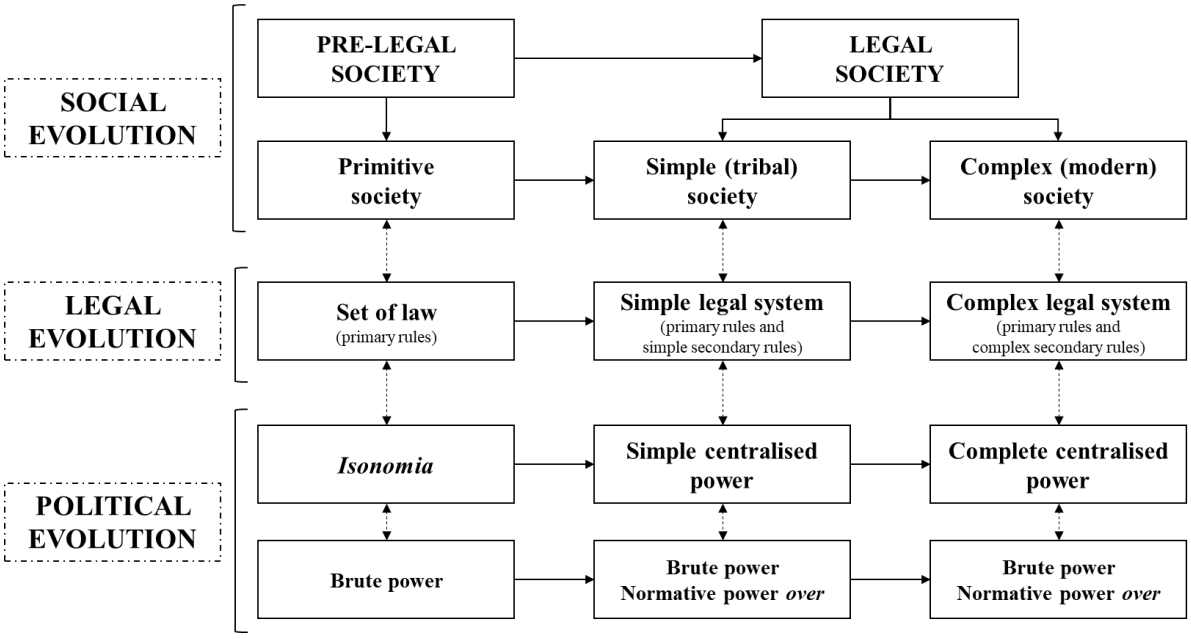
oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not" (2012: 202).

In legal societies, then, the survival of the group can be pitted against the survival of the individual, whereas in pre-legal societies this is not the case. This remark makes it paramount to consider something Hart does not explicitly mention: how "political evolution" intersects with "social evolution" and thus also how it would intersect with "legal evolution". In this sense, it is plausible to argue that the existence of political institutions is an inherent feature of human social evolution (Sandro 2022: 36). Hart himself seems to sense this dimension when he warns about the costs of the emergence of centralised organised power, i.e., the emergence of institutionalisation. However, his warning is not only about the concentration of naked, brute power, and the cooperation of a small group (officials) to maintain it. It is also about normative power: the creation of a *normative* 'power over' (Sandro 2022: 42) that only emerges with the advent of institutionalisation.

Adding "political evolution" to "legal evolution" and "social evolution", we can graphically summarise this evolutionary reconstruction of Hart's theory as follows:



As I mentioned at the beginning, when he postulated these ideas, Hart was not trying to advance a serious evolutionary theory of law (and legal systems). Instead, his aim was to explain why he believed that "the union of primary and secondary rules" had a central place in the concept of law. This is the reason why he did not postulate any explicit evolutionary

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principles or trends, nor did he try to go further and imagine a "next stage" after the complex legal system he associated with the modern state. However, as I have tried to show, I believe that his ideas can not only be reconstructed using an evolutionary theory lens, but that several general principles can also be obtained from them as a guide for theorisations about the next steps of the evolution of legal systems. I will return to them at the end of this section.

4.2. One author who seriously dealt with evolutionary aspects in the theory of legal systems and problematised Hart's proposal was Neil MacCormick. Although MacCormick shares the idea that legal evolution is linked to social evolution, he rejected the conclusion that the presence of a particularly differentiated set of power-conferring rules could be regarded as *the* mark that identifies a legal system as such (MacCormick 2008: 130). This mark would instead be the presence of (formal) institutions, but their existence does not depend on power-conferring rules. In this sense, he claims that normative powers can be granted by duty-imposing rules (2008: 101), and therefore power-conferring rules are not necessarily required in order to answer the challenges a society faces when both its changes and those of its environmental conditions affect common life (2008: 135-6). Thus, according to MacCormick, complex societies may well achieve self-regulation through a system consisting only of primary rules, achieving certainty, dynamism, and efficiency without necessarily resorting to secondary rules (2008: 146 ss). MacCormick provided an account of what he calls "legal development" using primally a historical basis to show, on the one hand, how primitive societies do not need rules for self-regulation nor they, in any case, lack of legal powers; and on the other hand, how complex societies can fulfil law-making, law-adjudicating and law-identifying functions only with a system of duty-imposing rules and thus without power-conferring rules. Let us take a closer look.

MacCormick departs from a critical analysis of the conceptions of human beings and society presupposed in Hart's proposal (2008: 118 ss). Two main criticisms are relevant here. On the one hand, MacCormick points to the extremely static view Hart adopted about the relationship between human nature and the terrestrial environment, thus failing to consider how the interaction between environmental problems and human responses both solves old challenges and creates new ones to overcome. On the other hand, while MacCormick agrees that the introduction of a dynamic element into social regulations –enabling individuals to create obligations and vary their impact– is necessary for any evolution of human society towards a division of labour, he rejects Hart's conclusion that this requires the emergence of a

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particularly differentiated set of power-conferring rules. These "powers", he claims, are easily understood as the conditions of 'obligations'.

MacCormick shares the view that what we can call legal evolution is, in a sense, linked to social evolution and the change of environmental conditions that affect common life. Based on the aim to survival and taking into account the truths about human nature and the world, certain kinds of social regulation that ensure social cooperation are necessary, and the form of this necessary regulation changes as the features of society –or the environment– change. MacCormick links an increasing division of labour with a decreasing social closeness, and this with a decreasing effectiveness of informal social pressure to conform to the standards of the group. The decreasing effectiveness, MacCormick argues, raises the case for institutionalising enforcement of the standards through recognised public functionaries. MacCormick, however, does not entirely agree with Hart's proposed links between the stages of legal evolution and the stages of social evolution.

Let us begin with Hart's *primitive society* or *pre-legal society*. MacCormick (2008: 126 ss) finds it unfortunate that Hart chose to describe the (successful) mode of self-regulation of this society as 'primary rules of obligation', since this implies that this society would be regulated only (or primarily) by *rules*, and that it would have no kind of normative powers, since their bestowal is not a matter of rules of obligation. On the first point, MacCormick claims that a *primitive society* would only need common *primary standards*. These standards are categorial minimum requirements of behaviour that relate to natural acts and abstentions or to acts and abstentions that occur without the invocation of rules[12]. They draw the line between wrongdoing and minimally acceptable behaviour, some of which relates to the breach of obligations and duties. Moreover, MacCormick argues, 'rules' are but a consequence of the development of formal legal institutions, which *ex hypothesi* this primitive society does not have. As for the second point, he maintains that even if these social standards were rules and related to obligations, this should not preclude the applicability of the concept of normative power within this community. On the one hand, he says, the particular kinds of formality associated with the exercise of 'legal powers' may well arise «from custom and convention hallowed by tradition and usage», as history shows. On the other hand, these required formalities may well be understood as exempting conditions from prohibitions, without necessarily resorting to the idea of a set of power-conferring rules. For these reasons,

[12] MacCormick points out that they would have the form of "thou shalt not kill", which does not state or describe obligations but only implies the proposition that killing is wrong.

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MacCormick rejects the idea that *primitive societies* self-regulate through a *regime of rules,* albeit a simple one, and suggests instead that it be understood as a *regime of primary social standards or requirements*.

What reasons, MacCormick asks, should a society have to go further from regulating by these standards? (2008: 134). Hart's answer was clear: because its evolution (and further complexity) would expose the standards as defective, because of uncertainty, stasis, and inefficiency. Here Hart seems to make two strong assumptions. The first is that the only way a society has to respond to the challenges posed by its evolution would be to introduce secondary rules, or in any case rules that are not duty-imposing. The second is that formal institutions only emerge by means of the emergence of these secondary rules. If the only way to ensure the survival of a society faced with these challenges were to introduce secondary rules and thus formal institutions, it would follow that any surviving society without secondary rules would have neither formal institutions nor be anything more than a primitive society. Is this so?

MacCormick explicitly rejects this conclusion, relying on two arguments. The first is that there can be is possible to have adjudication without pre-established power-conferring rules (*i.e.*, rules of adjudication) (2008: 141). The second is that the rule of recognition –the keystone of any legal system, the emergence of which would mark the first step of transition from pre-legal to legal, and from set of rules to system of rules– is to be understood as a duty-imposing rule (2008: 132). If so, it would be possible to have a surviving *primitive or simple society* –or a more complex one, albeit not as complex as a modern society– having both a *system of primary rules* and at least one formal institution of adjudication (and a corresponding rule of recognition, concerning its duties).

Let us go back to *primitive societies,* that live exclusively according to primary social standards. Those standards surely would have some exceptions to the consideration of wrongdoing by exercising force against another human being, MacCormick argues, such as the legitimate defence exception. The existence of these exceptions would potentially give rise to the need to determine whether or not someone could be considered as a wrongdoer in a particular situation, and that would potentially entail the need to ask else for an opinion on that determination. MacCormick here reconstructs a chain of duties of the members of the group, perhaps arising from the mere fact that maintaining cooperation is necessary for the survival of the group: a duty on those who present themselves as victims to seek a peaceful satisfaction by agreement with the alleged wrongdoer; failing that, a duty to either drop the accusation or to seek someone else to comment on this determination (perhaps the elders – the oldest members

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of the group); and the latter would have a duty to pass judgement on the matter, on the basis of the customary standards of wrongdoing of the society. No duties to abide the judgement are necessary.

Here MacCormick points out that the concept of 'normative power' does not seem to apply: the picture only shows that different parties have certain duties because they are hold certain roles (2008: 143 ss). For him, there is neither the invocation of a general rule in obtaining the duties, nor the invocation of a power-conferring rule in discharging them. In this *simple arrangement*, then, there is no need to think of 'judging' as what MacCormick calls a 'juristic act': an act that can be said to be performed validly or invalidly (according to certain rules). These elders would indeed have a duty to make a judgement consisting of two elements: the duty to make a judgement and the duty to make it with reference to primary social standards whose existence is not determined by their choice or decision. This duty would in fact be parasitic on primary social standards. At this point, MacCormick argues that there are an elementary 'rule of adjudication' and an elementary 'rule of recognition' – but both rules are duty-imposing and not power-conferring (and/or conceptual) ones. Moreover, he holds that primary social standards can be structured to characterise an elder's decision as an authoritative determination of wrongdoing or justification, and thus have a monopoly *over* (though not a monopoly *of*) the justified use of force[13]. As such, MacCormick argues, these imaginary elders would play a 'judicial role', and this role is not necessarily defined by –or dependent on– power-conferring rules.

What about the situation in a more complex society (*a simple society*)? Could it still be that law-making, law-applying and law-identifying can exist without power-conferring rules? To answer this question, MacCormick proposes to analyse a simplified view of a *feudal order*. Here, society is built on duty-relations between lords and vassals. Each lord has a duty to protect the customary rights of his vassals and vindicate them against wrongdoers; each vassal has a duty to obey his lord's commands; in turn, as the supreme lord, the king has a duty of protection of his sworn vassals and the peace of the community. This duty can be extended even further to include a duty to protect the customary rights of the community, and thus to adjudicate individual complaints about wrongs on the basis of those customary rights. And these duties could be delegated to someone else – who in turn had the duty to adjudicate these issues following procedural requirements, and who occupied a judicial role by king's appointment.

[13] As MacCormick points out, when jurisdiction is divided among several individuals or groups, an organised hierarchy is needed. Is this organisation that requires Hartian 'rules of adjudication'.

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The definition and extension of this judicial power – by interpreting what matters could breach the "peace of the community" – was done through custom and usage (2008: 147-8).

Up to this point, MacCormick argues, this *simple society* would still need nothing more than *duty-imposing rules* to successfully self-regulate and resolve potential problems of uncertainty and ineffectiveness. So, is there a point in this process where it would become appropriate to describe this judicial rule in terms of separate power-conferring rules? MacCormick answers in the affirmative: It would be appropriate with the increasing complexity of this simple judiciary. Here, on the one hand, the king's instructions on the procedure to be followed started to be considered as rules, meaning that participants and interested parties would assert that those in judicial roles could validly exercise jurisdiction only by invoking those rules. On the other hand, jurisdiction was divided among several individuals or groups, thus requiring an organised hierarchy. At this point, therefore, it would be appropriate to describe this situation in terms of 'rules of adjudication' as power-conferring rules.

Would this *simple society* have any power of change, albeit not conferred by a power-conferring rule? Up to this point, this simple society successfully self-regulates on the basis of pre-existing customary rights. General questions about the existence and/or scope of these customary rights could be answered by the king through 'statutes', *i.e.*, authoritative settlements of these questions after consultation with experts. However, according to MacCormick, this would not imply any power of change on the part of the king, since it was understood as a matter of clarifying the existence and/or scope of pre-existent law and not the elaboration of new one. The king would merely be fulfilling his duty to know the existence, content, and scope of customary rights in order to able to protect them and settle questions about them. It is only when "some set of understood procedural and other requirements which must be fulfilled before a general decision on law counts as a 'statute'» when it would be «proper to say that there exists a power-conferring rule enabling only *those* people acting by *this* procedure to make a valid statute" (2008: 149).

MacCormick traces the historical emergence of this rule of change –and an increasing complexity of the simple rule of recognition– around the 17th century, when questions about the subject-matter of statutes arose along with heavy discussion about the role of custom, the existence of principles of right reason, and the absolute power of an appointed ruler. Some of those who rejected the absolutist doctrine and believed in the existence of principles of right reason began to consider custom as good, but not conclusive, evidence of those principles. This opened up space for considering this statute-making power not only in the original identifying

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way (statutes as asseverations of custom) but also in a modifying way (statutes as modifying customs when the customs did not uphold the principles of right reason). In order to promote better conformity to the principles of right reason and to promote society, he who had the statute-making power had a duty to exercise it to amend the poorly conforming customary rules (2008: 149-150). The emergence of this rule of change (which is still a duty-imposing rule) in turn increased the complexity of the criteria of recognition and thus changed the rule of recognition.

However, it was around the 18th century that a power-conferring rule of change appeared. With the rejection of these principles of right reason and the return to absolutist doctrine, MacCormick argues, the conception regarding the statutes changed. Indeed, statutes were regarded as law only because they had been enacted by those who had the power to do so, *i.e.*, whose commands were actually habitually obeyed. There were thus no restrictions on the content of these statutes, either in the sense of natural law or in the form of judicial precedent or custom. This power of change is interpreted by some as simple factual social power, but for others it must be conceived as (the result of the application of) a rule. The latter, according to MacCormick, would be a power-conferring rule of change.

MacCormick says that this account shows the way in which a power-conferring 'rule of change' emerged: originally stemming from a power (a duty) to settle conclusive evidence of law, then it transformed into a power (a duty) of limited legal change, and it was finally reinterpreted as an unrestricted power (no duty) of change (2008: 150-1). He also contends that, parallel to this development, there were "refinements in and modifications of the 'rule of recognition' upheld by the judges as settling the criteria of recognition determinative of their duty to decide according to 'laws', which are for them valid as justifying grounds for their decisions" (2008: 151). And this redefinition of the power of change, in which judges also participated, laid the grounds for (custom-stemmed) courts to be reorganised through statutes settling who has power over deciding what subject and according to which procedure. In other words: the redefined power of change by the 'rule of change' allows for the valid enactment of 'rules of adjudication', which is what has happened historically. As the changes where being done in accordance with the developed criteria of recognition, participants were committed to accept the changes as valid. The emergence of 'rules of change' is thus necessarily reflected in the 'rule of recognition': and since they confer the power to make valid legal changes, their exercise could lead to a redefinition or reestablishment of the 'rules of adjudication'. At the end

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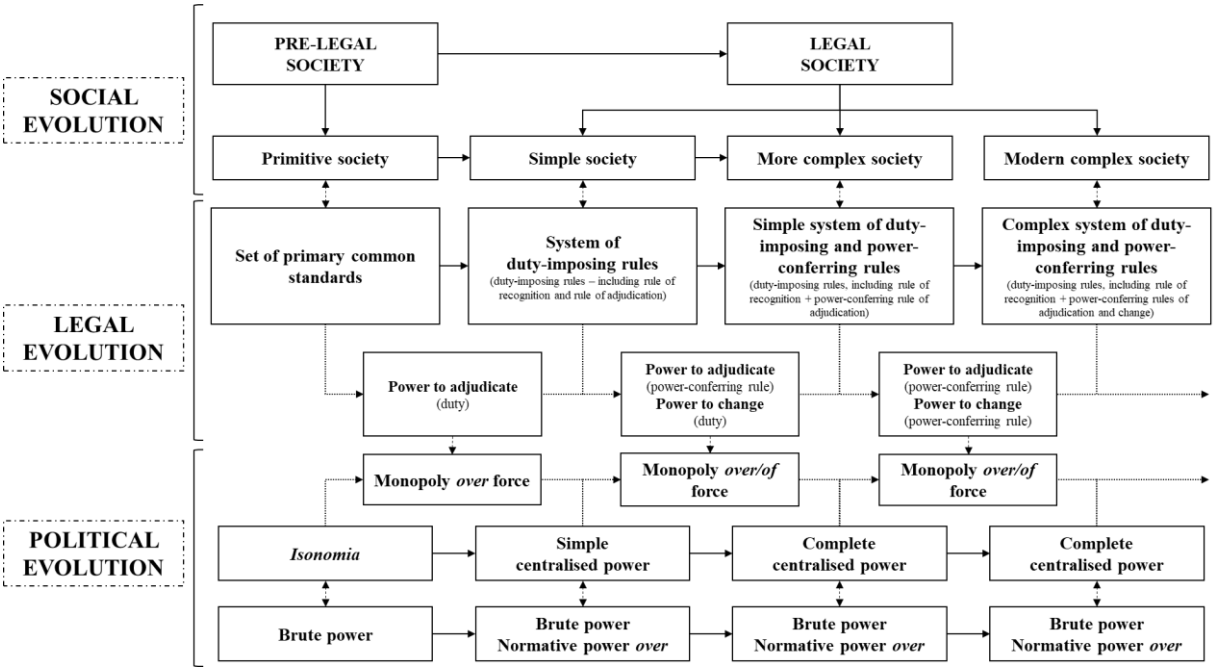
of this process, there would be a *complex legal system of duty-imposing and power-conferring rules*, for a *modern complex society*.

We can graphically summarise this evolutionary reconstruction of MacCormick's approach as follows:



We can now see what MacCormick was trying to argue for, namely that legal systems can very well exist without power-conferring rules and that, just as primitive societies can successfully self-regulate without rules, more complex societies can also successfully self-regulate without power-conferring rules. In this sense, legal evolution here seems to follow institutional or political evolution rather than social evolution, in the sense that power-conferring rules only emerge when law-making, law-adjudicating and law-identifying become more complex activities and require organisation. Moreover, MacCormick shows that it should be possible to consider at least part of legal evolution as self-referential, *i.e.* as a consequence of the changes and challenges that arise *within* legal institutions *to* legal institutions, and not only as a consequence of social evolution.

4.3. Although there would certainly be many points of controversy and/or debate, Hart's and MacCormick's proposals are full of interesting ideas. In particular, some principles can be derived from their analysis and can be used to do something that neither author was really interested nor engaged in, namely, to construct an evolutionary theory of legal systems and then

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hypothesise about the possible next step or steps in their evolution. We will analyse this in Section 5.

Here I will summarise some of these principles:

[H1] "*Assuming the aim of ensuring survival, the evolution of law follows the evolution of society."*

[H2] "Ceteris paribus, *the survival of societies is much more plausible when cooperation and protection of persons, property and promises are effectively ensured*".

[H3] "*The higher the societal complexity, the more difficult it is to effectively ensure the protection of persons, property and promises".*

[H4] "*Assuming the aim of ensuring survival, the higher difficulty in effectively ensuring the protection of persons, property and promises, the higher institutional complexity is needed".*

[H5] "*Assuming the aim of ensuring survival, the higher social complexity, the higher institutional complexity is needed".*

[MC1] "*The challenges posed by social evolution do not necessarily require the introduction of other types of rules than duty-imposing rules*".

[MC2] "*The evolution of law, in regard to the emergence of other types of rules than duty-imposing rules, is plausibly more related to institutional or political evolution than to social evolution"*[14].

[MC3] "*At some point in time, at least part of the evolution of law can be seen as self-referential (caused by changes and challenges* within *legal institutions* to *legal institutions) rather than linked to social evolution"*[15].

[MC4] "*In the context of the evolution of law, changes in the regulation of law-making, law-applying or law-identifying activities are bound to generate changes in the other two activities of normative labour".*

V. GOING FURTHER: CHALLENGES AND NEXT STAGE(S) IN THE EVOLUTION OF LEGAL SYSTEMS

[14] In this same line, and from a historical point of view, Watson claims that «law in society is not correlated with life in society», as legal evolution is pushed by legal elites (see 1987: 550).
[15] In the same line, Carlson points out that the higher complexity law and in survival would amount to a higher need of experts (see 2009: 67).

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In Section IV, I have tried to reconstruct a plausible picture of what an evolutionary theory of legal systems might be and propose, based on the proposals of Hart and MacCormick. Here I will try to apply it to analyse what the next stage(s) of the evolution of legal systems might look like, taking into account a handful of the multiple challenges that contemporary legal systems face. These challenges stem from various sources (legal, political, social) of complexity that impact directly or indirectly on legal systems, whose exhaustive analysis would merit an entire chapter or book. Nevertheless, it is worth mentioning at least some of them: 1) the existence of other (political) organisations with other legal systems; 2) the emergence and increasingly spread of non-physical jurisdictions; 3) the further division and hyper-specialisation of epistemic labour; 4) the further complexity in the division of normative labour; 4) the highly increasing mobility of actors between territories; 5) the highly volatile changes in the natural environment; 6) the emergence and spread of non-human allegedly experts; 7) the possible recognition of non-human beings as full members of society; and so on.

In the following pages, I will briefly analyse how a possible evolution of legal systems might result from addressing issues 1) and 4). In particular, I will assess whether new types of rules, further specification of the already existing types of rules, and/or new institutional arrangements of the already known types are needed[16].

1. *Existence of other (political) organisations with other (legal) systems.* The existence of other political organisations with other legal systems, at whatever stage of evolution, and their potential relationships, is something that is not overtly addressed in Hart's and MacCormick's evolutionary proposals. Although Hart seems to acknowledge that only primitive societies can be isolated groups, and also goes out of his way to argue that sovereign states can be bound by international law (Hart 2012: 220 ss), this does not seem to be taken into account in the stages of legal evolution (and also social and political evolution) that he identifies. In the same vein, while he criticises Hart for not paying attention to the inequalities between groups (see e.g. MacCormick 2008: 119), MacCormick's account of legal evolution on a historical basis does not extend to the process of contact between municipal and international and/or transnational law, although he does acknowledge the existence (and rise) of different institutional normative orders and the importance of inter-recognition by other political organisations (2008: 11, 40).

[16] Some of the following ideas have stemmed from a very fruitful discussion with Paolo Sandro, to whom I am both grateful and indebted.

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The challenge posed to individual legal systems by the existence of other political organisations with other (legal) systems, both at the macro-level (organisation-organisation) and at the micro-level (member-member) is thus to regulate their relations in such a way as to ensure their survival. In other words, to successfully define and defend their "external sovereignty" and to regulate the situations in which legal rules from other legal systems would have a legal or normative effect of sorts in relation to the original legal system [H5, MC2]. Undoubtedly, it is possible to understand that this challenge was answered both by plain international relations and politics as well as by international law. As far as the latter is concerned, monist and dualist approaches have indeed been proposed in theory and elaborated in practice. This can be seen as an extension of some sorts of Hartian original secondary rules.

However, it is also possible to understand that this challenge could be answered by introducing a third type of rules into legal systems: the so-called tertiary rules proposed by Michaels[17] [H5, MC2]. These tertiary rules "are rules with which one legal order designates, relative to itself, the normative space of another legal order to which it is not hierarchically superior" (2021: 425): in other words, "the rules with which a legal system organised its own relation to other legal systems and designates those other legal systems' normative space with regard to itself" (2021: 447). They are not Hartian primary rules since they are not duty-imposing, and they are not secondary rules since they do not refer to questions of validity and valid change of rules belonging to a legal system. They identify the process by which applicable rules may be recognised, but other legal system's rules (2021: 434). In this sense, tertiary rules belong to a legal system and do not operate *within* that system (as secondary rules do) but *between* non-hierarchically ordered legal systems and deal with the recognition and application of foreign institutions and rules that are considered valid under foreign law [MC2]. Michaels considers them the best alternative to meet this challenge[18], although this does not mean that conflicts can arise between legal systems cannot arise.

2. *Increasing complexity in the division of normative labour*. In contemporary states, the division of normative labour is becoming increasingly more complex and difficult. Hart's and MacCormick's approaches seemed to assume, at least to some extent, that normative labour activities are neatly clear-cut, on the one hand, and attributed to only one kind of subjects and/or institutions, on the other hand. Indeed, the division of normative labour into rules of change and

[17] Michaels recognises his proposal is similar to other previous ones, albeit he deems them not still sufficiently precise. See 2021: 453. Moreover, this "tertiary" character is not linked to them being some kind of meta-rules of recognition of secondary rules of recognition. See Carlson 2009: 63-6.
[18] See his refusal of three other strategies in 2021: 431-434.

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rules of adjudication seemed to be a synonymous with "rules for law-creation" and "rules for law-applying", both of which were associated with only one type or class of institutions or legal authority ("legislature", "courts"). In this sense, as MacCormick pointed out, hierarchical organisation between different officials of the same type or class of institution –for example, the judiciary– demanded the power-conferring version of these rules. Moreover, increasingly complex institutional scenarios required a highly complex criteria of recognition capable of systematising these multiple sources of law.

However, contemporary social and political circumstances have brought some challenges to this picture [H5, MC4]. One of these is the emergence of various institutions that have both the power of law-applying and an increasingly power of law-creation[19]. One example of this are supreme courts that have the concentrated power of *ex post facto* constitutional review. They clearly exercise power of law-applying, but also an important power of law-creating in several situations, quite distinct from the power to merely decide in 'penumbra' cases. Apart from the notorious issues of political power involved, this fact poses an interesting problem within legal systems, not only at the level of the criteria of recognition, but also at the level of rules of change and adjudication [MC3, MC4]. Is it possible to conceive such a situation in terms of separate rules of change and adjudication? More than that: is it possible to conceive it in terms of pure rules of adjudication?

I consider four possibilities to be plausible here. The first would be to revise the concept of adjudication and explicitly recognise two subsets of rules of adjudication: one that allows law-creating power in the context of law-applying, and another one that does not. The first subset would then apply to these institutions. The second possibility would be to rethink the role of these institutions and consider their activities as governed by a rule of change, that limits the conferred power of change to very specific situations (such as a judicial process). This would also create a new subset of rules of change, specifying an already existent one: the rule of change for general rules[20]. The third possibility would be to conceive of a new and unique type of power-conferring rule, resulting from the combination of a rule of change and a rule of adjudication. The fourth and, in my view, most fruitful possibility would be to describe the

[19] I am inclined to agree with Kelsen that, at some level, all legal authorities –except at the top and the bottom– are both law-creating and law-applying. I would also be inclined to concede a wider, if not central, law-creating (in the sense of *norm-creating*, not *text-creating*) role to traditional law-applying institutions like courts. Unfortunately, I cannot do justice to this debate here. See at least Kelsen 2005; Sandro 2022 (for an exhaustive defence on the possibility, and necessity, of distinguishing between law-creating and law-making); Guastini 2015 (for a strong defence on the law-creating role of courts).

[20] The other one being the rule of change for particular rules, such as the power to contract, make wills, and so on.

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situation as the result of a (micro-)system of different rules: a system that includes both a rule of change and a rule of adjudication, of whatever kind, and potentially other elements such as duty-imposing rules or determinative rules[21].

A second challenge arises from some emergent changes in the way general law-making and law-making institutions are conceived. The first is the increasing emergence of highly technical institutions that have almost unlimited powers of change within their field of expertise, and that receive almost complete deference from more traditional law-making institutions [H5, MC3]. This situation poses a major challenge because this rule of change confers power, on the one hand, to an institution that can be conceived mainly as an epistemic authority rather than a practical authority; and on the other hand, to an institution whose decisions cannot be considered as authoritative based on the same principle as those of other law-making institutions such a legislature.

The final challenge is the increasing emergence of institutionalised instruments, especially based on new information and communication technologies, for direct citizen intervention in general law-making[22]. This development has been linked to the incessant and rapidly increasing complexity of contemporary societies, caused, among other things, by the exponentially rapid development of new technologies, the highly increasing mobility of people between territories, the rapidly everchanging natural environmental conditions, and so on. Traditional general law-making has been shown as lagging behind and struggling to adapt to these changes [H3, H5]. The result is either poorly conceived general rules or no regulation at all – reducing both the plausibility of social compliance with the legal system and the success of general coordination on these issues. The challenge posed by this social picture, and the possible response to it through these institutionalised instruments, is both a political and a legal challenge. It requires a rethinking of the traditional rules of change and the idea that the emergence (and existence) of secondary rules opens a gap between ruler and ruled [MC4].

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[21] On the notion of constitutive systems, regarding legal competence or power, see Calzetta & Rabanos 2022.
[22] *Crowdlaw* is one recent example. See v.gr. Alsina & Martí 2018.

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