CONTENTS

II

LAWS, COMMANDS, AND ORDERS

1. VARIETIES OF IMPERATIVES

THE clearest and the most thorough attempt to analyse the concept of law in terms of the apparently simple elements of commands and habits, was that made by Austin in the *Province of Jurisprudence Determined.* In this and the next two chapters we shall state and criticize a position which is, in substance, the same as Austin's doctrine but probably diverges from it at certain points. For our principal concern is not with Austin but with the credentials of a certain type of theory which has perennial attractions whatever its defects may be. So we have not hesitated where Austin's meaning is doubtful or where his views seem inconsistent to ignore this and to state a clear and consistent position. Moreover, where Austin merely gives hints as to ways in which criticisms might be met, we have developed these (in part along the lines followed by later theorists such as Kelsen) in order to secure that the doctrine we shall consider and criticize is stated in its strongest form.

In many different situations in social life one person may express a wish that another person should do or abstain from doing something. When this wish is expressed not merely as a piece of interesting information or deliberate self-revelation but with the intention that the person addressed should conform to the wish expressed, it is customary in English and many other languages, though not necessary, to use a special linguistic form called the *imperative mood*, 'Go home!' 'Come here!' 'Stop!' 'Do not kill him!' The social situations in which we thus address others in imperative form are extremely diverse; yet they include some recurrent main types, the importance of which is marked by certain familiar classifications. 'Pass the salt, please', is usually a mere *request*, since normally it is addressed by the speaker to one who is able to render him a service, and there is no suggestion either of any great urgency or any hint of what may follow on failure to comply. 'Do not

kill me', would normally be uttered as a *plea* where the speaker is at the mercy of the person addressed or in a predicament from which the latter has the power to release him. 'Don't move', on the other hand, may be a *warning* if the speaker knows of some impending danger to the person addressed (a snake in the grass) which his keeping still may avert.

The varieties of social situation in which use is characteristically, though not invariably, made of imperative forms of language are not only numerous but shade into each other; and terms like 'plea', 'request', or 'warning', serve only to make a few rough discriminations. The most important of these situations is one to which the word 'imperative' seems specially appropriate. It is that illustrated by the case of the gunman who says to the bank clerk, 'Hand over the money or I will shoot.' Its distinctive feature which leads us to speak of the gunman *ordering* not merely *asking*, still less *pleading with* the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard as harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gunman succeeds, we would describe him as having *coerced* the clerk, and the clerk as in that sense being in the gunman's power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman *ordered* the clerk to hand over the money and the clerk obeyed, but it would be somewhat misleading to say that the gunman *gave an order* to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door.

We need not here concern ourselves with these subtleties. Although a suggestion of authority and deference to authority may often attach to the words 'order' and 'obedience', we shall use the expressions 'orders backed by threats' and 'coercive orders' to refer to orders which, like the gunman's, are supported only by threats, and we shall use the words 'obedience' and 'obey' to include compliance with such orders. It is, however, important to notice, if only because of the great influence on jurists of Austin's definition of the notion of a

command, that the simple situation, where threats of harm and nothing else is used to force obedience, is *not* the situation where we naturally speak of 'commands'. This word, which is not very common outside military contexts, carries with it very strong implications that there is a relatively stable hierarchical organization of men, such as an army or a body of disciples in which the commander occupies a position of pre-eminence. Typically it is the general (not the sergeant) who is the commander and gives commands, though other forms of special pre-eminence are spoken of in these terms, as when Christ in the New Testament is said to command his disciples. More important—for this is a crucial distinction between different forms of 'imperative'—is the point that it need not be the case, where a command is given, that there should be a latent threat of harm in the event of disobedience. To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.

It is obvious that the idea of a command with its very strong connection with authority is much closer to that of law than our gunman's order backed by threats, though the latter is an instance of what Austin, ignoring the distinctions noticed in the last paragraph, misleadingly calls a command. A command is, however, too close to law for our purpose; for the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is. We cannot therefore profitably use, in the elucidation of law, the notion of a command which also involves it. Indeed it is a virtue of Austin's analysis, whatever its defects, that the elements of the gunman situation are, unlike the element of authority, not themselves obscure or in need of much explanation; and hence we shall follow Austin in an attempt to build up from it the idea of law. We shall not, however, hope, as Austin did, for success, but rather to learn from our failure.

2. LAW AS COERCIVE ORDERS

Even in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something. A policeman orders

a particular motorist to stop or a particular beggar to move on. But these simple situations are not, and could not be, the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do. Instead such particularized forms of control are either exceptional or are ancillary accompaniments or reinforcements of general forms of directions which do not name, and are not addressed to, particular individuals, and do not indicate a particular act to be done. Hence the *standard* form even of a criminal statute (which of all the varieties of law has the closest resemblance to an order backed by threats) is general in two ways; it indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it. Official individuated face-to-face directions here have a secondary place: if the primary general directions are not obeyed by a particular individual, officials may draw his attention to them and demand compliance, as a tax inspector does, or the disobedience may be officially identified and recorded and the threatened punishment imposed by a court.

Legal control is therefore primarily, though not exclusively, control by directions which are in this double sense *general.* This is the first feature which we must add to the simple model of the gunman if it is to reproduce for us the characteristics of law. The range of persons affected and the manner in which the range is indicated may vary with different legal systems and even different laws. In a modern state it is normally understood that, in the absence of special indications widening or narrowing the class, its general laws extend to all persons within its territorial boundaries. In canon law there is a similar understanding that normally all the members of the church are within the range of its law except when a narrower class is indicated. In all cases the range of application of a law is a question of interpretation of the particular law aided by such general understandings. It is here worth noticing that though jurists, Austin among them, sometimes speak of laws being *addressed*[1] to classes of persons this is misleading in

[1] 'Addressed to the community at large', Austin, above, p. 1 n. 4 at p. 22.

suggesting a parallel to the face-to-face situation which really does not exist and is not intended by those who use this expression. Ordering people to do things is a form of communication and does entail actually 'addressing' them, i.e. attracting their attention or taking steps to attract it, but making laws for people does not. Thus the gunman by one and the same utterance, 'Hand over those notes', expresses his wish that the clerk should do something and actually *addresses* the clerk, i.e. he does what is normally sufficient to bring this expression to the clerk's attention. If he did not do the latter but merely said the same words in an empty room, he would not have addressed the clerk at all and would not have *ordered* him to do anything: we might describe the situation as one where the gunman merely said the words, 'Hand over those notes'. In this respect making laws differs from ordering people to do things, and we must allow for this difference in using this simple idea as a model for law. It may indeed be desirable that laws should as soon as may be after they are made, be brought to the attention of those to whom they apply. The legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. But laws may be complete as laws before this is done, and even if it is not done at all. In the absence of special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby. What is usually intended by those who speak of laws being 'addressed' to certain persons, is that these are the persons to whom the particular law applies, i.e. whom it requires to behave in certain ways. If we use the word 'addressed' here we may both fail to notice an important difference between the making of a law and giving a face-to-face order, and we may confuse the two distinct questions: 'To whom does the law apply?' and 'To whom has it been published?'

Besides the introduction of the feature of generality a more fundamental change must be made in the gunman situation if we are to have a plausible model of the situation where there is law. It is true there is a sense in which the gunman has an ascendancy or superiority over the bank clerk; it lies

in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do. There is no other form of relationship of superiority and inferiority between the two men except this short-lived coercive one. But for the gunman's purposes this may be enough; for the simple face-to-face order 'Hand over those notes or I'll shoot' dies with the occasion. The gunman does not issue to the bank clerk (though he may to his gang of followers) *standing orders* to be followed time after time by classes of persons. Yet laws pre-eminently have this 'standing' or persistent characteristic. Hence if we are to use the notion of orders backed by threats as explaining what laws are, we must endeavour to reproduce this enduring character which laws have.

We must therefore suppose that there is a general belief on the part of those to whom the general orders apply that disobedience is likely to be followed by the execution of the threat not only on the first promulgation of the order, but continuously until the order is withdrawn or cancelled. This continuing belief in the consequences of disobedience may be said to keep the original orders alive or 'standing', though as we shall see later there is difficulty in analysing the persistent quality of laws in these simple terms. Of course the concurrence of many factors which could not be reproduced in the gunman situation may, in fact, be required if such a general belief in the continuing likelihood of the execution of the threat is to exist: it may be that the power to carry out threats attached to such standing orders affecting large numbers of persons could only in fact exist, and would only be thought to exist, if it was known that some considerable number of the population were prepared both themselves to obey voluntarily, i.e. independently of fear of the threat, and to co-operate in the execution of the threats on those who disobeyed.

Whatever the basis of this general belief in the likelihood of the execution of the threats, we must distinguish from it a further necessary feature which we must add to the gunman situation if it is to approximate to the settled situation in which there is law. We must suppose that, whatever the motive, most of the orders are more often obeyed than disobeyed by most of those affected. We shall call this here, following Austin,

'a general habit of obedience' and note, with him, that like many other aspects of law it is an essentially vague or imprecise notion. The question how many people must obey how many such general orders, and for how long, if there is to be law, no more admits of definite answers than the question how few hairs must a man have to be bald. Yet in this fact of general obedience lies a crucial distinction between laws and the original simple case of the gunman's order. Mere temporary ascendancy of one person over another is naturally thought of as the polar opposite of law, with its relatively enduring and settled character, and, indeed, in most legal systems to exercise such short-term coercive power as the gunman has would constitute a criminal offence. It remains indeed to be seen whether this simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats is really enough to reproduce the settled character and continuity which legal systems possess.

The concept of general orders backed by threats given by one generally obeyed, which we have constructed by successive additions to the simple situation of the gunman case, plainly approximates closer to a penal statute enacted by the legislature of a modern state than to any other variety of law. For there are types of law which seem prima facie very unlike such penal statutes, and we shall have later to consider the claim that these other varieties of law also, in spite of appearances to the contrary, are really just complicated or disguised versions of this same form. But if we are to reproduce the features of even a penal statute in our constructed model of general orders generally obeyed, something more must be said about the person who gives the orders. The legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems which we have not yet reproduced in our simple model. These two notions are not as simple as they may appear, but what, on a common-sense view (which may not prove adequate) is essential to them, may be expressed as follows. English law, French law, and the law of any modern country regulates the conduct of populations inhabiting territories with fairly well-defined geographical limits. Within the territory of each country there may be many different persons or bodies of

persons giving general orders backed by threats and receiving habitual obedience. But we should distinguish some of these persons or bodies (e.g. the LCC or a minister exercising what we term powers of delegated legislation) as *subordinate* lawmakers in contrast to the Queen in Parliament who is supreme. We can express this relationship in the simple terminology of habits by saying that whereas the Queen in Parliament in making laws obeys no one habitually, the subordinate lawmakers keep within limits statutorily prescribed and so may be said in making law to be agents of the Queen in Parliament. If they did not do so we should not have one system of law in England but a plurality of systems; whereas in fact just because the Queen in Parliament is supreme in relation to all within the territory in this sense and the other bodies are not, we have in England a single system in which we can distinguish a hierarchy of supreme and subordinate elements.

The same negative characterization of the Queen in Parliament, as *not* habitually obeying the orders of others, roughly defines the notion of *independence* which we use in speaking of the separate legal systems of different countries. The supreme legislature of the Soviet Union is not in the habit of obeying the Queen in Parliament, and whatever the latter enacted about Soviet affairs (though it would constitute part of the law of England) would not form part of the law of the USSR. It would do so only if the Queen in Parliament were habitually obeyed by the legislature of the USSR.

On this simple account of the matter, which we shall later have to examine critically, there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons the sovereign, the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.

III

THE VARIETY OF LAWS

IF we compare the varieties of different kinds of law to be found in a modern system such as English Law with the simple model of coercive orders constructed in the last chapter, a crowd of objections leap to mind. Surely not all laws order people to do or not to do things. Is it not misleading so to classify laws which confer powers on private individuals to make wills, contracts, or marriages, and laws which give powers to officials, e.g. to a judge to try cases, to a minister to make rules, or a county council to make by-laws? Surely not all laws are enacted nor are they all the expression of someone's desire like the general orders of our model. This seems untrue of custom which has a genuine though modest place in most legal systems. Surely laws, even when they are statutes deliberately made, need not be orders given only to *others*. Do not statutes often bind the legislators themselves? Finally, must enacted laws to be laws really express any legislator's actual desires, intentions, or wishes? Would an enactment duly passed not be law if (as must be the case with many a section of an English Finance Act) those who voted for it did not know what it meant?

These are some of the most important of many possible objections. Plainly some modification of the original simple model will be necessary to deal with them and, when they have all been accommodated, we may find that the notion of general orders backed by threats has been transformed out of recognition.

The objections we have mentioned fall into three main groups. Some of them concern the *content* of laws, others their *mode of origin*, and others again their *range of application*. All legal systems, at any rate, *seem* to contain laws which in respect of one or more of these three matters diverge from the model of general orders which we have set up. In the rest of this chapter we shall consider separately these three types of objection. We shall leave to the next chapter a more fundamental criticism

that apart from these objections on the score of content, mode of origin, and range of application, the whole conception of a supreme and independent sovereign habitually obeyed, on which the model rests, is misleading, since there is little in any actual legal system which corresponds to it.

1. THE CONTENT OF LAWS

The criminal law is something which we either obey or disobey and what its rules require is spoken of as a 'duty'. If we disobey we are said to 'break' the law and what we have done is legally 'wrong', a 'breach of duty', or an 'offence'. The social function which a criminal statute performs is that of setting up and defining certain kinds of conduct as something to be avoided or done by those to whom it applies, irrespective of their wishes. The punishment or 'sanction' which is attached by the law to breaches or violations of the criminal law is (whatever other purpose punishment may serve) intended to provide one motive for abstaining from these activities. In all these respects there is at least a strong analogy between the criminal law and its sanctions and the general orders backed by threats of our model. There is some analogy (notwithstanding many important differences) between such general orders and the law of torts, the primary aim of which is to provide individuals with compensation for harm suffered as the result of the conduct of others. Here too the rules which determine what types of conduct constitute actionable wrongs are spoken of as imposing on persons, irrespective of their wishes, 'duties' (or more rarely 'obligations') to abstain from such conduct. This conduct is itself termed a 'breach of duty' and the compensation or other legal remedies a 'sanction'. But there are important classes of law where this analogy with orders backed by threats altogether fails, since they perform a quite different social function. Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain

conditions, structures of rights and duties within the coercive framework of the law.

The power thus conferred on individuals to mould their legal relations with others by contracts, wills, marriages, &c., is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats. The radical difference in function between laws that confer such powers and the criminal statute is reflected in much of our normal ways of speaking about this class of laws. We may or may not 'comply' in making our will with the provision of s. 9 of the Wills Act, 1837, as to the number of witnesses. If we do not comply the document we have made will not be a 'valid' will creating rights and duties; it will be a 'nullity' without legal 'force' or 'effect'. But, though it is a nullity our failure to comply with the statutory provision is not a 'breach' or a 'violation' of any obligation or duty nor an 'offence' and it would be confusing to think of it in such terms.

If we look into the various legal rules that confer legal powers on private individuals we find that these themselves fall into distinguishable kinds. Thus behind the power to make wills or contracts are rules relating to *capacity* or minimum personal qualification (such as being adult or sane) which those exercising the power must possess. Other rules detail the manner and form in which the power is to be exercised, and settle whether wills or contracts may be made orally or in writing, and if in writing the form of execution and attestation. Other rules delimit the variety, or maximum or minimum duration, of the structure of rights and duties which individuals may create by such acts-in-the-law. Examples of such rules are those of public policy in relation to contract, or the rules against accumulations in wills or settlements.

We shall consider later the attempts made by jurists to assimilate those laws which provide facilities or powers and say, 'If you wish to do this, this is the way to do it' to the criminal laws which, like orders backed by threats, say, 'Do this whether you wish to or not.' Here, however, we shall consider a further class of laws which also confer legal powers but, in contrast to those just discussed, the powers are of a public or official rather than a private nature. Examples of

these are to be found in all the three departments, judicial, legislative, and administrative, into which government is customarily though vaguely divided.

Consider first those laws which lie behind the operation of a law court. In the case of a court some rules specify the subject-matter and content of the judge's jurisdiction or, as we say, give him 'power to try' certain types of case. Other rules specify the manner of appointment, the qualifications for, and tenure of judicial office. Others again will lay down canons of correct judicial behaviour and determine the procedure to be followed in the court. Examples of such rules, forming something like a judicial code, are to be found in the County Courts Act, 1959, the Court of Criminal Appeal Act, 1907, or Title 28 of the United States Code. It is salutary to observe the variety of provisions made in these statutes for the constitution and normal operation of a law court. Few of these seem at first sight to be orders given to the judge to do or abstain from doing anything; for though of course there is no reason why the law should not also by special rules prohibit a judge under penalty from exceeding his jurisdiction or trying a case in which he has a financial interest, these rules imposing such legal duties would be additional to those conferring judicial powers on him and defining his jurisdiction. For the concern of rules conferring such powers is not to deter judges from improprieties but to define the conditions and limits under which the court's decisions shall be valid.

It is instructive to examine in a little detail a typical provision specifying the extent of a court's jurisdiction. We may take as a very simple example the section of the County Courts Act, 1959, as amended, which confers jurisdiction on the county courts to try actions for the recovery of land. Its language which is very remote from that of 'orders', is as follows:

> A county court shall have jurisdiction to hear and determine any action for the recovery of land where the net annual value for rating of the land in question does not exceed one hundred pounds.[1]

If a county court judge exceeds his jurisdiction by trying a case for the recovery of land with an annual value greater

[1] Section 48 (1).

than £100 and makes an order concerning such land, neither he nor the parties to the action commit an *offence*. Yet the position is not quite like that which arises when a private person does something which is a 'nullity' for lack of compliance with some condition essential for the valid exercise of some legal power. If a would-be testator omits to sign or obtain two witnesses to his will, what he writes has no legal status or effect. A court's order is not, however, treated in this way even if it is plainly one outside the jurisdiction of the court to make. It is obviously in the interests of public order that a court's decision should have legal authority until a superior court certifies its invalidity, even if it is one which the court should not legally have given. Hence, until it is set aside on appeal as an order given in excess of jurisdiction, it stands as a legally effective order between the parties which will be enforced. But it has a legal defect: it *is liable* to be set aside or 'quashed' on appeal because of the lack of jurisdiction. It is to be noted that there is an important difference between what is ordinarily spoken of in England as a 'reversal' by a superior court of an inferior court's order and the 'quashing' of an order for lack of jurisdiction. If an order is reversed, it is because what the lower court has said either about the law applicable to the case or the facts, is considered wrong. But an order of the lower court which is quashed for lack of jurisdiction may be impeccable in both these respects. It is not *what* the judge in the lower court has said or ordered that is wrong, but *his* saying or ordering of it. He has purported to do something which he is not legally empowered to do though other courts may be so empowered. But for the complication that, in the interests of public order a decision given in excess of jurisdiction stands till quashed by a superior court, conformity or failure to conform to rules of jurisdiction is like conformity and failure to conform to rules defining the conditions for the valid exercise of legal powers by private individuals. The relationship between the conforming action and the rule is ill-conveyed by the words 'obey' and 'disobey', which are more apposite in the case of the criminal law where the rules are analogous to orders.

A statute conferring legislative power on a subordinate legislative authority similarly exemplifies a type of legal rule that

cannot, except at the cost of distortion, be assimilated to a general order. Here too, as in the exercise of private powers, conformity with the conditions specified by the rules conferring the legislative powers is a step which is like a 'move' in a game such as chess; it has consequences definable in terms of the rules, which the system enables persons to achieve. Legislation is an exercise of legal powers 'operative' or effective in creating legal rights and duties. Failure to conform to the conditions of the enabling rule makes what is done ineffective and so a nullity for this purpose.

The rules which lie behind the exercise of legislative powers are themselves even more various than those which lie behind the jurisdiction of a court, for provision must be made by them for many different aspects of legislation. Thus some rules specify the subject-matter over which the legislative power may be exercised; others the qualifications or identity of the members of the legislative body; others the manner and form of legislation and the procedure to be followed by the legislature. These are only a few of the relevant matters; a glance at any enactment such as the Municipal Corporations Act, 1882, conferring and defining the powers of an inferior legislature or rule-making body will reveal many more. The consequence of failure to conform to such rules may not always be the same, but there will always be some rules, failure to conform to which renders a purported exercise of legislative power a nullity or, like the decision of an inferior court, liable to be declared invalid. Sometimes a certificate that the required procedures have been followed may by law be made conclusive as to matters of internal procedure, and sometimes persons not qualified under the rules, who participate in legislative proceedings, may be liable to a penalty under special criminal rules making this an offence. But, though partly hidden by these complications, there is a radical difference between rules conferring and defining the manner of exercise of legislative powers and the rules of criminal law, which at least resemble orders backed by threats.

In some cases it would be grotesque to assimilate these two broad types of rule. If a measure before a legislative body obtains the required majority of votes and is thus duly passed, the voters in favour of the measure have not 'obeyed' the law

requiring a majority decision nor have those who voted against it either obeyed or disobeyed it: the same is of course true if the measure fails to obtain the required majority and so no law is passed. The radical difference in function between such rules as these prevents the use here of the terminology appropriate to conduct in its relation to rules of the criminal law.

A full detailed taxonomy of the varieties of law comprised in a modern legal system, free from the prejudice that all *must* be reducible to a single simple type, still remains to be accomplished. In distinguishing certain laws under the very rough head of laws that confer powers from those that impose duties and are analogous to orders backed by threats, we have made only a beginning. But perhaps enough has been done to show that some of the distinctive features of a legal system lie in the provision it makes, by rules of this type, for the exercise of private and public legal powers. If such rules of this distinctive kind did not exist we should lack some of the most familiar concepts of social life, since these logically presuppose the existence of such rules. Just as there could be no crimes or offences and so no murders or thefts if there were no criminal laws of the mandatory kind which do resemble orders backed by threats, so there could be no buying, selling, gifts, wills, or marriages if there were no power-conferring rules; for these latter things, like the orders of courts and the enactments of law-making bodies, just consist in the valid exercise of legal powers.

Nevertheless the itch for uniformity in jurisprudence is strong: and since it is by no means disreputable, we must consider two alternative arguments in favour of it which have been sponsored by great jurists. These arguments are designed to show that the distinction between varieties of law which we have stressed is superficial, if not unreal, and that 'ultimately' the notion of orders backed by threats is adequate for the analysis of rules conferring powers as well as for the rules of criminal law. As with most theories which have persisted long in jurisprudence there is an element of truth in these arguments. There certainly are points of resemblance between the legal rules of the two sorts which we have distinguished. In both cases actions may be criticized or assessed by reference to the rules as legally the 'right' or 'wrong' thing

to do. Both the power-conferring rules concerning the making of a will and the rule of criminal law prohibiting assault under penalty constitute *standards* by which particular actions may be thus critically appraised. So much is perhaps implied in speaking of them both as rules. Further it is important to realize that rules of the power-conferring sort, though different from rules which impose duties and so have some analogy to orders backed by threats, are always related to such rules; for the powers which they confer are powers to make general rules of the latter sort or to impose duties on particular persons who would otherwise not be subject to them. This is most obviously the case when the power conferred is what would ordinarily be termed a power to legislate. But, as we shall see, it is also true in the case of other legal powers. It might be said, at the cost of some inaccuracy, that whereas rules like those of the criminal law impose duties, power-conferring rules are recipes for creating duties.

Nullity as a sanction

The first argument, designed to show the fundamental identity of the two sorts of rule and to exhibit both as coercive orders, fastens on the 'nullity' which ensues when some essential condition for the exercise of the power is not fulfilled. This, it is urged, is like the punishment attached to the criminal law, a threatened evil or sanction exacted by law for breach of the rule; though it is conceded that in certain cases this sanction may only amount to a slight inconvenience. It is in this light that we are invited to view the case of one who seeks to enforce by law, as contractually binding, a promise made to him, and finds, to his chagrin, that, since it is not under seal and he gave no consideration for the promise, the written promise is legally a nullity. Similarly we are to think of the rule providing that a will without two witnesses will be inoperative, as moving testators to compliance with s. 9 of the Wills Act, just as we are moved to obedience to the criminal law by the thought of imprisonment.

No one could deny that there are, in some cases, these associations between nullity and such psychological factors as disappointment of the hope that a transaction will be valid. None the less the extension of the idea of a sanction

to include nullity is a source (and a sign) of confusion. Some minor objections to it are well known. Thus, in many cases, nullity may not be an 'evil' to the person who has failed to satisfy some condition required for legal validity. A judge may have no material interest in and may be indifferent to the validity of his order; a party who finds that the contract on which he is sued is not binding on him, because he was under age or did not sign the memorandum in writing required for certain contracts, might not recognize here a 'threatened evil' or 'sanction'. But apart from these trivialities, which might be accommodated with some ingenuity, nullity cannot, for more important reasons, be assimilated to a punishment attached to a rule as an inducement to abstain from the activities which the rule forbids. In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. But how could we consider in this light such desirable social activities as men making each other promises which do not satisfy legal requirements as to form? This is not like the conduct discouraged by the criminal law, something which the legal rules stipulating legal forms for contracts are designed to suppress. The rules merely withhold legal recognition from them. Even more absurd is it to regard as a sanction the fact that a legislative measure, if it does not obtain the required majority, fails to attain the status of a law. To assimilate this fact to the sanctions of the criminal law would be like thinking of the scoring rules of a game as designed to eliminate all moves except the kicking of goals or the making of runs. This, if successful, would be the end of all games; yet only if we think of power-conferring rules as designed to make people behave in certain ways and as adding 'nullity' as a motive for obedience, can we assimilate such rules to orders backed by threats.

The confusion inherent in thinking of nullity as similar to the threatened evil or sanctions of the criminal law may be brought out in another form. In the case of the rules of the criminal law, it is logically possible and might be desirable that there should be such rules even though no punishment or other evil were threatened. It may of course be argued that in that case they would not be *legal* rules; none the less, we

can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, and suppose the first to exist without the latter. We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it was designed to maintain. But we cannot logically make such a distinction between the rule requiring compliance with certain conditions, e.g. attestation for a valid will, and the so-called sanction of 'nullity'. In this case, if failure to comply with this essential condition did not entail nullity, the rule itself could not be intelligibly said to exist without sanctions even as a non-legal rule. The provision for nullity is *part* of this type of rule itself in a way which punishment attached to a rule imposing duties is not. If failure to get the ball between the posts did not mean the 'nullity' of not scoring, the scoring rules could not be said to exist.

The argument which we have here criticized is an attempt to show the fundamental identity of power-conferring rules with coercive orders by *widening* the meaning of a sanction or threatened evil, so as to include the nullity of a legal transaction when it is vitiated by non-compliance with such rules. The second argument which we shall consider takes a different, indeed an opposite, line. Instead of attempting to show that these rules are a species of coercive orders, it denies them the status of 'law'. To exclude them it *narrows* the meaning of the word 'law'. The general form of this argument, which appears in a more or less extreme form in different jurists, is to assert that what are loosely or in popular modes of expression referred to as complete rules of law, are really incomplete fragments of coercive rules which are the only 'genuine' rules of law.

Power-conferring rules as fragments of laws

In its extreme form this argument would deny that even the rules of the criminal law, in the words in which they are often stated, are genuine laws. It is in this form that the argument is adopted by Kelsen: 'Law is the primary norm which stipulates the sanction'.[1] There is no law prohibiting murder: there

[1] *General Theory of Law and State*, p. 63. See above, p. 2.

is only a law directing officials to apply certain sanctions in certain circumstances to those who do murder. On this view, what is ordinarily thought of as the content of law, designed to guide the conduct of ordinary citizens, is merely the antecedent or 'if-clause' in a rule which is directed not to them but to officials, and orders them to apply certain sanctions if certain conditions are satisfied. All genuine laws, on this view, are conditional orders to officials to apply sanctions. They are all of the form, 'If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y.'

By greater and greater elaboration of the antecedent or if-clauses, legal rules of every type, including the rules conferring and defining the manner of exercise of private or public powers, can be restated in this conditional form. Thus, the provisions of the Wills Act requiring two witnesses would appear as a common part of many different directions to courts to apply sanctions to an executor who, in breach of the provisions of the will, refuses to pay the legacies: 'if and only if there is a will duly witnessed containing these provisions and if . . . then sanctions must be applied to him.' Similarly, a rule specifying the extent of a court's jurisdiction would appear as a common part of the conditions to be satisfied before it applies any sanctions. So too, the rules conferring legislative powers and defining the manner and form of legislation (including the provisions of a constitution concerning the supreme legislature) can also be restated and exhibited as specifying certain common conditions on the fulfilment of which (among others) the courts are to apply the sanctions mentioned in the statutes. Thus, the theory bids us disentangle the substance from the obscuring forms; then we shall see that constitutional forms such as 'what the Queen in Parliament enacts is law', or the provisions of the American constitution as to the law-making power of Congress, merely specify the general conditions under which courts are to apply sanctions. These forms are essentially 'if-clauses', not complete rules: '*If* the Queen in Parliament has so enacted . . .' or '*if* Congress within the limits specified in the Constitution has so enacted . . .' are forms of conditions common to a vast number of directions to courts to apply sanctions or punish certain types of conduct.

This is a formidable and interesting theory, purporting to disclose the true, uniform nature of law latent beneath a variety of common forms and expressions which obscure it. Before we consider its defects it is to be observed that, in this extreme form, the theory involves a shift from the original conception of law as consisting of orders backed by threats of sanctions which are to be exacted when the orders are disobeyed. Instead, the central conception now is that of orders to officials to apply sanctions. On this view it is not necessary that a sanction be prescribed for the *breach* of every law; it is only necessary that every 'genuine' law shall direct the application of some sanction. So it may well be the case that an official who disregards such directions will not be punishable; and of course this is in fact often the case in many legal systems.

This general theory may, as we have said, take one of two forms, one less extreme than the other. In the less extreme form the original conception of law (which many find intuitively more acceptable) as orders backed by threats directed to ordinary citizens, among others, is preserved at least for those rules that, on a common-sense view, refer primarily to the conduct of ordinary citizens, and not merely to officials. The rules of the criminal law, on this more moderate view, are laws as they stand, and need no recasting as fragments of other complete rules; for they are already orders backed by threats. Recasting is, however, needed in other cases. Rules which confer legal powers on private individuals are, for this as for the more extreme theory, mere fragments of the real complete laws—the orders backed by threats. These last are to be discovered by asking: what persons does the law order to do things, subject to a penalty if they do not comply? When this is known the provisions of such rules as those of the Wills Act, 1837, in relation to witnesses, and other rules conferring on individuals powers and defining the conditions for valid exercise of them, may be recast as specifying some of the conditions under which ultimately such a legal duty arises. They will then appear as part of the antecedent or 'if-clause' of conditional orders backed by threats or rules imposing duties. 'If and only if a will has been signed by the testator and witnessed by two witnesses in the specified manner

and if . . . then the executor (or other legal representative) shall give effect to the provisions of the will.' Rules relating to the formation of contract will similarly appear as mere fragments of rules ordering persons, if certain things are the case or have been said or done (if the party is of full age, has covenanted under seal or been promised consideration) to do the things which by the contract are to be done.

A recasting of rules conferring legislative powers (including the provisions of a constitution as to the supreme legislature), so as to represent them as fragments of the 'real' rules, may be carried through along the lines similar to those explained on page 36 in the case of the more extreme version of this theory. The only difference is that on the more moderate view the power-conferring rules are represented by the antecedents or if-clauses of rules ordering ordinary citizens, under threat of sanctions, to do things and not merely (as in the more extreme theory) as the if-clauses of directions to officials to apply sanctions.

Both versions of this theory attempt to reduce apparently distinct varieties of legal rule to a single form alleged to convey the quintessence of law. Both, in different ways, make the sanction a centrally important element, and both will fail if it is shown that law without sanctions is perfectly conceivable. This general objection must be, however, left till later. The specific criticism of both forms of the theory which we shall develop here is that they purchase the pleasing uniformity of pattern to which they reduce all laws at too high a price: that of distorting the different social functions which different types of legal rule perform. This is true of both forms of the theory, but is most evident in the recasting of the criminal law demanded by the theory in its more extreme form.

Distortion as the price of uniformity

The distortion effected by this recasting is worth considering for it illuminates many different aspects of law. There are many techniques by which society may be controlled, but the characteristic technique of the criminal law is to designate by rules certain types of behaviour as standards for the guidance either of the members of society as a whole or of special classes within it: they are expected without the aid or intervention of

officials to understand the rules and to see that the rules apply to them and to conform to them. Only when the law is broken, and this primary function of the law fails, are officials concerned to identify the fact of breach and impose the threatened sanctions. What is distinctive of this technique, as compared with individuated face-to-face orders which an official, like a policeman on traffic duty, might give to a motorist, is that the members of society are left to discover the rules and conform their behaviour to them; in this sense they 'apply' the rules themselves to themselves, though they are provided with a motive for conformity in the sanction added to the rule. Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring the courts to impose the sanctions in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the system. They may indeed be indispensable but they are ancillary.

The idea that the substantive rules of the criminal law have as their function (and, in a broad sense, their meaning) the guidance not merely of officials operating a system of penalties, but of ordinary citizens in the activities of non-official life, cannot be eliminated without jettisoning cardinal distinctions and obscuring the specific character of law as a means of social control. A punishment for a crime, such as a fine, is not the same as a tax on a course of conduct, though both involve directions to officials to inflict the same money loss. What differentiates these ideas is that the first involves, as the second does not, an offence or breach of duty in the form of a violation of a rule set up to guide the conduct of ordinary citizens. It is true that this generally clear distinction may in certain circumstances be blurred. Taxes may be imposed not for revenue purposes but to discourage the activities taxed, though the law gives no express indications that these are to be abandoned as it does when it 'makes them criminal'. Conversely the fines payable for some criminal offence may, because of the depreciation of money, become so small that they are cheerfully paid. They are then perhaps felt to be 'mere taxes', and 'offences' are frequent, precisely because in these circumstances the sense is lost that the rule is, like the bulk of the criminal law, meant to be taken seriously as a standard of behaviour.

It is sometimes urged in favour of theories like the one under consideration that, by recasting the law in a form of a direction to apply sanctions, an advance in clarity is made, since this form makes plain all that the 'bad man' wants to know about the law. This may be true but it seems an inadequate defence for the theory. Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is? Or with the 'man who wishes to arrange his affairs' if only he can be told how to do it? It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happens in courts. The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.

We may compare the inversion of ancillary and principal, which this extreme form of the theory makes, to the following suggestion for recasting the rules of a game. A theorist, considering the rules of cricket or baseball, might claim that he had discovered a uniformity hidden by the terminology of the rules and by the conventional claim that some were primarily addressed to players, some primarily to officials (umpire and scorer), some to both. 'All rules', the theorist might claim, 'are *really* rules directing officials to do certain things under certain conditions.' The rules that certain motions after hitting the ball constitute a 'run', or that being caught makes a man 'out', are really just complex directions to officials; in the one case to the scorer to write down 'a run' in the scoring-book and in the other to the umpire to order the man 'off the field'. The natural protest is that the uniformity imposed on the rules by this transformation of them conceals the ways in which the rules operate, and the manner in which the players use them in guiding purposive activities, and so obscures their function in the co-operative, though competitive, social enterprise which is the game.

The less extreme form of the theory would leave the criminal

law and all other laws which impose duties untouched, since these already conform to the simple model of coercive orders. But it would reduce all rules conferring and defining the manner of exercise of legal powers to this single form. It is open here to the same criticism as the extreme form of the theory. If we look at all law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills, and other structures of rights and duties which he is enabled to build. Why should rules which are used in this special way, and confer this huge and distinctive amenity, not be recognized as distinct from rules which impose duties, the incidence of which is indeed in part determined by the exercise of such powers? Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?

The reduction of rules conferring and defining legislative and judicial powers to statements of the conditions under which duties arise has, in the public sphere, a similar obscuring vice. Those who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control. To represent such rules as mere aspects or fragments of the rules of duty is, even more than in the private sphere, to obscure the distinctive characteristics of law and of the activities possible within its framework. For the introduction into society of rules enabling

legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel. Not only was it an important step; but it is one which, as we shall argue in Chapter IV, may fairly be considered as the step from the pre-legal into the legal world.

2. THE RANGE OF APPLICATION

Plainly a penal statute, of all the varieties of law, approximates most closely to the simple model of coercive orders. Yet even these laws have certain characteristics, examined in this section, to which the model is apt to blind us, and we shall not understand them till we shake off its influence. The order backed by threats is essentially the expression of a wish that *others* should do or abstain from doing certain things. It is, of course, possible that legislation might take this exclusively other-regarding form. An absolute monarch wielding legislative power may, in certain systems, always be considered exempt from the scope of the laws he makes; and even in a democratic system laws may be made which do not apply to those who made them, but only to special classes indicated in the law. But the range of application of a law is always a question of its interpretation. It may or may not be found on interpretation to exclude those who made it, and, of course, many a law is now made which imposes legal obligations on the makers of the law. Legislation, as distinct from just ordering *others* to do things under threats, may perfectly well have such a self-binding force. There is nothing *essentially* other-regarding about it. This is a legal phenomenon which is puzzling only so long as we think, under the influence of the model, of the laws as always laid down by a man or men above the law for others subjected to it.

This vertical or 'top-to-bottom' image of law-making, so attractive in its simplicity, is something which can only be reconciled with the realities by the device of distinguishing between the legislator in his official capacity as one person and in his private capacity as another. Acting in the first capacity he then makes law which imposes obligations on other persons, including himself in his 'private capacity'. There is nothing objectionable in these forms of expression, but the

notion of different capacities, as we shall see in Chapter IV, is intelligible only in terms of power-conferring rules of law which cannot be reduced to coercive orders. Meanwhile it is to be observed that this complicated device is really quite unnecessary; we can explain the self-binding quality of legislative enactment without it. For we have to hand, both in daily life and in the law, something which will enable us to understand it far better. This is the operation of a *promise* which in many ways is a far better model than that of coercive orders for understanding many, though not all, features of law.

To promise is to say something which creates an obligation for the promisor: in order that words should have this kind of effect, rules must exist providing that if words are used by appropriate persons on appropriate occasions (i.e. by sane persons understanding their position and free from various sorts of pressure) those who use these words shall be bound to do the things designated by them. So, when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others; in lawyers' parlance we exercise 'a power' conferred by rules to do this. It would be indeed possible, but not helpful, to distinguish two persons 'within' the promisor: one acting in the capacity of creator of obligations and the other in the capacity of person bound: and to think of one as ordering the other to do something.

Equally we can dispense with this device for understanding the self-binding force of legislation. For the making of a law, like the making of a promise, presupposes the existence of certain rules which govern the process: words said or written by the persons qualified by these rules, and following the procedure specified by them, create obligations for all within the ambit designated explicitly or implicitly by the words. These may include those who take part in the legislative process.

Of course, though there is this analogy which explains the self-binding character of legislation, there are many differences between the making of promises and the making of laws. The rules governing the latter are very much more complex and the bilateral character of a promise is not present. There is usually no person in the special position of the promisee *to whom* the promise is made and who has a special,

if not the only, claim to its performance. In these respects certain other forms of self-imposition of obligation known to English law, such as that whereby a person declares himself trustee of property for other persons, offer a closer analogy to the self-binding aspect of legislation. Yet, in general, making of law by enactment is something we shall understand best by considering such private ways of creating particular legal obligations.

What is most needed as a corrective to the model of coercive orders or rules, is a fresh conception of legislation as the introduction or modification of general standards of behaviour to be followed by the society generally. The legislator is not necessarily like the giver of orders to another: someone by definition outside the reach of what he does. Like the giver of a promise he exercises powers conferred by rules: very often he may, as the promisor *must*, fall within their ambit.

3. MODES OF ORIGIN

So far we have confined our discussion of the varieties of law to statutes which, in spite of the differences we have emphasized, have one salient point of analogy with coercive orders. The enactment of a law, like the giving of an order, *is* a deliberate datable act. Those who take part in legislation consciously operate a procedure for making law, just as the man who gives an order consciously uses a form of words to secure recognition of, and compliance with, his intentions. Accordingly, theories which use the model of coercive orders in the analysis of law make the claim that all law can be seen, if we strip away the disguises, to have this point of resemblance to legislation and to owe its status as law to a deliberate law-creating act. The type of law which most obviously conflicts with this claim is custom; but the discussion whether custom is 'really' law has often been confused by the failure to disentangle two distinct issues. The first is whether 'custom as such' is law or not. The meaning and good sense of the denial that custom, as such, is law lie in the simple truth that, in any society, there are many customs which form no part of its law. Failure to take off a hat to a lady is not a breach of any rule of law; it has no legal status save that of being permitted by law. This shows that custom is law only if it is one of a class of customs

which is 'recognized' as law by a particular legal system. The second issue concerns the meaning of 'legal recognition'. What is it for a custom to be legally recognized? Does it, as the model of coercive orders requires, consist in the fact that someone, perhaps 'the sovereign' or his agent, has ordered the custom to be obeyed, so that its status as law is due to something which, in this respect, resembles the act of legislation?

Custom is not in the modern world a very important 'source' of law. It is usually a subordinate one, in the sense that the legislature may by statute deprive a customary rule of legal status; and in many systems the tests which courts apply, in determining whether a custom is fit for legal recognition, incorporate such fluid notions as that of 'reasonableness' which provide at least some foundation for the view that in accepting or rejecting a custom courts are exercising a virtually uncontrolled discretion. Even so, to attribute the legal status of a custom to the fact that a court or the legislature or the sovereign has so 'ordered' is to adopt a theory which can only be carried through if a meaning is given to 'order' so extended as to rob the theory of its point.

In order to present this doctrine of legal recognition we must recall the part played by the sovereign in the conception of law as coercive orders. According to this theory, law is the order of either the sovereign or of his subordinate whom he may choose to give orders on his behalf. In the first case law is made by the order of the sovereign in the most literal sense of 'order'. In the second case the order given by the subordinate will only rank as law if it is, in its own turn, given in pursuance of some order issued by the sovereign. The subordinate must have some authority delegated by the sovereign to issue orders on his behalf. Sometimes this may be conferred by an express direction to a minister to 'make orders' on a certain subject-matter. If the theory stopped here, plainly it could not account for the facts; so it is extended and claims that sometimes the sovereign may express his will in less direct fashion. His orders may be 'tacit'; he may, without giving an express order, signify his intentions that his subjects should do certain things, by not interfering when his subordinates both give orders to his subjects and punish them for disobedience.

A military example may make the idea of a 'tacit order' as clear as it is possible to make it. A sergeant who himself regularly obeys his superiors, orders his men to do certain fatigues and punishes them when they disobey. The general, learning of this, allows things to go on, though if he had ordered the sergeant to stop the fatigues he would have been obeyed. In these circumstances the general may be considered tacitly to have expressed his will that the men should do the fatigues. His non-interference, when he could have interfered, is a silent substitute for the words he might have used in ordering the fatigues.

It is in this light that we are asked to view customary rules which have the status of law in a legal system. Till the courts apply them in particular cases such rules are *mere* customs, in no sense law. When the courts use them, and make orders in accordance with them which are enforced, then for the first time these rules receive legal recognition. The sovereign who might have interfered has tacitly ordered his subjects to obey the judges' orders 'fashioned' on pre-existing custom.

This account of the legal status of custom is open to two different criticisms. The first is that it is not *necessarily* the case that until they are used in litigation customary rules have no status as law. The assertion that this is necessarily the case is either merely dogmatic or fails to distinguish what is necessary from what may be the case in certain systems. Why, if statutes made in certain defined ways are law before they are applied by the courts in particular cases, should not customs of certain defined kinds also be so? Why should it not be true that, just as the courts recognize as binding the general principle that what the legislature enacts is law, they also recognize as binding another general principle: that customs of certain defined sorts are law? What absurdity is there in the contention that, when particular cases arise, courts apply custom, as they apply statute, as something which is already law and because it is law? It is, of course, *possible* that a legal system should provide that no customary rule should have the status of law until the courts, in their uncontrolled discretion, declared that it should. But this would be just *one* possibility, which cannot exclude the possibility of systems in which the courts have no such discretion. How can it establish

the general contention that a customary rule *cannot* have the status of law till applied in court?

The answers made to these objections sometimes reduce to no more than the reassertion of the dogma that nothing can be law unless and until it has been *ordered* by someone to be so. The suggested parallel between the relationships of courts to statute and to custom is then rejected on the ground that, before it is applied by a court, a statute has already been 'ordered' but a custom has not. Less dogmatic arguments are inadequate because they make too much of the particular arrangements of particular systems. The fact that in English law a custom may be rejected by the courts if it fails to pass the test of 'reasonableness' is sometimes said to show that it is not law till applied by the courts. This again could at the most only prove something about custom in English law. Even this cannot be established, unless it is true, as some claim, that it is meaningless to distinguish a system in which courts are only bound to apply certain customary rules if they are reasonable from a system in which they have an uncontrolled discretion.

The second criticism of the theory that custom, when it is law, owes its legal status to the sovereign's tacit order is more fundamental. Even if it is conceded that it is not law till enforced by the court in the particular case, is it possible to treat the failure of the sovereign to interfere as a tacit expression of the wish that the rules should be obeyed? Even in the very simple military example on page 46 it is not a necessary inference from the fact that the general did not interfere with the sergeant's orders that he wished them to be obeyed. He may merely have wished to placate a valued subordinate and hoped that the men would find some way of evading the fatigues. No doubt we might in some cases draw the inference that he wished the fatigues to be done, but if we did this, a material part of our evidence would be the fact that the general knew that the orders had been given, had time to consider them, and decided to do nothing. The main objection to the use of the idea of tacit expressions of the sovereign's will to explain the legal status of custom is that, in any modern state, it is rarely possible to ascribe such knowledge, consideration and decision not to interfere to the 'sovereign', whether

we identify the sovereign with the supreme legislature or the electorate. It is, of course, true that in most legal systems custom is a source of law subordinate to statute. This means that the legislature *could* take away their legal status; but failure to do this may not be a sign of the legislator's wishes. Only very rarely is the attention of a legislature, and still more rarely that of the electorate, turned to the customary rules applied by courts. Their non-interference can therefore not be compared to the general's non-interference with his sergeant; even if, in his case, we are prepared to infer from it a wish that his subordinate's orders be obeyed.

In what then does the legal recognition of custom consist? To what does a customary rule owe its legal status, if it is not to the order of the court which applied it to a particular case or to the tacit order of the supreme law-making power? How can it, like statute, be law before the court applies it? These questions can only be fully answered when we have scrutinized in detail, as we shall in the next chapter, the doctrine that, where there is law, there must be some sovereign person or persons whose general orders, explicit or tacit, alone are law. Meanwhile we may summarize the conclusions of this chapter as follows:

The theory of law as coercive orders meets at the outset with the objection that there are varieties of law found in all systems which, in three principal respects, do not fit this description. First, even a penal statute, which comes nearest to it, has often a range of application different from that of orders given to others; for such a law may impose duties on those who make it as well as on others. Secondly, other statutes are unlike orders in that they do not require persons to do things, but may confer powers on them; they do not impose duties but offer facilities for the free creation of legal rights and duties within the coercive framework of the law. Thirdly, though the enactment of a statute is in some ways analogous to the giving of an order, some rules of law originate in custom and do not owe their legal status to any such conscious law-creating act.

To defend the theory against these objections a variety of expedients have been adopted. The originally simple idea of a threat of evil or 'sanction' has been stretched to include the

nullity of a legal transaction; the notion of a legal rule has been narrowed so as to exclude rules which confer powers, as being mere fragments of law; within the single natural person of the legislator whose enactments are self-binding two persons have been discovered; the notion of an order has been extended from a verbal to a 'tacit' expression of will, consisting in non-interference with orders given by subordinates. Notwithstanding the ingenuity of these devices, the model of orders backed by threats obscures more of law than it reveals; the effort to reduce to this single simple form the variety of laws ends by imposing upon them a spurious uniformity. Indeed, to look for uniformity here may be a mistake, for, as we shall argue in Chapter V, a distinguishing, if not the distinguishing, characteristic of law lies in its fusion of different types of rule.

IV

SOVEREIGN AND SUBJECT

IN criticizing the simple model of law as coercive orders we have so far raised no questions concerning the 'sovereign' person or persons whose general orders constitute, according to this conception, the law of any society. Indeed in discussing the adequacy of the idea of an order backed by threats as an account of the different varieties of law, we provisionally assumed that in any society where there is law, there actually is a sovereign, characterized affirmatively and negatively by reference to the habit of obedience: a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons.

We must now consider in some detail this general theory concerning the foundations of all legal systems; for in spite of its extreme simplicity the doctrine of sovereignty is nothing less than this. The doctrine asserts that in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one. This vertical structure composed of sovereign and subjects is, according to the theory, as essential a part of a society which possesses law, as a backbone is of a man. Where it is present, we may speak of the society, together with its sovereign, as a single independent state, and we may speak of *its* law: where it is not present, we can apply none of these expressions, for the relation of sovereign and subject forms, according to this theory, part of their very meaning.

Two points in this doctrine are of special importance and we shall emphasize them here in general terms in order to indicate the lines of criticism pursued in detail in the rest of the chapter. The first concerns the idea of a *habit* of obedience, which is all that is required on the part of those to

whom the sovereign's laws apply. Here we shall inquire whether such a habit is sufficient to account for two salient features of most legal systems: the *continuity* of the authority to make law possessed by a succession of different legislators, and the *persistence* of laws long after their maker and those who rendered him habitual obedience have perished. Our second point concerns the position occupied by the sovereign above the law: he creates law for others and so imposes legal duties or 'limitations' upon them whereas he is said himself to be legally unlimited and illimitable. Here we shall inquire whether this legally illimitable status of the supreme lawgiver is necessary for the existence of law, and whether either the presence or the absence of legal limits on legislative power can be understood in the simple terms of habit and obedience into which this theory analyses these notions.

I. THE HABIT OF OBEDIENCE AND THE CONTINUITY OF LAW

The idea of obedience, like many other apparently simple ideas used without scrutiny, is not free from complexities. We shall disregard the complexity already noticed[1] that the word 'obedience' often suggests deference to authority and not merely compliance with orders backed by threats. Even so, it is not easy to state, even in the case of a single order given face to face by one man to another, precisely what connection there must be between the giving of the order and the performance of the specified act in order that the latter should constitute obedience. What, for example, is the relevance of the fact, when it is a fact, that the person ordered would certainly have done the very same thing without any order? These difficulties are particularly acute in the case of laws, some of which prohibit people from doing things which many of them would never think of doing. Till these difficulties are settled the whole idea of a 'general habit of obedience' to the laws of a country must remain somewhat obscure. We may, however, for our present purposes imagine a very simple case to which the words 'habit' and 'obedience' would perhaps be conceded to have a fairly obvious application.

[1] See p. 19 above.

We shall suppose that there is a population living in a territory in which an absolute monarch (Rex) reigns for a very long time: he controls his people by general orders backed by threats requiring them to do various things which they would not otherwise do, and to abstain from doing things which they would otherwise do; though there was trouble in the early years of the reign, things have long since settled down and, in general, the people can be relied on to obey him. Since what Rex requires is often onerous, and the temptation to disobey and risk the punishment is considerable, it is hardly to be supposed that the obedience, though generally rendered, is a 'habit' or 'habitual' in the full sense or most usual sense of that word. Men can indeed quite literally acquire the habit of complying with certain laws: driving on the left-hand side of the road is perhaps a paradigm, for Englishmen, of such an acquired habit. But where the law runs counter to strong inclinations as, for example, do laws requiring the payment of taxes, our eventual compliance with them, even though regular, has not the unreflective, effortless, engrained character of a habit. None the less, though the obedience accorded to Rex will often lack this element of habit, it will have other important ones. To say of a person that he has habit, e.g. of reading a newspaper at breakfast, entails that he has for some considerable time past done this and that he is likely to repeat this behaviour. If so, it will be true of most people in our imagined community, at any time after the initial period of trouble, that they have generally obeyed the orders of Rex and are likely to continue to do so.

It is to be noted that, on this account of the social situation under Rex, the habit of obedience is a personal relationship between each subject and Rex: each regularly does what Rex orders him, among others, to do. If we speak of the *population* as 'having such a habit', this, like the assertion that people habitually frequent the tavern on Saturday nights, will mean only that the habits of most of the people are convergent: they each habitually obey Rex, just as they might each habitually go to the tavern on Saturday night.

It is to be observed that in this very simple situation all that is required from the community to constitute Rex the sovereign are the personal acts of obedience on the part of the population. Each of them need, for his part, only obey; and,

so long as obedience is regularly forthcoming, no one in the community need have or express any views as to whether his own or others' obedience to Rex is in any sense right, proper, or legitimately demanded. Plainly, the society we have described, in order to give as literal application as possible to the notion of a habit of obedience, is a very simple one. It is probably far too simple ever to have existed anywhere, and it is certainly not a primitive one; for primitive society knows little of absolute rulers like Rex, and its members are not usually concerned merely to obey but have pronounced views as to the rightness of obedience on the part of all concerned. None the less the community under Rex has certainly some of the important marks of a society governed by law, at least during the lifetime of Rex. It has even a certain unity, so that it may be called 'a state'. This unity is constituted by the fact that its members obey the same person, even though they may have no views as to the rightness of doing so.

Let us now suppose that, after a successful reign, Rex dies leaving a son Rex II who then starts to issue general orders. The mere fact that there was a general habit of obedience to Rex I in his lifetime does not by itself even render probable that Rex II will be habitually obeyed. Hence if we have nothing more to go on than the fact of obedience to Rex I and the likelihood that *he* would continue to be obeyed, we shall not be able to say of Rex II's first order, as we could have said of Rex I's last order, that it was given by one who was sovereign and was therefore law. There is as yet no established habit of obedience to Rex II. We shall have to wait and see whether such obedience will be accorded to Rex II, as it was to his father, before we can say, in accordance with the theory, that he is now sovereign and his orders are law. There is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that a habit of obedience has been established. Then, but not till then, we shall be able to say of any further order that it is already law as soon as it is issued and before it is obeyed. Till this stage is reached there will be an interregnum in which no law can be made.

Such a state of affairs is of course possible and has occasionally been realized in troubled times: but the dangers of discontinuity are obvious and not usually courted. Instead, it is

characteristic of a legal system, even in an absolute monarchy, to secure the uninterrupted continuity of law-making power by rules which bridge the transition from one lawgiver to another: these regulate the succession *in advance*, naming or specifying in general terms the qualifications of and mode of determining the lawgiver. In a modern democracy the qualifications are highly complex and relate to the composition of a legislature with a frequently changing membership, but the essence of the rules required for continuity can be seen in the simpler forms appropriate to our imaginary monarchy. If the rule provides for the succession of the eldest son, then Rex II has a *title* to succeed his father. He will have the *right* to make law on his father's death, and when his first orders are issued we may have good reason for saying that they are already law, before any relationship of habitual obedience between him personally and his subjects has had time to establish itself. Indeed such a relationship may never be established. Yet his word may be law; for Rex II may himself die immediately after issuing his first orders; he will not have lived to receive obedience, yet he may have had the *right* to make law and his orders may be law.

In explaining the continuity of law-making power through a changing succession of individual legislators, it is natural to use the expressions 'rule of succession', 'title', 'right to succeed', and 'right to make law'. It is plain, however, that with these expressions we have introduced a new set of elements, of which no account can be given in terms of habits of obedience to general orders, out of which, following the prescription of the theory of sovereignty, we constructed the simple legal world of Rex I. For in that world there were no rules, and so no rights or titles, and hence *a fortiori* no right or title to succeed: there were just the facts that orders were given by Rex I, and his orders were habitually obeyed. To constitute Rex sovereign during his lifetime and to make his orders law, no more was needed; but this is not enough to account for his successor's *rights*. In fact, the idea of habitual obedience fails, in two different though related ways, to account for the continuity to be observed in every normal legal system, when one legislator succeeds another. First, mere habits of obedience to orders given by one legislator cannot confer on the

new legislator any *right* to succeed the old and give orders in his place. Secondly, habitual obedience to the old lawgiver cannot by itself render probable, or found any presumption, that the new legislator's orders will be obeyed. If there is to be this right and this presumption at the moment of succession there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed.

What is this more complex practice? What is the acceptance of a rule? Here we must resume the inquiry already outlined in Chapter I. To answer it we must, for the moment, turn aside from the special case of legal rules. How does a habit differ from a rule? What is the difference between saying of a group that they have the habit, e.g. of going to the cinema on Saturday nights, and saying that it is the rule with them that the male head is to be bared on entering a church? We have already mentioned in Chapter I some of the elements which must be brought into the analysis of this type of rule, and here we must pursue the analysis further.

There is certainly one point of similarity between social rules and habits: in both cases the behaviour in question (e.g. baring the head in church) must be general though not necessarily invariable; this means that it is repeated when occasion arises by most of the group: so much is, as we have said, implied in the phrase, 'They do it *as a rule*.' But though there is this similarity there are three salient differences.

First, for the group to have a *habit* it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism. But such general convergence or even identity of behaviour is not enough to constitute the existence of a rule requiring that behaviour: where there is such a rule deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity, though the forms of criticism and pressure differ with different types of rule.

Secondly, where there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it. Criticism for deviation

is regarded as legitimate or justified in this sense, as are demands for compliance with the standard when deviation is threatened. Moreover, except by a minority of hardened offenders, such criticism and demands are generally regarded as legitimate, or made with good reason, both by those who make them and those to whom they are made. How many of the group must in these various ways treat the regular mode of behaviour as a standard of criticism, and how often and for how long they must do so to warrant the statement that the group has a rule, are not definite matters; they need not worry us more than the question as to the number of hairs a man may have and still be bald. We need only remember that the statement that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others.

The third feature distinguishing social rules from habits is implicit in what has already been said, but it is one so important and so frequently disregarded or misrepresented in jurisprudence that we shall elaborate it here. It is a feature which throughout this book we shall call the *internal aspect* of rules. When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour, or even know that the behaviour in question is general; still less need they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.

This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition,

they have a reflective critical attitude to this pattern of behaviour: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but 'has views' about the propriety of all moving the Queen in that way. These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others. For the expression of such criticisms, demands, and acknowledgements a wide range of 'normative' language is used. 'I (You) ought not to have moved the Queen like that', 'I (You) must do that', 'That is right', 'That is wrong'.

The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction or compulsion. When they say they 'feel bound' to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of 'binding' rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.

These are the crucial features which distinguish social rules from mere group habits, and with them in mind we may return to the law. We may suppose that our social group has not only rules which, like that concerning baring the head in church, makes a specific kind of behaviour standard, but a rule which provides for the identification of standards of behaviour in a less direct fashion, by reference to the words, spoken or written, of a given person. In its simplest form this

rule will be to the effect that whatever actions Rex specifies (perhaps in certain formal ways) are to be done. This transforms the situation which we first depicted in terms of mere habits of obedience to Rex; for where such a rule is accepted Rex will not only in fact specify what is to be done but will have the *right* to do this; and not only will there be general obedience to his orders, but it will be generally accepted that it is *right* to obey him. Rex will in fact be a legislator with the *authority* to legislate, i.e. to introduce new standards of behaviour into the life of the group, and there is no reason, since we are now concerned with standards, not 'orders', why he should not be bound by his own legislation.

The social practices which underlie such legislative authority will be, in all essentials, the same as those which underlie the simple direct rules of conduct, like that concerning baring the head in church, which we may now distinguish as mere customary rules, and they will differ in the same way from general habits. Rex's *word* will now be a standard of behaviour so that deviations from the behaviour he designates will be open to criticism; his word will now generally be referred to and accepted as justifying criticism and demands for compliance.

In order to see how such rules explain the continuity of legislative authority, we need only notice that in some cases, even before a new legislator has begun to legislate, it may be clear that there is a firmly established rule giving him, as one of a *class* or line of persons, the right to do this in his turn. Thus we may find it generally accepted by the group, during the lifetime of Rex I, that the person whose word is to be obeyed is not limited to the individual Rex I but is that person who, for the time being, is qualified in a certain way, e.g. as the eldest living descendant in the direct line of a certain ancestor: Rex I is merely the particular person so qualified at a particular time. Such a rule, unlike the habit of obeying Rex I, looks forward, since it refers to future possible lawgivers as well as the present actual lawgiver.

The acceptance, and so the existence, of such a rule will be manifested during Rex I's lifetime in part by obedience to him, but also by acknowledgements that obedience is something to which he has a right by virtue of his qualification under the general rule. Just because the scope of a rule accepted at a

given time by a group may look forward in general terms to successors in the office of legislator in this way, its acceptance affords us grounds *both* for the statement of law that the successor has a right to legislate, even before he starts to do so, and for the statement of fact that he is likely to receive the same obedience as his predecessor does.

Of course, acceptance of a rule by a society at one moment does not *guarantee* its continued existence. There may be a revolution: the society may cease to accept the rule. This may happen either during the lifetime of one legislator, Rex I, or at the point of transition to a new one, Rex II, and, if it does happen, Rex I will lose or Rex II will not acquire, the right to legislate. It is true that the position may be obscure: there may be intermediate confused stages, when it is not clear whether we are faced with a mere insurrection or temporary interruption of the old rule, or a full-scale effective abandonment of it. But in principle the matter is clear. The statement that a new legislator has a right to legislate presupposes the existence, in the social group, of the rule under which he has this right. If it is clear that the rule which now qualifies him was accepted during the lifetime of his predecessor, whom it also qualified, it is to be assumed, in the absence of evidence to the contrary, that it has not been abandoned and still exists. A similar continuity is to be observed in a game when the scorer, in the absence of evidence that the rules of the game have been changed since the last innings, credits the new batsman with the runs which he makes, assessed in the usual way.

Consideration of the simple legal worlds of Rex I and Rex II is perhaps enough to show that the continuity of legislative authority which characterizes most legal systems depends on that form of social practice which constitutes the acceptance of a rule, and differs, in the ways we have indicated, from the simpler facts of mere habitual obedience. We may summarize the argument as follows. Even if we concede that a person, such as Rex, whose general orders are habitually obeyed, may be called a legislator and his orders laws, habits of obedience to each of a succession of such legislators are not enough to account for the *right* of a successor to succeed and for the consequent continuity in legislative power. First, because

habits are not 'normative'; they cannot confer rights or authority on anyone. Secondly, because habits of obedience to one individual cannot, though accepted rules can, refer to a class or line of future successive legislators as well as to the current legislator, or render obedience to them likely. So the fact that there is habitual obedience to one legislator neither affords grounds for the statement that his successor has the right to make law, nor for the factual statement that he is likely to be obeyed.

At this point, however, an important point must be noticed which we shall develop fully in a later chapter. It constitutes one of the strong points of Austin's theory. In order to reveal the essential differences between accepted rules and habits we have taken a very simple form of society. Before we leave this aspect of sovereignty we must inquire how far our account of the acceptance of a rule conferring authority to legislate could be transferred to a modern state. In referring to our simple society we spoke as if most ordinary people not only obeyed the law but understood and accepted the rule qualifying a succession of lawgivers to legislate. In a simple society this might be the case; but in a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate. To speak of the populace 'accepting' these rules, in the same way as the members of some small tribe might accept the rule giving authority to its successive chiefs, would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have. We would only require such an understanding of the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is.

These differences between a simple tribal society and a modern state deserve attention. In what sense, then, are we to think of the continuity of the legislative authority of the Queen in Parliament, preserved throughout the changes of successive legislators, as resting on some fundamental rule or rules generally accepted? Plainly, general acceptance is here

a complex phenomenon, in a sense divided between official and ordinary citizens, who contribute to it and so to the *existence* of a legal system in different ways. The officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority: the legislators do this when they make laws in accordance with the rules which empower them to do so: the courts when they identify, as laws to be applied by them, the laws made by those thus qualified, and the experts when they guide the ordinary citizens by reference to the laws so made. The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and identified in this way, and also makes claims and exercises powers conferred by it. But he may know little of its origin or its makers: some may know nothing more about the laws than that they are 'the law'. It forbids things ordinary citizens want to do, and they know that they may be arrested by a policeman and sentenced to prison by a judge if they disobey. It is the strength of the doctrine which insists that habitual obedience to orders backed by threats is the foundation of a legal system that it forces us to think in realistic terms of this relatively passive aspect of the complex phenomenon which we call the existence of a legal system. The weakness of the doctrine is that it obscures or distorts the other relatively active aspect, which is seen primarily, though not exclusively, in the law-making, law-identifying, and law-applying operations of the officials or experts of the system. Both aspects must be kept in view if we are to see this complex social phenomenon for what it actually is.

2. THE PERSISTENCE OF LAW

In 1944 a woman was prosecuted in England and convicted for telling fortunes in violation of the Witchcraft Act, 1735.[1] This is only a picturesque example of a very familiar legal phenomenon: a statute enacted centuries ago may still be law today. Yet familiar though it is, the persistence of laws in this way is something which cannot be made intelligible in terms of the simple scheme which conceives of laws as orders given

[1] *R.* v. *Duncan* [1944] 1 KB 713.

by a person habitually obeyed. We have in fact here the converse of the problem of the continuity of law-making authority which we have just considered. There the question was how, on the basis of the simple scheme of habits of obedience, it could be said that the first law made by a successor to the office of legislator is *already* law before he personally had received habitual obedience. Here the question is: how can law made by an earlier legislator, long dead, *still* be law for a society that cannot be said habitually to obey him? As in the first case, no difficulty arises for the simple scheme if we confine our view to the lifetime of the legislator. Indeed, it seems to explain admirably why the Witchcraft Act was law in England but would not have been law in France, even if its terms extended to French citizens telling fortunes in France, though of course it could have been applied to those Frenchmen who had the misfortune to be brought before English courts. The simple explanation would be that in England there was a habit of obedience to those who enacted this law whereas in France there was not. Hence it was law for England but not for France.

We cannot, however, narrow our view of laws to the lifetime of their makers, for the feature which we have to explain is just their obdurate capacity to survive their makers and those who habitually obeyed them. Why is the Witchcraft Act law still for us, if it was not law for the contemporary French? Surely, by no stretch of language can we, the English of the twentieth century, now be said habitually to obey George II and his Parliament. In this respect, the English now and the French then are alike: neither habitually obey or obeyed the maker of this law. The Witchcraft Act might be the sole Act surviving from this reign and yet it would still be law in England now. The answer to this problem of 'Why law still?' is in principle the same as the answer to our first problem of 'Why law already?' and it involves the substitution, for the too simple notion of habits of obedience to a sovereign person, of the notion of currently accepted fundamental rules specifying a class or line of persons whose word is to constitute a standard of behaviour for the society, i.e. who have the *right* to legislate. Such a rule, though it must exist now, may in a sense be timeless in its reference: it may not only look

forward and refer to the legislative operation of a future legislator but it may also look back and refer to the operations of a past one.

Presented in the simple terms of the Rex dynasty the position is this. Each of a line of legislators, Rex I, II, and III, may be qualified under the same general rule that confers the right to legislate on the eldest living descendant in the direct line. When the individual ruler dies his legislative work lives on; for it rests upon the foundation of a general rule which successive generations of the society continue to respect regarding each legislator whenever he lived. In the simple case Rex I, II, and III, are each entitled, under the same general rule, to introduce standards of behaviour by legislation. In most legal systems matters are not quite so simple, for the presently accepted rule under which past legislation is recognized as law may differ from the rule relating to contemporary legislation. But, given the present acceptance of the underlying rule, the persistence of laws is no more mysterious than the fact that the decision of the umpire, in the first round of a tournament between teams whose membership has changed, should have the same relevance to the final result as those of the umpire who took his place in the third round. None the less, if not mysterious, the notion of an accepted rule conferring authority on the orders of past and future, as well as present, legislators, is certainly more complex and sophisticated than the idea of habits of obedience to a present legislator. Is it possible to dispense with this complexity, and by some ingenious extension of the simple conception of orders backed by threats show that the persistence of laws rests, after all, on the simpler facts of habitual obedience to the present sovereign?

One ingenious attempt to do this has been made: Hobbes, echoed here by Bentham and Austin, said that 'the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws'.[1] It is not immediately clear, if we dispense with the notion of a rule in favour of the simpler idea of habit, what the 'authority' as distinct from the 'power' of a legislator can be. But the general

[1] *Leviathan*, chap. xxvi.

argument expressed by this quotation is clear. It is that, though as a matter of history the source or origin of a law such as the Witchcraft Act was the legislative operation of a past sovereign, its present status as law in twentieth-century England is due to its recognition as law by the present sovereign. This recognition does not take the form of an *explicit* order, as in the case of statutes made by the now living legislators, but of a *tacit* expression of the sovereign's will. This consists in the fact that, though he could, he does not interfere with the enforcement by his agents (the courts and possibly the executive) of the statute made long ago.

This is, of course, the same theory of tacit orders already considered, which was invoked to explain the legal status of certain customary rules, which appeared not to have been ordered by any one at any time. The criticisms which we made of this theory in Chapter III apply even more obviously when it is used to explain the continued recognition of past legislation as law. For though, owing to the wide discretion accorded to the courts to reject unreasonable customary rules, there may be some plausibility in the view that until the courts actually apply a customary rule in a given case, it has no status as law, there is very little plausibility in the view that a statute made by a past 'sovereign' is not law until it is actually applied by the courts in the particular case, and enforced with the acquiescence of the present sovereign. If this theory is right it follows that the courts do not enforce it because it is already law: yet this would be an absurd inference to draw from the fact that the present legislator could repeal the past enactments but has not exercised this power. For Victorian statutes and those passed by the Queen in Parliament today surely have precisely the same legal status in present-day England. Both are law even before cases to which they are applied arise in the courts and, when such cases do arise, the courts apply both Victorian and modern statutes because they are already law. In neither case are these law only after they are applied by the courts; and in both cases alike their status as law is due to the fact that they were enacted by persons whose enactments are now authoritative under presently accepted rules, irrespective of the fact that these persons are alive or dead.

The incoherence of the theory that past statutes owe their present status as law to the acquiescence of the present legislature in their application by the courts, may be seen most clearly in its incapacity to explain why the courts of the present day should distinguish between a Victorian statute which has not been repealed as still law, and one which was repealed under Edward VII as no longer law. Plainly, in drawing such distinctions the courts (and with them any lawyer or ordinary citizen who understands the system) use as a criterion a fundamental rule or rules of what is to count as law which embraces past as well as present legislative operations: they do not rest their discrimination between the two statutes on knowledge that the present sovereign has tacitly commanded (i.e. allowed to be enforced) one but not the other.

Again, it seems that the only virtue in the theory we have rejected is that of a blurred version of a realistic reminder. In this case it is the reminder that unless the officials of the system and above all the courts accept the rule that certain legislative operations, *past or present*, are authoritative, something essential to their status as law will be lacking. But realism of this humdrum sort must not be inflated into the theory sometimes known as Legal Realism, the main features of which are discussed in detail later,[1] and which, in some versions, holds *no* statute to be law until it is actually applied by a court. There is a difference, crucial for the understanding of law, between the truth that if a statute is to be law, the courts must accept the rule that certain legislative operations make law, and the misleading theory that nothing is law till it is applied in a particular case by a court. Some versions of the theory of Legal Realism of course go far beyond the false explanation of the persistence of laws which we have criticized; for they go the full length of denying that the status of law can belong to any statute whether made by a past or *present* sovereign, before the courts have actually applied it. Yet an explanation of the persistence of laws which stops short of the full Realist theory and acknowledges that statutes of the present sovereign, as distinguished from past sovereigns, are law before they are applied by the courts has the

[1] See pp. 136–47 below.

worst of both worlds and is surely quite absurd. This halfway position is untenable because there is nothing to distinguish the legal status of a statute of the present sovereign and an unrepealed statute of an earlier one. Either both (as ordinary lawyers would acknowledge) or neither, as the full Realist theory claims, are law before they are applied by the courts of the present day to a particular case.

3. LEGAL LIMITATIONS ON LEGISLATIVE POWER

In the doctrine of sovereignty the general habit of obedience of the subject has, as its complement, the absence of any such habit in the sovereign. He makes law for his subjects and makes it from a position outside any law. There are, and can be, no legal limits on his law-creating power. It is important to understand that the legally unlimited power of the sovereign is his by definition: the theory simply asserts that there could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign. If he is sovereign he does not obey any other legislator and hence there can be no legal limits on his legislative power. The importance of the theory does not of course lie in these definitions and their simple necessary consequences which tell us nothing about the facts. It lies in the claim that in every society where there is law there is a sovereign with these attributes. We may have to look behind legal or political forms, which suggest that all legal powers are limited and that no person or persons occupy the position outside the law ascribed to the sovereign. But if we are resolute in our search we shall find the reality which, as the theory claims, exists behind the forms.

We must not misinterpret the theory as making either a weaker or a stronger claim than it in fact makes. The theory does not merely state that there are *some* societies where a sovereign subject to no legal limits is to be found, but that everywhere the existence of law implies the existence of such a sovereign. On the other hand the theory does not insist that there are no limits on the sovereign's power but only that there are no *legal* limits on it. So the sovereign may in fact defer, in exercising legislative power, to popular opinion

either from fear of the consequences of flouting it, or because he thinks himself morally bound to respect it. Very many different factors may influence him in this, and, if a fear of popular revolt or moral conviction leads him not to legislate in ways which he otherwise would, he may indeed think and speak of these factors as 'limits' on his power. But they are not legal limits. He is under no legal duty to abstain from such legislation, and the law courts, in considering whether they have before them a law of the sovereign, would not listen to the argument that its divergence from the requirements of popular opinion or morality prevented it from ranking as law, unless there was an order of the sovereign that they should.

The attractions of this theory as a general account of law are manifest. It seems to give us in satisfying simple form an answer to two major questions. When we have found the sovereign who receives habitual obedience but yields it to no one, we can do two things. First, we can identify in his general orders the law of a given society and distinguish it from many other rules, principles, or standards, moral or merely customary, by which the lives of its members are also governed. Secondly, within the area of law we can determine whether we are confronted with an independent legal system or merely a subordinate part of some wider system.

It is usually claimed that the Queen in Parliament, considered as a single continuing legislative entity, fills the requirements of this theory and the sovereignty of Parliament consists in the fact that it does so. Whatever the accuracy of this belief (some aspects of which we later consider in Chapter VI), we can certainly reproduce quite coherently in the imaginary simple world of Rex I what the theory demands. It is instructive to do this before considering the more complex case of a modern state, since the full implications of the theory are best brought out in this way. To accommodate the criticisms made in Section 1 of the notion of habits of obedience we can conceive of the situation in terms of rules rather than habits. On this footing we shall imagine a society in which there is a rule generally accepted by courts, officials, and citizens that, whenever Rex orders anything to be done, his word constitutes a standard of behaviour for the group. It may well be that, in order to distinguish among these orders those expressions of

'private' wishes, which Rex does not wish to have 'official' status, from those which he does, ancillary rules will also be adopted specifying a special style which the monarch is to use when he legislates 'in the character of a monarch' but not when he gives private orders to his wife or mistress. Such rules concerning the manner and form of legislation must be taken seriously if they are to serve their purpose, and they may at times inconvenience Rex. None the less, though we may well rank them as legal rules, we need not count them as 'limits' on his legislative power, since if he does follow the required form there is no subject on which he cannot legislate so as to give effect to his wishes. The 'area' if not the 'form' of his legislative power is unlimited by law.

The objection to the theory as a general theory of law is that the existence of a sovereign such as Rex in this imagined society, who is subject to no legal limitations, is not a necessary condition or presupposition of the existence of law. To establish this we need not invoke disputable or challengeable types of law. Our argument therefore is not drawn from systems of customary law or international law, to which some wish to deny the title of law just because they lack a legislature. Appeal to these cases is quite unnecessary; for the conception of the legally unlimited sovereign misrepresents the character of law in many modern states where no one would question that there is law. Here there are legislatures but sometimes the supreme legislative power within the system is far from unlimited. A written constitution may restrict the competence of the legislature not merely by specifying the form and manner of legislation (which we may allow not to be limitations) but by excluding altogether certain matters from the scope of its legislative competence, thus imposing limitations of substance.

Again, before examining the complex case of a modern state, it is useful to see what, in the simple world where Rex is the supreme legislator, 'legal limitations on his legislative power' would actually mean, and why it is a perfectly coherent notion.

In the simple society of Rex it may be the accepted rule (whether embodied in a written constitution or not) that no law of Rex shall be valid if it excludes native inhabitants from the territory or provides for their imprisonment without trial, and that any enactment contrary to these provisions shall be

void and so treated by all. In such a case Rex's powers to legislate would be subject to limitations which surely would be legal, even if we are disinclined to call such a fundamental constitutional rule '*a* law'. Unlike disregard of popular opinion or popular moral convictions to which he might often defer even against his inclinations, disregard of these specific restrictions would render his legislation void. The courts would therefore be concerned with these in a way in which they would not be concerned with the other merely moral or *de facto* limits on the legislator's exercise of his power. Yet, in spite of these legal limitations, surely Rex's enactments within their scope are laws, and there is an independent legal system in his society.

It is important to dwell a little longer on this imaginary simple case in order to see precisely what legal limits of this type are. We might often express the position of Rex by saying that he '*cannot*' pass laws providing for imprisonment without trial; it is illuminating to contrast this sense of 'cannot' with that which signifies that a person is under some legal duty or obligation not to do something. 'Cannot' is used in this latter sense when we say, 'You cannot ride a bicycle on the pavement.' A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing (or at any rate need not impose) duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities. 'Limits' here implies not the presence of *duty* but the absence of legal power.

Such restrictions on the legislative power of Rex may well be called constitutional: but they are not mere conventions or moral matters with which courts are unconcerned. They are parts of the rule conferring authority to legislate and they vitally concern the courts, since they use such a rule as a criterion of the validity of purported legislative enactments coming before them. Yet though such restrictions are legal and not merely moral or conventional, their presence or absence cannot be expressed in terms of the presence or absence of a habit of obedience on the part of Rex to other persons. Rex may well be subject to such restrictions and never seek

to evade them; yet there may be no one whom he habitually obeys. He merely fulfils the conditions for making valid law. Or he may try to evade the restrictions by issuing orders inconsistent with them; yet if he does this he will not have disobeyed any one; he will not have broken any superior legislators' law or violated a legal duty. He will surely have failed to make (though he does not break) a valid law. Conversely, if in the constitutional rule qualifying Rex to legislate there are no legal restrictions on Rex's authority to legislate, the fact that he habitually obeys the orders of Tyrannus, the king of the neighbouring territory, will neither deprive Rex's enactments of their status as law nor show that they are subordinate parts of a single system in which Tyrannus has supreme authority.

The foregoing very obvious considerations establish a number of points much obscured by the simple doctrine of sovereignty yet vital for the understanding of the foundation of a legal system. These we may summarize as follows: First, legal limitations on legislative authority consist not of duties imposed on the legislator to obey some superior legislator but of disabilities contained in rules which qualify him to legislate.

Secondly, in order to establish that a purported enactment is law we do not have to trace it back to the enactment, express or tacit, of a legislator who is 'sovereign' or 'unlimited' either in the sense that his authority to legislate is legally unrestricted or in the sense that he is a person who obeys no one else habitually. Instead we have to show that it was made by a legislator who was qualified to legislate under an existing rule and that either no restrictions are contained in the rule or there are none affecting this particular enactment.

Thirdly, in order to show that we have before us an independent legal system we do not have to show that its supreme legislator is legally unrestricted or obeys no other person habitually. We have to show merely that the rules which qualify the legislator do not confer superior authority on those who have also authority over other territory. Conversely, the fact that he is not subject to such foreign authority does not mean that he has unrestricted authority within his own territory.

Fourthly, we must distinguish between a legally unlimited

legislative authority and one which, though limited, is supreme in the system. Rex may well have been the highest legislating authority known to the law of the land, in the sense that all other legislation may be repealed by his, even though his own is restricted by a constitution.

Fifthly, and last, whereas the presence or absence of rules limiting the legislator's competence to legislate is crucial, the legislator's habits of obedience are at the most of some indirect evidential importance. The only relevance of the fact, if it be the fact, that the legislator is not in a habit of obedience to other persons is that sometimes it may afford some, though far from conclusive, evidence that his authority to legislate is not subordinate, by constitutional or legal rule, to that of others. Similarly, the only relevance of the fact that the legislator does habitually obey someone else is that this is some evidence that under the rules his authority to legislate is subordinate to that of others.

4. THE SOVEREIGN BEHIND THE LEGISLATURE

There are in the modern world many legal systems in which the body, normally considered to be the supreme legislature within the system, is subject to legal limitations on the exercise of its legislative powers; yet, as both lawyer and legal theorist would agree, the enactments of such a legislature within the scope of its limited powers are plainly law. In these cases, if we are to maintain the theory that wherever there is law there is a sovereign incapable of legal limitation, we must search for such a sovereign behind the legally limited legislature. Whether he is there to be found is the question which we must now consider.

We may neglect for the moment the provisions, which every legal system must make in one form or another, though not necessarily by a written constitution, as to the qualification of the legislators and 'the manner and form' of legislation. These may be considered as specifications of the identity of the legislative body and of what it must do to legislate rather than legal limitations on the scope of its legislative power; though, in fact, as the experience of South Africa has shown,[1] it is

[1] See *Harris* v. *Dönges* [1952] 1 TLR 1245.

difficult to give general criteria which satisfactorily distinguish mere provisions as to 'manner and form' of legislation or definitions of the legislative body from 'substantial' limitations.

Plain examples of substantive limitations are, however, to be found in federal constitutions such as those of the United States or Australia, where the division of powers between the central government and the member states, and also certain individual rights, cannot be changed by the ordinary processes of legislation. In these cases an enactment, either of the state or federal legislature, purporting to alter or inconsistent with the federal division of powers or with the individual rights protected in this way, is liable to be treated as *ultra vires*, and declared legally invalid by the courts to the extent that it conflicts with the constitutional provisions. The most famous of such legal limitations on legislative powers is the Fifth Amendment to the Constitution of the United States. This provides, among other things, that no person shall be deprived 'of life liberty or property without due process of law'; and statutes of Congress have been declared invalid by the courts when found to conflict with these or with other restrictions placed by the constitution on their legislative powers.

There are, of course, many different devices for protecting the provisions of a constitution from the operations of the legislature. In some cases, such as that of Switzerland, some provisions as to the rights of the member states of a federation and the rights of individuals, though mandatory in form, are treated as 'merely political' or hortatory. In such cases the courts are not accorded jurisdiction to 'review' the enactment of the federal legislature and to declare it invalid even though it may be in plain conflict with the provisions of the constitution as to the proper scope of the legislature's operations.[1] Certain provisions of the United States Constitution have been held to raise 'political questions', and where a case falls within this category the courts will not consider whether a statute violates the constitution.

Where legal limitations on the normal operations of the supreme legislature are imposed by a constitution, these themselves may or may not be immune from certain forms of

[1] See Art. 113 of the Constitution of Switzerland.

legal change. This depends on the nature of the provision made by the constitution for its amendment. Most constitutions contain a wide amending power to be exercised either by a body distinct from the ordinary legislature, or by the members of the ordinary legislature using a special procedure. The provision of Article V of the Constitution of the United States for amendments ratified by the legislatures of three-fourths of the States or by conventions in three-fourths thereof is an example of the first type of amending power; and the provision for amendment in the South Africa Act of 1909 s. 152 is an example of the second. But not all constitutions contain an amending power, and sometimes even where there is such an amending power certain provisions of the constitution which impose limits on the legislature are kept outside its scope; here the amending power is itself limited. This may be observed (though some limitations are no longer of practical importance) even in the Constitution of the United States. For Article V provides that 'no amendment made prior to the Year 1808 shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article and that no State without its consent shall be deprived of its equal suffrage in the Senate'.

Where the legislature is subject to limitations which can, as in South Africa, be removed by the members of the legislature operating a special procedure, it is arguable that it may be identified with the sovereign incapable of legal limitation which the theory requires. The difficult cases for the theory are those where the restrictions on the legislature can, as in the United States, only be removed by the exercise of an amending power entrusted to a special body, or where the restrictions are altogether outside the scope of any amending power.

In considering the claim of the theory to account consistently for these cases we must recall, since it is often overlooked, that Austin himself in elaborating the theory did *not* identify the sovereign with the legislature even in England. This was his view although the Queen in Parliament is, according to the normally accepted doctrine, free from legal limitations on its legislative power, and so is often cited as a paradigm of what is meant by 'a sovereign legislature' in

contrast with Congress or other legislatures limited by a 'rigid' constitution. None the less, Austin's view was that in any democracy it is not the elected representatives who constitute or form part of the sovereign body but the electors. Hence in England 'speaking accurately the members of the commons house are merely trustees for the body by which they are elected and appointed: and consequently the sovereignty always resides in the Kings Peers and the electoral body of the commons'.[1] Similarly, he held that in the United States sovereignty of each of the states and 'also of the larger state arising from the Federal Union resided in the states' governments as forming one aggregate body, meaning by a state's government not its ordinary legislature but the body of citizens which appoints its ordinary legislature'.[2]

Viewed in this perspective, the difference between a legal system in which the ordinary legislature is free from legal limitations, and one where the legislature is subject to them, appears merely as a difference between the manner in which the sovereign electorate chooses to exercise its sovereign powers. In England, on this theory, the only direct exercise made by the electorate of their share in the sovereignty consists in their election of representatives to sit in Parliament and the delegation to them of their sovereign power. This delegation is, in a sense, absolute since, though a trust is reposed in them not to abuse the powers thus delegated to them, this trust in such cases is a matter only for moral sanctions and the courts are not concerned with it, as they are with legal limitations on legislative power. By contrast, in the United States, as in every democracy where the ordinary legislature is legally limited, the electoral body has not confined its exercise of sovereign power to the election of delegates, but has subjected them to legal restrictions. Here the electorate may be considered an 'extraordinary and ulterior legislature' superior to the ordinary legislature which is legally 'bound' to observe the constitutional restrictions and, in cases of conflict, the courts will declare the Acts of the ordinary legislature invalid. Here then, in the electorate, is the sovereign free from all legal limitations which the theory requires.

[1] Austin, *Province of Jurisprudence Determined*, Lecture VI, pp. 230–1.
[2] Ibid., p. 251.

It is plain that in these further reaches of the theory the initial, simple conception of the sovereign has undergone a certain sophistication, if not a radical transformation. The description of the sovereign as 'the person or persons to whom the bulk of the society are in the habit of obedience' had, as we showed in Section 1 of this chapter, an almost literal application to the simplest form of society, in which Rex was an absolute monarch and no provision was made for the succession to him as legislator. Where such a provision was made, the consequent continuity of legislative authority, which is such a salient feature of a modern legal system, could not be expressed in the simple terms of habits of obedience, but required for its expression the notion of an accepted rule under which the successor had the right to legislate before actually doing so and receiving obedience. But the present identification of the sovereign with the electorate of a democratic state has no plausibility whatsoever, unless we give to the key words 'habit of obedience' and 'person or persons' a meaning which is quite different from that which they had when applied to the simple case; and it is a meaning which can only be made clear if the notion of an accepted rule is surreptitiously introduced. The simple scheme of habits of obedience and orders cannot suffice for this.

That this is so may be shown in many different ways. It emerges most clearly if we consider a democracy in which the electorate excludes only infants and mental defectives and so itself constitutes 'the bulk' of the population, or if we imagine a simple social group of sane adults where all have the right to vote. If we attempt to treat the electorate in such cases as the sovereign and apply to it the simple definitions of the original theory, we shall find ourselves saying that here the 'bulk' of the society habitually obey themselves. Thus the original clear image of a society divided into two segments: the sovereign free from legal limitation who gives orders, and the subjects who habitually obey, has given place to the blurred image of a society in which the majority obey orders given by the majority or by all. Surely we have here neither 'orders' in the original sense (expression of intention that *others* shall behave in certain ways) or 'obedience'.

To meet this criticism, a distinction may be made between the members of the society in their private capacity as

individuals and the same persons in their official capacity as electors or legislators. Such a distinction is perfectly intelligible; indeed many legal and political phenomena are most naturally presented in such terms; but it cannot rescue the theory of sovereignty even if we are prepared to take the further step of saying that the individuals in their official capacity constitute *another person* who is habitually obeyed. For if we ask what is meant by saying of a group of persons that in electing a representative or in issuing an order, they have acted not 'as individuals' but 'in their official capacity', the answer can only be given in terms of their qualifications under certain rules and their compliance with other rules, which define what is to be done by them to make a valid election or a law. It is only by reference to such rules that we can identify something as an election or a law made by this body of persons. Such things are to be attributed to the body 'making' them not by the same simple natural test which we use in attributing an individual's spoken or written orders to him.

What then is it for such rules to exist? Since they are rules defining what the members of the society must do to function as an electorate (and so for the purposes of the theory as a sovereign) they cannot themselves have the status of orders issued by the sovereign, for nothing can count as orders issued by the sovereign unless the rules already exist and have been followed.

Can we then say that these rules are just parts of the description of the population's *habits* of obedience? In a simple case where the sovereign is a single person whom the bulk of the society obey if, and only if, he gives his orders in a certain form, e.g. in writing signed and witnessed, we might say (subject to the objections made in Section 1 to the use here of the notion of habit) that the rule that he must legislate in this fashion is just part of the description of the society's habit of obedience: they habitually obey him *when* he gives orders in this way. But, where the sovereign person is not identifiable independently of the rules, we cannot represent the rules in this way as merely the terms or conditions under which the society habitually obeys the sovereign. The rules are *constitutive* of the sovereign, not merely things which we should have to mention in a description of the habits of

obedience to the sovereign. So we cannot say that in the present case the rules specifying the procedure of the electorate represent the conditions under which the society, as so many individuals, obeys itself as an electorate; for 'itself as an electorate' is not a reference to a person identifiable apart from the rules. It is a condensed reference to the fact that the electors have complied with rules in electing their representatives. At the most we might say (subject to the objections in Section 1) that the rules set forth the conditions under which the *elected persons* are habitually obeyed: but this would take us back to a form of the theory in which the legislature, not the electorate, is sovereign, and all the difficulties, arising from the fact that such a legislature might be subject to legal limitations on its legislative powers, would remain unsolved.

These arguments against the theory, like those of the earlier section of this chapter, are fundamental in the sense that they amount to the contention that the theory is not merely mistaken in detail, but that the simple idea of orders, habits, and obedience, cannot be adequate for the analysis of law. What is required instead is the notion of a rule conferring powers, which may be limited or unlimited, on persons qualified in certain ways to legislate by complying with a certain procedure.

Apart from what may be termed the general conceptual inadequacy of the theory, there are many ancillary objections to this attempt to accommodate within it the fact that what would ordinarily be regarded as the supreme legislature may be legally limited. If in such cases the sovereign is to be identified with the electorate, we may well ask, even where the electorate has an unlimited amending power by which the restrictions on the ordinary legislature could all be removed, if it is true that these restrictions are legal because the electorate has given orders which the ordinary legislature habitually obeys. We might waive our objection that legal limitations on legislative power are misrepresented as orders and so as *duties* imposed on it. Can we, even so, suppose that these restrictions are duties which the electorate has even *tacitly* ordered the legislature to fulfil? All the objections taken in earlier chapters to the idea of tacit orders apply with even greater force to its use here. Failure to exercise an amending

power as complex in its manner of exercise as that in the United States constitution, may be a poor sign of the wishes of the electorate, though often a reliable sign of its ignorance and indifference. We are a long way indeed from the general who may, perhaps plausibly, be considered tacitly to have ordered his men to do what he knows the sergeant tells them to do.

Again, what are we to say, in the terms of the theory, if there are some restrictions on the legislature which are altogether outside the scope of the amending power entrusted to the electorate? This is not merely conceivable but actually is the position in some cases. Here the electorate is subject to legal limitations, and though it may be called an extraordinary legislature it is not free from legal limitation and so is not sovereign. Are we to say here that the society as a whole is sovereign and these legal limitations have been tacitly ordered by *it*, since it has failed to revolt against them? That this would make the distinction between revolution and legislation untenable is perhaps a sufficient reason for rejecting it.

Finally, the theory treating the electorate as sovereign only provides at the best for a limited legislature in a democracy where an electorate exists. Yet there is no absurdity in the notion of an hereditary monarch like Rex enjoying limited legislative powers which are both limited and supreme within the system.

V

LAW AS THE UNION OF PRIMARY AND SECONDARY RULES

1. A FRESH START

IN the last three chapters we have seen that, at various crucial points, the simple model of law as the sovereign's coercive orders failed to reproduce some of the salient features of a legal system. To demonstrate this, we did not find it necessary to invoke (as earlier critics have done) international law or primitive law which some may regard as disputable or borderline examples of law; instead we pointed to certain familiar features of municipal law in a modern state, and showed that these were either distorted or altogether unrepresented in this over-simple theory.

The main ways in which the theory failed are instructive enough to merit a second summary. First, it became clear that though of all the varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats. Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription. Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitation, failed to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign person or persons could not be identified with either the electorate or the legislature of a modern state.

It will be recalled that in thus criticizing the conception of law as the sovereign's coercive orders we considered also a number of ancillary devices which were brought in at the cost of corrupting the primitive simplicity of the theory to rescue it from its difficulties. But these too failed. One device, the notion of a *tacit* order, seemed to have no application to the complex actualities of a modern legal system, but only to very much simpler situations like that of a general who deliberately refrains from interfering with orders given by his subordinates. Other devices, such as that of treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distort the ways in which these are spoken of, thought of, and actually used in social life. This had no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer. The device, designed to reconcile the self-binding character of legislation with the theory that a statute is an order given to *others*, was to distinguish the legislators acting in their official capacity, as *one* person ordering *others* who include themselves in their private capacities. This device, impeccable in itself, involved supplementing the theory with something it does not contain: this is the notion of a rule defining what must be done to legislate; for it is only in conforming with such a rule that legislators have an official capacity and a separate personality to be contrasted with themselves as private individuals.

The last three chapters are therefore the record of a failure and there is plainly need for a fresh start. Yet the failure is an instructive one, worth the detailed consideration we have given it, because at each point where the theory failed to fit the facts it was possible to see at least in outline why it was bound to fail and what is required for a better account. The root cause of failure is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law. It is true that the idea of a rule is by no means a simple one: we have already seen in Chapter III the need, if we are to do justice to the complexity of a legal system, to discriminate

between two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.

We have already given some preliminary analysis of what is involved in the assertion that rules of these two types exist among a given social group, and in this chapter we shall not only carry this analysis a little farther but we shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence'. We shall not indeed claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations—often of analogy of either form or content—to a central case. What we shall attempt to show, in this and the succeeding chapters, is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. The justification for the use of the word 'law' for a range of apparently heterogeneous cases is a secondary matter which can be undertaken when the central elements have been grasped.

2. THE IDEA OF OBLIGATION

It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea. It is, however, here, at this crucial first step, that we have perhaps most to learn from the theory's errors.

Let us recall the gunman situation. A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large; A must be the sovereign habitually obeyed and the orders must be general, prescribing courses of conduct not single actions. The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was 'obliged' to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B 'had an obligation' or a 'duty' to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it. The first is often a statement about the beliefs and motives with which an action is done: B was obliged to hand over his money may simply mean, as it does in the gunman case, that he believed that some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences. In such cases the prospect of what would happen to the agent if he disobeyed has rendered something he would otherwise have preferred to have done (keep the money) less eligible.

Two further elements slightly complicate the elucidation of the notion of being obliged to do something. It seems clear that we should not think of B as obliged to hand over the money if the threatened harm was, according to common

judgments, trivial in comparison with the disadvantage or serious consequences, either for B or for others, of complying with the orders, as it would be, for example, if A merely threatened to pinch B. Nor perhaps should we say that B was obliged, if there were no reasonable grounds for thinking that A could or would probably implement his threat of relatively serious harm. Yet, though such references to common judgments of comparative harm and reasonable estimates of likelihood, are implicit in this notion, the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference. Thus not only is it the case that the facts about B's action and his beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are *not sufficient* to warrant the statement that he had an obligation to do this; it is also the case that facts of this sort, i.e. facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something. Thus the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience. Moreover, whereas the statement that he had this obligation is quite independent of the question whether or not he in fact reported for service, the statement that someone was obliged to do something, normally carries the implication that he actually did it.

Some theorists, Austin among them, seeing perhaps the general irrelevance of the person's beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of these subjective facts, but in terms of the *chance* or *likelihood* that the person having the obligation will suffer a punishment or 'evil' at the hands of others in the event of disobedience. This, in effect, treats statements of obligation not as psychological statements but as predictions or assessments of chances of incurring punishment or 'evil'. To many later theorists this

has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same clear, hard, empirical terms as are used in science. It has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing 'above' or 'behind' the world of ordinary, observable facts. But there are many reasons for rejecting this interpretation of statements of obligation as predictions, and it is not, in fact, the only alternative to obscure metaphysics.

The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions. We have already drawn attention in Chapter IV to this neglect of the internal aspect of rules and we shall elaborate it later in this chapter.

There is, however, a second, simpler, objection to the predictive interpretation of obligation. If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.

It is, of course, true that in a normal legal system, where sanctions are exacted for a high proportion of offences, an offender usually runs a risk of punishment; so, usually the statement that a person has an obligation and the statement that he is likely to suffer for disobedience will both be true together. Indeed, the connection between these two statements is somewhat stronger than this: at least in a municipal system it may well be true that, unless *in general* sanctions were likely to be exacted from offenders, there would be little or no point in making particular statements about a person's obligations. In this sense, such statements may be said to presuppose

belief in the continued normal operation of the system of sanctions much as the statement 'he is out' in cricket presupposes, though it does not assert, that players, umpire, and scorer will probably take the usual steps. None the less, it is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge.

It is clear that obligation is not to be found in the gunman situation, though the simpler notion of being obliged to do something may well be defined in the elements present there. To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which, unlike the gunman situation, includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behaviour a standard, is the normal, though unstated, background or proper context for such a statement; and, secondly, the distinctive function of such statement is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it. We have already seen in Chapter IV that there is involved in the existence of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard. We have also seen the main ways in which these differ from mere social habits, and how the varied normative vocabulary ('ought', 'must', 'should') is used to draw attention to the standard and to deviations from it, and to formulate the demands, criticisms, or acknowledgements which may be based on it. Of this class of normative words the words 'obligation' and 'duty' form an important sub-class, carrying with them certain implications not usually present in the others. Hence, though a grasp of the elements generally differentiating social rules from mere habits is certainly indispensable for understanding the notion of obligation or duty, it is not sufficient by itself.

The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour

required by them is conceived of in terms of obligation. 'He ought to have' and 'He had an obligation to' are not always interchangeable expressions, even though they are alike in carrying an implicit reference to existing standards of conduct or are used in drawing conclusions in particular cases from a general rule. Rules of etiquette or correct speech are certainly rules: they are more than convergent habits or regularities of behaviour; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behaviour in the characteristic normative vocabulary. 'You ought to take your hat off', 'It is wrong to say "you was"'. But to use in connection with rules of this kind the words 'obligation' or 'duty' would be misleading and not merely stylistically odd. It would misdescribe a social situation; for though the line separating rules of obligation from others is at points a vague one, yet the main rationale of the distinction is fairly clear.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law. We may, of course, find both these types of serious social pressure behind what is, in an obvious sense, the same rule of conduct; sometimes this may occur with no indication that one of them is peculiarly appropriate as primary and the

other secondary, and then the question whether we are confronted with a rule of morality or rudimentary law may not be susceptible of an answer. But for the moment the possibility of drawing the line between law and morals need not detain us. What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So too rules which require honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are thought of in terms of either 'obligation' or perhaps more often 'duty'. Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.

The figure of a *bond* binding the person obligated, which is buried in the word 'obligation', and the similar notion of a debt latent in the word 'duty' are explicable in terms of these three factors, which distinguish rules of obligation or duty from other rules. In this figure, which haunts much legal thought, the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want. The other end of the chain is sometimes held by the group or their official representatives, who insist on performance or exact the penalty: sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and the second those of civil law where we think

of private individuals having rights correlative to the obligations.

Natural and perhaps illuminating though these figures or metaphors are, we must not allow them to trap us into a misleading conception of obligation as essentially consisting in some feeling of pressure or compulsion experienced by those who have obligations. The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure. Hence there is no contradiction in saying of some hardened swindler, and it may often be true, that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. To *feel* obliged and to have an obligation are different though frequently concomitant things. To identify them would be one way of misinterpreting, in terms of psychological feelings, the important internal aspect of rules to which we drew attention in Chapter III.

Indeed, the internal aspect of rules is something to which we must again refer before we can dispose finally of the claims of the predictive theory. For an advocate of that theory may well ask why, if social pressure is so important a feature of rules of obligation, we are yet so concerned to stress the inadequacies of the predictive theory; for it gives this very feature a central place by defining obligation in terms of the likelihood that threatened punishment or hostile reaction will follow deviation from certain lines of conduct. The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person's case falls under such a rule. In fact, however, this difference is not a slight one. Indeed, until its importance is grasped, we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society.

The following contrast again in terms of the 'internal' and

'external' aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of law but of the structure of any society. When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'. Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. But whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the group. Such an observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment. Such knowledge may not only reveal much about the group, but might enable him to live among them without unpleasant consequences which would attend one who attempted to do so without such knowledge.

If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer,

deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. Their point of view will need for its expression, 'I was obliged to do it', 'I am likely to suffer for it if . . .', 'You will probably suffer for it if . . .', 'They will do that to you if . . .'. But they will not need forms of expression like 'I had an obligation' or 'You have an obligation' for these are required only by those who see their own and other persons' conduct from the internal point of view. What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.

At any given moment the life of any society which lives by

rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.

3. THE ELEMENTS OF LAW

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of 'custom'; but we shall not use this term, because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation. If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Such rules are in fact always found in the primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life. Secondly, though such a society may exhibit the tension,

already described, between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure: for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view.

More important for our present purpose is the following consideration. It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways. In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts. They will in this respect resemble our own rules of etiquette. Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgement of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* are all that the group has. This defect in the simple social structure of primary rules we may call its *uncertainty*.

A second defect is the *static* character of the rules. The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed. There will be no means, in such a society, of deliberately adapting the rules to changing circumstances,

either by eliminating old rules or introducing new ones: for, again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives. In an extreme case the rules may be static in a more drastic sense. This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case, not only would there be no way of deliberately changing the general rules, but the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual. Each individual would simply have fixed obligations or duties to do or abstain from doing certain things. It might indeed very often be the case that others would benefit from the performance of these obligations; yet if there are only primary rules of obligation they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance. For such operations of release or transfer create changes in the initial positions of individuals under the primary rules of obligation, and for these operations to be possible there must be rules of a sort different from the primary rules.

The third defect of this simple form of social life is the *inefficiency* of the diffuse social pressure by which the rules are maintained. Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation. Lack of such final and authoritative determinations is to be distinguished from another weakness associated with it. This is the fact that punishments for violations of the rules, and other forms of social pressure involving physical effort or the use of force, are not administered by a special agency but are left to the individuals affected or to the group at large. It is obvious that the waste of time involved in the group's unorganized efforts to catch and punish offenders, and the smouldering vendettas which may result from self-help in the absence of an official monopoly of 'sanctions', may be serious. The history of law does, however, strongly suggest that the lack of official agencies to determine

authoritatively the fact of violation of the rules is a much more serious defect; for many societies have remedies for this defect long before the other.

The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system. We shall consider in turn each of these remedies and show why law may most illuminatingly be characterized as a union of primary rules of obligation with such secondary rules. Before we do this, however, the following general points should be noted. Though the remedies consist in the introduction of rules which are certainly different from each other, as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. Thus they may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. No doubt as a matter of history this step from the pre-legal to the legal may be accomplished in

distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. Moreover, where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law. Such complexity may make the rules of recognition in a modern legal system seem very different from the simple acceptance of an authoritative text: yet even in this simplest form, such a rule brings with it many elements distinctive of law. By providing an authoritative mark it introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified. Further, in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.

The remedy for the *static* quality of the regime of primary rules consists in the introduction of what we shall call 'rules of change'. The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules. As we have already argued in Chapter IV it is in terms of such a rule, and not in terms of orders backed by threats, that the ideas of legislative enactment and repeal are to be understood. Such

rules of change may be very simple or very complex: the powers conferred may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation. Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation. Usually some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment. Of course if there is a social structure so simple that the only 'source of law' is legislation, the rule of recognition will simply specify enactment as the unique identifying mark or criterion of validity of the rules. This will be the case for example in the imaginary kingdom of Rex I depicted in Chapter IV: there the rule of recognition would simply be that whatever Rex I enacts is law.

We have already described in some detail the rules which confer on individuals power to vary their initial positions under the primary rules. Without such private power-conferring rules society would lack some of the chief amenities which law confers upon it. For the operations which these rules make possible are the making of wills, contracts, transfers of property, and many other voluntarily created structures of rights and duties which typify life under law, though of course an elementary form of power-conferring rule also underlies the moral institution of a promise. The kinship of these rules with the rules of change involved in the notion of legislation is clear, and as recent theory such as Kelsen's has shown, many of the features which puzzle us in the institutions of contract or property are clarified by thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals.

The third supplement to the simple regime of primary rules, intended to remedy the *inefficiency* of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.

The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them 'rules of adjudication'. Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed. Like the other secondary rules these are on a different level from the primary rules: though they may be reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers and a special status on judicial declarations about the breach of obligations. Again these rules, like the other secondary rules, define a group of important legal concepts: in this case the concepts of judge or court, jurisdiction and judgment. Besides these resemblances to the other secondary rules, rules of adjudication have intimate connections with them. Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a 'source' of law. It is true that this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect. Unlike an authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.

It need hardly be said that in few legal systems are judicial powers confined to authoritative determinations of the fact of violation of the primary rules. Most systems have, after some delay, seen the advantages of further centralization of social pressure; and have partially prohibited the use of physical punishments or violent self help by private individuals. Instead they have supplemented the primary rules of obligation by further secondary rules, specifying or at least limiting the penalties for violation, and have conferred upon judges, where

they have ascertained the fact of violation, the exclusive power to direct the application of penalties by other officials. These secondary rules provide the centralized official 'sanctions' of the system.

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.

Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated. The reason why an analysis in these terms of primary and secondary rules has this explanatory power is not far to seek. Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour. This requires more detailed attention in the analysis of legal and political concepts than it has usually received. Under the simple regime of primary rules the internal point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view is required for the analysis of the basic concepts of obligation and duty. With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers,

private and public. There is a constant pull towards an analysis of these in the terms of ordinary or 'scientific', fact-stating or predictive discourse. But this can only reproduce their external aspect: to do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules.

In the next chapter we shall show how the ideas of the validity of law and sources of law, and the truths latent among the errors of the doctrines of sovereignty may be rephrased and clarified in terms of rules of recognition. But we shall conclude this chapter with a warning: though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, this cannot by itself illuminate every problem. The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate, in ways indicated in later chapters, elements of a different character.

VI

THE FOUNDATIONS OF A LEGAL SYSTEM

1. RULE OF RECOGNITION AND LEGAL VALIDITY

ACCORDING to the theory criticized in Chapter IV the foundations of a legal system consist of the situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one. This social situation is, for this theory, both a necessary and a sufficient condition of the existence of law. We have already exhibited in some detail the incapacity of this theory to account for some of the salient features of a modern municipal legal system: yet none the less, as its hold over the minds of many thinkers suggests, it does contain, though in a blurred and misleading form, certain truths about certain important aspects of law. These truths can, however, only be clearly presented, and their importance rightly assessed, in terms of the more complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of a legal system. In this chapter we shall discuss various elements of this situation which have received only partial or misleading expression in the theory of sovereignty and elsewhere.

Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases. In a very simple system like the world of Rex I depicted in Chapter IV, where only what he enacts is law and no legal limitations upon his legislative power are imposed by customary rule or constitutional

document, the sole criterion for identifying the law will be a simple reference to the fact of enactment by Rex I. The existence of this simple form of rule of recognition will be manifest in the general practice, on the part of officials or private persons, of identifying the rules by this criterion. In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. It is in this way that in our system 'common law' is subordinate to 'statute'.

It is important to distinguish this relative *subordination* of one criterion to another from *derivation*, since some spurious support for the view that all law is essentially or 'really' (even if only 'tacitly') the product of legislation, has been gained from confusion of these two ideas. In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a 'tacit' exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place. Again, as in the simple case, the existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria.

In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested sources of law. For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular

conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules. In this respect, as in many others, the rule of recognition of a legal system is like the scoring rule of a game. In the course of the game the general rule defining the activities which constitute scoring (runs, goals, &c.) is seldom formulated; instead it is *used* by officials and players in identifying the particular phases which count towards winning. Here too, the declarations of officials (umpire or scorer) have a special authoritative status attributed to them by other rules. Further, in both cases there is the possibility of a conflict between these authoritative applications of the rule and the general understanding of what the rule plainly requires according to its terms. This, as we shall see later, is a complication which must be catered for in any account of what it is for a system of rules of this sort to exist.

The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that . . .', which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a given rule of the system. This, like the expression 'Out' or 'Goal', is the language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose. This attitude of shared acceptance of rules is to be contrasted with that of an observer who records *ab extra* the fact that a social group accepts such rules but does not himself accept them. The natural expression of this external point of view is not 'It is the law that . . .' but 'In England they recognize as law . . . whatever the Queen in Parliament enacts. . . .' The first of these forms of expression we shall call an *internal statement* because it manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the

system as valid. The second form of expression we shall call an *external statement* because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it.

If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished from an external statement of fact that the rule is accepted, many obscurities concerning the notion of legal 'validity' disappear. For the word 'valid' is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition. 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. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements; for, like the cricketers' 'Out', these statements of validity normally apply to a particular case a rule of recognition accepted by the speaker and others, rather than expressly state that the rule is satisfied.

Some of the puzzles connected with the idea of legal validity are said to concern the relation between the validity and the 'efficacy' of law. If by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connection between the validity of any particular rule and *its* efficacy, unless the rule of recognition of the system includes among its criteria, as some do, the provision (sometimes referred to as a rule of obsolescence) that no rule is to count as a rule of the system if it has long ceased to be efficacious.

From the inefficacy of a particular rule, which may or may not count against its validity, we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group. In either case, the normal context or background for making

any internal statement in terms of the rules of the system is absent. In such cases it would be generally *pointless* either to assess the rights and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rules of recognition. To insist on applying a system of rules which had either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded.

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy. It would however be wrong to say that statements of validity 'mean' that the system is generally efficacious. For though it is normally pointless or idle to talk of the validity of a rule of a system which has never established itself or has been discarded, none the less it is not meaningless nor is it always pointless. One vivid way of teaching Roman Law is to speak *as if* the system were efficacious still and to discuss the validity of particular rules and solve problems in their terms; and one way of nursing hopes for the restoration of an old social order destroyed by revolution, and rejecting the new, is to cling to the criteria of legal validity of the old regime. This is implicitly done by the White Russian who still claims property under some rule of descent which was a valid rule of Tsarist Russia.

A grasp of the normal contextual connection between the internal statement that a given rule of a system is valid and the external statement of fact that the system is generally efficacious, will help us see in its proper perspective the common theory that to assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken. In many ways this theory is similar to the predictive analysis of obligation which we considered and rejected in the last chapter. In both cases alike the motive for advancing this predictive theory is the conviction that only thus can metaphysical interpretations be avoided: that either a statement that a rule is valid must ascribe some mysterious property

which cannot be detected by empirical means or it must be a prediction of future behaviour of officials. In both cases also the plausibility of the theory is due to the same important fact: that the truth of the external statement of fact, which an observer might record, that the system is generally efficacious and likely to continue so, is normally presupposed by anyone who accepts the rules and makes an internal statement of obligation or validity. The two are certainly very closely associated. Finally, in both cases alike the mistake of the theory is the same: it consists in neglecting the special character of the internal statement and treating it as an external statement about official action.

This mistake becomes immediately apparent when we consider how the judge's own statement that a particular rule is valid functions in judicial decision; for, though here too, in making such a statement, the judge presupposes but does not state the general efficacy of the system, he plainly is not concerned to predict his own or others' official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court, and constitutes not a prophecy of but part of the *reason* for his decision. There is indeed a more plausible case for saying that a statement that a rule is valid is a prediction when such a statement is made by a private person; for in the case of conflict between unofficial statements of validity or invalidity and that of a court in deciding a case, there is often good sense in saying that the former must then be withdrawn. Yet even here, as we shall see when we come in Chapter VII to investigate the significance of such conflicts between official declarations and the plain requirements of the rules, it may be dogmatic to assume that it is withdrawn as a statement now shown to be *wrong*, because it has falsely *predicted* what a court would say. For there are more reasons for withdrawing statements than the fact that they are wrong, and also more ways of being wrong than this allows.

The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an *ultimate* rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is *supreme*.

These ideas of the ultimacy of the rule of recognition and the supremacy of one of its criteria merit some attention. It is important to disentangle them from the theory, which we have rejected, that somewhere in every legal system, even though it lurks behind legal forms, there must be a sovereign legislative power which is legally unlimited.

Of these two ideas, supreme criterion and ultimate rule, the first is the easiest to define. We may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion. A similar explanation in comparative terms can be given of the notions of 'superior' and 'subordinate' criteria which we have already used. It is plain that the notions of a superior and a supreme criterion merely refer to a *relative* place on a scale and do not import any notion of legally *unlimited* legislative power. Yet 'supreme' and 'unlimited' are easy to confuse—at least in legal theory. One reason for this is that in the simpler forms of legal system the ideas of ultimate rule of recognition, supreme criterion, and legally unlimited legislature seem to converge. For where there is a legislature subject to no constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of their status as law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity. This is, according to constitutional theory, the position in the United Kingdom. But even systems like that of the United States in which there is no such legally unlimited legislature may perfectly well contain an ultimate rule of recognition which provides a set of criteria of validity, one of which is supreme. This will be so, where the legislative competence of the ordinary legislature is limited by a constitution which contains no amending power, or places some clauses outside the scope of that power. Here there is no legally unlimited legislature, even in the widest interpretation of 'legislature'; but the system of course contains an ultimate rule of recognition and, in the clauses of its constitution, a supreme criterion of validity.

The sense in which the rule of recognition is the *ultimate* rule of a system is best understood if we pursue a very familiar chain of legal reasoning. If the question is raised whether some suggested rule is legally valid, we must, in order to answer the question, use a criterion of validity provided by some other rule. Is this purported by-law of the Oxfordshire County Council valid? Yes: because it was made in exercise of the powers conferred, and in accordance with the procedure specified, by a statutory order made by the Minister of Health. At this first stage the statutory order provides the criteria in terms of which the validity of the by-law is assessed. There may be no practical need to go farther; but there is a standing possibility of doing so. We may query the validity of the statutory order and assess its validity in terms of the statute empowering the minister to make such orders. Finally, when the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.

There are, indeed, many questions which we can raise about this ultimate rule. We can ask whether it is the practice of courts, legislatures, officials, or private citizens in England actually to use this rule as an ultimate rule of recognition. Or has our process of legal reasoning been an idle game with the criteria of validity of a system now discarded? We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer the same kind of question about it as those which we answered about other rules with its aid. When we move from saying that a particular enactment is valid, because it satisfies the rule that what the Queen in Parliament enacts is law, to saying that in England this last rule is used by courts, officials, and private persons as the ultimate rule of recognition,

we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it. So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value.

Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis'. This may, however, be seriously misleading. Statements of legal validity made about particular rules in the day-to-day life of a legal system whether by judges, lawyers, or ordinary citizens do indeed carry with them certain presuppositions. They are internal statements of law expressing the point of view of those who accept the rule of recognition of the system and, as such, leave unstated much that could be stated in external statements of fact about the system. What is thus left unstated forms the normal background or context of statements of legal validity and is thus said to be 'presupposed' by them. But it is important to see precisely what these presupposed matters are, and not to obscure their character. They consist of two things. First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.

Neither of these two presuppositions are well described as 'assumptions' of a 'validity' which cannot be demonstrated. We only need the word 'validity', and commonly only use it,

to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.

A more serious objection is that talk of the 'assumption' that the ultimate rule of recognition is valid conceals the essentially factual character of the second presupposition which lies behind the lawyers' statements of validity. No doubt the practice of judges, officials, and others, in which the actual existence of a rule of recognition consists, is a complex matter. As we shall see later, there are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer. None the less it is important to distinguish 'assuming the validity' from 'presupposing the existence' of such a rule; if only because failure to do this obscures what is meant by the assertion that such a rule *exists*.

In the simple system of primary rules of obligation sketched in the last chapter, the assertion that a given rule existed could only be an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour was generally accepted as a standard and was accompanied by those features which, as we have seen, distinguish a social rule from mere convergent habits. It is in this way also that we should now interpret and verify the assertion that in England a rule—though not a legal one—exists that we must bare the head on entering a church. If such rules as these are found to exist in the actual practice of a social group, there is no separate question of their validity to be discussed, though of course their value or desirability is open to question. Once their existence has been established as a fact we should only confuse matters by affirming or denying

that they were valid or by saying that 'we assumed' but could not show their validity. Where, on the other hand, as in a mature legal system, we have a system of rules which includes a rule of recognition so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition, this brings with it a new application of the word 'exist'. The statement that a rule exists may now no longer be what it was in the simple case of customary rules—an external statement of the *fact* that a certain mode of behaviour was generally accepted as a standard in practice. It may now be an internal statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity'. In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.

2. NEW QUESTIONS

Once we abandon the view that the foundations of a legal system consist in a habit of obedience to a legally unlimited sovereign and substitute for this the conception of an ultimate rule of recognition which provides a system of rules with its criteria of validity, a range of fascinating and important questions confronts us. They are relatively new questions; for they were veiled so long as jurisprudence and political theory were committed to the older ways of thought. They are also difficult questions, requiring for a full answer, on the one hand a grasp of some fundamental issues of constitutional law and on the other an appreciation of the characteristic manner in which legal forms may silently shift and change. We shall therefore investigate these questions only so far as they bear upon the wisdom or unwisdom of insisting, as we have done, that a central place should be assigned to the union of primary and secondary rules in the elucidation of the concept of law.

The first difficulty is that of classification; for the rule which, in the last resort, is used to identify the law escapes the conventional categories used for describing a legal system, though these are often taken to be exhaustive. Thus, English constitutional writers since Dicey have usually repeated the statement that the constitutional arrangements of the United Kingdom consist partly of laws strictly so called (statutes, orders in council, and rules embodied in precedents) and partly of conventions which are mere usages, understandings, or customs. The latter include important rules such as that the Queen may not refuse her consent to a bill duly passed by Peers and Commons; there is, however, no legal duty on the Queen to give her consent and such rules are called conventions because the courts do not recognize them as imposing a legal duty. Plainly the rule that what the Queen in Parliament enacts is law does not fall into either of these categories. It is not a convention, since the courts are most intimately concerned with it and they use it in identifying the law; and it is not a rule on the same level as the 'laws strictly so called' which it is used to identify. Even if it were enacted by statute, this would not reduce it to the level of a statute; for the legal status of such an enactment necessarily would depend on the fact that the rule existed antecedently to and independently of the enactment. Moreover, as we have shown in the last section, its existence, unlike that of a statute, must consist in an actual practice.

This aspect of things extracts from some a cry of despair: how can we show that the fundamental provisions of a constitution which are surely law are really law? Others reply with the insistence that at the base of legal systems there is something which is 'not law', which is 'pre-legal', 'meta-legal', or is just 'political fact'. This uneasiness is a sure sign that the categories used for the description of this most important feature in any system of law are too crude. The case for calling the rule of recognition 'law' is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system, and so itself worth calling 'law'; the case for calling it 'fact' is that to assert that such a rule exists is indeed to make an external statement of an actual fact concerning the manner in which

the rules of an 'efficacious' system are identified. Both these aspects claim attention but we cannot do justice to them both by choosing one of the labels 'law' or 'fact'. Instead, we need to remember that the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.

A second set of questions arises out of the hidden complexity and vagueness of the assertion that a legal system *exists* in a given country or among a given social group. When we make this assertion we in fact refer in compressed, portmanteau form to a number of heterogeneous social facts, usually concomitant. The standard terminology of legal and political thought, developed in the shadow of a misleading theory, is apt to oversimplify and obscure the facts. Yet when we take off the spectacles constituted by this terminology and look at the facts, it becomes apparent that a legal system, like a human being, may at one stage be unborn, at a second not yet wholly independent of its mother, then enjoy a healthy independent existence, later decay and finally die. These halfway stages between birth and normal, independent existence and, again, between that and death, put out of joint our familiar ways of describing legal phenomena. They are worth our study because, baffling as they are, they throw into relief the full complexity of what we take for granted when, in the normal case, we make the confident and true assertion that in a given country a legal system exists.

One way of realizing this complexity is to see just where the simple, Austinian formula of a general habit of obedience to orders fails to reproduce or distorts the complex facts which constitute the minimum conditions which a society must satisfy if it is to have a legal system. We may allow that this formula does designate one necessary condition: namely, that where the laws impose obligations or duties these should be generally obeyed or at any rate not generally disobeyed. But, though essential, this only caters for what we may term the 'end product' of the legal system, where it makes its impact on the private citizen; whereas its day-to-day existence consists

also in the official creation, the official identification, and the official use and application of law. The relationship with law involved here can be called 'obedience' only if that word is extended so far beyond its normal use as to cease to characterize informatively these operations. In no ordinary sense of 'obey' are legislators obeying rules when, in enacting laws, they conform to the rules conferring their legislative powers, except of course when the rules conferring such powers are reinforced by rules imposing a duty to follow them. Nor, in failing to conform with these rules do they 'disobey' a law, though they may fail to make one. Nor does the word 'obey' describe well what judges do when they apply the system's rule of recognition and recognize a statute as valid law and use it in the determination of disputes. We can of course, if we wish, preserve the simple terminology of 'obedience' in face of the facts by many devices. One is to express, e.g. the use made by judges of general criteria of validity in recognizing a statute, as a case of obedience to orders given by the 'Founders of the Constitution', or (where there are no 'Founders') as obedience to a 'depsychologized command' i.e. a command without a commander. But this last should perhaps have no more serious claims on our attention than the notion of a nephew without an uncle. Alternatively we can push out of sight the whole official side to law and forgo the description of the use of rules made in legislation and adjudication, and instead, think of the whole official world as one person (the 'sovereign') issuing orders, through various agents or mouthpieces, which are habitually obeyed by the citizen. But this is either no more than a convenient shorthand for complex facts which still await description, or a disastrously confusing piece of mythology.

It is natural to react from the failure of attempts to give an account of what it is for a legal system to exist, in the agreeably simple terms of the habitual obedience which is indeed characteristic of (though it does not always exhaustively describe) the relationship of the ordinary citizen to law, by making the opposite error. This consists in taking what is characteristic (though again not exhaustive) of the official activities, especially the judicial attitude or relationship to law, and treating this as an adequate account of what must

exist in a social group which has a legal system. This amounts to replacing the simple conception that the bulk of society habitually obey the law with the conception that they must generally share, accept, or regard as binding the ultimate rule of recognition specifying the criteria in terms of which the validity of laws are ultimately assessed. Of course we can imagine, as we have done in Chapter III, a simple society where knowledge and understanding of the sources of law are widely diffused. There the 'constitution' was so simple that no fiction would be involved in attributing knowledge and acceptance of it to the ordinary citizen as well as to the officials and lawyers. In the simple world of Rex I we might well say that there was more than mere habitual obedience by the bulk of the population to his word. There it might well be the case that both they and the officials of the system 'accepted', in the same explicit, conscious way, a rule of recognition specifying Rex's word as the criterion of valid law for the whole society, though subjects and officials would have different roles to play and different relationships to the rules of law identified by this criterion. To insist that this state of affairs, imaginable in a simple society, always or usually exists in a complex modern state would be to insist on a fiction. Here surely the reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or of its criteria of validity. The law which he obeys is something which he knows of only as 'the law'. He may obey it for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so. He will be aware of the general likely consequences of disobedience: that there are officials who may arrest him and others who will try him and send him to prison for breaking the law. So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists.

But just because a legal system is a complex union of primary and secondary rules, this evidence is not all that is needed to describe the relationships to law involved in the existence of a legal system. It must be supplemented by a

description of the relevant relationship of the officials of the system to the secondary rules which concern them as officials. Here what is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity. But it is just here that the simple notion of general obedience, which was adequate to characterize the indispensable minimum in the case of ordinary citizens, is inadequate. The point is not, or not merely, the 'linguistic' one that 'obedience' is not naturally used to refer to the way in which these secondary rules are respected as rules by courts and other officials. We could find, if necessary, some wider expression like 'follow', 'comply', or 'conform to' which would characterize both what ordinary citizens do in relation to law when they report for military service and what judges do when they identify a particular statute as law in their courts, on the footing that what the Queen in Parliament enacts is law. But these blanket terms would merely mask vital differences which must be grasped if the minimum conditions involved in the existence of the complex social phenomenon which we call a legal system is to be understood.

What makes 'obedience' misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) *need* involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. He need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply. Instead, he may think of the rule only as something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. But this merely personal

concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts. This is most patently the case with the ultimate rule of recognition in terms of which the validity of other rules is assessed. This, if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system. If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity. In the interval between these vagaries of judicial behaviour and the chaos which would ultimately ensue when the ordinary man was faced with contrary judicial orders, we would be at a loss to describe the situation. We would be in the presence of a *lusus naturae* worth thinking about only because it sharpens our awareness of what is often too obvious to be noticed.

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more

general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses. Of course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey.

The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour. We need not be surprised at this duality. It is merely the reflection of the composite character of a legal system as compared with a simpler decentralized pre-legal form of social structure which consists only of primary rules. In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.

3. THE PATHOLOGY OF A LEGAL SYSTEM

Evidence for the existence of a legal system must therefore be drawn from two different sectors of social life. The normal, unproblematic case where we can say confidently that a legal system exists, is just one where it is clear that the two sectors

are congruent in their respective typical concerns with the law. Crudely put, the facts are, that the rules recognized as valid at the official level are generally obeyed. Sometimes, however, the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts. The variety of ways in which this may happen belongs to the pathology of legal systems; for they represent a breakdown in the complex congruent practice which is referred to when we make the external statement of fact that a legal system exists. There is here a partial failure of what is presupposed whenever, from within the particular system, we make internal statements of law. Such a breakdown may be the product of different disturbing factors. 'Revolution', where rival claims to govern are made from within the group, is only one case, and though this will always involve the breach of some of the laws of the existing system, it may entail only the legally unauthorized substitution of a new set of individuals as officials, and not a new constitution or legal system. Enemy occupation, where a rival claim to govern without authority under the existing system comes from without, is another case; and the simple breakdown of ordered legal control in the face of anarchy or banditry without political pretensions to govern is yet another.

In each of these cases there may be half-way stages during which the courts function, either on the territory or in exile, and still use the criteria of legal validity of the old once firmly established system; but these orders are ineffective in the territory. The stage at which it is right to say in such cases that the legal system has finally ceased to exist is a thing not susceptible of any exact determination. Plainly, if there is some considerable chance of a restoration or if the disturbance of the established system is an incident in a general war of which the issue is still uncertain, no unqualified assertion that it has ceased to exist would be warranted. This is so just because the statement that a legal system exists is of a sufficiently broad and general type to allow for interruptions; it is not verified or falsified by what happens in short spaces of time.

Of course difficult questions may arise after such interruptions have been succeeded by the resumption of normal

relations between the courts and the population. A government returns from exile on the expulsion of occupying forces or the defeat of a rebel government; then questions arise as to what was or was not 'law' in the territory during the period of interruption. Here what is most important is to understand that this question may *not* be one of fact. If it were one of fact it would have to be settled by asking whether the interruption was so protracted and complete that the situation must be described as one in which the original system had ceased to exist and a new one was set up similar to the old, on the return from exile. Instead the question may be raised as one of international law, or it may, somewhat paradoxically, arise as a question of law within the very system of law existing since the restoration. In the latter case it might well be that the restored system included a retrospective law declaring the system to have been (or, more candidly, to be 'deemed' to have been) continuously the law of the territory. This might be done even if the interruption were so long as to make such a declaration seem quite at variance with the conclusion that might have been reached had the question been treated as a question of fact. In such a case there is no reason why the declaration should not stand as a rule of the restored system, determining the law which its courts must apply to incidents and transactions occurring during the period of interruption.

There is only a paradox here if we think of a legal system's statements of law, concerning what are to be deemed to be phases of its own past, present, or future existence, as rivals to the factual statement about its existence, made from an external point of view. Except for the apparent puzzle of self-reference the legal status of a provision in an existing system concerning the period during which it is to be considered to have existed, is no different from a law of one system declaring that a certain system is still in existence in another country, though the latter is not likely to have many practical consequences. We are, in fact, quite clear that the legal system in existence in the territory of the Soviet Union is not in fact that of the Tsarist regime. But if a statute of the British Parliament declared that the law of Tsarist Russia was still the law of Russian territory this would indeed have meaning and legal effect as part of English law referring to the USSR,

but it would leave unaffected the truth of the statement of fact contained in our last sentence. The force and meaning of the statute would be merely to determine the law to be applied in English courts, and so in England, to cases with a Russian element.

The converse of the situation just described is to be seen in the fascinating moments of transition during which a new legal system emerges from the womb of an old one—sometimes only after a Caesarian operation. The recent history of the Commonwealth is an admirable field of study of this aspect of the embryology of legal systems. The schematic, simplified outline of this development is as follows. At the beginning of a period we may have a colony with a local legislature, judiciary, and executive. This constitutional structure has been set up by a statute of the United Kingdom Parliament, which retains full legal competence to legislate for the colony; this includes power to amend or repeal both the local laws and any of its own statutes, including those referring to the constitution of the colony. At this stage the legal system of the colony is plainly a subordinate part of a wider system characterized by the ultimate rule of recognition that what the Queen in Parliament enacts is law for (*inter alia*) the colony. At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a 'local root' in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed. Hence, though the composition, mode of enactment, and structure of the local legislature may still be that prescribed in the original constitution, its enactments are valid now not

because they are the exercise of powers granted by a valid statute of the Westminster Parliament. They are valid because, under the rule of recognition locally accepted, enactment by the local legislature is an ultimate criterion of validity.

This development may be achieved in many different ways. The parent legislature may, after a period in which it never in fact exercises its formal legislative authority over the colony except with its consent, finally retire from the scene by renouncing legislative power over the former colony. Here it is to be noted that there are theoretical doubts as to whether the courts in the United Kingdom would recognize the legal competence of the Westminster Parliament thus irrevocably to cut down its powers. The break away may, on the other hand, be achieved only by violence. But in either case we have at the end of this development two independent legal systems. This is a factual statement and not the less factual because it is one concerning the existence of legal systems. The main evidence for it is that in the former colony the ultimate rule of recognition now accepted and used includes, no longer among the criteria of validity, any reference to the operations of legislatures of other territories.

Again, however, and here Commonwealth history provides intriguing examples, it is possible that though in fact the legal system of the colony is now independent of its parent, the parent system may not recognize this fact. It may still be part of English law that the Westminster Parliament has retained, or can legally regain, power to legislate for the colony; and the domestic English courts may, if any cases involving a conflict between a Westminster statute and one of the local legislature comes before them, give effect to this view of the matter. In this case propositions of English law seem to conflict with fact. The law of the colony is *not* recognized in English courts as being what it is in fact: an independent legal system with its own local, ultimate rule of recognition. As a matter of fact there will be two legal systems, where English law will insist that there is only one But, just because one assertion is a statement of fact and the other a proposition of (English) law, the two do not logically conflict. To make the position clear we can, if we like, say that the statement of fact is true and the proposition of English law is 'correct in English law'.

Similar distinctions between the factual assertion (or denial) that two independent legal systems exist, and propositions of law about the existence of a legal system, need to be borne in mind in considering the relationship between public international law and municipal law. Some very strange theories owe their only plausibility to a neglect of this distinction.

To complete this crude survey of the pathology and embryology of legal systems we should notice other forms of partial failure of the normal conditions, the congruence of which is asserted by the unqualified assertion that a legal system exists. The unity among officials, the existence of which is normally presupposed when internal statements of law are made within the system, may partly break down. It may be that, over certain constitutional issues and only over those, there is a division within the official world ultimately leading to a division among the judiciary. The beginning of such a split over the ultimate criteria to be used in identifying the law was seen in the constitutional troubles in South Africa in 1954, which came before the courts in *Harris* v. *Dönges*.[1] Here the legislature acted on a different view of its legal competence and powers from that taken by the courts, and enacted measures which the courts declared invalid. The response to this was the creation by the legislature of a special appellate 'court' to hear appeals from judgments of the ordinary courts which invalidated the enactments of the legislature. This court, in due course, heard such appeals and reversed the judgments of the ordinary courts; in turn, the ordinary courts declared the legislature creating the special courts invalid and their judgments a legal nullity. Had this process not been stopped (because the Government found it unwise to pursue this means of getting its way), we should have had an endless oscillation between two views of the competence of the legislature and so of the criteria of valid law. The normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition, would have been suspended. Yet the great mass of legal operations not touching on this constitutional issue would go on as before. Till the population became divided and 'law and order'

[1] [1952] 1 TLR 1245.

broke down it would be misleading to say that the original legal system had ceased to exist: for the expression 'the same legal system' is too broad and elastic to permit unified official consensus on *all* the original criteria of legal validity to be a necessary condition of the legal system remaining 'the same'. All we could do would be to describe the situation as we have done and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve.

This last case brings us to the borders of a wider topic which we discuss in the next chapter both in relation to the high constitutional matter of a legal system's ultimate criteria of validity and its 'ordinary' law. All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture', and this may affect the rule of recognition specifying the ultimate criteria used in the identification of the law as much as a particular statute. This aspect of law is often held to show that any elucidation of the concept of law in terms of rules must be misleading. To insist on it in the face of the realities of the situation is often stigmatized as 'conceptualism' or 'formalism', and it is to the estimation of this charge that we shall now turn.