

The Plateau of Legality

What Makes Law “Law”?

Hafsteinn Dan Kristjánsson

1 The Legality Question	16
2 Analytical Jurisprudence	17
3 Some Perceived Truths About Law	18
4 Explaining the Perceived Truths about Law: Some First Steps	19
4.1 Social-Historical Ideas About Law	19
4.2 Law is an Interpretive Social Practice	21
5 The Problem of Many Ideas and Many Examples of Law	23
6 Important Properties of Law – The Plateau of Legality	24
6.1 Choosing the Properties	24
6.2 A Just-So Story	25
6.3 The Plateau of Legality	26
7 Applying the Plateau of Legality. A Legality Test	27
7.1 The Nature of the Test	27
7.2 Other Kinds of Things Than Law	28
7.3 Six Considerations for Identifying Law	29
8 Concluding Remarks	33

...to answer questions whether a certain suggested law exists as a law in a certain legal system one must ultimately refer not to a law but to a jurisprudential criterion. Ultimately one must refer to a general statement that does not describe law but a general truth about law.

Joseph Raz, *The Concept of a Legal System*, p. 200.

1 The Legality Question

Some people equate law with state law. It is no wonder given the ideological, legal and geographical dominance of the nation state. However, the concept of a nation state is a relatively recent phenomenon in history. The modern nation states began to form in the middle ages and the demise of the last empires occurred during and after the First World War.¹ In light of this, it seems almost obvious that historically there have been instances of non-state law. If this is right, law is not only state law. The question arises then whether there can be or are instances of non-state law in our time. Examples could be international law and European Union law. However, they are linked to states. Perhaps better cases of non-state law are tribal law, global law that is not strictly a part of international law, law of a corporation or an association and various social norms that form around an activity, such as business, be it within a state or agents operating cross-border.

Two questions come to mind when speculating about non-state law. The first question is whether these examples of non-state law are really examples of 'law'. This question leads to the problem of how it can be answered. The second question is why it matters whether something is law or not. Is there something to be gained or lost depending on whether something is law? The former question will be elaborated on now but we shall return to the latter in section three.

The former question can be reformulated into the question: *What is law?* That question can embody at least two closely related questions. Firstly, it can be asked *what is the nature of law?* By asking this question we are investigating whether and, if so what, function, purpose, structure, implications and specific content law may have or necessarily has. Secondly, it can be asked *what makes law 'law'?* The focus of this question is on legality or the identity of law. It is being asked what properties, features, attributes, qualities or conditions are necessary, essential, sufficient or common for law. Put more simply, we can ask what are the *necessary and/or sufficient properties* in order for something to be 'law'. This is the *legality question* and it is the focus of this paper.²

1 For an interesting book about the modern state see e.g. Fukuyama, Francis, *The Origins of Political Order. From Prehuman Times to the French Revolution*, Farrar, Straus and Giroux, New York 2012, for example p. 19-22.

2 See e.g. Shapiro, Scott J., *Legality*, The Belknap Press of Harvard University Press, London 2011, p. 3-14. I am inspired by Shapiro's book in my approach in this paper and some of its content.

The reason for why the legality question matters for the issue of non-state law is that by answering it we can identify instances of law and distinguish them from instances that are not law. We can answer whether there can be non-state law and if so, what cases of non-state law look like.

Constructing a *concept of law* is a way to *answer* the question what is law or the more specific legality question. The answer may be in the form of a definition of law, a description, a criterion, an explanation or a list of features. The concept of law does however not entail explaining what the *word* law means or refers to in a language or languages. It is a philosophical concept not a linguistic one. According to Joseph Raz in the quote above or the idea that appears there, the answer to the legality question is a jurisprudential criterion or a general truth about law. Same line of thinking can be found in Ronald Dworkin's idea that we need a theory of law to identify law.³

It should be noted at the outset that how the legality question is formulated matters. This is because it shapes how the answer to it will look like. If the focus of the question is on necessary features of law, the concept may end up being bare, minimal or limited. The reason for that is that there may be few or very general features that all instances of law necessarily share. These limited features may not be helpful in identifying and distinguishing instances of law. If the focus is on common features of central cases of law (focal, standard, typical or paradigm cases),⁴ the answer may be richer in content and a more helpful tool in identifying and distinguishing cases of law.

In what follows, I will briefly explain the method used in this paper. Building on that, I will explore the legality question.

2 Analytical Jurisprudence⁵

One method for doing philosophy or jurisprudence is so called analytical jurisprudence. When doing analytical jurisprudence one first identifies perceived *truths* about law or relatively uncontroversial features of law. Next one needs to construct a *theory* or an *account* that *explains* these truths about law, preferably in a clear and a rational manner.

A theory does not need to explain all the truths identified or all the truths as well. It can *flout* some truths, maybe because they do not fit well with the theory. However, it cannot flout too many or too important truths to be a convincing account of the thing it seeks to explain. A theory is convincing if it *fits* with the truths about law and it has an *explanatory force*. It is a good explanation of the truths and by extension of the thing it seeks to explain.

3 Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, Cambridge 1978, p. 59-61, in the paper 'The Model of Rules II'.

4 On central cases of law *see* e.g. Hart, H.L.A., *The Concept of Law*, Oxford University Press, Oxford, 2nd. edition 1994, p. 3 and Finnis, John, *Natural Law and Natural Rights*, Oxford University Press, Oxford, 1980, p. 3-4, 9, 14-15 and 260.

5 The section is based on Shapiro, Scott J. *Legality*, p. 3-22.

Various tools can be used to construct or explain a theory of law. Among those are comparing instances of law and non-law, analysing and solving puzzles or perceived paradoxes regarding law, constructing a hypothetical legal system and analysing examples of law, both current ones and ones from history.⁶

In the next section, a few perceived truths about law will be identified. The list of truths will be minimal and they are chosen with the purpose of this paper in mind. Numerous other truths have undeniably exerted their influence even though they are not specifically mentioned here. In the section after that a rough sketch of a theory or theoretical insights will be presented in an attempt to explain those truths.

3 Some Perceived Truths About Law

In this section, four perceived truths or statements about law will be discussed. The first truth is one which H.L.A. Hart observed. There is a ‘...strange ability of most men to cite, with ease and confidence, examples of law if they are asked to do so.’⁷ ‘Most educated people have the idea that the laws in England form sort of a system, and that in France or the United States or [Russia] and, indeed, in almost every part of the world which is thought of as a separate ‘country’ there are legal systems which are broadly similar in structure in spite of important differences.’⁸ This truth (or truths) can be formulated into the following statements:

- (1) People *recognize* and can *give examples* of law.
People have some *ideas* about law.

The statements can be formulated into the following questions: Why do people recognize and are able to cite examples of law? Why do people have ideas about law?

It is not unlikely that, if asked, many people would cite state law as an example of law. The second truth relates to this and can be put into a statement.

- (2) State law is today the *central case* for law and international law has gotten that status as well over the last decades.

A central case is a core case or a paradigm example of law. It can be asked what lies behind our ability to make that judgment and differentiate between central and borderline cases.

The third truth can be worded in the following statements:

6 Shapiro, Scott J., *Legality*, p. 18-22.

7 Hart, H.L.A., *The Concept of Law*, p. 2.

8 Hart, H.L.A., *The Concept of Law*, p. 2-3.

- (3) Law has taken *different forms* and there have been *different ideas* about law throughout time and across communities. There can also be different ideas about law within one and the same community.

It can be contended that people have thought about law in different ways in different times and cultures. It is likely that people in ancient Greece had different ideas about these matters from people in the Nordic countries today. There have also been different opinions about law and disagreements. It suffices to mention the debate between natural law lawyers and legal positivists. This perceived truth may be in tension with the first truth. On the one hand people seem to have ideas about law and are able to recognize and give examples of law. On the other hand these ideas and the examples given may be different.

In section one, it was asked why it matters whether something is law or not. It seems that people think that the answer to the question is that it does. There is something good or important associated with law. The fourth truth can be worded in the following way:

- (4) Law has a certain *value* or *quality*.

When people call or identify something as law they often associate this value or quality with it. For the purpose of this paper, this quality can be any number of different things, such as importance, legitimation, force, bindingness, correctness, entrenchment, consequence and possibly a relation to or a justification by morality, justice or rationality.

4 Explaining the Perceived Truths about Law: Some First Steps

4.1 *Social-Historical Ideas About Law*

I will now suggest an explanation for some of the perceived truths in section three. The first truth was that people have some ideas about law and they recognize and can give examples of law. The ideas people have about law are *social-historical* in its nature.⁹ They are *social* in the sense that they are *shared* in a community and not purely personal. They are *historical* in the sense that they often have a tradition or a history in a community. The ideas are embedded and woven into the social fabric of a community. They form a part of its *culture*.

In the quote in section three, Hart pointed out three ideas people have about law. People have the idea that law forms sort of a system (legal system). People have the idea that each ‘country’ has a separate legal system. And finally, people have the idea that legal systems are broadly similar in structure although there are important differences. Ideas that people have about law can both be about *law in general* and about parts of it. Examples about how ideas about law

9 See in this context e.g. Grewe, Wilhelm G., *Epochs of International Law. Revised Edition*, Walter de Gruyter, New York 2000, p. 1-37.

in general may look like can be taken from legal theorists: Law is a command of a sovereign backed up by a sanction (John Austin). Law is a coercive normative order (Hans Kelsen). Law needs to be able to justify public coercion (Ronald Dworkin). Law is an affair of rules (H.L.A. Hart). Law is plans (Scott J. Shapiro).¹⁰ Ideas about *parts of law*, or sub-ideas, can be about, for example, rules, rights and duties, sources of law, interpretation, legal systems, the rule of law, sanctions and public coercion.

The social-historical or cultural ideas about law can also be *multiple, vague and loosely connected*. There may be a loosely connected group of ideas. People may share some ideas but not others. People may even adhere to different ideas and sub-ideas within one and the same community. For example, some people may be of the opinion that law cannot be unjust and still be law, whereas other people may disagree with that.

Within a community there may be a *legal culture* that only some members of the community share. A legal culture can form around institutions such as courts, an administration and a legal profession. In the legal culture, the ideas about law may be considerably richer, more complex, organized, conscious as well as more densely shared than in the larger culture of the community. This is not wholly dissimilar to Hart's notion that legal officials share or have knowledge of the rule of recognition but not necessarily the larger community.

Social-historical ideas about law can cast some light on the perceived truths in section three. The ideas that people have about law are social-historical or cultural just as many other ideas people have about various things in a community, such as about a democratic political system and the state. Currently, it would seem that there are shared ideas in our culture that different nation states have different laws and that those laws form a legal system. Social-historical ideas, like these examples, are one of the reasons for why people recognize and can give examples of law. They do it in light of these ideas. This is also one of the reasons for why we are able to make judgments about what examples of law are central cases and what are borderline cases, see the second perceived truth in section three. The judgments are made in light of these ideas and examples of law most associated with them.

One of Ronald Dworkin's criticisms of legal positivism was that there are pervasive (theoretical) disagreements about law.¹¹ Lawyers disagree, for example, on how to interpret a statute. There is no convention or a full agreement on how to do that. These pervasive disagreements have a deep current. They are not only about interpretation and sources of law, but also about the very nature of law. The third truth in section three was that people have different ideas about law, not only across time and cultures, but also within one and the same community. Law has also taken different forms. The

10 For these theories, see e.g.: Kelsen, Hans, *Pure Theory of Law*, University of California Press, New Jersey 2005, p. 33-37, For Austin's theory in general see Austin, John, *The Province of Jurisprudence Determined and the Use of Study of Jurisprudence*, Hackett Publishing Company, Cambridge 1998, and Shapiro, Scott J., *Legality*, p. 54, Hart, H.L.A., *The Concept of Law*, p. 79, Shapiro, Scott J., *Legality*, p. 119-150 and 190-208, Dworkin, Ronald, *Law's Empire*, Hart Publishing, Oxford 1986, p. 101, 110, 190, 224 and 227.

11 See e.g. Dworkin, Ronald, *Law's Empire*, p. 139.

examples of law we have knowledge of, such as modern state law and tribal law, can have important differences, both in structure and content. Social-historical ideas about law can help partly explain this. There can be different and even conflicting social-historical ideas about law not only between different communities but also within a community.

Because social-historical ideas can be vague, multiple and loosely connected and examples of law take different forms, there is room for perceiving, understanding and interpreting law differently. There is also room for constructing different theories of law. Theories of law can be put into this context. Legal theorists engage with ideas and examples of law. They identify truths about law from the examples of law they observe, for example, from their own community. They are not immune to social-historical ideas about law and the ideas can influence their theories of law. Legal theorists can also criticize other ideas about law and argue that perceived truths about law are really no truths at all. If a legal theorist is very influential he can even affect the social-historical ideas and the way members of a community understand law. One example of this is Hart's idea about the rule of recognition. He may have influenced many legal cultures and their ideas and understanding of law. Among the explanations for why theorists disagree is that they can identify or flout different perceived truths about law when they construct their theories. They can also look at different examples of law and are therefore explaining different examples. It is not unlikely that when Austin constructed his theory of law, the examples and ideas that he was engaging with were different from those that Kelsen engaged with when he was constructing his theory. Also, Dworkin may have predominantly focused on American common law when constructing his theory.

4.2 *Law is an Interpretive Social Practice*

Why do ideas about law matter for law? That is because law is an *interpretive social practice*. It is the kind of a social thing that partly gets its *identity* and *is shaped by the ideas* we have of it.¹² We understand, perceive and interpret the social practice in light of those ideas. When doing that we shape the social practice. For example, if we have the idea that a particular social practice is law, we interpret it *as law* in light of the ideas we have of law. If we have the idea that law forms a legal system, we interpret the social practice *as a legal*

12 I am inspired here by McCormick, Neil, *Rhetoric and The Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, Oxford 2005, p. 3. He says: 'A legal system is not ... a tangible physical entity. It is an ideal construction, a thought-object.' See also p. 23. McCormick, Neil, *Institutions of Law. An Essay in Legal Theory*, Oxford University Press, Oxford 2008, p. 11-12, speaks of 'institutional facts'. In this regard, see also Kaarlo Tuori, *Critical Legal Positivism*, Routledge, New York 2002, p. 127. Furthermore, I am inspired by Dworkin, Ronald, *Justice for Hedgehogs*, The Belknap Press of Harvard University Press, London 2011, p. 157-191, and Dworkin, Ronald, *Law's Empire*, p. 45-87, on interpretive concepts.

system.¹³ By doing that we impute a certain identity on the body of norms or the social practice.¹⁴ Law is not merely the social conventions, facts, formations and institutions. That is only the subject/object of interpretation or the raw material before interpretation. Law embodies as well how the social practice is collectively seen, perceived or understood in light of it being law and the numerous social-historical ideas we have of such a thing. Because law is an interpretive social practice, it is *constructed*. The ideas about law *add* something to it. They *give* it identity and structure that is not necessarily embodied in a social convention or a formation. The social practice is shaped into that identity and given that structure. These things are imputed on it through the process of interpretation. So in order to grasp law (fully) we need to have some idea about what law is.

Because law is an interpretive social practice, it has *two sides*. One side is the *social practice*. A social practice can consist of numerous conventions, customs, rules, principles, standards, other norms, ideas, perceived facts or formations, understandings, vocabulary and attitudes of practitioner. All these social norms and other social things are interlinked. They form a *social sphere* so to speak.¹⁵ Members of a community are a part of many social spheres that influence their thinking, perception, understanding and even the way they talk about things. The other side is the *interpretation* of the social practice. An interpretation has two faces. On the one hand is conservative. It is the interpretation *of something*. An interpretation needs to be 'faithful' to the object it is the interpretation of. It needs to fit with it. If it is not faithful to the object, it may be it is no longer an interpretation of that object. On the other hand it is *creative*. It is an *interpretation* of something. An object is *given* meaning, significance or an understanding.¹⁶ When a social practice is interpreted as law it is understood *as law* and therefore in light of the ideas we have of law. While it aims to be faithful to the social practice, it also entails shaping it into the kind of a thing our ideas of it indicate it is. If we think law is a legal system we *see* or *understand* it as having a certain structure or coherence.

13 See e.g. Kelsen, Hans, *Pure Theory of Law*, p. 31, who says: "A single norm is a valid legal norm, if it corresponds to the concept of 'law' ...", Kelsen, Hans, *General Theory of Law and State*, Russel and Russel, New York 1961, p. 116, says: "To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such...", McCormick, Neil, *Rhetoric and The Rule of Law*, p. 3, speaks about the idea of a system. On page 6, he says that an idea of a legal system is a framework to understand the social world. He speaks of "...a shared framework for understanding ...". He also says: "As a normative order, it is in continuous need of interpretation..." On page 23, he talks about how the raw material takes the form of a system when it is interpreted in light of an idea of a system.

14 McCormick, Neil, *Rhetoric and The Rule of Law*, p. 4 and 6.

15 For 'social spheres' see Galligan, Denis J., *Law in Modern Society*, Oxford University Press, Oxford 2006.

16 See e.g. Dickson, Julie, *Interpretation and Coherence in Legal Reasoning* in The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), chapter 2.2. (April 5, 2013, 12:30 AM) at "www.plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/".

This entails that law is not *reduced to the social practice* because our understanding of it depends on the ideas we have of it. Law is also not a pure creation or a thought-object, like a number, but it depends on and is shaped by the social practice. This has important implications that will not be discussed fully here.

Examples of how this might work can be taken from legal theorists. Kelsen's theory was that law is organized into hierarchical norms. It is implausible that social conventions all by themselves are able to organize a lot of material into a complex legal system. Kelsen may though have interpreted the material, and by it shaped it into, hierarchical norms in light of his idea of law as that kind of a thing. Austin may have been influenced by ideas of an absolute and omnipotent sovereign or by monarchies in his time and the times preceding him. In light of the idea about a sovereign he may have understood law as being a command of a sovereign and shaped it to fit that idea.

But how does this relate to the legality question? From a *social viewpoint* it can be said that the social-historical ideas about law 'make' a social practice into law. If a social practice fits with the ideas the members of a community have of law and the examples they associate with those ideas, they may see it or recognize it— *interpret it – as law*. By doing that it becomes law in a certain sense. With that in mind let us now return to the legality question.

5 The Problem of Many Ideas and Many Examples of Law

The legality question involves identifying necessary and/or sufficient properties of law. According to the social viewpoint mentioned above, law is or becomes law when members of a community interpret it as law in light of some ideas they have of law and examples of law they associate with those ideas. The question then arises whether law is whatever members of a particular community think or say is law. In other words, does what is law depend entirely on the social-historical ideas prevailing a particular community? This shall be called the Pure Social Viewpoint.¹⁷

The Pure Social Viewpoint has its limits. The first truth in section three was formulated into the questions why do people have some ideas about law and why can they recognize and give examples of law. It can be asked whether these questions relate to the legality question in the following way: Knowing why people recognize and have ideas about law can help us understand what makes law 'law'. Knowing what makes law 'law' can help us understand why people recognize and have ideas about law. There are *many ideas* and *many examples* of law and there are important differences between them. This shall be called the Problem of Many Ideas and Many Examples of Law. In light of this we are faced with the problem of how to know whether two ideas or two examples are ideas or examples of the same thing, i.e. of law. From the Pure Social Viewpoint, we cannot group together social-historical ideas across time

¹⁷ Here I am inspired by Tamanah, Brian Z. *Understanding Legal Pluralism: Past to Present, Local to Global* Legal Studies Research Series, paper 07-0080, 28 and onwards (2008) (April 5, 2013, 12:30 AM) at "ssrn.com/abstract=1010105".

and cultures that are about law and distinguish them from ideas that are about something else. The problem cannot be solved linguistically by viewing whatever the word ‘law’ has referred to in various cultures. There are both different words for law in different languages and the same word has been used to refer to different things.

To solve the problem there needs to be some *external viewpoint* (master idea or meta-idea) to fulfill this function. Social-historical ideas and examples of law are evaluated in light of this external viewpoint or idea. By using it we can identify instances of law and distinguish them from instances that are not law from the external viewpoint. This master idea about law is a *concept of law*. It is not purely sociological. It is *philosophical*. It is philosophical because it is based on a theory, reasoning, an explanation or an account of perceived truths about law. A theory is constructed by choosing certain truths about law and giving them the status of being necessary and/or sufficient properties. It picks out important truths about law. Since the truths are *chosen* and *given* the status *important*, the concept is philosophical.

There is a connection between the (philosophical) concept of law and the social-historical ideas about law (social conceptions of law).¹⁸ The concept is a tool, a standard or an explanation of the social-historical ideas. Law is not simply whatever members of communities think or say is law. However, what they think or say is law matters for constructing the concept of law.

6 Important Properties of Law – The Plateau of Legality

6.1 *Choosing the Properties*

In what follows, I will choose properties of law and claim that they are important in light of two things. The former is the fourth truth in section three: Law has a certain value or quality. We are not simply identifying all bodies of rules, but a certain kinds of bodies of rules. The latter is the focus on central cases of law in different communities and across time.

I will tell a *just-so story*.¹⁹ It is a story inspired by history, but it is not meant to be historically accurate. The story is simply meant to give, in a highly simplified manner, a sense of different communities and their laws. From them I will extract three important properties. The communities I have in mind are firstly, a group of families or a tribal community. Secondly, city-states and empires, such as ancient Greece and the Roman Empire. Thirdly, feudal societies in the middle ages. Fourthly, monarchies in the late middle ages and onwards. Lastly, the modern nation states.

18 For a discussion about concepts and conceptions see Dworkin, Ronald, *Law's Empire*, p. 71.

19 See e.g. Honoré, Tony, *Making Law Bind. Essays Legal and Philosophical*, Clarendon Press, Oxford 1987, p. 40-50 and Hart, H.L.A., *The Concept of Law*, p. 89-95, where he tells his story about the deficiencies of the pre-legal society.

6.2 A Just-So Story²⁰

The first community is a simple one. A group of families form a tribal community. They have various social-moral norms about what people may or may not do. There may be some norms about the role of a chief or elders in settling disputes. The community has a social structure. It is a close-knit society with a highly dense and shared understanding of the world, values and how things are done. In this community, there may be norms that are perceived to be of different degrees of bindingness for various reasons, such as because of religion, morality, politics, tradition or magic. The norms that are the most binding may be perceived as unchangeable and handed down through tradition. They will often be about the fundamental social relations within the community, such as marriage, family matters, trade and how people should be treated, for example, not to lie, steal and kill. These norms may also be about the structure of the group, for example, the role of the chief.²¹ A violation of the norms may be perceived as a violation against the community as a whole and there may be various enforcement mechanisms, such as exile, self-help and revenge. The most important norms will develop in a spontaneous or organic way and not be easily distinguishable from other social-moral and social-political norms.

The second community is that of a city-state and an empire akin to ancient Greece and the Roman Empire. The structure of those communities is in some sense more formal and political power has become more consolidated. The political power has been attached to formal institutions and they may not only settle disputes but formulate the norms by articulating them in a standard, for example, the Icelandic Law-Speaker, or be codified, for example, the Roman Twelve Tablets and *Lex Talion*. These institutions regulate or enforce the norms that are about many of the fundamental social relations in the community and the group-structure. The law has become less spontaneous and more institutionalized and formal.

The third community is that of a feudal society in the middle ages.²² The political power may be dispersed and diffused between a king that does not hold firm control over internal matters and concentrated locally in lords. It may be that many of the most important norms are subject to spontaneous development in the local community, but there may also be some more formal and articulated norms in directives from the lords or the king. They may be observed for various reasons, for example, because of tradition and belief in the

20 The just-so story is inspired by the following books: Weber, Max, *Economic and Society: An Outline of Interpretive Sociology*, University of California Press, Berkely 1978, Grewe, Wilhelm G., *Epochs of International Law*, LINDAL, Sigurður, *Um lög og lögfræði – grundvöllur laga, réttarheimildir*, Hið íslenska bókmenntafélag, Reykjavík 2002, Galligan, Denis J., *Law in Modern Society*, chapters 4 and 5, Honoré, Tony, *Making Law Bind*, p. 40-50, Moore, Sally Falk, *Law and Anthropology. A Reader* Blackwell Publishing, Oxford 2004, especially part III.

21 See e.g. Galligan, Denis J., *Law in Modern Society*, chapter 4.

22 I am inspired here by, Grewe, Wilhelm G., *Epochs of International Law*, p. 40-43.

right of the king to rule.²³ It may even be that scholars will try to rationalize law into a coherent order and infuse the old laws with the new conventions and directives.

The fourth community is that of the monarch. In this community the king has gained substantial internal control over his nation and is perhaps perceived as absolute and omnipotent. He may even have exclusive law-making powers. The law becomes perceived as the law of the monarch, distinct from other social-moral norms. The law may even be collected and unified into a code or a law-book in order to create a single law for the monarch's people. In that book, there may be clear rules for how the succession of rulers is regulated, how new law shall be introduced and how courts shall adjudicate disputes.

The fifth community is that of the nation state. The powers of the monarch have become the powers of the state and the people have been unified as people of particular nation states. The state has particular institutions that create and enforce law as well as adjudicate on disputes. The state, like the monarch, is not just externally independent but it also has a substantial control over internal affairs. The state gains a wide regulative power, not just over some matters, but also over matters that are perhaps not of utmost importance. The law becomes more detached or uprooted from social life. Law is perceived as those norms that the state backs up. It is distinct from other norms and it is seen as a rational or a coherent whole, a system. It is the state's legal system.

6.3 *The Plateau of Legality*

There are three important properties of law in these five communities in the just-so story. The first property is that law is grouped together into a body of rules. It is not a single or an isolated rule. The second property is that law is connected to institutions in the wide sense of the term. Furthermore law is linked to the community it is the law of and is shaped by the characteristics and structure of the community, including the community's political power.²⁴ The third property is that law regulates important social relations and organization of the community, including its institutions.

These properties of law can be formulated into a concept of law. That concept is a thin or an abstract one. I will call the concept a plateau or the

23 See e.g. Weber, Max, *Economy and Society*, chapter 1.

24 See in this context e.g. Raz, Joseph, *The Authority of Law. Essays on Law and Morality*, Oxford University Press, Oxford 1979, p. 99-101 and Grewe, Wilhelm G., *Epochs of International Law*, p. 7 and 29-39. See also Honoré, Tony, *Making Law Bind*, p. 2, where he says that "...all law is the law of groups or complex of groups ...", p. 33 where he says: "All law is the law of group of individuals or groups of individuals...", and p. 34 where he says: "The existence of a group is therefore a necessary and sufficient condition of the existence of law..." See also Raz, Joseph, *The Concept of a Legal System*, Oxford University Press, Oxford 1970, p. 212, who says that "...ultimately [the borders of a legal system] are dependent upon the nature and boundaries of the larger political system of which it is part." Finnis, John, *Philosophy of Law. Collected Essays. Volume IV*, Oxford University Press, Oxford 2011, p. 428-429, also talks about the society that a legal systems exists within.

Plateau of Legality. Having the features identified in the plateau makes something law in the philosophical sense or from the external viewpoint.²⁵ The Plateau of Legality is:

*Law is an institutional normative order of a community that is backed up by the strongest social-political power in that community and regulates fundamental social relations, affairs and organization of that community.*²⁶

These properties are abstract or thin. They need to be fleshed out in light of particular social-cultural circumstances. Because such circumstances are different, the properties of the plateau can be fleshed out differently and take different shapes. There are two important variables shaping law leading to the conclusion that examples of law have important differences and take different forms. Firstly, law is shaped by the structure and characteristics of the community, including its institutions and the social-political power that backs it up. Secondly, law is shaped by the social-historical ideas about law in a particular community. An example of the former variable is that if there is a comprehensive, strong and highly formal social-political power that backs up law, law will get the features of that social-political power and its institutions. The modern nation state could be mentioned in this context. The law of the state is shaped by the characteristics and structure of the state, including its institutions. If the social-political power is more informal, law will get those features. Here, tribal communities and their laws can be mentioned. The institutions of a tribe may be less formal than those of the state. Tribal law may therefore be less comprehensive and structured than state law.

7 Applying the Plateau of Legality: A Legality Test

7.1 *The Nature of the Test*

When determining whether a candidate for law is ‘law’ it needs to be compared with the Plateau of Legality. The plateau is a *vague* and an *abstract concept*. When determining whether a candidate for law fits with the plateau, considerations derived from it need to be applied to the candidate. The process involves a *holistic and an evaluative judgment*. This has important implications for how the test is applied and what the results may look like.

First, a candidate for law is evaluated in light of each consideration separately. It can fit with a consideration to a different degree.²⁷ Second, the

25 See e.g. Kelsen, Hans, *Pure Theory of Law*, p. 31, who says: “A single norm is a valid legal norm, if it corresponds to the concept of ‘law’.

26 For this and next chapter see Shapiro, Scott J., *Legality*, p. 225. He says that law is ‘... a self-certifying compulsory planning organization whose aim is to solve moral problems that cannot be solved, or solved well through alternative forms of social ordering.’ He also says that the “...activity of social planning is shared, official, institutional, compulsory, self-certifying and has a moral aim.”

candidate is evaluated in light of all the considerations taken together, i.e. holistically. It can fit with one consideration poorly, but because it fits well with the rest it still counts as law. Finally, in light of the foregoing evaluation, it is asked whether there is a *sufficient relationship* to the plateau. The concept is called a plateau because all laws need to have a sufficient basis in it. If a candidate for law fits well with the considerations, it is law (in the philosophical sense). If it fits poorly with the considerations, it is not law (in the philosophical sense).

The idea of necessary and/or sufficient properties of law must be understood in light of the nature of the concept and the test. It is vague and abstract, but does not furnish fixed criteria that can almost mechanically be matched with candidates for law. Instead the focus is on whether there is a sufficient relationship to the plateau. The conclusion is based on a holistic and an evaluative *judgment*.

It should be noted that the plateau is biased towards central cases of law. The reason for that is that the properties of the plateau were chosen in light of central cases of law throughout history in the *just-so story*.

7.2 *Other Kinds of Things Than Law*

Before continuing, it is good to keep in mind what kinds of things are not law (in the philosophical sense) and need to be distinguished from it or at least it is debatable whether they are law.

Firstly, there are *authorities that give (binding) orders*. A parent, a boss or a commander in the military can give his child, an employee or a subordinate a command. These commands are not law and need to be distinguished from it.

Secondly, there are many different kinds of *games*. Examples are sports, chess and hide and seek. Games have rules that must be followed. Some games, like some sports, may be formal and have institutions that lay down rules, enforce them and adjudicate on disputes. Games are not law and need to be distinguished from it.

Thirdly, there are *moral and social norms*, including etiquette and manners. They can tell us how we should behave. At least many of these norms are not law and need to be distinguished from it.

Fourthly, there are *norms of various associations and institutions*. Examples are a law of a corporation and law of a religious institution. It can be debated whether these norms are law (in the philosophical sense).

27 See e.g. Shapiro, Scott J., *Legality*, p. 223, who says that the features of law are a matter of degree, Raz, Joseph, *The Authority of Law*, p. 116, says: "The general traits which mark a system as legal one are several and each of them admits, in principle of various degrees. ", Fuller, Lon. L., *The Morality of Law. Revised Edition*, Yale University Press, New Haven 1969, p. 131, says there is no one point where a community gets a legal system, On p. 122, he says that the "...truth is that there are degrees of success...", Raz, Joseph, *The Concept of a Legal System*, p. 211, says that legal systems may be "...vague and imprecise along ... [the] border."

7.3 *Six Considerations for Identifying Law*

In this paper, the considerations derived from the Plateau of Legality and how they can be used to distinguish law from other kinds of things, will only be briefly discussed. The first four considerations are directly based on the plateau, but the last two are derivative. The six considerations are: (1) Law is an *institutional normative order*. (2) Law is a normative order of a *community (group)*. (3) Law is *backed up by the strongest social-political power* of the community. (4) Law *regulates fundamental social relations and community-organization*. (5) Law is or claims to be *obligatory, public and supreme*. (6) Law purports to have the aim of *creating or creates the conditions of civility*. Let us now view these considerations one by one.

(1) Law is an *institutional normative order*.

Law is a normative order.²⁸ By that is meant an order of norms and other things that have some cohesiveness or interrelation.²⁹ The word ‘system’ may be too strong to account for all laws, but when the cohesiveness and coherence of the norms reaches a certain level, there is a legal system in place.³⁰

Law is also institutionalized.³¹ There are some institutions that have some role in applying the norms.³² They can be both formal and informal. What institutions are relevant? That depends on the type of community and the strongest social-political power in it. The relevant institutions are the institutions of the group or the community in question and those are (usually) backed up by the strongest social-political power in it. In case of the nation state, the relevant institutions are those of the state. In case of the tribe it may be a chief or the elders.

28 See e.g. Kelsen, Hans, *Pure Theory of Law*, p. 43, who says that law is an “normative coercive order”, Raz, Joseph, *The Authority of Law*, p. 42, 44 and 86. On the last page he says “...it is an essential feature of legal systems that they are institutional, normative systems.”, Raz, Joseph, *The Concept of a Legal System*, p. 3, says that the three most general and important features of a legal system are that it is ‘normative, institutionalized and coercive.’

29 McCormick, Neil, *Institutions of Law*, p. 1.

30 See e.g. Raz, Joseph, *The Concept of a Legal System*, p. 141, who says that there needs to be “...a minimum degree of complexity”. On page 183, he says that “...legal systems should be regarded as intricate webs of interconnected laws.” Honoré, Tony, *Making Law Bind*, p. 40-46, speaks of “interlocking prescriptions”.

31 Raz, Joseph, *The Authority of Law*, p. 42, 44 and 86. On the last page he says: “... it is an essential feature of legal systems that they are institutional, normative systems”., Raz, Joseph, *The Concept of a Legal System*, p. 3, says that the three most general and important features of a legal system are that it is “normative, institutionalized and coercive.”, Honoré, Tony, *Making Law Bind*, p. 20-21, 46-50 and 68, Hart, H.L.A., *The Concept of Law*, p. 84. McCormick, Neil, *Rhetoric and The Rule of Law*, p. 23, speaks about the importance of decision-making authority.

32 See e.g. Raz, Joseph, *The Concept of a Legal System*, p. 192-193, and Raz, Joseph, *The Authority of Law*, p. 44, 105, 111 and 115.

This consideration can help to distinguish law from things that are not normative or do not form an order. It can also be helpful in distinguishing law from normative orders that are not institutionalized, such as critical and conventional morality, many games and social norms. Other normative orders than law can be institutionalized, such as the boy scouts, religious institutions and many associations. It is debateable whether they are laws.

(2) Law is a normative order *of a community (group)*.

Law cannot be seen in isolation from the community or group it exists within or is the law of. It is created, practiced and understood by groups of legal officials and other community members.³³ Law (partly) constitutes and is constituted by the group.³⁴

The community or group needs to be of the *right kind*.³⁵ Not any community will do. This relates to other considerations of the plateau. The relevant communities might be, for example, a family, a tribe, a village, a city, a province, a state, a union of states and the world. A group can be, for instance, an association, such as a club, or people that come together to play a game. These kinds of groups are not necessarily of the right kind. A group must be viewed in the context of other groups its members may belong to. Groups that play games are (often) a part of a wider community that is backed up by the strongest social-political power of the wider group, such as the nation state. Members of these groups usually do not live their lives or a meaningful part of it within the group that plays a game and the group does not regulate fundamental social relations or purports to have the aim of creating the conditions of civility.

This consideration can help to distinguish law from games and many authorities that give binding orders as well as norms of various institutions and associations that are not groups of the right kind.

(3) Law is *backed up by the strongest social-political power of a community (group)*.

33 Shapiro, Scott J., *Legality*, p. 208 and Dickson, Julie “Towards a Theory of European Union Legal Systems” in *Philosophical Foundations of European Union Law*, Oxford University Press, Oxford 2012, p. 40.

34 For an account of social groups, see N.W. Barber, *The Constitutional State*, Oxford University Press, Oxford 2011, p. 25-33 and 58-74.

35 See in this context Finnis, John, *Natural Law and Natural Rights*, p. 260, who says: “The central case of law and legal system is the law and legal system of a complete community...” See also Raz, Joseph, *The Authority of Law*, p. 116, who says: “Legal systems differ from other institutionalized systems primarily by their relations to other institutionalized systems in force in the same society ... They are the “... most important institutionalized systems governing human in society.”

There is a link between law and political power. The relevant political power is (usually) the strongest social-political power in the community.³⁶ Today that is often concentrated in the nation state. The community must have some degree of independence and have ‘space’ where it has the power to regulate itself and its members. This relates to a group needing to be of the right kind.

This consideration can help to distinguish law from other phenomena, such as parental authority, games, associations such as the boy scouts, various corporations and religious institutions. To be sure, some of them may yield tremendous political power. However, it is unclear that they yield the strongest social-political power in the community (at least in many nation states). How they yield it can also matter. A large corporation may be powerful but it tries to influence the laws of a nation state and it is the nation state that backs up the legal system and regulates the corporation. Furthermore, the political power of a corporation may not be over social relations in general or the social affairs of utmost importance. Finally, the social context can also matter. Some institutions, such as some religious institutions, may come close to having or have laws, especially in the right social context. An example of that is the church in the middle ages when it was a dominant political power in a community.

(4) *Law regulates fundamental social relations and community-organization.*

Among the social relations that are of utmost importance are marriage and other family relations, contract and other business relations, core prohibitive rules, such as the ban on killing, stealing and raping, and other norms of conduct.

Fundamental social relations are linked to the consideration of law’s role in creating and maintaining the conditions of civility. They are important for the group members to be able to live their lives within a community with other group members. The social relations that law regulates can be between members of different sub-groups.³⁷ Law can therefore contribute to the cohesiveness of the overarching group by binding the sub-groups together with the strings of law that cut across them.³⁸ Law is in this sense the inter-group norms that reflect the strongest social-political power of the overarching group. Law thus has characteristics of public or shared norms. That can have

36 See e.g. Raz, Joseph *The Authority of Law*, p. 99, where he says that “...the identity of a legal system is bound up with that of the state...” and p. 100, where he says that a legal system is only a part of a political system, See also Honoré, Tony *Making Law Bind*, p. 11, where he says: “When groups come into conflict, the group that can force others to conform to its requirements attracts compliance. Of the various groups to which we belong, sovereign states have assembled the greatest concentration of force.” On page 12, he says: “But in view of [the state’s] relative effectiveness it is no surprise that the state’s official system has come to be marked by a special term: *law*.”

37 Legal systems can also, as Raz, Joseph, *The Authority of Law*, at 149, says: “...recognize and enforce many rules which are not part of the system.”

38 This is based on Durkheim, Émile, *The Division of Labor in Society*, Free Press, New York 1997, mainly book 1, theory about the function of law in society. This is also based on the idea that sharing law keeps the peace which has roots at least in Nordic law.

implications, for instance, for interpretation of law. It should be interpreted as public or shared norms and not from a strictly personal perspective.³⁹ Law also regulates the community, who are members of it, what are its powers, its institutions and their roles.

This consideration can help to distinguish law from institutional normative orders that do not regulate fundamental social relations, such as many associations and clubs.

(5) Law is or claims to be *public, obligatory and supreme*.

The other considerations indicate that law is in some sense, firstly, binding, obligatory, entrenched or compulsory.⁴⁰ Secondly, public or shared. And thirdly, supreme, superior, trumps other norms or independent.⁴¹ This is because law is the shared inter-group norms of the strongest social political-power in the community. Without these characteristics it would be at least more difficult for law to unite sub-groups and cut across their regulatory spheres.

This consideration can help to distinguish law from phenomena, such as games, etiquette, social norms and various associations that are in some sense 'private' and operate within the larger group and its laws.

(6) Law purports to or does create the *conditions of civility*.

At this time I am uncertain about the last consideration. It is meant to meet the perceived truth that law has a moral property. It might be that law does not have a particular moral property and it might also be that if it does, it is a different one from the one discussed here.

If law has or purports⁴² to have a moral aim or a function, it is to create and maintain the conditions of civility.⁴³ That means the creation of the foundation

39 Dworkin, Ronald, *Law's Empire*, p. 87-90, on the other hand, says that a judge must interpret the law in light of his own moral conviction.

40 Raz, Joseph, *The Authority of Law*, p. 3, talks about the coercive feature of law, Kelsen, Hans, *Pure Theory of Law*, p. 43, describes law as a "normative coercive order".

41 This links to the features that Hart, H.L.A., *The Concept of Law*, p. 24, identifies, i.e. law is supreme and independent, and Raz, Joseph, *The Authority of law*, p. 116-119, i.e. legal systems are supreme, comprehensive and open systems.

42 In accordance with tenets of legal positivism, Shapiro, Scott J., *Legality*, p. 187, says "...the legal point of view always purports to represent the moral point of view, even when it fails to do so." On page 186, he says that this is the "...perspective of a certain normative theory."

43 This condition is largely based on and inspired by Immanuel Kant and Kantian theories, see mainly: Eleftheriadis, Pavlo, *Legal Rights*, Oxford University Press, Oxford 2008, p. 51-56, Ripstein, Arthur, *Force and Freedom: Kant's Legal and Political Philosophy*, Harvard University Press, Cambridge 2009, Shapiro, Scott J., *Legality*, p. 152-175 and 213, Fuller, Lon L., *The Morality of Law*, p. 9, but he says that "...our whole legal system represents a complex of rules designed to rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity.", Kelsen, Hans, *Pure Theory of Law*, p. 37, talks about: "The aim of collective security is peace..."

and framework for us to live together in a society and share projects and have projects of our own. In complex societies, there are ongoing moral problems 'whose solutions are complex, contentious, or arbitrary',⁴⁴ such as of coordination, cooperation, *determinatio* and adapting to changing circumstances.⁴⁵ The conditions of civility are a solution to these moral problems. Law is a part of the conditions of civility and it has an important function in holding complex societies together by establishing a common framework for the members of a community to pursue common and personal goals or goods in a society.

Law is a fairly unique solution in comparison with other social mechanisms that can be deficient in solving the abovementioned moral problems. Also it has certain qualities relating to the rule of law that make it a desirable solution.⁴⁶ Furthermore, a political power, such as a state, exercises vital functions for the conditions of civility through law. It determines our responsibilities to each other, gives us a standing and an access to institutions, settles disputes and provides some assurance that others will conform to its scheme as well. In other words, law contributes the cohesiveness of a community⁴⁷ and it helps us to organize, cooperate and coordinate,⁴⁸ including constituting the group and determining who are its members. This relates to the consideration that law is public, obligatory and supreme. In order for law to bind members of a community together, by letting them share norms, law needs to have those characteristics.

If this consideration is relevant, then it can help to distinguish law from other phenomena, such as parenting, games, many associations and normative orders that do not purport to have or have this moral aim or function.

The fourth truth in section three, was that law has a certain value or quality. This can be because laws are the norms of the strongest social-political power in a community of the right kind, they regulate fundamental social matters, they are public, obligatory and supreme and important for the conditions of civility. Lastly, it may also be inked to specific cultural ideas about law, such as the rule of law.

8 Concluding Remarks

As was mentioned before, cases that fit nicely with the considerations derived from the Plateau of Legality are central cases of law. In section three, it was claimed that state law and international law are today central cases of law.

44 Shapiro, Scott J., *Legality*, p. 170 and 172.

45 See e.g. Shapiro, Scott J., *Legality*, p. 163-175 and Finnis, John, *Philosophy of Law*, p. 61, 70.

46 Shapiro, Scott J., *Legality*, p. 171 and Finnis, John, *Natural Law and Natural Rights*, p. 63, 71.

47 See Durkheim, Émile, *The Division of Labor in Society*, book 1.

48 See e.g. Finnis, John, *Natural Law and Natural Rights*, 231-260 and Raz, Joseph, *The Authority of Law*, p. 163-180.

Cases that fit poorly with the considerations are not cases of law (in the philosophical sense). Cases that lie in between those are borderline cases.

Law of a corporation is a borderline case. It fits well with some considerations of the Plateau of Legality. Corporations can have an institutional normative order. And they are a group and can have some social-political power. They do not fit as well with other considerations. For example, there are good reasons to doubt that a corporation is the right kind of a group or community or social-political power, that it regulates fundamental social relations and purports to have the aim of creating or creates the conditions of civility. It can also be doubted that a corporation regulates itself in a sufficiently independent manner since the norms of a wider group have important implications for it. Because a law of a corporation fits well with some of the considerations, it makes sense to call it 'law'. It has some resemblance with central cases of law. In the end, the question is whether there is a sufficient relationship to the Plateau of Legality. That is *a matter of judgment* and people may disagree.

It is not of crucial importance whether something is called 'law' or not.⁴⁹ The important thing is to be aware of what features of the plateau or the considerations derived from it, the candidate for law has and what features it lacks. It should be remembered that candidates for law can have *more or less* of the features of the plateau. It is a matter of degree.⁵⁰ It is no wonder since the plateau is a vague and an abstract concept. This entails that a candidate for law may have *more or less of the value or quality* associated with law. In the end, we need to be aware of exactly what we are talking about when we call something 'law'. If it is not a central case of law, it may lack important features of the plateau or have less of them. It may also have different features from central cases of law.

49 See e.g. Raz, Joseph, *The Authority of Law*, p. 116, who says: "It would be arbitrary and pointless to try to fix a precise borderline between normative systems which are legal systems and those that are not ... [it is] best to admit problematic credentials ..."

50 See e.g. Shapiro, Scott J., *Legality*, p. 223, who says that there can be degrees of legality.