

1

Introduction

THIS BOOK EXAMINES the theoretical accounts offered by Hans Kelsen and Joseph Raz to explain the temporal continuity and discontinuity of legal systems: accounts, that is, of how to determine whether a legal system existing in a given place at a given time is the same legal system as one existing in that place at a different time. In particular, the book tests the explanatory power of those accounts by applying them to one specific instance or historical context: the legal system (or systems) of British derivation in Australia between 1788 and 2001. The book's primary objective is to establish whether a sustained analysis vindicates Kelsen's and Raz's accounts, or highlights aspects that are flawed or in need of refinement.¹ Exposition and reconstruction of Kelsen's and Raz's accounts in light of their application to a complex body of legal materials reveals where development and enrichment is required, and permits evaluation of the accounts, individually and in comparison.

In this book, 'continuity' and 'discontinuity' are used in relation to propositions about whether a legal system existing at one time is, or is not, the same legal system as one that existed, or may exist, at another time. Propositions about continuity and discontinuity are thus propositions about the identity of a legal system—or the non-identity of legal systems—over time. Because of its sense of non-identity, discontinuity is also implicated in propositions that a *discrete* legal system can be identified—a legal system separate from, and not hierarchically related to, any other legal system, whether existing in the past, the present or the future. Continuity and discontinuity in the sense of the diachronic identity of legal systems is a jurisprudential phenomenon. Depending on the criterion operative in a given account, there may be significant continuities or discontinuities in other senses (for example, social, political or economic senses)—connections or disconnections over time, despite, or as a result of, change. Save to the extent implicated in the theoretical accounts of Kelsen and Raz, those other senses of continuity and discontinuity are not the subject of enquiry here. While continuity and discontinuity is analysed in this book as an independent jurisprudential phenomenon, it provides conceptual

¹ Language is here borrowed from MD Adler and KE Himma, 'Introduction' in MD Adler and KE Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford, OUP, 2009) xiv.

2 Introduction

context for other purposes involving propositions about the identity of legal systems over time. Such propositions may, for example, be put to use in solving practical legal problems connected with allegiance, political and legal independence or authority in the wake of a successful revolution.² A clearer, more plausible understanding of the leading accounts of continuity and discontinuity of legal systems helps make sense of such debates, be they in history or in prospect.

I. 'APPLYING' THEORETICAL ACCOUNTS

In this book, the notion of 'applying' an account to a particular context denotes a critical enquiry into, and evaluation of, the *explanatory power* of an account or model (these terms are used interchangeably). Application is thus one mode of testing or evaluating an account's *factual fit*: how adequately the account corresponds to, accords with and persuasively makes sense of, the facts—including complex social facts, attitudes and normative standards—for which it purports to account.³ Fit is a matter of degree: an account may connect to the facts more or less consistently; it may represent or characterise the facts in all their complexity more or less accurately (and more or less efficiently); and it may accord more or less closely with intuitive judgements about the facts made by contemporary and subsequent participants, observers and commentators. An account might achieve so poor a fit as, in whole or in part, to be unserviceable, or it might articulate some new insight into, or understanding of, the facts.⁴ In addition to this central function of testing fit, application—as a mode of testing theoretical accounts—can reveal gaps, inconsistencies and unexpressed assumptions in the models themselves, deficiencies that may not necessarily appear in the abstract.⁵ Further, application to a concrete instance affords a common point of reference for evaluating the relative success of competing theoretical accounts.

Of course, despite encompassing the dimensions just mentioned—consistency, accuracy, efficiency, concordance with intuitive judgements

² Some theorists deny that an account of continuity and discontinuity is necessary or even relevant background to solving practical legal problems of this kind: see C Arnold, 'Institutional Aspects of Law' (1979) 42 *MLR* 667, 678–79.

³ The language of 'fit' is borrowed from Dworkin: see, eg, RM Dworkin, *Justice in Robes* (Cambridge, Mass, Harvard University Press, 2006) 15.

⁴ FP Hubbard, "'One Man's Theory...': A Metatheoretical Analysis of HLA Hart's Model of Law' (1976) 36 *Maryland Law Review* 39, 47–48.

⁵ See, eg, Greenawalt's application of Hart's account of the rule of recognition to the constitutional law of the United States of America, which identifies 'at least ten possibilities that are omitted or underdeveloped': K Greenawalt, 'The Rule of Recognition and the Constitution' (1987) in MD Adler and KE Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford, OUP, 2009) 1, 37–38.

and articulation of new insight—factual fit is not the sole criterion by which the explanatory power of a theoretical account may be evaluated. A comprehensive evaluation may implicate wider issues in legal philosophy and in social science more generally. However, there is consensus that a sufficient working sense of the explanatory power of an account of the continuity and discontinuity of legal systems may be obtained by reference to fit, even though corroboration according to some further measure(s) may be desirable. Theorists such as Finnis, whose philosophical approach holds that even the descriptive parts of jurisprudence require a richly normative perspective, as well as theorists such as Kelsen, who maintains that legal phenomena may rationally and usefully be described without reliance on normative considerations about desirable forms of social life, find considerable scope for analysis and evaluation by reference to factual fit. This book focuses on that area of common ground, and nothing in the analysis conducted suggests that a meaningful evaluation is impossible without reference to a set of deeper normative criteria.⁶

II. KELSEN AND RAZ

Theoretical accounts of the continuity and discontinuity of legal systems vary. Some theorists deny that it is possible to discern anything more than the continuing existence (or not) of particular laws or institutions that make up a legal system: continuity of the system or set of laws and institutions taken as a whole is thus treated as a matter of degree, and to point to any diachronic feature as indicating continuity beyond the continuing existence of any of those particular elements is, in view of the vagueness of law, held to be arbitrary.⁷ Other theorists—arguably moving away from the notion of a legal system—treat propositions of continuity or identity over time in the context of a broader notion of tradition,⁸ or as a normative matter, grounded in a continuity of legal practice and common life that *'has to be determined'* practically, deliberatively within a judicial and social frame of thinking that is mindful of time in the manner modeled by melody'.⁹

Notwithstanding this range of views, the dominant type of account understands a legal system as a sequence of sets of laws that form a

⁶ Accordingly, in this book, 'evaluate' and its cognates are used in the general sense of testing, and not in the sense in which 'evaluative' sometimes refers to normative judgements concerning, eg, conceptions of justice or desirable forms of social life.

⁷ Arnold (n 2), 679–82.

⁸ HP Glenn, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 *McGill Law Journal* 863.

⁹ GJ Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 *Ratio Juris* 203, 225. Others have also been attracted to musical metaphors of symphony, harmony and cacophony: see, eg, J Stone, *Legal System and Lawyers' Reasonings* (London, Stevens & Sons, 1964) 27–28.

system—both at each given point in time and across time—in view of some unifying criterion or feature (other than the fact that they comprise laws).¹⁰ This book considers Kelsen’s and Raz’s accounts because they are, within that dominant type of account, amongst the most developed (and, especially in Kelsen’s case, the most critiqued) theories of legal systems, and because their accounts are usually understood to differ in their approach to the unifying criterion. Kelsen’s account focuses on an internal or formal criterion: authorised constitutional change. In contrast, Raz’s account ultimately locates the unifying criterion in the continuity of the society in which the legal system exists. This extra-systemic criterion is generally perceived to entail a wider and more substantive range of considerations, drawing on politics and history in addition to legal authorisation, which is the focus of Kelsen’s account.

III. AUSTRALIA 1788–2001

The diversity, subtlety and complexity of the circumstances presented by the historical instance of Australia between settlement and the centenary of Federation (a convenient end-point because it captures the principal phases of evolution in Australian law and society to date) make it a concrete case that is particularly apt for evaluating the explanatory success of accounts of continuity and discontinuity of legal systems. The advantage lies both in the relative lack of existing scholarship considering the evolution of Australian law in light of jurisprudential theories of legal systems,¹¹ and in the variety of challenges to accounts of continuity that the Australian context affords. While Australia has not endured the kinds of revolution, often violent, experienced elsewhere,¹² it presents interesting and difficult phenomena for which a model of continuity and

¹⁰ J Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd edn (Oxford, Clarendon Press, 1980) 35, 187; J Raz, *Practical Reason and Norms*, 2nd edn (Oxford, OUP, 1990) 9; JM Finnis, ‘Revolutions and Continuity of Law’ (1971) in *Philosophy of Law—Collected Essays: Volume IV* (Oxford, OUP, 2011) 407, 426 (but cp 428); G MacCormack, ‘“Law” and “Legal System”’ (1979) 42 *MLR* 285, 285.

¹¹ To date, the most substantive discussion that considers Kelsen and Raz in the Australian context appears in PC Oliver, *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford, OUP, 2005) chs 12–13. Oliver, however, focuses on the Commonwealth of Australia, and his enquiry concerns not the abstract notion of the continuity of legal systems but the related, though distinct, question of ‘constitutional independence’: the ‘ability in formal legal terms to determine with finality the rules, constitutional and other, in their respective legal systems’: *ibid.* 1–2.

¹² It was the spate of revolutions and coups d’état such as those summarised in M Tayyab, ‘Jurisprudence of Successful Treason: Coup d’Etat & Common Law’ (1994) 27 *Cornell International Law Journal* 49 that stimulated academic interest in the topic, a sample of which is noted in MS Green, ‘Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order’ (2005) 83 *North Carolina Law Review* 331, 334, fn 10.

discontinuity must account. These phenomena include: settlement and colonisation by an imperial power; a sustained period of government that may well have been unconstitutional in important respects; merger of formerly discrete political units; divided sovereignty—in terms of twentieth-century federalism, but also imperially imposed colonial-era limitations on political and legal change, control over natural resources and defence; the co-existence of multiple but coordinate courts of final appeal; derivative and original acquisition, and cession, of territory; attempted (or at least actively initiated) legal secession; maturation of an independent international legal personality; an emergent economic, cultural and social national identity; and—fundamentally—growth, over a relatively confined period of time, from a small autocratic British penal colony at Botany Bay to a federal, multicultural Western liberal democracy spanning a continent. The principal candidate legal systems for analysing continuity and discontinuity in this historical context are the Imperial, Australian (national), Commonwealth (central, federal), Colonial, State and Territory legal systems. The intricacies of potential subsystems or partial systems within these candidate legal systems fall to be characterised according to the tenets of each theoretical model; accounting for these complexities coherently and persuasively is an important factor in evaluating the models' success.

There is an additional advantage to the methodology adopted in this book: systematically applying theoretical accounts to a concrete instance not only tests the accounts, but simultaneously tests our understanding of the concrete case in issue—the light of theory reveals fresh questions and prompts us to re-evaluate historical and doctrinal orthodoxies. Examining the explanatory success of an account and understanding the instance to which it is applied cannot reasonably be dissociated: the relationship between these activities is captured by something approximating the Rawlsian notion of 'reflective equilibrium'.¹³ In asking whether the depiction of Australian legal systems presented by a given theory achieves an adequate fit, it proves necessary to reconsider our intuitive judgements—say, in relation to the role of the Westminster Parliament at a given point in time. In some cases, the detail of the Australian materials to which a fine-grained application of the accounts requires the legal theorist to have regard has previously passed unnoticed, and accepted characterisations have passed unchallenged. This book contributes to better understanding both the evolution of Australian legal systems between 1788 and 2001 taken as a whole, and also particular discrete developments and controversies within that period.

¹³ J Rawls, *A Theory of Justice*, revised edn (Oxford, OUP, 1999) 18–19, 42–45.

IV. A NOTE ON METHODOLOGY

While the distinctive methodology of this book involves significant recourse to constitutional law and theory and to legal history, as well as passing reference to questions of political philosophy, the book is not a historical, social, political or economic study of legal systems in Australia. Rather, it is concerned with the *interactions* between legal systems and the features that are the concern of those disciplines more or less cognate to general jurisprudence. Whether driving or being driven by legal changes, the features with which those other disciplines are concerned interact with legal systems in ways that are captured in legal materials of standard kinds. This book is therefore concerned with describing the *legal* materials connected with—those that instantiate or reflect—the non-legal features that are implicated in the application or evaluation of the accounts of continuity and discontinuity. For example, applying Raz's model entails analysing membership of a political community, while evaluating Kelsen's and Raz's accounts involves measuring how successfully they accord with realities of Australian economic and political independence. This book (and, in particular, chapter two) accordingly looks to the legal manifestations of these factors: community membership is instantiated in nationality and citizenship laws, and in oaths of allegiance and office; economic independence finds reflections in constitutional and legal principles governing control over natural resources, responsibility for public debts and control of borrowing power, while political independence is reflected in measures such as the Statute of Westminster 1931 (Imp).

V. OUTLINE

This book is structured so as to present the relevant legal materials first, in a neutral, predominantly factual framework, deliberately eschewing the categories of Kelsen's and Raz's models to avoid characterising the legal materials in the terms of a particular theoretical account. Chapter two reviews developments bearing on the continuity and discontinuity of legal systems in Australia between 1788 and 2001, dividing the material into strands corresponding to the nature and material scope, the spatial scope and the personal scope of Australian law over the period. The arguments of constitutional law and theory, and the original legal historical research presented in this chapter, expose the complex detail against which Kelsen's and Raz's accounts are later tested.

Chapter three critically reconstructs Kelsen's model of authorised constitutional change and identifies three exceptions or qualifications provided for in his analysis. Controversial features that appear in abstract criticisms of the account are explicated, and possible corrections to the

distortions those features introduce are suggested and interrogated, again at the theoretical level. Particular difficulties connected with the core notion of 'historically first constitutions' are recognised and flagged for further consideration in the context of the model's application. That application is undertaken in chapter four, which tackles at an early stage problems connected with inferring multiple sufficient basic norms for a given set of legal materials. A possible modification of Kelsen's account is suggested to accommodate a degree of temporary unconstitutional action, to avoid the counter-intuitive judgements that the unmodified model would produce in the context of early colonial New South Wales. A central argument developed in chapter four highlights the interrelationship of Kelsen's theory of total and partial legal systems and his accounts of national legal systems and of historically first constitutions. On the basis of this argument, it is contended that the model implies a fourth exception to the criterion of constitutionally authorised change, one that has not been noticed in the academic commentary. Ultimately, chapters three and four argue that Kelsen's account of continuity and discontinuity is more subtle than has often been supposed, and that, while still flawed in important respects, it provides, when applied in its own terms, a reasonably satisfactory fit in explaining the historical context of Australia between 1788 and 2001.

Chapter five critically reconstructs Raz's account of legal systems and embarks on the delicate task of teasing out the implications of (consciously) relatively underdeveloped aspects of its treatment of continuity and discontinuity. The chapter synthesises elements of Raz's consideration of the subject at different points in time and amplifies that consideration in light of related work, elaborating the model in greater detail than has been undertaken in the existing literature. Application of the model in chapter six reveals significant gaps in Raz's theory in relation to subsystems or partial legal systems, but also demonstrates the potential sophistication that is possible within the account as reconstructed. A central function is shown to be performed by the test of 'exclusion', integrating Raz's analysis of the existence of legal systems in the face of competing institutionalised normative orders into his model of their existence over time. Taken together, chapters five and six argue that Raz's model, though underdeveloped in important respects compared to Kelsen's, offers a more flexible and comprehensive framework for establishing continuity or discontinuity, and achieves a sound fit with the facts in issue in Australia between 1788 and 2001.

Chapter seven concludes the book with a comparative evaluation of Kelsen's and Raz's accounts, highlighting the convergence of the two models' conclusions when tested against the instance of Australia, despite significant differences in their structure, composition and operation. Notwithstanding that convergence, and despite the fact that both models

8 *Introduction*

are revealed to exhibit important flaws and limitations, it is argued that Raz's account offers a better fit in terms of accuracy and concordance with intuitive judgements about the diachronic identity of legal systems in Australia. Chapter seven also offers a brief reflection on the insights into doctrine and history revealed by the book's application of jurisprudential theory—in particular, in terms of reconceptualising the role of certain Imperial laws and institutions during the late nineteenth and early twentieth centuries, and clarifying the relationship between Colonial, State, Commonwealth and Imperial legal systems both before and after Federation.