Taking Identity Seriously: On the Politics of the Individuation of Legal Systems

Cormac Mac Amhlaigh*

Abstract—This article examines the question of the identity of legal systems of non-monistic accounts of law. It critically analyses approaches to individuation based on validity, the nature of individual norms and the purposes for which they are applied, arguing that the latter approach, as endorsed particularly by Raz, offers the most convincing approach to the question of individuation. The article argues that Raz’s own criterion, however, is under-inclusive and misses important reasons why a norm should be individuated in a particular way. The article defends an approach to individuation which builds upon and expands Raz’s approach. This approach emphasises the political importance of legal systems as providing the basis for criteria of individuation. These criteria are also relevant for Dworkin’s account of law as integrity, which, the article argues, also relies on an understanding of individuation notwithstanding Dworkin’s claims to the contrary.

Keywords: theories of legal systems, legal pluralism, legal conflicts, identity, Raz, Dworkin.

1. Introduction

The notion that the contemporary world is made up of a plurality of legal systems is a commonplace of non-monistic accounts of law.¹ Even an account of law which limits its focus to municipal law is pluralistic in that it presupposes the existence of multiple municipal legal systems corresponding, more or less,

*University of Edinburgh. Email: cormac.mac.amhlaigh@ed.ac.uk. I would like to thank the participants at a staff research seminar as well as a work-in-progress seminar at Edinburgh Law School, and in particular Leonardo Cofré, Andrew Cornford, Luis Duarte d’Almeida, Claudio Michelon, Amalia Amaya Navarro, Maggie O’Brien, Judith Rauhofer and Neil Walker. Particular thanks to Neil Walker and an anonymous reviewer for helpful comments on earlier drafts, and to Claudio Michelon and Euan MacDonald for patiently pointing out errors in previous versions of the argument. The usual disclaimer applies.

¹ A commitment to legal pluralism necessarily involves scepticism about legal monism. It assumes that legal systems as they exist and are recognised by legal officials can have distinct identities and do not all share a single identity. Thus, for current purposes, we endorse the rejection of Kelsen’s legal monism by Hart and Raz on the grounds that legal officials do not, in fact, recognise that all law (eg state law and international law) belong to the same legal system. See H Kelsen, General Theory of Law and State (A Wedberg tr, Harvard UP 1945) ch VI; J Raz, The Authority of Law (2nd edn (OUP 2009) ch 7; HLA Hart, Essays in Jurisprudence and Philosophy (Clarendon 1983) ch 15. For a discussion of the tensions between monism and pluralism in pluralist jurisprudence, see N Roughan and A Halpin, ‘The Promises and Pursuits of Pluralist Jurisprudence’ in N Roughan and A Halpin (eds), In Pursuit of a Pluralist Jurisprudence (Cambridge UP 2017) 329–33.
with the number of states in the world as well as, possibly, international law. More contemporary accounts of law have broadened their horizons considerably, resulting in a more diverse plurality of legal systems, including supranational law, indigenous law, religious law and more. The plurality of legal systems becomes particularly explicit when the courts of one system self-consciously apply the norms of another, ‘external’ legal system. Perhaps the most familiar example of this is when a court of one municipal legal system applies the norms of another municipal system under private international law rules. However, the phenomenon has become an increasingly common feature of judicial practice in the light of the growth of transnational legal systems.

In the light of this plurality, then, an important feature of non-monistic accounts of law is an ability to distinguish between different legal systems. This issue invokes the problem of the identity of legal systems and in particular the issue of identifying criteria of individuation, which allows us to determine that a norm applied by a court either belongs, or does not belong, to the legal system of the applying court: that is, whether it is an ‘internal’ or ‘external’ norm according to the criteria of individuation.

This article will critically analyse the problem of the identity of legal systems from the perspective of the criteria of individuation. It will examine some of the common approaches to identity and individuation based on validity, the nature of particular norms and purposes-based approaches, arguing that the latter approaches provide the most promising basis for identifying satisfactory criteria of individuation of systems of law. However, it argues that current purposes-based approaches such as Raz’s are under-inclusive in that the set of reasons dictating how we should individuate norms as ‘internal’ or ‘external’ to the system of the applying court is too limited. It therefore endorses a broader purposes-based approach to individuation which is linked to the political importance of legal systems. This approach identifies the reasons why we may wish to classify norms as ‘internal’ and ‘external’ in terms of political reasons which are connected to the supremacy and openness of legal systems. This approach allows us to capture a more diverse array of reasons for classifying a norm as internal and external according to the core characteristics of legal systems. Moreover, if we consider the characteristics of legal systems in

---

2 Contemporary anglophone debates on the status of international law as a legal system were largely prompted by Hart’s well-known treatment of international law in HLA Hart, The Concept of Law (2nd edn, Clarendon Press 1994) ch X. For a revision of this account, see M Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ (2011) 21 EJIL 967; Jeremy Waldron, ‘International Law: “A Relatively Small and Unimportant” Part of Jurisprudence?’ in Luis Duarte d’Almeida, James Edwards and Andrea Dolcetti (eds), Reading HLA Hart’s The Concept of Law (Hart Publishing 2013).

3 That non-state laws can be systemic is increasingly recognised by contemporary jurisprudence. See eg R. Cotterrell, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (Routledge 2006); N MacCormick, Questioning Sovereignty (OUP 1999); J Raz, ‘Why the State?’ in Roughan and Halpin, In Pursuit of a Pluralist Jurisprudence (n 1); C Mac Amhlaigh, ‘Does Legal Theory have a Pluralism Problem?’ in P Schiff Berman, The Oxford Handbook of Global Legal Pluralism (OUP 2020).

4 See eg C Mac Amhlaigh, ‘Pluralising Constitutional Pluralism’ in Roughan and Halpin, In Pursuit of a Pluralist Jurisprudence (n 1).
terms of supremacy and openness as involving moral considerations, the approach also fulfils what the article argues is a necessary condition of Dworkin’s integrity-based account of law, notwithstanding his claims to the contrary.

The article will proceed as follows. Section 2 introduces the problem of the identity of legal systems and particularly the problem of scope, which entails the need for criteria of individuation. Section 3 critically appraises some candidate approaches to criteria of individuation based on validity, the nature of the norm and the purposes for which norms are applied. Section 4 illustrates how, notwithstanding Dworkin’s claims to the contrary, the question of identity is also necessary for his account of law as integrity. Section 5 develops and defends a purposes-based approach to the question of individuation by focusing on the core characteristics of legal systems as well as the political importance of legal systems as formulated by Raz. The article concludes that the political importance of legal systems illustrates why the question of individuation and identity matters more broadly, and provides the basis for more convincing criteria of individuation centred around the supremacy and openness of legal systems—criteria which also elucidate Dworkin’s account of law as integrity.

2. Individuating Individuation

Perhaps the clearest account of the problem of the individuation of non-monistic accounts of law can be found in Raz’s account of the identity of legal systems. Following Raz, we can consider the problem of the identity of legal systems as involving two distinct questions: the aspect of the continuity of legal systems and the aspect of the scope of legal systems. The aspect of continuity relates to the question of how we can distinguish between the existence of a legal system over particular norm-subjects and its replacement by a new one over the same norm-subjects after a period of substantive reform or upheaval such as revolution. It involves a dynamic conception of a legal system which looks at the identity of a legal system over time. The question of scope, on the other hand, relates to a complete description of the legal system in terms of identifying all of the norms which belong to it. The problem of scope, therefore, involves the conceptualisation of a legal system at a given moment in time; a ‘snapshot’ of a legal system, including a full account of all of its laws. A momentary legal system is necessarily part of the question of identity.

---

5 The problem of the identity of legal systems involves the ‘criterion or set of criteria that determines which laws are part of the systems and which are not’. Raz, *The Authority of Law* (n 1) 79.
6 ibid 81.
7 ibid. See also J Finnis, *Philosophy of Law: Collected Essays*, vol IV (OUP 2011) ch 21.
8 Raz, *The Authority of Law* (n 1) 81.
9 ibid 81.
10 ibid.
continuity, however. This is because the problem of continuity requires a method of determining whether two momentary legal systems are part of one continuous legal system.  

Of the two questions implicated in the identity of legal systems, it is the question of scope which is most relevant to the individuation of legal systems in the context of legal plurality. Moreover, as the question of scope relates to the extent of legal systems in attempting to provide a ‘snapshot’ or overview of all the norms of the legal system, it entails both the question of when and how legal systems apply norms of external legal systems which are not incorporated into the legal system, as well as the question of whether and how non-positive standards, such as moral standards, can or should be considered part of legal systems when they are referred to by the positive norms of the system. Thus, the question of the identity of legal systems raises two questions for non-monistic accounts of legal systems. The first relates to the question of the criteria we use to distinguish between positive laws of a legal system and positive laws applied by a legal system but deemed to belong to another legal system. The second relates to the particular concern of debates between inclusive and exclusive legal positivists regarding the relationship between legal systems and moral standards.

3. The Unfinished Business of Identity

Writing over 50 years ago, Hart identified the problem of the identity of legal systems as part of the ‘unfinished business of analytical jurisprudence’. Raz, writing a couple of decades later, also noted that questions of the problems of identity had been neglected by legal philosophers as interest had moved elsewhere. It is, however, perhaps more accurate to say that the question was not entirely ignored by legal philosophy, but rather that considerations of identity were folded into broader debates surrounding the legal status of moral norms and the extent to which they should be included within or excluded from the concept of a legal system when referred to by the officials of the system, itself a discrete part of the debate between ‘inclusive’ and ‘exclusive’ legal positivists. The current state of the debate on individuation, such as it is,

---

11 ibid 81.
12 References to ‘identity’ or the ‘identity of legal systems’ will, for this reason, refer to the problem of scope for the remainder of this article.
13 Contrast Raz, The Authority of Law (n 1) and J Raz, Between Authority and Interpretation (OUP 2009) ch 7 with M Kramer, ‘How Moral Principles Can Enter Law’ (2000) 6 Legal Theory 83; M Kramer, ‘On Morality as a Necessary of Sufficient Condition for Legality’ (2003) 48 Am J Juris 53. See also D Priel, ‘Free-Floating from Reality’ (2008) 21 Canadian Journal of Law & Jurisprudence 429.
14 In which we can include non-state forms of law such as international law, supranational law and others such as religious and indigenous laws. See Mac Amhlaigh, ‘Does Legal Theory have a Pluralism Problem?’ (n 3).
15 Hart, Essays in Jurisprudence and Philosophy (n 1) 335.
16 J Raz, ‘Two Views of the Nature of the Theory of Law: A Partial Comparison’ in J Coleman (ed), Hart’s Postscript: Essays on the Postscript to the Concept of Law (OUP 2001) 11.
17 Raz, Between Authority and Interpretation (n 13) 198.
thus involves three general approaches to the question, focusing on the validity of a norm, the nature of a norm and the reasons for the application of a norm respectively.

A. Legal Validity as Criteria of Individuation

A recognition-based approach to individuation involves criteria which include all norms which fulfil the officially recognised criteria of validity of the legal system within the identity of that system. Hart’s account of legal validity adopted this approach to addressing the question of individuation. His description of the rule of recognition included criteria of individuation in that it designated rules betraying ‘some feature or features’ as ‘conclusive affirmative indication that it is a rule of the group’.18 Perhaps more clearly, Hart asserted that ‘To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system’.19 Thus, on a Hartian account, the rule of recognition contains the criteria for identifying all the laws which the officials of the systems ought to apply,20 and therefore entails criteria for the individuation of legal systems. The fact that the rule of recognition may be vague and open-textured as well as the fact that it could be incomplete do not undermine its individuating function.21

Validity appears, initially, to be a natural and useful way of thinking about the identity of legal systems. It is a necessary condition for considering whether norms belong to a legal system in relation to the question of scope. Of the many potential candidates for the norms of the legal system, it is only those that the officials of the system ought to recognise and apply that qualify as norms of the legal system.22 Thus, responding to the question of scope requires, at a minimum, that all the norms that are valid according to the criteria of validity of the system and which the officials of the system ought to apply are included in the identity of the legal system.23

18 Hart, The Concept of Law (n 2) 94. (emphasis added)
19 ibid, 102. (emphasis added)
20 Raz, The Authority of Law (n 1) 93.
21 ibid.
22 This remains the case even if, as Raz argues, the rule of recognition itself does not necessarily contain all the criteria of validity of the norms of the system and that legal systems can contain more than one rule of recognition. Raz, The Authority of Law (n 1) 94–5.
23 That we include the norms that officials ought to apply, rather than actually do apply, is explained by our focus on the question of scope relating to a static conception of a legal system at a given moment in time. As Raz notes, given that criteria of validity such as a rule of recognition can be incomplete, indeterminate and subject to change as a customary rule, courts can and do modify the rule of recognition when they resolve problems of ambiguity or incompleteness in the rule of recognition. Raz, The Authority of Law (n 1) 94–5. Therefore, when looking at the question of scope, we refer to all the norms a court ought to apply based on the available information regarding the criteria of validity at a given moment in time—when the ‘snapshot’ of the legal system is taken.
However, the problem with using validity exclusively as the criteria for the 
validity of legal systems is that it is potentially radically over-inclusive. If we 
insist that all norms valid according to the criteria of recognition of a legal sys-
tem (whether single or multiple), including norms validated by norms down-
dstream of a rule of recognition, such as, potentially, norms of international law 
or agreements between private actors, then we end up with counter-intuitive 
results. Just because a Polish court, for example, applies a provision of Greek 
law because it is validated by the Polish legal system does not mean that it 
should automatically be considered as part of that legal system. Moreover, if a 
court applies a mathematical formula contained in, say, a tax law, a simple 
validity-based account potentially includes this formula on the grounds that it 
is validated by the norms of the system. Without more, basing the identity 
of a legal system on the mere validity of norms transforms the law, as Shapiro 
colourfully puts it, ‘into a vortex that sucks the rules of other normative sys-
tems into its voracious maw’.

Therefore, whereas validity does have a role to play in the individuation of 
legal systems—only those norms which officials ought to recognise and apply 
according to the criteria of the recognition of the system are part of the iden-
tity of the system—it is, by itself, insufficient. For this reason, validity is best 
considered as a necessary, but not sufficient, condition for the criteria of indi-
viduation of legal systems.

---

24 Assuming that mathematical standards can be normative. For discussion, see Priel (n 13).
25 S Shapiro, ‘What Is the Rule of Recognition (and Does It Exist)?’ in M Adler and K Einar Himma (eds), 
The Rule of Recognition and the U.S. Constitution (OUP 2009) 246–7. Hart was aware of the problem and 
advanced inchoate criteria based on ‘original’ and ‘derivative’ recognition. Hart, Essays in Jurisprudence and 
Philosophy (n 1) 342.
26 Raz, The Authority of Law (n 1) 98. It is for this reason also that more contemporary, Hartian-inspired, 
jurisprudential approaches to legal pluralism are problematic from the viewpoint of establishing the identity of 
legal systems. Several recent Hartian-inspired accounts of pluralism such as those of Von Daniels and Michaels 
have offered an account of the identity of legal systems by positing what Michaels calls ‘tertiary’ rules of the sys-
tem which serve to recognise and validate the norms of other systems within the internal system. D Von 
Daniels, The Concept of Law from a Transnational Perspective (Ashgate, 2010); R Michaels, ‘Law and 
Recognition—Towards a Relational Concept of Law’ in Roughan and Halpin, In Pursuit of a Pluralist 
Jurisprudence (n 1). Michaels, in particular, argues that when a legal system recognises and applies the rules of 
another system, such as norms of customary law or foreign law in private international law cases, they are not 
‘absorbed’ by the system but merely ‘recognised’ (98). Thus, Michaels argues, legal systems and law in general 
should be considered as involving two rules of recognition: an internal rule of recognition and an external rule 
of recognition (99). These tertiary rules, in which Michaels includes Von Daniels’s ‘linkage rules’, should be 
conceived of as an integral aspect of law and legal systems in the same way that primary and secondary rules 
are on a Hartian conception of law. Thus, if primary rules are rules of action and secondary rules, particularly 
the rule of recognition, are rules about what counts as law, then tertiary rules establish how the legal system 
interacts with other legal orders (108). The problem with this account is that it is difficult to see how 
Michaels’s account is not a simple validity-based account with all the attendant problems identified above. We 
can simply recast Michaels’s tertiary rules as another rule of recognition endorsing, with Raz, the idea that legal 
systems can have multiple rules of recognition. Raz, The Authority of Law (n 1) 95. See also N Barber, ‘Legal 
Pluralism in the European Union’ (2006) 12 ELJ 306. Thus, alongside rules of recognition which validate stat-
ute law, precedent and customary law, we can posit a rule of recognition that validates foreign law or inter-
national law in the system. This view is reinforced by the fact that Michaels deems these ‘tertiary rules’ to be 
unique to each system ‘in the sense that it is created within this system’ (108) and with respect to the relation-
ship between two systems, concerning ‘one direction of this relation only’ (108).
B. The Nature of Norms as Criteria of Individuation

(i) Acceptance-independence as a criterion of individuation

It is in part due to the over-inclusiveness of criteria of individuation involving simple recognition-based validity that exclusive legal positivists have argued for the exclusion of moral standards from the identity of legal systems. Raz, for example, argues for an approach to the criteria of individuation based on the nature of particular norms which has the effect, on his account, of excluding moral standards recognised and applied by courts from the identity of legal systems. For Raz, the mere fact that the law refers to a standard—validating it and making it applicable within a legal system—cannot mean that that standard then becomes part of the legal system.27 Otherwise anything and everything normative can be considered part of the legal system, including ‘the edicts of the Pope or the writings of Kant’ where they are referred to by a legal system.28 Thus, to avoid the over-inclusiveness of a simple criterion of validity, we need additional conditions to delimit the identity of a legal system. We can, Raz argues, exclude certain norms applied by a legal system from its identity where they are, in Kramer’s words, ‘acceptance-independent’.29 That is, their validity and applicability to individuals do not depend on their recognition by the law. Moral standards are one such example of ‘acceptance-independent’ norms. As moral standards apply to individuals anyway, the law cannot ‘turn’30 moral standards into legal standards nor ‘empower’31 morality by referring to it. Even if the law did not refer to the moral duty to keep our promises, for example, the moral duty to keep our promises would still apply to us.32 From this fact, Raz goes on to argue that when legal systems refer to moral standards, such as the moral standards contained in constitutional bills of rights, we should not consider those moral standards as forming part of the identity of the legal system—that is, our criteria of individuation should designate such norms as ‘external’ norms.

He offers a primary reason and a subsidiary reason for this conclusion. The primary reason is based on his view of the relationship between normatively valid law and morality. As normatively valid law is itself based on moral principles, when legal provisions refer to moral standards such as the freedom of expression in constitutional bills of rights, the law does not, Raz argues, incorporate the moral norm (such that we should consider it as part of the law). Rather, the law changes the ways in which morality applies to people by, for example, setting limits to the ways that law makers can exclude morality.

27 A position he calls the ‘simple-minded view’, which he attributes to inclusive legal positivism. Raz, Between Authority and Interpretation (n 13) 200.
28 Raz, Between Authority and Interpretation (n 13) 194.
29 Kramer, ‘On Morality’ (n 13) 73
30 Raz, Between Authority and Interpretation (n 13) 201.
31 ibid 190.
32 ibid 184.
empowering courts to modify moral considerations or considering the impact of certain norms on moral considerations.  

The subsidiary reason for excluding morality from the identity of legal systems is based on the political relevance of legal systems. Whereas, Raz notes, the reasons for distinguishing between internal and external norms such as moral norms often make ‘no practical difference’, it does matter for other reasons. The law, Raz argues:

[is] not merely a set of guides for court decisions. It is a political institution of great importance to the working of societies and to their members. From this point of view a British person cannot say ‘Polish law is my law’ just because it will be followed by British courts when their conflict-of-law rules direct them to do so. The distinction between standards that the courts have to apply and those that are the law of the land is vital to our ability to identify the law as the political institution it is.

Thus, there are important political reasons for excluding certain norms from the identity of legal systems based on the idea that what is considered ‘the law of the land’ is important politically.

However, it is not easy to parse precisely the reasons why we should consider as significant the fact that moral norms are directly applicable to subjects, whereas other norms, such as those of international law (at least in dualist systems) or the law of other state legal systems, are not, from the viewpoint of identity. As Kramer has argued, it is not clear that the criteria of acceptance-dependence or -independence succeed as criteria of individuation of legal systems on this score. The norms of other legal systems, as well as customary norms, are acceptance-dependent, yet, as Kramer notes, Raz himself acknowledges that customary law can form part of the identity of legal systems while the norms of other legal systems cannot. Thus, in Raz’s account, there are clear cases of acceptance-dependent norms which we should consider part of a legal system which applies its norms, such as customary law, and there are clear cases of acceptance-dependent norms which should not properly be considered part of a legal system applying its norms, such as the norms of foreign legal systems. Therefore, simple criteria of acceptance-dependence or -independence cannot do the individuating work required to distinguish between norms which are included and excluded from the identity of a legal system.

More generally, it is not clear why the fact that morality applies to us anyway should exclude moral standards from the identity of legal systems when referred to by positive legal norms. How, Raz asks, can a reference by the law

33 ibid 196–7.
34 I call this a subsidiary reason as it is not discussed and justified to the same extent as the primary reason considered above based on Raz’s views on the relationship between normatively valid law and morality. See further below, Part 5.
35 Raz, Between Authority and Interpretation (n 13) 199.
36 ibid.
37 Kramer, ‘On Morality’ (n 13) 71, 75.
to a moral standard turn that moral standard into law?\textsuperscript{38} The inclusion of moral standards referred to by the law as part of the identity of legal systems results, he argues, in a lack of resources ‘to distinguish between law directing us and the courts to follow some foreign law or to obey the rules of some associations, and so on, and the incorporation of morality’.\textsuperscript{39} His worry seems to be that considering moral references in the law as part of the law will result in people thinking that moral standards apply to them only if they are referred to in the law.\textsuperscript{40} But why should this be the case? We can, I think, coherently view moral standards as binding regardless of their relationship to the law, as well as consider moral standards part of the legal system where referred to by that legal system. This remains the case even if we adopt the view that when the law refers to moral standards, it modifies how morality applies to us rather than creating fresh moral obligations for us.\textsuperscript{41} We will still be able to recognise moral standards that apply to us anyway, as well as moral standards whose application has been modified by the law.

Indeed, it seems that the fact that the law has determined that particular moral norms which apply to us anyway should be applied to us in a particular way is an analytically relevant fact of interest to our ‘general conception of what a legal system is’.\textsuperscript{42} The fact that a legal system modifies our moral obligations in a particular way as compared with another legal system which modifies them in a different way seems like something which we might want to include in our account of the identity of those legal systems. It is therefore an analytically relevant fact that a legal system chooses to enforce moral standards that already apply to the population in a particular way because, just as a population can fail to have law,\textsuperscript{43} it can also fail to have law which enforces (already applicable) moral standards in a particular way.

The distinctive way or ways in which legal systems modify moral norms which apply to us also seem to matter for the purposes of identity on the subsidiary ground of Raz’s justification: namely, the political import of legal

\textsuperscript{38} Raz, \textit{Between Authority and Interpretation} (n 13) 201.
\textsuperscript{39} ibid.
\textsuperscript{40} ‘[The incorporation thesis] has a special difficulty with [the incorporation of morality], for morality applies anyway, and the incorporation thesis suggests that it applies only if incorporated.’ Raz, \textit{Between Authority and Interpretation} (n 13) 202.
\textsuperscript{41} Dworkin picks up and rejects two other reasons Raz advances for the exclusion of moral norms from the identity of legal systems: the fact that law can fail to exist but moral norms cannot fail to exist, and the fact that legal communities can have moral rights and duties that are not legal rights and duties. For these reasons, Raz argues, moral norms should be excluded from the identity of legal systems when applied. Dworkin makes relatively short shrift of these arguments, noting that the contingency of the existence of law has no bearing on the question of whether moral norms form part of the law when applied by courts, and the fact that there can be moral norms in a legal community which are not part of the law is tantamount to saying that ‘When we say that John Donne made certain words part of his poetry we do not deny that there are words he did not make part of his poetry or that there is a difference between the concept of Donne’s poetry and the concept of a word’. R Dworkin, \textit{Justice in Robes} (Harvard UP 2006) 240.
\textsuperscript{42} Raz, \textit{Between Authority and Interpretation} (n 13) 195.
\textsuperscript{43} Raz argues that the fact that a population can fail to have law but not morality is a reason for excluding moral references in the from the identity of the legal system law. Raz, \textit{Between Authority and Interpretation} (n 13) 200.
systems and what counts as ‘the law of the land’. It would seem that the ways in which a legal system modifies the way that morality applies to us is of considerable ‘political importance’ (as well as being analytically relevant) in the way Raz describes. This is particularly the case in light of the fact that Raz acknowledges that ‘different claims about [the relationship between law and morality] will imply different demarcations of the boundary of law’ in different systems. Thus, for example, the (particularly libertarian) way in which the US Constitution modifies our moral obligations not to inhibit freedom of expression is a characteristic feature of the US legal system qua political institution such that we should include the way in which such morality is modified as contributing (potentially significantly) to the identity of the US legal system.

Therefore, we have reasons to doubt that Raz’s arguments regarding the relationship between law and morality, and in particular the idea that references to moral standards by legal systems modify how morality applies to us rather than creates moral obligations for us, can justify the exclusion of moral references to the law from our account of the identity of legal systems. It is at least arguable that our criteria of individuation should catch moral standards referred to by the system even on Raz’s view of the relationship between normatively valid law and morality.

(ii) ‘Free-floatingness’ as a criterion of individuation
Kramer offers alternative criteria of individuation based on the nature of norms in response to Raz’s attempts to exclude moral norms. He argues for the inclusion of norms which are ‘free-floating’ in the sense that they are ‘not the products of formally authoritative institutions’ within the identity of a legal system that refers to them. Examples of ‘free-floating norms’ according to Kramer include customary norms as well as, significantly, moral norms. The quality of being free-floating, Kramer argues, makes such norms ‘available for incorporation’ into ‘this or that legal system as one of its laws’, leading to the conclusion that they should be properly considered part of the identity of a legal system when referred to by the legal system.

Kramer’s approach to the question of individuation, and in particular his criterion of ‘free-floatingness’ resulting in the inclusion of moral standards referred to by the law as part of the identity of the referring legal system, also, however, leaves room for doubt as to whether this provides a satisfactory

44 ibid 199.
45 ibid.
46 Kramer, ‘On Morality’ (n 13) 70.
47 This is part of a ‘disjunctive test’ of individuation developed by Kramer which includes a validity-based criterion based on the ‘authoritative law-generating organs of the system’. Kramer, ‘On Morality’ (n 13) 70. This validity-based criterion suffers from the same problems as the general validity-based accounts considered above and so will not be considered further here.
48 Kramer, ‘On Morality’ (n 13) 72.
49 ibid.
criterion for individuation. It is not clear why the mere fact of being ‘free-floating’ has a bearing on whether a norm should be considered as incorporated within a legal system or not. Kramer does not explain how the supposed availability of such norms for incorporation into a legal system is distinct from the availability of the positive norms of other legal systems which Kramer argues should not be included in the identity of legal systems when referred to, on the grounds that they are the product of some ‘contemporaneous system of authority’ to which they ‘distinctively belong’. Kramer argues for the inclusion of ‘free-floating’ norms in the identity of legal systems by contrasting the purposes behind their application to the purposes for recognising the positive norms of other systems. He argues:

When legal officials treat [free-floating norms such as customary norms] as a binding standard within their regime, they are not doing so in order to give due acknowledgment to a co-existent institutional scheme in which the norm has emerged through some process of formal enactment. Instead, the officials are incorporating the norm into their matrix of laws as something that can belong integrally thereto precisely because it does not owe its existence and applicability to its having been formally adopted by some alternative jurisdiction or organisation. The thought here, then, is that when courts apply positive norms of other legal systems, they do so to give ‘due acknowledgement’ to a ‘co-existent institutional scheme’. As neither customary norms nor moral standards are dependent on an institutional scheme for their existence—they are ‘free-floating’—no such motivation of ‘due acknowledgement’ can be attributed to their application by courts. For this reason, they should properly be considered as forming part of the identity of the applying legal system.

However, it is not clear that the quality of ‘free-floatingness’ can do the individuating work that Kramer attributes to it. Consider, for example, the norms of other positive legal systems which themselves refer to moral standards such as contra bonos mores doctrines in contract law or the moral standards contained in fundamental rights norms such as those contained in the European Convention of Human Rights (ECHR) referred to in the Human Rights Act 1998 (HRA). Such norms simultaneously enjoy the quality of being both ‘free-floating’ as well as the ‘product of some contemporaneous system of authority’. According to Kramer’s criteria, this fact could result in the recognised norm or set of norms both being and not being considered part of the

50 He notes that ‘Although they are not engendered by authoritative law-creating organs of the legal system within which they are operative, they are free-floating and are thus available for incorporation into that system. In this pregnant respect they are distinguishable from foreign laws and from the rules of sporting associations, which are neither free-floating nor created by authoritative organs of the legal system within which they are invoked.’ Kramer, ‘On Morality’ (n 13) 71.
51 Kramer, ‘On Morality’ (n 13) 72.
52 ibid.
53 ibid, noting that both customary norms and moral norms satisfy the criterion of being ‘free-floating’ based on his ‘disjunctive test’ of individuation, which includes validity-based criteria.
recognising legal system on the grounds that the norms are both free-floating as well as fulfilling the ‘due acknowledgment’ condition of his criteria of individuation. As such, the moral standards referred to in the ECHR could be considered both part and not part of the identity of the UK’s legal systems by virtue of their being referred to by the HRA.

Moreover, there are cases where such ‘free-floating’ norms are recognised and applied with a specific reciprocal regulatory intent; that is, they give ‘due acknowledgment to a co-existent institutional scheme’ which also recognises those free-floating norms. Again, this is a common feature of much state behaviour in relation to international human rights law. States often incorporate international human rights law into their legal systems in order to regulate certain matters in a way that others have done (in this case, the international community) in order to boost their reputation with the international community: for example, where (moral) human rights norms are recognised and applied by a state legal system to signal a state’s status as a legitimate member of the international community. It also occurs between non-state and state legal systems where a non-state legal system wishes to signal to a state legal system its credentials as a legitimate legal system. For example, the judicial development of fundamental rights within the EU’s legal system occurred as part of an effort to assuage the fears of Member State courts regarding its human rights bona fides in response to criticism from those courts.

In light of the different reasons we may have for considering whether specific norms contribute to the identity of legal systems or not, we can conclude, pace Raz and Kramer, that the nature of the norm in question cannot be determinative of questions of identity. That is, that whether a norm is created by an autochthonous system of authority or an external system of authority, is acceptance-dependent or acceptance-independent or is ‘free-floating’ cannot, by itself, provide us with satisfactory criteria for the individuation of legal systems. We may have a variety of cross-cutting purposes and reasons to include, as well as exclude, both positive norms of other legal systems as well as moral norms referred to by legal systems within the criteria of the identity of a legal system.

C. The Reasons for the Application of a Norm as Criteria of Individuation

We have already seen how the purpose of giving ‘due acknowledgement’ to alternative systems of authority features in Kramer’s criteria. In a similar way, Raz offers two supplementary conditions to his criteria of individuation. He argues that valid norms are to be considered part of the identity of the

---

54 See eg D Zartner and J Ramos, ‘Human Rights as Reputation Builder: Compliance with the Convention Against Torture’ (2011) 12 Human Rights Review 71.
55 See eg Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel ECLI:EU:C:1970:114. See generally G De Bürca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ (2011) 105 AJIL 649, 667–8.
applying system unless they are applied, ‘because the system intends to respect the way that [another] community regulates its activities, regardless of whether the same regulation would have been otherwise adopted’ or they are norms made by norm-subjects pursuant to powers conferred by the legal system ‘in order to enable individuals to arrange their own affairs as they desire’.56 Where either of these conditions applies to the norms which are valid according to the legal system, we can conclude that the norms are recognised by the system but are not part of it.57

Each of these ‘regulatory intent’ conditions supplement validity to make more comprehensive criteria of individuation. The first, capturing, for example, the application of foreign law under private international law rules,58 involves a ‘co-regulation’ condition whereby the application of a norm by a legal system due to an intention to ‘co-regulate’ an activity in the manner regulated by another system should not mean that the norm is considered to be an internal norm of the applying system. The second captures a ‘regulatory autonomy’ condition whereby legal systems can be said to facilitate the regulatory autonomy of norm-subjects in particular circumstances. In such cases, the norms applied pursuant to this regulatory autonomy condition should be considered to be external norms applied by the system.

There are a number of questions which these additional ‘regulatory intent’ criteria of individuation raise. Raz is not particularly forthcoming as to how we might determine regulatory intent in legal systems, nor why this should count as a criterion for the individuation of legal systems. From his rather terse statement of the criteria, we can glean two motivations relating to each condition. The co-regulation condition seems to stem from a desire or intention on behalf of a legal system to ‘respect’ the way in which another community regulates its activities. The question then is: what might this desire or intention to respect entail? Should such recognition emerge from some sort of moral compulsion to ‘do justice’ based on particular ‘fact patterns’ or according to a particular consequential ‘comparative impairment’, some ‘governmental interest’ or other functional considerations which justify the application of foreign law under private international law rules?59 Must it conform to ideals of comity, for example, under private international law more generally,60 or out of some normative ideal of mutual recognition and respect between legal systems?61 If the latter, what might the limits of such mutual recognition and respect be? Moreover, there is a sense in which the co-regulation condition

56 Raz, The Authority of Law (n 1) 120.
57 ibid.
58 ibid.
59 R Michaels and J Pauwelyn, ‘Conflicts of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law’ (2012) 22 Duke J Comp & Int’l L 349, 358–9.
60 However conceived: as an expression of a moral obligation, expedience, courtesy, reciprocity, utility or diplomacy. JR Paul, ‘The Transformation of International Comity’ (2008) 71(18) LCP 21. See also E D’Alerio, ‘From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?’ (2011) 9 ICON 394.
61 See Michaels and Pauwelyn (n 59) 109.
involves an element of recognition on the part of the external system.\textsuperscript{62} Does it matter if the target community is aware of or acknowledges such respect or recognition? Must they acquiesce in this recognition? Can a co-regulatory intent be unilateral?

The condition of regulatory autonomy is similarly ambiguous. It seems to involve a desire or intent on behalf of a legal system to ‘enable individuals to arrange their own affairs as they desire’.\textsuperscript{63} The question then is whether moral criteria of autonomy pursuant, say, to a substantive liberal political philosophy can be attributed to this condition. If so, is it the case that this is a general feature of legal systems or something which only applies to legal systems which can be said to embody or pursue politically liberal ends? What does this then say about the relationship between the moral standards of liberalism and legal systems?

Without clear answers to these questions, it is not clear that regulatory intent is sufficient to determine whether a norm belongs to a legal system or not. If we focus on Raz’s first condition, a norm or set of norms valid according to the legal system should not be included within the identity of the legal system where they are applied in order to respect or defer to the way an external system regulates a particular matter for whatever reason. However, there may be circumstances where the criteria of validity of a legal system validate a norm or series of norms for reasons which conform with the regulatory intent condition but which should still be excluded from the identity of the legal system on other grounds. For example, where a legal system unilaterally ‘borrows’ norms or even a complete regulatory regime on a particular matter for reasons of efficiency or to solve particular problems internal to the legal system which have nothing to do with the fact that such recognition is acknowledged by the external legal system, it is not clear that such norms should be considered external norms. In such circumstances, we may wish to impose a unilateral exception to the co-regulation condition.

Furthermore, the reasons why a legal system may validate external norms can be more complex than mere regulatory intent. For example, a legal system may have reasons of regulatory continuity for deferring to another legal system on the regulation of particular matters. However, such reasons of regulatory continuity may be superseded by other considerations relating to the autonomy of the legal system when it comes to criteria of individuation. One example of this is the UK Parliament’s EU (Withdrawal) Act 2018. This is one of the measures taken by the UK legislature to give effect to the 2016 referendum to leave the EU (including its legal system and the jurisdiction of its courts) while minimising the economic and social disruption from the act of leaving a political and legal system with which the UK’s legal systems have

\textsuperscript{62} Particularly in the light of the last line of Raz’s criteria: ‘regardless of whether the same regulation would have been otherwise adopted’. Raz, The Authority of Law (n 1) 120.

\textsuperscript{63} ibid.
been integrating for the best part of five decades. On its face, the Act fulfils the first condition of Raz’s test. It is an explicit intention by the UK legislature to ‘respect the way that the [EU] regulates its activities’ in a broad array of policy areas after it leaves the organisation. As such, when courts in the UK apply the norms of EU law pursuant to this Act, the norms of EU law should, under Raz’s regulatory intent condition, be considered to be norms external to the UK’s legal systems—that is, that they should not be considered part of the identity of the UK’s legal systems. However, taking into account the broader political context within which this law was passed, the purpose of this law is to (re)assert the autonomy of the UK’s legal systems precisely by incorporating the EU’s norms into those legal systems. Thus, whereas Raz’s condition of regulatory intent may give us reasons to consider the EU norms as external norms, the purpose of the Act and the political context within which it was passed arguably give us stronger reasons for including them within the identity of the UK’s legal systems. This latter interpretation arguably better reflects the political purposes of the Act as part of the UK’s withdrawal from the EU, including the freedom to diverge from its regulatory sphere when considered desirable while minimising the social and economic disruption of departure, than Raz’s simpler regulatory intent condition.

What this example shows is not that Raz’s criteria are incorrect, but rather that they are incomplete. There is a sense in which the question of the criteria of individuation of legal systems is more complex, involving a series of broader and more diverse reasons for concluding that a norm is an internal one of the system or an external one than the ‘co-regulation’ or ‘regulatory autonomy’ conditions of Raz’s regulatory intent criteria.

4. (Why) Should We Bother to Individuate Legal Systems?

In the light of these difficulties with establishing a satisfactory account of the identity of legal systems, we might be tempted to give up on the problem entirely. We would have, on this view, the support of Ronald Dworkin, who has argued that the question of identity is not really a problem worth addressing at all. While he notes that what we take to be relevant to determine what legal
rights and duties people and officials have is important, 67 little turns on the taxonomic exercise of sifting out these considerations as distinctly legal considerations or belonging to one or another legal system. We may, for linguistic reasons or reasons of clarity, talk of what is ‘special to law’ 68 in general in order to exclude, for example, mathematical formulae from statements about the law. In a similar way, we may prefer to exclude foreign law or customary law from a discussion about the law of a particular state and include moral principles in our definition of law when describing the particular practices of courts. 69 However, such a way of talking about the law diverts our attention from what law and legal practice are really about and runs the risk of committing the mistake of supposing that the ‘law’ of a community consists of a ‘finite body of rules, principles, and other standards that might in theory be listed and counted’. 70 For Dworkin, the law is not a fixed set of standards ‘of any sort’, 71 thereby making the entire taxonomic enterprise of marginal relevance. As the determination of what the law requires in a given case is ultimately about the ‘correct resolution of a moral issue’, 72 when judges decide cases what matters is that they correctly resolve the moral questions raised by the particular dispute. 73 For this reason, when courts adjudicate on what the law requires it matters little whether they consider themselves to be reasoning about the law (thereby distinguishing between legal norms and moral norms) or reasoning according to the law (determining what the law requires when referring to moral standards); they involve considerations of political morality ‘all the way down’. 74 The question of individuation of legal systems has little or nothing to do with this exercise in moral reasoning.

However, Dworkin’s scepticism surrounding the question of the identity of legal systems is itself not unproblematic. As noted earlier, if we do not take the enterprise of individuation seriously, then we fail to have good reasons for adopting a pluralist view of law. Legal pluralism necessarily requires at least in principle a method of individuating norms into different systems or at least the law of different communities. If we deem this view unimportant or of limited relevance, we undermine a pluralist view of law. Of course, this may not in itself be a problem for committed monists. 75 However, we have good reasons to believe that this matters for Dworkin’s own account of law as integrity.

As is well known, Dworkin’s account of law as integrity involves the interpretation of the ‘brute facts of history’ 76 in their best light by reference to an

67 Dworkin, *Justice in Robes* (n 41) 238
68 ibid.
69 ibid 238–9.
70 ibid 239.
71 ibid 234.
72 ibid 237.
73 ibid 236.
74 ibid.
75 Such as Kelsen, *General Theory of Law and State* (n 1).
76 Dworkin, *Justice in Robes* (n 41) 255.
underlying scheme of principle. Moreover, the underlying scheme of principle is made up of the ‘associative obligations’ assumed by members of a ‘community of principle’, which involves bonds of fraternity and an equal concern for members of the community. However, as Dworkin explicitly acknowledges, the associative obligations generated by communities of principle are not universal moral standards emanating from a universal morality or natural law. They are autochthonous principles generated by the distinctive social practices of distinctive communities of principle. He makes very clear that the associative obligations of communities of principle ‘may be different from those of other communities’, and that the bonds of fraternity and equal concern that they entail are not extended to non-members of the group.

In this way, Dworkin’s associative obligations serve to define—individuate, even—a particular community of principle and its law from other communities of principle; in short, the nature of associative obligations imbue a community of principle and its law with a distinctive moral, political and legal identity.

Given the way in which these obligations of political morality feature in Dworkin’s concept of law—justifying judicial decision making and legitimating coercion more generally—recognition of the particular moral identity of the community of principle is central to his account of law as integrity. Again, as Dworkin makes clear, if judicial decisions are based on considerations which do not involve those principles, such as the personal convictions of individual judges, then the decision cannot be legitimate. Integrity requires, in the terms of Dworkin’s memorable metaphor, that judges decide cases based not on unconstrained personal conviction, but rather as multiple authors of a ‘chain novel’, and are therefore ‘constrained’ by the development of the ‘novel’ by previous ‘authors’. By the same token, we can conclude that if a judicial decision is based on the law (including the principles of political morality) of a different community of principle, such as another state or a supranational community such as the EU, then such a decision could not be legitimate under

---

77 In earlier work, Dworkin saw the relevance of integrity to law as having two dimensions: the dimension of fit—relating to the ‘brute facts of legal history’ and providing a ‘rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all’—and the dimension of justification—requiring an interpretation of the historical record informed by the scheme of principles of political morality upheld by the community of principle, which shows the historical record in its best light. R Dworkin, Law’s Empire (Harvard UP 1986) 255. However, in later work, he rejected this ‘two-systems picture’ on the grounds that it simultaneously endorses two incompatible views of law: an analytical positivist one implied in the dimension of fit and an interpretivist one based on the dimension of justification, and endorsed a single system view whereby the determination of the relevant historical record implicates the underpinning justificatory principles, which treats law as ‘part of political morality’. R Dworkin, Justice for Hedgehogs (Harvard UP 2011) 403.

78 Dworkin, Law’s Empire (n 77) 196.
79 ibid 227.
80 ibid 213.
81 ibid 263, 397.
82 ibid 263. These will, in part, be determined by the size and shape of the particular community. ibid 197.
83 ibid 213.
84 Dworkin, Law’s Empire (n 77) 196. Associative obligations are ‘special’ in that the yield ‘distinctly within the group, rather than as general duties its members owe equally to persons outside it’. ibid 199.
85 ibid 188.
86 ibid ch 6. See also R Dworkin, Freedom’s Law (OUP 1996) ch 4.
Dworkin’s scheme in that it would not be in keeping with the ‘spirit’ of the previous ‘chapters’ of the ‘chain novel’. Therefore, Dworkin’s account of law as integrity arguably presupposes the individuation of different communities of principle, their associative obligations and their law in order to allow judges to make decisions which conform with the requirements of integrity.

The fact that the principles of integrity necessarily include considerations of the individuation of communities of principle does not mean that a judge deciding on the basis of the law of another political community or system can never be justified. It may be the case that a judicial decision based on the law of another community can serve to legitimate coercion. Rather, integrity must require that where the courts in a community of principle apply the law of another community of principle, the relevant laws of the different communities be appropriately individuated.

This point is developed somewhat by Dworkin himself in his posthumously published article on international law.87 There, Dworkin provides a way of understanding the legitimacy of applying the norms of other communities (in this case, primarily the norms of the international community) within a distinct state-based community of principle in the form of a principle of ‘salience’.88 The justification of coercive political power, for Dworkin, arises not just within states, but with regard to the system of international law as a whole.89 Thus, the principles that legitimate the (external) international legal system are not independent, ‘but are actually part of the coercive system each of those states imposes on its citizens’.90 From this, Dworkin argues, it follows that:

The general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction.91

According to the principle of salience, then, states are under an obligation to subscribe to an international regulatory scheme developed by the international community where it has the effect of enhancing its own legitimacy as well as the legitimacy of the international system as a whole.92 Furthermore, the domestic relevance of the principle of salience requires that the constitutional courts of states should be ‘drawn to notice and attempt to achieve some integrity with the constitutional principles of other nations’.93 The principle of salience, therefore, grounds the moral obligation on communities of principle to

87 Ronald Dworkin, ‘A New Philosophy for International Law’ (2013) 41 Philosophy & Public Affairs 2.
88 ibid 19.
89 ibid 16.
90 ibid 17.
91 ibid 17 (emphasis added).
92 ibid
93 ibid 21.
apply the norms of other communities of principle such as the international community or other states in certain circumstances.

However, lest it be construed that Dworkin is here arguing for some sort of transcendental or universal moral standard of legitimacy which would undermine the role and relevance of identity to his conception of law as integrity, he continues that this obligation demands ‘only what, in the circumstances, is feasible’.94 ‘It does not require any state,’ Dworkin argues, ‘to ignore the division of the world into distinct states and suppose that it has the same responsibilities to citizens of other nations as it has to its own.’95 Thus, the obligations stemming from the principle of salience as legitimating the coercion of states through the application of the law of other communities are subject to a key distinction between different communities of principle. This distinction holds even if, as Dworkin argues, one of the principles which supports the legitimacy of the international system—the principle of salience—requires that courts apply the law of other (state) communities of principle.96

This demand need not rule out expressions of solidarity and coherence of purpose with other legal systems such as those prescribed by the principle of salience. What it does require, however, is that law is individuated, as a preliminary matter, into distinct communities of principle so as to ensure that coercion is properly legitimated.97

94 ibid 17.
95 ibid 17 (emphasis added).
96 ibid 21.
97 Letsas offers an alternative, albeit Dworkin-inspired, account of non-positivist law called ‘harmonic law’, which is ambiguous as regards considerations of identity. G Letsas, ‘Harmonic Law’ in Dickson and Eleftheriadis (n 66). He seems to endorse Dworkin’s conception of law as referring to ‘a value of political morality that normatively constrains the ways in which a political community treats its members, in the sense that it can licence coercive force against them’ (95–6). Moreover, his definition of harmonic law seems to entail similar identity-based prerequisites to Dworkin’s, in that it refers to ‘a moral value that normatively controls the effect of a community’s political history on collectively enforced rights’ (96) (emphasis added). It is, he argues, ‘in virtue of the history of a political community that individuals have acquired certain moral rights or duties’ (97) (emphasis added). For a similar statement, see G Letsas, ‘Monism, Interpretivism and Law’s Aim’ in M Freeman and R Harrison, Law and Philosophy (OUP 2007). However, he then goes on to claim that once a ‘joint scheme of cooperation is in place’, such as where states come together to set up institutions of cooperation, the identity of the (state) community (as expressed in national constitutions) ‘cannot have any normative relevance’ (99). More generally, he argues that ‘core human rights’ express ‘moral requirements’ that make it ‘impermissible for any political community to make certain individual liberties or choices the subject of a collective (majoritarian) decision’ (100) (emphasis added). It is difficult to reconcile the community-based morality which informs Letsas’s concept of harmonic law with his claims regarding the ‘moral requirements’ stemming from supranational schemes of cooperation or international human rights law which seem to eschew a community-based morality in favour of a more general universal morality as part of the concept of law. This ambiguity is resolved somewhat in Letsas’s subsequent work where he explicitly rejects Dworkin’s identity-based understanding of the law in terms of a ‘true community’ which legitimates coercion. G Letsas, ‘Law and Polity: Some Philosophical Preliminaries’ (2019) 16 ICON 1242. He argues that we do not need a ‘true community’ in terms of a community of principle assuming associative obligations in order to argue for the value of legality in law (1249–50). He concludes that the ‘disembedding of law’ from a community of principle ‘is plausible, both conceptually and morally’ (1250). Of course, Letsas is hardly the first to come to these sorts of conclusions around the concept of law and the idea of a universal morality. See eg G Radbruch, ‘Five Minutes of Legal Philosophy (1945)’ (2006) 26 OJLS 13; G Radbruch ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26 OJLS 1. However, a number of questions emerge from his account of harmonic law. Even if we agree that taking a non-positivist moral conception of law reduces the problems associated with legal pluralism in terms of conflicts between legal systems (‘Harmonic Law’ 95), it seems a large step from here to conclude that there is no law to be individuated, just one big (moral) global law. Moreover, it would appear that the identity (and therefore the
5. Individuation as (Political) Reasons

At this juncture, it is worth taking stock of our argument. The identity of a legal system is an indispensable feature of non-monistic concepts of law. Moreover, validity is a necessary but insufficient condition for determining the identity of legal systems. It is insufficient given that validity, without more, as a criterion of individuation is over-inclusive. The nature of the norm in terms of its acceptance-dependence, acceptance-independence or ‘free-floatingness’ is itself contingent upon other reasons we might have for including or excluding norms from the identity of a legal system. Finally, regulatory intent, particularly as elaborated by Raz, is under-inclusive.

In this section, a reasons-based approach to the identity of legal systems will be defended, drawing upon, but broadening Raz’s reasons-based approach. The reasons for individuating norms in a particular way in this account are reasons that relate to the political importance of legal systems. As noted in the discussion of Raz’s reasons for excluding morality from the identity of legal systems, legal systems are political institutions which are important to the societies over which they govern. The criteria of individuation between what features as part of the ‘law of the land’ and what are standards a court merely has to apply are central to the political importance of legal systems. Moreover, the political importance of legal systems stems from the particularly intimate relationship between legal systems and political systems. Revising and updating to a legal pluralist context Raz’s comments on the relationship between law and the state, we can argue that every political system and social system has a legal system that constitutes the law of that system. The identity of the legal system is, moreover, ‘bound up’ with the political system. We can conclude from this, paraphrasing Raz, that a theory of law must be based at least partly on a theory of a political and social system, and that a theory of a political and social system is partly based on a theory of law.

individuation) of distinct legal communities is a necessary feature of his account of harmonic law at least to the extent that the practices of discrete communities feature in his account. For these purposes, he notes that ‘man-made edicts, pronouncements, rules, directives, practices etc.’ (‘Harmonic Law’ 96) are morally relevant ‘facts of a practice’ that are governed by the moral value of legality (‘Harmonic Law’ 96). However, even with regard to a supranational ‘scheme of co-operation’ there is a pluralism of factual practices—between state-based and supranational institutions—which could potentially be morally relevant for the purposes of settling legal disputes. The question then becomes which of these practices is the morally correct one when these practices conflict, such as when the practices of constitutional law and international conflict? Letsas argues that even if there are conflicts between practices (especially rules), there are no moral conflicts to settle in such cases. Even if we accept this, we need to know which set of (conflicting) practices the moral value of legality prefers. Letsas seems to load the dice in favour of international legal practices in his account, but does so by fiat, without explaining why, say, the practices and scheme of principle of state-based communities are morally irrelevant to this question.

Raz, Between Authority and Interpretation (n 13) 199.
Raz, (n 1) 98–9.
ibid 99.
ibid 199.
ibid 99.
We can therefore see that the relationship between normative political and social systems and legal systems of whichever type are important for the identity of legal systems and therefore for criteria of individuation.

Furthermore, we can identify two general ways in which legal systems are politically important. One relates to the identificatory function of legal systems which Raz emphasises when he speaks of the political importance of legal systems in terms of constituting the ‘law of the land’. In this regard, legal systems contain ‘political laws’ which are a ‘function’ of the identity of the political system. Legal systems contribute to the definition and identity of a political community through these ‘political laws’, which protect particular values of the political and social system. For this reason, with respect to the relationship between the political and legal systems of states in particular, constitutional and administrative laws are more relevant to the identity of the legal system than the law of contract or torts.

A second way in which legal systems are politically important is the way they facilitate interactions between a political system and other systems. As Raz notes, political systems interact with other political systems. Legal systems contribute to these interactions by applying norms of other political systems through private international law rules, giving effect to international law and so on. Political systems, furthermore, interact with other social systems, including the society which they organise politically. A legal system again can facilitate these interactions by recognising and applying norms of social subsystems, for example, the norms of private associations or other social groupings, and thereby support the politically important interactions between a political system and a social system. In all of these ways, then, legal systems can be politically important.

Moreover, viewing the identity of legal systems through the prism of the political importance of legal systems helps us better understand the core features of legal systems as institutional systems identified by Raz. Legal systems, Raz argues, have three characteristic features: comprehensiveness, supremacy and openness. It is these features that distinguish legal systems from other normative systems. Comprehensiveness involves the idea that legal systems claim authority to regulate any type of behaviour. Supremacy, an entailment of comprehensiveness, involves the idea that legal systems claim authority ‘to regulate the setting up and application of other institutionalised systems by its subject-community’. With regard to the question of openness, Raz

---

104 Raz, Between Authority and Interpretation (n 13).
105 ibid. (n 1) 100.
106 ibid.
107 ibid.
108 ibid.
109 ibid.
110 ibid 116.
111 ibid.
112 ibid 118.
comments that a normative system is an open one ‘to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it’. The reasons why legal systems recognise these norms stem from a desire to ‘maintain and support’ other forms of social grouping, such as private associations, as well as from a desire to have relations and interact with other legal (and therefore also political) systems.

If we treat comprehensiveness and supremacy as a single feature of legal systems given their common characteristics, we can see how the core features of legal systems map on to the ways in which legal systems are politically and socially important. The politically important identificatory function of legal systems is expressed in the claims to supremacy of legal systems over other institutionalised systems of the subject-community. It is this claim to supremacy of the legal system which supports the political identity of the political system by giving clear definition to what the subjects of the legal system have in common: the legal and political system. Moreover, the openness of legal systems somewhat self-explanatorily expresses the interactions between the political system and other political systems, and between the political system and social systems.

The basis for the criteria of the individuation of legal systems defended here, therefore, lies in the ways in which a particular norm applied by a legal system better serves one of these two politically important features of legal systems. If, in a given context, a valid legal norm can be said to better express the supremacy of a legal system (and therefore its broader political identificatory function), then it is best considered an internal norm of the system. On other hand, if a valid legal norm can be said to better express the politically important function of the openness of legal systems, it is best designated as an ‘external’ norm of the system, adopted by but not incorporated into the system. We can formulate our criteria of individuation based on these political reasons in the following terms: a norm is an internal norm of a legal system if, and only if, it is valid according to that system and supports the supremacy of that legal system; a norm is adopted by but not incorporated into a legal

113 ibid 119.
114 In this regard, we can invoke Kelsen’s (1927) remarks on the way in which law gives expression to political unity. H Kelsen, ‘On the Essence and Value of Democracy’ in A Jacobson and B Schlink (eds), Weimar: A Jurisprudence of Crisis (University of California Press 2000) 90. We do not need to go as far as Kelsen in assuming that a political system can only exist through the legal system, though, to argue that law and legal systems have a role in institutionalising and shaping the political unity of political systems. Moreover, given this important identificatory role, the legal system gives expression to this political identity by claiming supremacy over other institutionalised systems of the norm-subjects of the system. The German Federal Constitutional Court’s deployment of a ‘constitutional identity’ doctrine in respect of potential conflicts with EU law provides a good example of the way in which the supremacy claims of a legal system shore up the identity of the political system. See C Calliess, ‘Constitutional Identity in Germany: One for Three or Three in One?’ in C Calliess and G van der Schyff (eds), Constitutional Identity in a Europe of Multilevel Constitutionalism (CUP 2019). This doctrine was deployed with dramatic effect in May 2020, when the court explicitly asserted the constitutional identity of the German legal system to prevent German participation in a bond-buying programme by the European Central Bank. See BVerfG, Judgment of the Second Senate of 5 May 2020—2 BvR 859/15 <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html>. (accessed 26 March 2021). See generally ‘Symposium: The PSPP Judgment of the Bundesverfassungsgericht’ (2021) 19(1) ICON 179-327.
system if, and only if, it is valid according to that system and supports the openness of that system.

According to this approach, therefore, the method of creation of the norm is relatively unimportant. The fact that a norm was produced by the ‘authoritative law-creating organs’\(^\text{115}\) of the applying legal system will only contribute to its being considered an internal norm of the system by virtue of its relationship to the supremacy of that system. By the same token, the fact that a norm applied was originally created by an ‘alternative system of authority’\(^\text{116}\) will only contribute to its designation as an external norm to the extent that its application is related to the openness of the legal system. The nature of the norm in terms of being acceptance-dependent, acceptance-independent or free-floating will, in a similar way, only matter to the extent to which it helps us establish whether the norm in question relates to one of these two conditions.

However, none of these characteristics of norms can be determinative of the question of whether the norm is to count as an ‘internal’ or an ‘external’ norm. We may have reasons to designate a norm as internal even if it was produced by an alternative system of authority on the grounds that its validity relates more closely to the supremacy of the applying legal system. Arguably, the UK’s EU Withdrawal Act 2018 is an instance of this. Similarly, notwithstanding the ‘free-floating’ nature of a norm such as a moral norm, we may have reasons to conclude, \textit{pace} Kramer, that the norm is better understood as an external norm where the bindingness of the norm is more closely related to the openness of a legal system such as where human rights norms are recognised by a legal system for reputational reasons. Alternatively, we may, \textit{pace} Raz have reasons to designate an acceptance-independent norm such as a moral norm as an \textit{internal} norm where the reasons conform more closely with the supremacy condition of individuation. This could occur where a legal system recognises and applies a moral standard as part of its ‘constitutional identity’\(^\text{117}\) and therefore better conforms to the supremacy condition, or the particular way in which a legal system modifies or modulates the ways in which moral reasons apply to individuals.

These two overarching criteria provide a better account of the reasons we have to individuate norms than the alternatives considered above. First of all, they add that important missing condition to validity. Furthermore, they help us make sense of the ways in which the type of norm involved, such as its method of production or its ‘free-floating’ nature, relates to the question of identity. They also broaden the number of reasons we may have for considering a norm as an external or internal one based on the political importance of legal systems beyond those contained in Raz’s ‘regulatory intent’ condition.

\(^{115}\) Kramer, ‘On Morality’ (n 13) 71.
\(^{116}\) Kramer, ‘On Morality’ (n 13) 72.
\(^{117}\) See eg the role of fundamental rights in the ‘constitutional identity’ doctrine of the German Federal Constitutional Court. Calliess (n 114).
Furthermore, approaching the question of individuation in terms of the dual criteria of supremacy and openness-related reasons for designating norms as internal or external norms also sheds light on the nature of putative conflicts between legal systems. The rise in the number of legal systems over the past number of decades, particularly at transnational level, has resulted in the increased threat of conflicts between the norms of each system.\(^{118}\) These are often characterised as inter-systemic conflicts,\(^{119}\) and a wide variety of solutions have been advanced to resolve these conflicts.\(^{120}\) Characterising such conflicts as conflicts between legal systems presupposes an Archimedean vantage point from which such conflicts can be approached. However, as Hart argued in his critique of Kelsen’s ‘no conflicts’ justification for his unity thesis, statements about what norms require (‘descriptive ought statements’)\(^{121}\) which set up the possibility that two norms could require conflicting things are always made relative to the systems that they describe.\(^{122}\) Thus, a putative conflict, say, between a state constitutional norm and a norm of the EU legal system\(^{123}\) is not a true conflict between the norms of each system, as the requirements of their norms, even if they require contrary things, are relative to each system. Rather, in the many cases, particularly involving EU law, which are adduced as evidence of conflicts between legal systems,\(^{124}\) the criteria of individuation defended here allow us to understand such putative inter-systemic conflicts as conflicts within a legal system involving norms designated as ‘internal’ and ‘external’ according to the supremacy and openness of the legal system.\(^{125}\) Such conflicts therefore involve a norm which relates to the supremacy of the legal system and a norm which relates to the openness of a legal system. Ultimately, therefore, these conflicts involve a conflict between the political ends of the supremacy of a legal system and the political ends of the openness of a legal system to be resolved internally by the organs of the

\(^{118}\) N MacCormick, ‘Risking Constitutional Collision in Europe?’ (1998) 18 OJLS 517; Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 EJIL 395; V Jeutner, Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma (OUP 2017); Michaels and Pauwelyn (n 59).

\(^{119}\) Michaels and Pauwelyn (n 59) 375.

\(^{120}\) This is particularly the case in the ‘constitutional pluralist’ literature. For a general overview, see M Avbelj and J Komárek (eds), Constitutional Pluralism in the European Union and Beyond (Hart Publishing 2012); Davies and Avbelj (n 66).

\(^{121}\) Hart, Essays in Jurisprudence and Philosophy (n 1) 333.

\(^{122}\) ibid 331.

\(^{123}\) MacCormick (n 118).

\(^{124}\) See Calliess (n 114).

\(^{125}\) The fact that such conflicts emerge internally in a legal system as opposed to between two different systems does not necessarily lead to the conclusion that monism is a better view of this relationship as argued by Somek. See A Somek, ‘Monism: A Tale of the Undead’ in Avbelj and Komárek (n 120). The reasons for this are similar to the reasons why Hart and Raz rejected Kelsen’s monism: namely, the attitude of legal officials. For Hart and Raz, it was the fact that state legal officials did not recognise the unity of state legal systems and international law that led to their rejection of monism: Hart, Essays in Jurisprudence and Philosophy (n 1); Raz, The Authority of Law (n 1). In a similar way, it is the fact that courts do not accept that the norms of EU law and state legal systems form part of one big legal system which precludes a monist view of their interactions and potential conflicts. This is clearly evidenced by their individuation of norms into ‘internal’ (domestic) and ‘external’ (EU) norms.
legal system itself according to these ends. Of course, the way in which such conflicts are managed and resolved will have an impact on external legal systems, particularly the system which ‘claims’ the norm deemed to be ‘external’ in the conflict. Moreover, how the officials of the external legal system view the way in which the conflict is resolved may influence the resolution of the conflict within the applying system, potentially resulting in, for example, a preference for the ends of openness over the ends of supremacy in a given case. However, this does not change the fact that the conflict remains internal to the applying legal system.

As the designation of a norm as internal or external is based on political reasons on the view defended here, each designation will be dependent upon the political context in which the norm is applied. This means that this approach to individuation does not provide a sharp test to determine the identity of legal systems. After all, Raz does recognise that the question of individuation is ‘particularly vague’. However, approaching the question in terms of political reasons for designating the norms one way or another, does, it is submitted, serve a useful goal of at least clarifying some of the vagueness surrounding the question by acknowledging the diversity of reasons we will have for making the designation, classifying them according to the binary criteria of supremacy or openness and recognising that they relate to political reasons stemming from the fact that legal systems are politically important.

A. The Political Importance of Law as Integrity

This approach also supports the individuation of law necessary for law as integrity. As noted above, notwithstanding Dworkin’s claims to the contrary, there are good reasons to believe that integrity also requires criteria of individuation to justify coercion in the manner Dworkin proposes. The moral norms which support law as integrity are the autochthonous principles which emerge from the associative obligations of communities of principle. Applying the law according to the personal convictions of judges or applying principles which do not stem from the associative obligations of the relevant community of principle would, without more, fail to justify coercion in this way. The one exception to this is the principle of salience, where supporting and applying the law of other communities of principle such as other states or the international community can also serve to legitimate coercion.

The approach outlined here based on the politically important reasons of supremacy and openness can therefore support Dworkinian integrity too. If we understand the supremacy of legal systems as supporting the application of the scheme of principle stemming from the associative obligations of communities of principle, and if we understand the political importance of openness as

126 See Raz, The Authority of Law (n 1) 84.
127 Raz, Between Authority and Interpretation (n 13) 195.
supporting the principle of salience, we can see that these political reasons can also be supported by moral considerations which support law as integrity. If the moral principles of the relevant community of principle justify coercion in that community, supremacy serves the important moral purpose of identifying the principles of that community which legitimate that coercion. Similarly, if the principle of salience plays a role in justifying coercion within the community through the application of external law, then openness serves the purpose of legitimating coercion according to these external norms. Furthermore, on a Dworkinian account, the reasons which are included within the criteria of supremacy or openness can themselves be thoroughgoing moral reasons of the relevant community of principle. For example, we can easily envisage moral reasons relating to democracy, self-determination or ‘constitutional identity’\textsuperscript{128} for considering the principles emerging from the associative obligations of a community as internal norms of the system. In the same way, substantive moral considerations can support the designation of norms of the law of a community of principle as external norms according to the principle of salience. One striking example of this is provided by Dworkin himself where he argues that coercion can be legitimated through the application of (external) laws whose ends are a stable international order which ‘protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world’.\textsuperscript{129} Moreover, we can see how the ends of justice can be said to be served through the facilitation of interactions by the legal system between the political and the social systems, whether in terms of distributive justice, corrective justice or otherwise.\textsuperscript{130}

However, notwithstanding the fact that the question of individuation can be moral ‘all the way down’ for Dworkin’s account of law as integrity, the determining criteria of individuation will be morally relevant reasons relating to the supremacy and openness of the law of the relevant community of principle.

### 6. Conclusion

The issue of the identity of legal systems is a central feature of non-monistic concepts of law. Moreover, in the context of a global ‘disorder of legal orders’,\textsuperscript{131} the question of individuation is becoming an increasingly practical concern for courts who are called upon increasingly frequently to recognise and apply the norms of other legal systems. This is particularly the case where

\textsuperscript{128} At least with respect to non-abusive uses of the idea. See J. Scholtes, ‘Abusing Constitutional Identity’ (2021) 22 German Law Journal 531.

\textsuperscript{129} Dworkin, ‘A New Philosophy for International Law’ (n 87) 22.

\textsuperscript{130} See eg T Kronman, ‘Contract Law and Distributive Justice’ (1980) 89 Yale LJ 472.

\textsuperscript{131} N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 ICON 373, 376.
identity becomes central to the resolution of potential conflicts between ‘internal’ and ‘external’ norms, which is becoming increasingly common in certain contexts, such as the application of EU law in the legal systems of its Member States.132

If the ‘vagueness’ that characterised the distinction could be excused by the infrequency with which we need to rely on it,133 then this is arguably no longer the case. In this regard, it is argued that criteria of supremacy and openness based on the political importance of legal systems provide an improvement on extant approaches to the question of individuation and a clearer approach to the problem of identity for both positivist and interpretivist accounts of law.

132 See Avbelj and Komárek (n 120).
133 Raz notes, in this regard, that the ‘vagueness’ between ‘what is part of the law and what are standards binding according to the law’ is unsurprising because ‘we do not often need to rely on it’. Raz, Between Authority and Interpretation (n 13) 195.