

AUSTIN'S COMMAND AND SOVEREIGNTY THEORY

Positivism : British Theories^{*}

The start of the nineteenth century might be taken as marking the beginning of the positivist movement. It represented a reaction against the *a priori* methods of thinking that characterised the preceding age. Prevailing theories of natural law shared the feature of turning away from the realities of actual law in order to discover in nature or reason principles of universal validity. Actual laws were then explained or condemned according to these canons. Unverified hypotheses of this sort failed to satisfy the intelligence of an age nurtured in the critical spirit of new scientific learning. Scrutiny of natural law postulates had damaging results, for they were shown to be without foundation or else the products of extrapolation.

The term 'positivism' has many meanings, which were tabulated by Professor Hart as follows: (1) Laws are commands. This meaning is associated with the two founders of British positivism, Bentham and his disciple Austin, whose views will be considered in this chapter, (2) The analysis of legal concepts is (a) worth pursuing, (b) distinct from sociological and historical inquiries, (c) distinct from critical evaluation. (3) Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality. (4) Moral judgments cannot be established or defended by rational argument, evidence or proof. (5) The law as it is actually laid down, *positum*, has to be kept separate from the law that ought to be. Whatever meanings are ascribed to positivism, it is contrasted with natural law, which also has different meanings. In view of these differences one needs to be chary of classifying any particular writer as positivist or naturalist. However, subject to that general caution, it would be safe to assert that the authors discussed in this and the following chapter are commonly regarded as positivists. What matters are their views on particular issues, not how they are labelled.

The fifth meaning given above seems to be the one currently associated with positivism. It may spring from a love of order, which aims at the clarification of legal conceptions and their orderly presentation. To insist that 'what the law is' is one question, 'what the law ought to be' is another, looks neat and tidy. Precision may be elusive but striving towards it whenever possible is commendable and profitable. Positivism flourishes in stable social conditions; the difficulties of maintaining a rigid separation between 'what is' and 'what ought to be' are only projected to the forefront when conditions are in turmoil. It is worth remarking that neither Bentham nor Austin should be thought of as writing in periods of particular stability. What they represent is the intellectual reaction against naturalism and a love of order and precision. Bentham was a tireless campaigner for reform, and both he and Austin insisted that prior to reform there has to be a thorough-going clarification of the law as it is. The significance of stable conditions might conceivably be seen in the fact that the Austinian theory made no headway until after his death, until after the Chartist movement had collapsed, and it then rapidly reached the zenith of its influence in the serene atmosphere of Victorian

^{*} R.W.M. Dias, *Jurisprudence* 331-335 (5th ed., 1985).

England. Whether a separation between the 'is' and the 'ought' is tenable or not is a debatable issue to which allusion will be made on several occasions. It is necessary, therefore, to try and clarify what that issue is. The preceding portions of this book, especially the analysis of 'Duty', will have shown that a large part of law consists of perspective patterns of behaviour, i.e. models of conduct to which people ought to conform and by which their actual behaviour is judged. Therefore the 'is', which positivists are anxious to preserve inviolate, is largely composed of 'oughts'. So far most positivists would agree but they would add that only those 'oughts' acquire the character of 'law' which have filtered through certain accepted criteria of validity. In English law these are precedent, legislation and immemorial customs. The distinction, in other words, between an 'ought' proposition that 'is' law and an 'ought' proposition that 'ought' to become law lies solely in the fact that the former has passed through one or other of the media which regulate the use of the label 'law'. It follows that positivists need not deny that judges make law; indeed, the majority admit it. They also acknowledge the influence of ethical considerations on judges and legislators, and that generally it is because a proposition was thought to be moral and just that a judge or legislator adopted it. What they do say is that it is only incorporation in precedent, statute or customs that imparts the quality of 'law'. This quality follows from such incorporation irrespective of morality, so that even if an unjust proposition were embodied in precedent or statute, it would be 'law' none the less because it would exhibit the formal stamp of validity. Therefore, they maintain, every proposition which passes through one or other of the accepted media is 'law' irrespective of all considerations which go towards saying that it should be, or should not be, law. It is this contention which touches the heart of a modern controversy to which some anticipatory reference is necessary. Natural lawyers would assert that a proposition is 'law' not merely because it satisfies some formal requirement, but by virtue of an additional minimum moral content. According to them an immoral rule would not be 'law' however much it may satisfy formal requirements [Sajjad Ahmad J in *Jilani v. Government of Punjab Pak LD* (1972) SC 139, 261].

It is also thought to follow from the positivist obsession with the 'is' that they distinguish between formal analysis on one hand, and historical and functional analysis on the other. Those who assert this do not deny the value of the latter, but contend that these should be kept apart from the former. Any such attempt, however, suffers from the inherent difficulty that it is seldom possible to study institutions as they are except in the light of their history and function. Many can only be understood in the light of their origins and past influences, which is especially the case with common law institutions, reaching back as they do unbroken for centuries. The suggested division between 'analytical' and 'functional' study is unhappier still. The preceding chapters should have demonstrated that legal conceptions are shaped by the way in which they are used and the ends which they serve, all of which import social, moral and other value considerations. This leads to a moral general objection. If the analysis of legal conceptions as they are inevitably brings in a consideration of their function, which in turn as inevitably brings in considerations of what ought to be law, what then becomes of the alleged distinction between formal and functional analysis?

Some further objections to the 'is'/'ought' distinction may also be mentioned at this juncture. It is said that a law is what its maker thought it ought to be, whether it be moral or

immoral, as with Herod's decree for the massacre of the innocents. In so far as this assertion relates to the content of a law, no positivist need disagree. The real thrust of the objection, however, becomes apparent when one considers the structures of concepts, which are shaped by the ends which they serve. This is not a mere matter of content, but of the texture of the law itself. The point is also apparent in the judicial process which, as pointed out, is guided by values. In a situation uncovered by authority, for instance, a judge will enunciate as law an appropriate rule, which will lead to the desired decision; but the point is that he states the rule *to be* what he feels it *ought to be*. As far as he is concerned he accepts it as law already because it appeals to his sense of right and *before* it is made into a precedent. As Sir Garfield Barwick CJ said 'the common law is what the court, so informed, decides that it should be ... For where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the court in general is to declare what the law is and not to decide what it ought to be. As has been suggested, the same sentiment may underlie the converse situation: what ought not to be law cannot have been law, which may be the explanation of the retrospective effect of overruling. Even where there is a rule of law, its application blurs the line between the 'is' and the 'ought'. As should have been evident from the discussion of precedent, statutory interpretations and values, rules are occasionally shaped and reshaped so as to yield the desired conclusion, i.e. the rule is stated as being what it ought to be to lead to the decision. Another point is that principles and doctrines operate differently from rules in that they exert pressure as to the direction in which rules ought to develop. No one disputes that they, too, are part of law, so what 'is' law here are statements as to what is ought to be. If, then for these reasons a total separation of 'is' and 'ought' cannot be maintained, any assertion that they are separate does not represent the position that 'is', but only what positivists think ought to be; which makes positivism itself an ideology.

When considering this debate two questions have to be asked: How far is there a separation? and, Is it desirable that there ought to be a separation? With regard to the first, the relationship between the 'is' and the 'ought' is close, as both sides will agree. It is submitted that if the matter is viewed in a temporal perspective a reconciliation may be found. There is no separation in a continuum, since the continuity of laws, their application and even their criteria of validity are in the long run dependant on conformity with moral and other such dictates. In this time-frame the naturalists can make out a case. On the other hand, in the present time-frame positivists can likewise make out a case for at least some degree of separation for the practical purposes of here and now. They themselves must concede that total separation is difficult to maintain in the day to day business of applying rules. So their contention narrows itself to the *means of identifying* 'law' at any given point of time, in short to the criteria of validity. When the matter is reduced in this way, the two questions can be restated as follows: Are the criteria of validity purely formal and separate from moral considerations? and, Should they incorporate a minimum moral criterion? Identification of that which is 'law' is the concern of lawyers in their daily business, and in this context the answer to the first question is on the side of the positivists. Even so, it may be possible to draw a slight distinction between precedent and statute as criteria of identification. A lower court is bound to apply an undistinguishable precedent of a superior court, however, wrong it may be, so that, with regard to such court, there is a distinction between what 'is' and what 'ought to be law'. A superior court, however, when overruling the unjust precedent declares

that it never was law notwithstanding the formal stamp of validity which it had borne until then. With regard to such a court the 'is'/'ought' separation in precedent as a criterion of identification breaks down at that point. Repeal of a statute, on the other hand, takes effect only from the date of repeal, and even when the effect of repeal is expressly made retroactive, there is no denial that the repealed statute was law until it was repealed. Summing up, therefore, one may say that the answer to the first question is that, within the limits of here and now and for the purpose of identifying laws, there is a separation in the criteria of identification (subject to the suggestion to the contrary with regard to precedent).

The second question is whether such a separation is desirable. The arguments that it is undesirable have been considered and need not be rehearsed. In this chapter it is necessary to consider why positivists contend that separation is desirable. Their arguments are practical. (a) Valid laws are what those charged with administering laws identify as such, and the principal reason for keeping the means of identification as clear cut as possible is convenience. For otherwise no one could know how to regulate his or her daily actions and the task of lawyers when advising clients, law-teachers instructing pupils, businessmen conducting their affairs etc. would be impossible. The importance of being able to tell as clearly and simply as possible whether this is, or is not, a 'law' at any given point of time is obvious. The introduction of morality into the criterion of identification presents difficulties. Morality is a diffuse idea and no one, even a naturalists, maintains that everything which is moral is 'law'. Since the area of 'law' is bound to be narrower than that of morality, its boundary should be made as clear as possible. (b) There is a difference in the application of formal and moral criteria. Establishing the validity of a precept by means of a formal test and a moral test involve different processes. Courts have neither the time nor the training to undertake the latter. (c) A separation between the 'is' and the 'ought' is useful in providing a standard by which positive law can be evaluated and criticised. Even naturalists concede that there will always be some discrepancy between law as it is and as it ought to be, and as long as this is so latter can be used to evaluate the former. This argument is thus not conclusive.

The above is an attempt to clarify what is perhaps the most important contention of contemporary positivism. In considering positivist theories it should not be forgotten that although there is value in identifying laws clearly for practical purposes, there is more to law besides that; but these are matters which will have to be dealt with in due course.

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The Province of Jurisprudence Determined*

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are concluded, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects:- Law set by God to his human creatures, and laws set by men to men.

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or to the law of *nature* (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled *positive* law, or law existing *by position*. As contradistinguished to the rules which I style *positive morality*, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked

* John Austin, *The Province of Jurisprudence Determined* 9 – 221 (1954).

commodiously with the name of *positive law*. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, *positive law*: though rules, which are *not* established by political superiors, are also *positive*, or exist *by position*, if they be rules or laws, in the proper signification of the term.

Though *some* of the laws or rules, which are set by men to men, are established by political superiors, *others* are *not* established by political superiors, or are *not* established by political superiors, in that capacity or character.

Closely analogous to human laws of this second class, are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term *law* are the expressions – ‘The law of honour;’ ‘The law set by fashion;’ and rules of this species constitute much of what is usually termed ‘International law.’

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they *should* be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it should be*, if it conformed to the law of God, and were, therefore, deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptance of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the grounds or decay of vegetables; of *laws* determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

Having suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy: I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of '*command*': an analysis which I fear, will task the patience of my hearers, but which they will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. '*Preces erant, sed quibus contradici nan posset.*' Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

I observe that Dr. Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a *duty* to regard it.

If he means, by a *violent* motive, a motive operating with certainty, his proposition is manifestly false. The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on that same event, the greater, no doubt, is the *chance* that the wish will *not* be disregarded. But no conceivable motive will *certainly* determine to compliance, or no conceivable motive will render obedience inevitable. If Paley's proposition be true, in the sense which I have now ascribed to it, commands and duties are simply impossible. Or, reducing his proposition to absurdity by a consequence as manifestly false, commands and duties are possible, but are never disobeyed or broken.

If he means by a *violent* motive, an evil which inspires fear, his meaning is simply this: that the party bound by a command is bound by the prospect of an evil. For that which is not feared is not apprehended as an evil: or (changing the shape of the expression) is not an evil in prospect.

The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.

By some celebrated writers (by Locke, Bentham, and, I think Paley), the term *sanction*, or *enforcement of obedience*, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity.

Rewards are, indisputably, *motives* to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms.

If *you* expressed a desire that *I* should render a service, and if you proffered a reward as the motive or inducement to render it, *you* would scarcely be said to *command* the service, nor should *I*, in ordinary language be *obliged* to render it. In ordinary language, *you* would *promise* me a reward, on condition of my rendering the service, whilst *I* might be *incited* or *persuaded* to render it by the hope of obtaining the reward.

Again: If a law hold out a *reward* as an inducement to do some act, an eventual *right* is conferred, and not an *obligation* imposed, upon those who shall act accordingly: The *imperative* part of the law being addressed or directed to the party whom it requires to *render* the reward.

In short, I am determined or inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also determined or inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring *evil*, that I am *bound* or *obliged* to compliance. It is only by conditional *evil*, that duties are *sanctioned* or *enforced*. It is the power and the purpose of inflicting eventual *evil*, and *not* the power and the purpose of imparting eventual *good*, which gives to the expression of a wish the name of a *command*.

If we put *reward* into the import of the term *sanction*, we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.

It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following: 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It also appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded', are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

But when I am talking *directly* of the expression or intimation of wish, I employ the term *command*: The expression or intimation of the wish being presented *prominently* to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation*: The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction*, or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath:- Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and

precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of '*occasional or particular* commands.'

The term *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner.

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

The statement which I have given in abstract expressions I will now endeavour to illustrate by apt examples.

If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specially determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders shall be given would be called a *general* order, and *might* be called a *rule*.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of acts being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be *called* a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands.

Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the

sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

Whether such an order would be *called* a law, seems to depend upon circumstances which are purely immaterial: immaterial, that is, with reference to the present purpose, though material with reference to others. If made by a sovereign assembly deliberately, and with the forms of legislation, it would probably be called a law. If uttered by an absolute monarch, without deliberation or ceremony, it would scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number.

To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determined a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus:- Acts or forbearances of a *class* are enjoined *generally* by the former. Acts *determined specifically*, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner:- A law obliges *generally* the members of the given community, or a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

For, *first*, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptance of the term. For, though it obliges

generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded that *black* should be the dress of his subjects, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular.

And, *secondly*, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or a rule.

For example, A father may set a *rule* to his child or children: a guardian, to his ward: a master, to his slave or servant. And certain of God's *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so called, oblige generally the members of the political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless. Most of the laws established by political superiors are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.

But if we suppose that Parliament creates and grants an office, and that Parliament binds the grantee to services of a given description, we suppose a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects.

It appears, from what has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is, emphatically, the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, is also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That *laws* emanate from *superiors*' is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from *superiors*', or to affirm of laws universally 'that *inferiors* are bound to obey them', is the merest tautology and trifling.

Like most of the leading terms in the sciences of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of *commands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands; and which, therefore, are *not* laws, properly so called.

Accordingly, the proposition 'that laws are commands' must be taken with limitations. Or, rather, we must distinguish the various meanings of the term *laws*; and must restrict the

proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.

I have already indicated, and shall hereafter more fully described, the objects improperly termed laws, which are *not* within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called, or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence. These I shall endeavour to particularise:-

1. Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. Working no change in the actual duties of the governed, but simply declaring what those duties *are*, they properly are acts of *interpretation* by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of *authentic* interpretation.

But, this notwithstanding, they are frequently styled laws; *declaratory laws*, or declaratory statutes. They must, therefore, be noted as forming an exception to the proposition 'that laws are a species of commands.'

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition 'that laws are a species of commands.' In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. They authorize or permit the parties, to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do. And, considered with regard to *this*, their immediate or direct purpose, they are often named *permissive laws*, or, more briefly and more properly, *permissions*.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived.

But this is a matter which I shall examine with exactness, when I analyse the expressions 'legal right', 'permission by the sovereign or state', and 'civil or political liberty.'

3. Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition 'that laws are a species of commands.'

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an

imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of *the Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *morals*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply, that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation. The term *imperfect* does not denote that the law imposing the duty wants the appropriate sanction. It denotes that the law imposing the duty is *not* a law established by a political superior: that it wants that *perfect*, or that surer or more cogent sanction, which is imparted by the sovereign or state.

I believe that I have now received all the classes of objects, to which the term *laws* is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. There are laws, it may be said, which *merely* create *rights*: And, seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlating rights, and which, therefore may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute.

The meaning of the term *right*, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here. I proposed, in my earlier lectures, to determine the province of jurisprudence; or to distinguish the laws established by political superiors, from the various laws, proper and improper, with which they are frequently confounded. And this I may accomplish exactly enough, without a nice inquiry into the import of the term *right*.

2. According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary laws* must be excepted from the proposition 'that laws are a species of commands.'

By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist *as positive law* by the spontaneous adoption of the governed, and not by the position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all the law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, or all judge-made law established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative*, in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observes spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which

lies at his disposition is merely delegated. The rules, which he makes, derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party, which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules, which emerge from the customs, are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following:- 1. Declaratory laws, or laws explaining the import of existing positive law; 2. Laws abrogating or repealing existing positive law; 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.

Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or remote analogy, to the following objects:— 1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

I shall finish the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to give an explanation of the marks which distinguish positive laws, I shall analyze the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments *ought* to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) ‘the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.’

Having stated the topic or subject appropriate to my present discourse, I proceed to distinguish sovereignty from other superiority or might, and to distinguish society political and independent from society of other descriptions.

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters:— 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus:— If a *determinate* human superior, *not* in a habit of obedience to a like

superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is *a state of subjection*, or *a state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are *dependent*: or to that certain person, or certain body of persons, the other members of the society are *subject*. By ‘an independent political society’, or ‘an independent and sovereign nation’, we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

To show that the union of those marks renders a given society a society political and independent, I call your attention to the following positions and examples.

1. In order that a given society may form a society political, the generality or bulk of its members must be in a *habit* of obedience to a determinate and common superior.

In case the generality of its members obey a determinate superior, but the obedience be rare or transient and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society. In other words, that determinate superior and the members of that given society do not become thereby an independent political society. Whether that given society be political and independent or not, it is not an independent political society whereof that certain superior is the sovereign portion.

For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not

sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those commands, and in spite of that obedience, the French government was sovereign or independent. Or in spite of those commands, and in spite of that obedience, the French government and its subjects were an independent political society whereof the allied sovereigns were not the sovereign portion.

Now if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been changed by the obedience into a society political. And it would not have been changed by the obedience into a society political, because the obedience was not habitual. For, inasmuch as the obedience was not habitual, it was not changed by the obedience from a society political and independent, into a society political but subordinate. A given society, therefore, is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior.

Again: A feeble state holds its independence precariously, or at the will of the powerful states to whose aggressions it is obnoxious. And since it is obnoxious to their aggressions, it and the bulk of its subjects render obedience to commands which they occasionally express or intimate. Such, for instance, is the position of the Saxon government and its subjects in respect of the conspiring sovereigns who form the Holy Alliance. But since the commands and the obedience are comparatively few and rare, they are not sufficient to constitute the relation of sovereignty and subjection between the powerful states and the feeble state with its subjects. In spite of those commands, and in spite of that obedience, the feeble state is sovereign or independent. Or in spite of those commands, and in spite of that obedience, the feeble state and its subjects are an independent political society whereof the powerful states are not the sovereign portion. Although the powerful states are permanently *superior*, and although the feeble state is permanently *inferior*, there is neither a *habit* of command on the part of the former, nor a *habit* of obedience on the part of the latter. Although the latter is unable to defend and maintain its independence, the latter is independent of the former in fact or practice.

From the example now adduced, as from the example adduced before, we may draw the following inference: that a given society is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior. By the obedience to the powerful states, the feeble state and its subjects are not changed from an independent, into a subordinate political society. And they are not changed by the obedience into a subordinate political society, because the obedience is not habitual. Consequently, if they were a natural society (setting that obedience aside), they would not be changed by that obedience into a society political.

2. In order that a given society may form a society political, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to a determinate and *common* superior. In other words, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to *one and the same* determinate person, or determinate body of persons.

Unless habitual obedience be rendered by the *bulk* of its members, and be rendered by the bulk of its members to *one and the same* superior, the given society is either in a state of nature, or is split into two or more independent political societies.

For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is in one of the two positions which I have now supposed. As there is no common superior to which the bulk of its members render habitual obedience, it is not a political society single or undivided. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies. If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved or broken into its individual elements, or into numerous societies of an extremely limited size: of a size so extremely limited, that they could hardly be styled societies independent and *political*. For, as I shall show hereafter, a given independent society would hardly be styled *political*, in case it fell short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute.

3. In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior *determinate* as well as common.

On this position I shall not insist here. For I have shown sufficiently in my fifth lecture, that no indeterminate party can command expressly or tacitly, or can receive obedience or submission: that no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.

4. It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must *not* be habitually obedient to a determinate human superior.

The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes. The given society may form a society political and independent, although that certain superior renders occasional submission to commands of determinate parties. But the society is not independent, although it may be political, in case that certain superior habitually obeys the commands of a certain person or body.

Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. Now though he commands habitually within the limits of his province, and receives habitual obedience from the generality or bulk of its inhabitants, the viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. The viceroy, and (through the viceroy) the generality or bulk of its inhabitants, are habitually obedient or submissive to the sovereign of a larger society. He and the inhabitants of his province are therefore in a state of subjection to the sovereign of that larger society. He and

the inhabitants of his province are a society political but subordinate, or form a political society which is merely a limb of another.

A natural society, a society in a state of nature, or a society independent but natural, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who composes it, lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.

Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. And considered as entire communities, and as connected by mutual intercourse, independent political societies form, it is commonly said, a natural society. These expressions, however, are not perfectly apposite. Since all the members of the related societies are members of a society political, none of the related societies is strictly in a state of nature: nor can the larger society formed by their mutual intercourse be styled strictly a natural society. Speaking strictly, the several members of the several related societies are placed in the following positions. The sovereign and subject members of each of the related societies form a society political: but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

Besides societies political and independent, societies independent but natural, society formed by the intercourse of independent political societies, and societies political but subordinate, there are societies which will not quadrate with any of those descriptions. Though, like a society political but subordinate, it forms a limb or member of a society political and independent, a society of the class in question is not a political society. Although it consists of members living in a state of subjection, it consists of subjects considered as private persons. A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyze many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose. To the accomplishment of my present purpose, it is merely incumbent upon me to determine the notion of sovereignty, with the inseparably connected notion of independent political society. For every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author.

The definition of the abstract term *independent political society* (including the definition of the correlative term *sovereignty*) cannot be rendered in expression of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every *independent* society, whether it were *political* or *natural*. It would hardly enable us to determine of every *political* society, whether it were *independent* or *subordinate*.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The *generality* or *bulk* of its members must be in a *habit* of obedience to a *certain* and *common* superior: whilst that certain person, or certain body of persons, must *not* be habitually obedient to a certain person or body.

But, in order that the *bulk* of its members may render obedience to a *common* superior, *how many* of its members, or *what proportion* of its members, must render obedience to *one and the same* superior? And, assuming that the bulk of its members render obedience to a common superior, *how often* must they render it, and *how long* must they render it, in order that that obedience may be *habitual*? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

In the cases of independent society which lie, as it were, at the extremes, we should apply that positive test without a moment's difficulty, and should fix the class of the society without a moment's hesitation. In some of those cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *political*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were in a *habit* of obedience or submission to a certain and *common* superior. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization. In other of those cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent and broken, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *natural*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were *not* in a

habit of obedience to a certain and *common* superior. Such, for example, is the state of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

But in the cases of independent society which lie between the extremes, we should hardly find it possible to fix with absolute certainty the class of the given community. We should hardly find it possible to determine with absolute certainty, whether the generality of its members did or did not obey one and the same superior. Or we should hardly find it possible to determine with absolute certainty, whether the general obedience to one and the same superior was or was not habitual. For example: During the height of the conflict between Charles, the First and the Parliament, the English nation was broken into two distinct societies: each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, was a common government completely re-established? Or at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and was the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the *bulk* of the nation were *habitually* obedient to the body which affected sovereignty? And after the conflict had subsided, and until that juncture had arrived, what was the class of the society which was formed by the English people? These are questions which it were impossible to answer with certainty, although the facts of the case were precisely known.

The positive mark of sovereignty and independent political society is therefore a fallible test. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

The negative mark of sovereignty and independent political society is also an uncertain measure. It would not enable us to determine of every *political* society, whether it were *independent* or *subordinate*. Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a habit of obedience to a determinate person or body? Is that common superior sovereign and independent, or is that common superior a superior in a state of subjection?

In numerous cases of political society, it were impossible to answer this question with absolute certainty. For example: Although the Holy Alliance dictates to the Saxon government, the commands which it gives, and the submission which it receives, are comparatively few and rare. Consequently, the Saxon government is sovereign or supreme, and the Saxon government and its subjects are an independent political society, notwithstanding its submission to the Holy Alliance. But, in case the commands and submission were somewhat more numerous and frequent, we might find it impossible to determine certainly the class of the Saxon community. We might find it impossible to determine certainly where the sovereignty resided; whether the Saxon government were a government supreme and independent; or were in a *habit* of obedience, and therefore in a state of subjection, to the allied or conspiring monarchs.

The definition or general notion of independent political society, is therefore vague or uncertain. Applying it to specific or particular cases, we should often encounter the difficulties which I have laboured to explain.

The difficulties which I have laboured to explain, often embarrass the application of those positive moral rules which are styled international law.

For example: When did the revolted colony, which is now the Mexican nation, ascend from the condition of an insurgent province to that of an independent community? When did the body of colonists, who affected sovereignty in Mexico, change the character of rebel leaders for that of a supreme government? Or (adopting the current language about governments *de jure* and *de facto*) when did the body of colonists, who affected sovereignty in Mexico, become sovereign *in fact*? And (applying international law to the specific or particular case) when did international law authorize neutral nations to admit the independence of Mexico with the sovereignty of the Mexican government?

Now the questions suggested above are equivalent to this:— When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the *bulk* of the inhabitants of Mexico were *habitually* disobedient to Spain, and probably would not resume their discarded habit of submission?

Or the questions suggested above are equivalent to this:— When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the inhabitants of Mexico were independent of Spain in practice, and were likely to remain permanently in that state of practical independence?

At that juncture exactly (let it have arrived when it may), neutral nations were authorized, by the morality which obtains between nations, to admit the independence of Mexico with the sovereignty of the Mexican government. But, by reason of the perplexing difficulties which I have laboured to explain, it was impossible for neutral nations to hit that juncture with precision, and to hold the balance of justice between Spain and her revolted colony with a perfectly even hand.

This difficulty presents itself under numerous forms in international law: indeed almost the only difficult and embarrassing questions in that science arise out of it. And as I shall often have occasion to show, law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions, *reasonable* time, *reasonable* notice, *reasonable* diligence? Than the line of demarcation which distinguishes libel and fair criticism; than that which constitutes a violation of copyright; than that degree of mental aberration which constitutes idiocy or lunacy? In all these cases, the difficulty is of the same nature with that which adheres to the phrases sovereignty and independent society; it arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived. And this, I suppose, is what people were driving at when they have agitated the very absurd enquiry whether questions of this kind are questions of law or of fact. The truth is that they are questions neither of law nor of fact. The fact be perfectly ascertained, and so may the law, as far as it is capable of being ascertained. The rule is known, and so is the given species, as the Roman jurists term it; the difficulty is in bringing the species under the rule; in

determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.

I have tacitly supposed, during the preceding analysis, that every independent society forming a society political possesses the essential property which I will now describe.

In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Now, since it is not a limb of another and larger community, the society formed by the parents and children is clearly an independent society. And, since the rest of its members habitually obey its chief, this independent society would form a society political, in case the number of its members were not extremely minute. But, since the number of its members is extremely minute, it would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. Without an application of the terms which would somewhat smack of the ridiculous, we could hardly style the society a society *political* and independent, the imperative father and chief a *monarch* or *sovereign*, or the obedient mother and children *subjects*.— ‘*La puissance politique*’ (says Montesquieu) ‘*comprend necessairement l’union de plusieurs families.*’

Again: let us suppose a society which may be styled independent, or which is not a limb of another and larger community. Let us suppose that the number of its members is not extremely minute. And let us suppose it in the savage condition, or in the extremely barbarous condition which closely approaches the savage.

Inasmuch as the given society lives in the savage condition, or in the extremely barbarous condition which closely approaches the savage, the generality or bulk of its members is not in a habit of obedience to one and the same superior. For the purpose of attacking an external enemy, or for the purpose of repelling an attack made by an external enemy, the generality or bulk of its members, who are capable of bearing arms, submits to one leader, or to one body of leaders. But as soon as that exigency passes, this transient submission ceases; and the society reverts to the state which may be deemed its ordinary state. The bulk of each of the families which composes the given society, renders habitual obedience to its own peculiar chief: but those domestic societies are themselves independent societies, or and not united or compacted into one political society by general and habitual obedience to a certain and common superior. And, as the bulk of the given society is not in a habit of obedience to one and the same superior, there is no law (simply or strictly so styled) which can be called the law of that given society or community. The so-called laws which are common to the bulk of the community, are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions. The state which I have briefly delineated, is the ordinary state of the

savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent. It was also the ordinary state of many of the German nations whose manners are described by Tacitus.

Now, since the bulk of its members is not in a habit of obedience to one and the same superior, the given independent society would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. But such it could not be esteemed, unless the term *political* were restricted to independent societies whose numbers are not inconsiderable. Supposing that the term *political* applied to independent societies whose numbers are extremely minute, each of the independent families which constitute the given society would form of itself a political community: for the bulk of each of those families renders habitual obedience to its own peculiar chief. And, seeing that each of those families would form of itself an independent political community, the given independent society could hardly be styled with strictness a natural society. Speaking strictly, that given society would form a congeries of independent political communities. Or, seeing that a few of its members might not be members also of those independent families, it would form a congeries of independent political communities mingled with a few individuals living in a state of nature. Unless the term *political* were restricted to independent societies whose numbers are not inconsiderable, few of the many societies which are commonly esteemed natural could be styled natural societies with perfect precision and propriety.

For the reasons which I have now produced, and for reasons which I pass in silence, we must, I believe, arrive at the following conclusion:- A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

And arriving at that conclusion, we must proceed to this further conclusion: In order that an independent society may form a society political, it must not fall short of a *number* which may be called considerable.

The lowest possible number which will satisfy that vague condition cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or exceed not a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

The definition of the terms *sovereignty* and *independent political society*, is, therefore, embarrassed by the difficulty following, as well as by the difficulties which I have stated in a foregoing department of my discourse. In order that an independent society may form a

society political, it must not fall short of a *number* which may be called considerable. And the lowest possible number which will satisfy that vague condition cannot be fixed precisely.

But here I must briefly remark, that, though the essential property which I have not described is an essential or necessary property of *independent* political society, it is not an essential property of *subordinate* political society. If the independent society, of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state for political or public purposes is a society or body politic: and it continues to bear the character of a society or body politic, although its number be reduced, by deaths or other causes, to that of a small family or small domestic community.

Having tried to determine the notion of sovereignty, with the implied or correlative notion of independent political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

Distinguishing *political* from *natural* society, Mr. Bentham, in his Fragment on Government, thus defines the former: 'When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*), such persons altogether (*subjects* and *governors*) are said to be in a state of *political* society.' And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should be capable of indefinite duration. Considered as a definition of independent political society, this definition is inadequate or defective. In order that a given society may form a society political and independent, the superior habitually obeyed by the bulk or generality of its members must not be habitually obedient to a certain individual or body: which negative character or essential of independent political society Mr. Bentham has forgotten to notice. And, since the definition in question is an inadequate or defective definition of *independent* political society, it is also an inadequate or defective definition of political society in general. Before we can define political society, or can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not independent is a member or constituent parcel of a political society which is. Or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignty committed by sovereigns to subjects.

According to the definition of independent political society which is stated or supposed by Hobbes in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But if power to maintain its independence by its own intrinsic strength be a character or essential property of an independent political society, or to any of the past societies which occur in the history of mankind. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly

maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations. Any political society is (I conceive) independent, if it be not dependent in fact or practice: if the party habitually obeyed by the bulk of generality of its members be not in a habit of obedience to a determinate individual or body.

In his great treatise on international law, Grotius defines sovereignty – Now in order that an individual or body may be sovereign in a given society, two essentials must unite. The generality of the given society must render habitual obedience to that certain individual or body; whilst that individual or body must not be habitually obedient to a determinate human superior. In order to an adequate conception of the nature of international morality, as in order to an adequate conception of the nature of positive law, the former as well as the latter of those two essentials of sovereignty must be noted or taken into account. But, this notwithstanding, the former and positive essential of sovereign or supreme power is not inserted by Grotius in his formal definition. And the latter and negative essential is stated inaccurately. Sovereign power (according to Grotius) is perfectly or completely independent of other human power; inasmuch that its acts cannot be annulled by any human will other than its own. But if perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet *sovereign* will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments. Every government defers frequently to those opinions and sentiments which are styled international law. And every government defers habitually to the opinions and sentiments of its own subjects. If it were not in a habit of obedience to the commands of a determinate party, a government has all the independence which a government can possibly enjoy.

According to Von Martens of Göttingen (the writer on positive international law already referred to), ‘a sovereign government is a government which *ought* not to receive commands from any external or foreign government.’ Of the conclusive and obvious objections to this definition of sovereignty the following are only a few. 1. If the definition in question will apply to sovereign governments, it will also apply to subordinate. If a sovereign ought to be free from the commands of foreign governments, so ought every government which is merely the creature of a sovereign, and which holds its powers or rights as a mere trustee for its author. 2. Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. Though, according to that morality, it *ought* to be sovereign or independent, it is subordinate or dependent in practice. 3. It cannot be affirmed absolutely of a sovereign or independent government, that it *ought* not to receive commands from foreign or external governments. The intermeddling of independent governments with other independent governments is often repugnant to the morality which actually obtains between nations. But according to that morality which actually obtains between nations (and to that international morality which general utility commends), no independent government ought to be freed completely from the supervision and control of its fellows. 4. In this definition by Von Martens (as in that which is given by Grotius) there is not the shadow of an allusion to the positive character of sovereignty. The

definition points at the relations which are borne by sovereigns to sovereigns: but it omits the relations, not less essential, which are borne by sovereigns to their own subjects.

I have now endeavoured to determine the general notion of sovereignty, including the general notion of independent political society. But in order that I may further elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will call the attention of my hearers to a few concise remarks upon the following subjects or topics. 1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary limits which bound the power of sovereigns, and by which the power of sovereigns is supposed to be bounded. 3. The origin of government, with the origin of political society: or the causes of the habitual obedience which is rendered by the bulk of subjects, and from which the power of sovereigns to compel and restrain the refractory is entirely or mainly derived.

An independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. The sovereignty can hardly reside in *all* the members of the society: for it can hardly happen that some of those members shall not be naturally incompetent to exercise sovereign powers. In most actual societies, the sovereign powers are engrossed by a single member of the whole, or are shared exclusively by a very few of its members: and even in the actual societies whose governments are esteemed popular, the sovereign number is a slender portion of the entire political community. An independent political society governed by itself, or governed by a sovereign body consisting of the whole community, is not impossible: but the existence of such societies is so extremely improbable, that, with this passing notice, I throw them out of my account.

Every society political and independent is therefore divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. In case that sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*. In case that sovereign portion consist of a number of members, the supreme government may be styled an *aristocracy* (in the generic meaning of the expression). And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy or government of one, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy or government of a number, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. In the case of an aristocracy or government of a number, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts.

In every society, therefore, which may be styled political and independent, *one* of the individual members engrosses the sovereign powers, or the sovereign powers are shared by a *number* of the individual members less than the number of the individuals composing the

entire community. Changing the phrase, every supreme government is a *monarchy* (properly so called), or an *aristocracy* (in the generic meaning of the expression).

Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms: namely, *oligarchies*, *aristocracies* (in the specific meaning of the name), and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an *oligarchy*. If the proportion be deemed small, but not extremely small, the supreme government is styled an *aristocracy* (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled *popular*, or is styled a *democracy*. But these three forms of *aristocracy* (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it. A government which one man shall deem an oligarchy, will appear to another a liberal aristocracy: whilst a government which one man shall deem an aristocracy, will appear to another a narrow oligarchy. A government which one man shall deem a democracy, will appear to another a government of a few: whilst a government which one man shall deem an aristocracy, will appear to another a government of many. The proportion, moreover, of the sovereign number to the number of the entire community, may stand, it is manifest, at any point in a long series of minute degrees.

The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

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PURE THEORY OF LAW – HANS KELSEN*

LAW AND NATURE

1. The Pure Theory

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is a science of law (jurisprudence) not legal politics.

It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law. Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.

Such an approach seems a matter of course. Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.

2. The Act and its Legal Meaning

If we differentiate between natural and social sciences - and thereby between nature and society as two distinct objects of scientific cognition - the question arises whether the science of law is a natural or a social science; whether law is a natural or a social phenomenon. But the clean delimitation between nature and society is not easy, because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature. Besides, law - or what is customarily so called - seems at least partly to be rooted in nature and to have a “natural” existence. For if you analyze any body of facts interpreted as “legal” or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts - a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act; that is, the meaning conferred upon the act by Law. For example: People assemble in a large room, make speeches, some raise their hands, others do not - this is the external happening. Its meaning is that a statute is being passed, that law is created. We are faced here

* Hans Kelsen, *Pure Theory of Law* Translated by Max Knight. 1-17, 24-58 (1970)

with the distinction (familiar to jurists) between the process of legislation and its product, the statute. To give other illustrations: A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of certain content to another merchant, who, in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.

3. The Subjective and Objective Meanings of the Act: Its Self-interpretation

The legal meaning of an act, as an external fact, is not immediately perceptible by the senses - such as, for instance, that color, hardness, weight, or other physical properties of an object can be perceived. To be sure, the man acting rationally connects his act with a definite meaning that expresses itself in some way and is understood by others. This subjective meaning may, but need not necessarily, coincide with its objective meaning, that is, the meaning the act has according to the law. For example somebody makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is a testament. Objectively, however, it is not, because some legal formalities were not observed. Suppose a secret organization intending to rid the nation of subversive elements, condemns to death a man thought to be a traitor, and has a member execute what it subjectively believes to be and calls "a death penalty"; objectively and legally however, not a death penalty but a Feme murder was carried out, although the external circumstances of a Feme murder are no different from the execution of a legal death penalty.

A written or spoken act can even say something about its own legal meaning. Therein lies a peculiarity of the objects of legal cognition. A plant is unable to tell the classifying botanist anything about itself. It makes no attempt to explain itself scientifically. But an act of human conduct can indeed carry a legal self-interpretation: it can include a statement indicating its legal meaning. The men assembled in parliament can expressly declare that they are enacting a statute; a man making a disposition about his property may call it "last will and testament"; two men can declare that they are making a contract. The scientist investigating the law, sometimes finds a legal self-interpretation which anticipates his own interpretation.

4. The Norm

a) *The Norm As a Scheme of Interpretation*

The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. To put it differently: The judgment that an act of human behavior, performed in time and space, is "legal" (or "illegal") is the result of a specific, namely normative, interpretation. And even the view that this act has the character of a natural phenomenon is

only a specific interpretation, different from the normative, namely a causal interpretation. The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. The qualification of a certain act as the execution of the death penalty rather than as a murder - a qualification that cannot be perceived by the senses - results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure. That the mentioned exchange of letters between merchants constitutes legally a contract, results exclusively from the fact that such an exchange conforms with conditions defined in the civil code. That a document is objectively *as well* as subjectively a valid testament results from the fact that it conforms to conditions stipulated by this code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents of actual happenings agree with a norm accepted as valid.

b) Norm and Norm Creation

Those norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The legal order which is the object of this cognition is a normative order of human behavior - a system of norms regulating human behavior. By "norm" we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so directed, if they, according to their content, command such behavior, but also if they permit it, and - particularly - if they authorize it. "Authorize" means to confer upon someone else a certain power, specifically the power to enact norms himself. In this sense the acts whose meaning is a norm are acts of will. If an individual by his acts expresses a will directed at a certain behavior of another, that is to say, if he commands, permits, or authorizes such behavior - then the meaning of his acts cannot be described by the statement that the other individual *will* (future tense) behave in that way, but only that he *ought* to behave in that way. The individual who commands, permits, or authorizes *wills*; the man to whom the command, permission, or authorization is directed *ought to*. The word "ought" is used here in a broader than the usual sense. According to customary usage, "ought" corresponds only to a command, while "may" corresponds to a permission, and "can" to an authorization. But in the present work the word "ought" is used to express the normative meaning of an act directed toward the behavior of others; this "ought" includes "may" and "can". If a man who is commanded, permitted, or authorized to behave in a certain way asks for the reason of such command, permission, or authorization, he can only do so by saying: Why "ought" I behave in this way? Or, in customary usage: Why may I or why can I behave in this way?

"Norm" is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: then norm is an *ought*, but the act of will is an *is*. Hence the situation constituted by such an act must be described by the statement: The one individual wills that the other individual ought to behave in a certain way. The first part of this sentence refers to an *is*., the existing fact of the first individual's act of volition; the second part to an *ought*, to a norm as the

meaning of that act. Therefore it is incorrect to assert - as is often done - that the statement: "An individual ought" merely means that another individual wills something; that the *ought* can be reduced to an *is*.

The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is" - that is, the statement by which an existent fact is described - is fundamentally different from the statement: "something ought to be" - which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.

This dualism of *is* and *ought* does not mean, however, that there is no relationship between *is* and *ought*. One says: an *is* conforms to an *ought*, which means that something is as it ought to be; and one says: an *ought* is "directed" toward an *is* - in other words: something ought to be. The expression: "an *is* conforms to an *ought*" is not entirely correct, because it is not the *is* that conforms the *ought*, but the "something" that one time is and the other time ought to be - it is the "something" which figuratively can be designated as the content of the *is* or as the content of the *ought*.

Put in different words, one can also say: a certain something - specifically a certain behavior - can have the quality of *is* or of *ought*. For example: In the two statements, "the door is being closed" and "the door ought to be closed," the closing of the door in the former statement is pronounced as something that is, in the latter as something that ought to be. The behavior that is and the behavior that ought to be are not identical, but they differ only so far as the one is and the other ought to be. *Is* and *ought* are two different modi. One and the same behavior may be presented in the one or the other of the two modi. Therefore it is necessary to differentiate the behavior stipulated by a norm as a behavior that ought to be from the actual behavior that corresponds to it. We may compare the behavior stipulated by the norm (as content of the norm) with the actual behavior; and we can, therefore, judge whether the actual behavior conforms to the norm, that is, to the content of the norm.

The behavior as it actually takes place may or may not be equal to the behavior as it ought to be. But equality is not identity. The behavior that is the content of the norm (that is, the behavior that ought to be) and the actual behavior (that is, the behavior that is) are not identical, though the one may be *equal* to the other. Therefore, the usual way to describe the relation between an actual behavior and a norm to which the behavior corresponds: "the actual behavior is the behavior that - according to the norm - ought to be," is not correct. The behavior that is cannot be the behavior that ought to be. They differ with respect to the modus which is in one case the *is*, in the other the *ought*.

Acts whose meaning is a norm can be performed in various ways. For example, by a gesture: The traffic policeman, by a motion of his arms, orders the pedestrian to stop or to continue; or by a symbol: a red light constitutes a command for the driver to halt, a green light, to proceed; or by spoken or written words, either in the imperative form - be quiet! - or in the form of an indicative statement - I order you to be silent. In this way also permissions or authorizations may be formulated. They are statements about the act whose meaning is a command, a permission, an authorization. But their meaning is not that something is, but that

something ought to be. They are not - as they linguistically seem to be - statements about a fact, but a norm, that is to say, a command, a permission, an authorization.

A criminal code might contain the sentence: Theft is punished by imprisonment. The meaning of this sentence is not, as the wording seems to indicate, a statement about an actual event; instead, the meaning is a norm it is a command or an authorization, to punish theft by imprisonment. The legislative process consists of a series of acts which, in their totality, have the meaning of a norm. To say that acts, especially legislative acts, "create" or "posit" a norm, is merely a figure of speech for saying that the meaning or the significance of the act or acts that constitute the legislative process is a norm. It is, however, necessary to distinguish the subjective and the objective meaning of the act. "Ought" is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning: and only if the act of will has also the objective meaning of an "ought," is this "ought" called a "norm." If the "ought" is also the objective meaning of the act, the behavior at which the act is directed is regarded as something that *ought* to be not only from the point of view of the individual who has performed the act, but also from the point of view of the individual at whose behavior the act is directed, and of a third individual not involved in the relation between the two. That the "ought" is the objective meaning of the act manifests itself in the fact that it is supposed to exist (that the "ought" is valid) even if the will ceases to exist whose subjective meaning it is - if we assume that an individual ought to behave in a certain way even if he does not know of the act whose meaning is that he ought to behave in this way. Then the "ought," as the objective meaning of an act, is a valid *norm* binding upon the addressee, that is, the individual at whom it is directed. The ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a "higher" norm.

The command of a gangster to turn over to him a certain amount of money has the same subjective meaning as the command of an income-tax official, namely that the individual at whom the command is directed ought to pay something. But only the command of the official, not that of the gangster, has the meaning of a valid norm, binding upon the addressed individual. Only the one order, not the other, is a norm-positing act, because the official's act is authorized by a tax law, whereas the gangster's act is not based on such an authorizing norm. The legislative act, which subjectively has the meaning of *ought*, also has the objective meaning - that is, the meaning of a valid norm - because the constitution has conferred this objective meaning upon the, legislative act. The act whose meaning is the constitution has not only the subjective but also the objective meaning of "ought," that is to say, the character of a binding norm, if - in case it is the historically first constitution - we presuppose in our juristic thinking that we ought to behave as the Constitution prescribes.

If a man in need asks another man for help, the *subjective* meaning of this request is that the other ought to help him. But in an objective sense he ought to help (that is to say, he is morally obliged to help) only if a general norm - established, for instance, by the founder of a religion - is valid that commands, "Love your neighbor." And this latter norm is objectively valid only if it is presupposed that one ought to behave as the religious founder has commanded. Such a presupposition, establishing the objective validity of the norms of a

moral or legal order, will here be called a *basic norm (Grundnorm)*. Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say, from an *ought*.

Norms according to which men ought to behave in a certain way can also be created by custom. If men who socially live together behave for some time and under the same circumstances in the same way, then a tendency - that is, psychologically, a will - comes into an existence within the men to behave as the members of the group habitually do. At first the subjective meaning of the acts that constitute the custom is not an *ought*. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*. However, the subjective meaning of the acts that constitute the custom can be interpreted as an objectively valid norm only if the custom has been instituted by a higher norm as a norm-creating fact. Since custom is constituted by human acts, even norms created by custom are created by acts of human behavior, and are therefore - like the norms which are the subjective meaning of legislative acts - "posited" or "positive" norms. Custom may create moral or legal norms. Legal norms are created by custom, if the constitution of the social group institutes custom - a specially defined custom - as norm-creating fact.

Finally it is to be noted that a norm need not be only the meaning of a real act of will; it can also be the content of an act of thinking. This is the case if the norm is only presupposed in our thinking. Just as we can imagine things which do not really exist but "exist" only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking - as is the basic norm of a positive legal order.

c) *Validity and Sphere of Validity of the Norm*

By the word "validity" we designate the specific existence of a norm. When we describe the meaning or significance of a norm-creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden, or permitted, allowed, authorized. If we use the word *ought* to comprise all these meanings, as has been suggested, we can describe the validity of a norm by saying: Something ought to, or ought not to, be done. If we describe the specific existence of a norm as "validity," we express by this the special manner in which the norm - in contradistinction to a natural fact - is existent. The "existence" of a positive norm - that is to say, its "validity" - is not the same as the existence of the act of will, whose objective meaning the norm is. A norm can be valid even if the act of will whose meaning the norm is, no longer exists. Indeed, the norm does not become valid until the act of will whose meaning the norm is has been accomplished and hence has ceased to exist. The individual who has

created a legal norm by an act directed at the behavior of others, need not continue to will this conduct in order that the norm be valid. When the men who act as legislators have passed a statute regulating certain affairs and have put this statute into "force" (i.e., into validity), they turn in their decisions to the regulation of other affairs; and the statutes put into validity may be valid long after these men have died and therefore are unable to will anything. It is incorrect, therefore, to characterize norms in general, and legal norms in particular, as the "will" or the "command" of the legislator or state, if by "will" or "command" a psychological act of will is meant. The norm is the *meaning* of an act of will, not the act of will.

Since the validity of a norm is an *ought* and not an *is*, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an "is-fact" - the fact that the norm is actually applied and the fact that people actually behave according to the norm. To say that a norm is "valid," however, means something else than that it is actually applied and obeyed; it means that it *ought* to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity. "Validity" of a legal norm presupposes, however, that it is possible to behave in a way contrary to it: a norm that were to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.

Nor do validity and effectiveness coincide in time. A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed; a law court that applies a statute immediately after promulgation - therefore before the statute had a chance to become "effective" - applies a valid legal norm. But a legal norm is no longer considered to be valid if it is permanently ineffective. Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity.

By effectiveness of a legal norm, which attaches a sanction to certain behavior and thus qualifies the behavior conditioning the sanction as illegal, that is, as "delict," two facts may be understood: (1) that this norm is *applied* by the legal organs (particularly the law courts), which means, that the sanction in a concrete case is ordered and executed; and (2) that this norm is *obeyed* by the individuals subjected to the legal order, which means, that they behave in a way which avoids the sanction. If the stipulation of sanctions intends to prevent the commission of delicts, we are faced with the ideal case of the validity of a legal norm if this norm is never applied, because the awareness among those subjected to the legal order of the sanction to be executed in case of the commission of a delict has become the motive to refrain from committing the delict. In this situation, the effectiveness of the legal norm is confined to obedience to it. But obedience to the legal norm can be induced by other motives, if, for instance, the legal delict is at the same time a religious delict, obedience to the law may be caused not by the wish to avoid the legal sanction, but to avoid the religious sanction. In this

case the law is effective, that is, actually obeyed, because religion is effective. The relation between validity and effectiveness will be discussed later.

Let us take the statement: "The norm refers to a certain human behavior." If by this behavior we mean the behavior that constitutes the content of the norm, then the norm can also refer to other facts than human behavior - however, only to the extent that these are *conditions* or (if existent in reality) *effects* of human behavior. For example: A legal norm can prescribe that in the event of a natural catastrophe those not immediately affected are obliged to render aid to the victims as much as possible. If a legal norm establishes the death penalty for murder, then the delict as well as the sanction do not only consist in a certain human behavior - directed toward the death of another human being - but also in a specific effect of such behavior, namely the death of a human being, which is a physiological event, not a human behavior. Since human behavior, as well as its conditions and effects, occur in space and time the legal norm must refer to space and time. The validity of norms regulating human behavior in general, and the validity of legal norms in particular, therefore, must be defined in terms of space and time, since these norms refer to spatial and temporal events in their content. That a norm is "valid" means always that it is valid for some specified space and time; it means that it relates to a behavior that can take place only somewhere and sometime (although it may perhaps not actually take place).

The relation of the norm to space and time is the spatial and temporal *sphere of validity* of the norm. This sphere of validity can be limited or unlimited. The norm can be valid either for a definite space and time (that determined by the norm itself or by a higher norm): it regulates, then, only those events that occur within a certain space and during a certain time; or the norm can be valid everywhere and always, that is, it can refer to events no matter where and when they occur. This latter alternative would be the meaning of a norm which does not contain any spatial or temporal limitations. Such a norm is not valid beyond space and time; the sphere of its validity in that case, does not lack space and time; it merely is not limited to a specific space or a specific time - its spatial and temporal sphere of validity is unlimited. The sphere of validity of a norm is an element of its content; and this content, as we shall see, can to some extent be determined by another, higher norm.

As for the temporal sphere of validity of a positive norm, it is necessary to distinguish between the time before and after the enactment of the norm. In general, norms refer only to future behavior, but they may also refer to the past. For example, a legal norm which attaches a sanction to a certain behavior may prescribe that an individual ought to be punished even for behavior that had occurred before the legal norm was enacted whereby the behavior is qualified as a delict. In this case we say that the norm is retroactive. But a legal norm may refer to the past not only with respect to the delict but also with respect to the sanction. A legal norm may stipulate not only that under certain conditions, fulfilled before its enactment, a coercive act as a sanction ought to be executed in the future, but also that under these conditions a coercive act that actually has been performed in the past without being prescribed by a norm then valid, ought to have been performed; so that the character of a sanction is conferred upon this coercive act with retroactive force. For example: In Nationalist Socialist Germany certain coercive acts which at the time of their performance were legally murder,

were subsequently retroactively legitimized as “sanctions”; and the behavior of the victim which elicited the murder was subsequently qualified as a “delict.”

A legal norm can retroactively annul the validity of an earlier norm in such a way *that* the coercive acts carried out as sanctions under the earlier norm are divested of their character as punishments or civil executions; and that the human behavior that was the condition of the sanction is divested of its character as a delict. For example: A government that has come to power by revolution can, by a retroactive statute, repeal a statute enacted by the over-thrown government, under which certain acts committed by members of the revolutionary party had been punished as political crimes. Of course, that which had been done cannot be undone; but the normative interpretation in general, and the legal qualifications in particular, of acts can be subsequently changed on the basis of norms which are enacted after the acts have been performed.

In addition to a spatial and temporal sphere of validity of a norm, a personal and material sphere of validity is to be distinguished. For the behavior that is regulated by norms is the behavior of human beings and every behavior regulated by a norm contains a personal and a material element: the *individual* who ought to behave in a certain way, and the *manner* in which he ought to behave. Both elements are inseparably linked. In this respect it must be carefully observed that the norm does not refer to the individual as such, but to a definite behavior of an individual. The personal sphere of validity refers to the personal element of the behavior determined by the norm. This sphere of validity, again, can be unlimited or limited: a moral order may claim to be valid for all individuals; that is, the norm of this order regulates the behavior of all individuals and not only of individuals specifically qualified by the order; this is usually expressed by saying that this order addresses itself to all individuals. On the other hand, the behavior determined by the norms of a national legal order is only the behavior of individuals who live within the state territory and of the state's citizens who happen to be abroad. This is expressed by saying that the national legal order regulates only the behavior of human beings determined in this way - only these human beings are subject to the national legal order; in other words: the personal sphere of validity is limited to these individuals.

We speak of the material sphere of validity when we have in mind the various provinces of human behavior that are subject to regulation such as economic, religious, political behavior. A norm that regulates the economic behavior of men is said to be regulating the economy, one that regulates religious behavior to be regulating religion, and so on. One speaks of different objects of *regulation* and means by this the different directions of the behavior regulated by norms. What the norms of an order regulate is always human behavior - only *it* can be regulated by norms. Facts other than human behavior can be made the content of norms only in connection with human conduct - only as a condition or as the effect of it. The concept of a material sphere of validity is applied, for example, when a total legal order - such as that of a federal state comprising several member states - is articulated into several partial legal orders, whose spheres of validity are determined with respect to the objects to be regulated. For example, if the legal orders of the member states are competent to regulate only those objects which are specifically enumerated by the constitution; if - in other words - the regulating of these objects falls within the competence of the member states, whereas the

regulation of all other objects is reserved for the legal order of the federation, which, in itself is also a partial legal order. The material sphere of validity of a total legal order is always unlimited, in the sense that such an order, by its very nature, can regulate the behavior of the individuals subjected to it in all directions.

d) *Positive and Negative Regulations: Commanding, Authorizing, Permitting*

The behavior regulated by a normative order is either a definite action or the omission (nonperformance) of such an action. Human behavior, then, is either positively or negatively regulated by the normative order. Positively, when a definite action of a definite individual or when the omission of such an action is commanded. (When the omission of an action is commanded, the action is forbidden.) To say that the behavior of an individual is commanded by an objectively valid norm amounts to the same as saying the individual is obliged to behave in this way. If the individual behaves as the norm commands he fulfills his obligation - he obeys the norm; if he behaves in the opposite way, he "violates" the norm - he violates his obligation. Human behavior is positively regulated also, when an individual is authorized by the normative order to bring about, by a certain act, certain consequences determined by the order. Particularly an individual can be authorized (if the order regulates its own creation) to create norms or to participate in that creation; or when, in case of a legal order providing for coercive acts as sanctions, an individual is authorized to perform these acts under the conditions stipulated by the legal order; or when the norm permits an individual to perform an act, otherwise forbidden - a norm which limits the sphere of validity of a general norm that forbids the act. An example for the last-mentioned alternative is self-defense: although a general norm forbids the use of force of one individual against another, a special norm permits such use of force in self-defense. When an individual acts as he is authorized by the norm or behaves as he is permitted by a norm, he "applies" the norm. The judge, authorized by a statute (that is, a general norm) to decide concrete cases, applies the statute to a concrete case by a decision which constitutes an *individual* norm. Again, authorized by a judicial decision to execute a certain punishment, the enforcement officer "applies" the individual norm of the judicial decision. In exercising self-defense, one applies the norm that permits the use of force. Further, a norm is also "applied" in rendering a judgment that an individual does, or does not, behave as he is commanded, authorized, or permitted by a norm.

In the broadest sense, any human behavior determined by a normative order as condition or consequence, can be considered as being authorized by this order and in this sense as being positively regulated. Human behavior is regulated negatively by a normative order if this behavior is not forbidden by the order without being positively permitted by a norm that limits the sphere of validity of a forbidding norm, and therefore is permitted only in a negative 'sense. This merely negative function of permitting has to be distinguished from the positive function of permitting - "positive," because it is the function of a positive norm, the meaning of an act of will. The positive character of a permission becomes particularly apparent when the limitation of the sphere of validity of a norm that forbids a certain conduct is brought about by a norm that permits the otherwise forbidden conduct under the condition that the permission has to be given by an organ of the community authorized thereto. The negative as well as positive function of permitting is therefore fundamentally connected with

the function of commanding A definite human behavior can be permitted only within a normative order that commands different kinds of behavior.

"To permit" is also used in the sense of "to entitle" (*berechtigen*). If *A* is commanded to endure that *B* behaves in a certain way, it is - said that *B* is permitted (that is, entitled) to behave in this way. And if *A* is commanded to render a certain service to *B*, it is said that *B* is permitted (that is, entitled) to receive the service of *A*. In the first example, then, the sentence "*B* is permitted to behave in a certain way" says the same as the sentence: "*A* is commanded to endure that *B* behaves in a certain way." And in the second example the sentence: "*B* is permitted to receive a certain service from *A*" says the same as the sentence: "*A* is commanded to render a service to *B*." The quality of *B*'s behavior "to be permitted" is merely the reflex of the quality of *A*'s behavior "to be commanded. This kind of permitting" is not a function of the normative order different from its function of "commanding."

5. The Social Order *Social Orders Prescribing Sanctions*

The behavior of an individual can be - but need not be - in relation to other individuals: a man can behave in a certain way toward another man, but he can do so also toward animals, plants, and inanimate objects. The relation of one individual to other individuals can be direct or indirect. Murder is the behavior of a murderer toward the murdered - a direct relation between one individual and another. He who destroys a valuable object acts directly in relation to a thing but indirectly in relation to men who are interested in the object, particularly its owners. A normative order that regulates human behavior in its direct or indirect relations to other human beings, is a social order. Morals and law are such social orders.

On the other hand, logic has as its subject matter a normative order that does not have a social character. For the acts of human thought, which are regulated by the norms of this order, do not refer to other human beings; one does not think "toward" another man in the way that one acts toward another.

The behavior of one individual toward others may be useful or detrimental for them. From a psychological-sociological point of view, the function of every social order is to bring about a certain behavior of the individuals subject to this order; to motivate them to refrain from certain acts deemed detrimental "socially," that is, to other individuals; and to perform certain acts deemed socially useful. This motivating function is rendered by the idea men have of norms, which command or forbid certain human acts.

Depending on the manner in which human acts are commanded or forbidden, different types may be distinguished - they are ideal types, not average types. The social order may command certain human behavior without attaching any consequence to the obeying or the disobeying of the command. Or the social order may command a definite human behavior and at the same time connect with that behavior the granting of an advantage, a reward; or with the opposite behavior a disadvantage, punishment in the broadest sense of the word. The principle, to react upon a certain human behavior with reward or punishment is the principle

of retribution. Reward and punishment may be called “sanctions,” but usually only punishment, not reward, is so called.

Finally a social order may - and a legal order does - command a certain behavior just attaching a disadvantage to the opposite behavior, for example the deprivation of life, health, freedom, honor, material goods, in the broadest sense the word. Therefore, one may say that a certain behavior is “commanded” by a social order and - in case of a legal order - is legally commanded, only insofar as the contrary behavior is a condition of a sanction (in the narrower sense of the word). If a social order - like the legal order ... commands a behavior by prescribing a sanction in case of the opposite behavior, this set of circumstances can be described by a sentence stating that in the event of a certain behavior a certain sanction *ought* to be executed. By this is implied that the behavior conditioning the sanction is prohibited, the opposite behavior commanded: The behavior which is “commanded” is not the behavior which “ought” to be executed. That a behavior is commanded” means that the contrary behavior is the condition is the condition of a sanction that ought to be executed. The execution of the sanction is *commanded* (i.e., it is the content of a legal obligation if the non-execution is the condition of a sanction. If this is not the case, the sanction is only authorized, not commanded. Since this regression cannot go on indefinitely, the last sanction in this chain can only be authorized, not commanded.

It follows that within such a normative order the same behavior may be - in this sense - commanded and forbidden at the same time, and that this situation may be described without logical contradiction. This is the case if a certain conduct is the condition of a sanction and at the same time the omission of this conduct is also the condition of a sanction. The two norms: “a ought to be” and “a ought not to be” exclude each other insofar as they cannot be obeyed or applied by the same individual at the same time; only one can be valid. But the two norms: “If *a* is, *x* ought to be” and “If non-*a* is, *x* ought to be” are not mutually exclusive. These two norms can be valid at the same time. Under a legal order a situation may exist in which a certain human behavior and at the same time the opposite behavior is the condition of a sanction which ought to be executed. The two norms can be valid side by side. They can be described without logical contradiction, but they express two conflicting political tendencies, a teleological conflict. The situation is possible, but politically unsatisfactory. Therefore legal orders usually contain rules according to which one of the two norms is invalid or may be invalidated.

Insofar as the evil that functions as a sanction - the punishment in the widest sense - has to be inflicted against the will of the affected individual; and insofar as, in case of resistance, the evil has to be inflicted by force, the sanction has the character of a coercive act. A normative order, which prescribes coercive acts as sanctions (that is, as reactions against a certain human behavior), is a coercive order. But coercive acts can be prescribed - and are so prescribed in a legal order, as we shall see - not only as sanctions, but as reactions against socially undesirable facts that do not have character of human behavior and are therefore not to be regarded as prohibited.

From a sociological-psychological point of view, reward or punishment are ordered to make the desire for reward and the fear of punishment the motives for a socially desirable

behavior. But actually this behavior may be brought about by other motives. According to its inherent meaning, the order may prescribe sanctions without regard to the motives that actually, in each single case have brought about the behavior conditioning the sanctions. The meaning of the order is expressed in the statement that in the case of a certain behavior - brought about by whatever motives - a sanction (in the broader sense of the word, that is, reward or punishment) ought to be executed. Indeed, an order may attach a reward to a behavior only if it had not been motivated by the desire for reward. For example, a moral order may honor only the one who does good deeds for their own sake, not for honor's sake. Since in the foregoing pages the validity of a social order has been distinguished from its effectiveness, it should be noted that a social order prescribing rewards or punishments is effective in the literal sense of the word insofar only as the behavior conditioning the reward is caused by the desire for the reward, and the behavior avoiding the punishment is caused by the fear of punishment. However, it is usual to speak of an effective order also if the behavior of the individuals subjected to the order by and large corresponds to the order, that is to say, if the individuals by and large by their behavior fulfill the conditions of the rewards and avoid the conditions of the punishments, without regard to the motive of their behavior. Used in this way the concept of effectiveness has a normative, not a causal, meaning.

a) *Are There Social Orders without Sanctions?*

Distinctly different from a social order prescribing sanctions (in the wider sense of the word) is one that commands a certain behavior without attaching reward for it or punishment for its opposite - that is, an order in which the principle of retribution is not applied. Usually the moral order is considered to be such a social order, and is thereby distinguished from the legal order. Jesus, in his Sermon on the Mount, does not seem, at first glance to posit a moral order with sanctions, because he decidedly rejects the retribution principle of the Old Testament - evil for evil, good for good: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist one who is *evil*.... You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, Love your enemies For if you love those who love you, what reward have you? Do not even the tax collectors do the same?" Evidently Jesus refers here to the heavenly reward, and therefore even in this moral order of highest standard the principle of retribution is not entirely excluded. Heavenly (although not secular) reward is promised to the one who renounces the application of the principle of retribution in this world - who does not requite evil with evil, and not only the good with good. Also punishment in the other world is included in this moral order which does not provide for punishment in this world. It is not a moral order without sanctions, but an order with transcendental sanctions, and in that sense a religious order.

In order to judge the possibilities of a sanctionless moral order, it must be noted that: if a moral order commands a certain behavior, it commands simultaneously that the commanded behavior of the one subject is to be approved by the others opposite behavior disapproved. If somebody disapproves the commanded behavior or approves the opposite behavior, then he behaves immorally and must himself be morally disapproved. Approval and disapproval by the fellow members of the community are sensed as reward and punishment and may therefore be interpreted as sanctions. Sometimes they are more effective sanctions than other

forms of reward and punishment, because they satisfy or hurt man's desire for reputation, which is one of the most important components of the instinct for self-preservation. It is to be noted that the two moral norms - the one commanding a certain behavior and the one prescribing disapproval for the opposite behavior - are essentially connected and form a unity. It is therefore doubtful whether a distinction between social orders with and without sanctions is possible. The only relevant difference between social orders is not that some prescribe sanctions and the others do not, but that they prescribe different types of sanctions.

c) Transcendental and Socially Immanent Sanctions

The sanctions prescribed by a social order are either transcendental or socially immanent. Transcendental sanctions are those that according to the faith of the individuals subjected to the order originate from a superhuman authority. Such a faith is a specific element of a primitive mentality. Early man interprets natural events that affect his immediate interest according to the principle of retribution: favorable events as rewards for the observance, unfavorable events as punishment for disregard of the existing social order. Originally it was probably the spirits of the dead which, according to the religious ideas of early man, reward socially good behavior with success in the hunt, a rich harvest, victory in battle, health, fertility, and long life; and which punish bad behavior with disease and death. Nature, socially interpreted, appears as a normative social order connecting a definite human behavior with definite sanctions. This order has a religious character. But even within religions of the highest standards, such as the Judeo-Christian, the normative interpretation of nature plays a part that is not to be underestimated. Even modern man, when hit by misfortune, will often instinctively ask: What have I done to deserve such punishment? He will be inclined to interpret his good fortune as reward for conscientious observance of God's commands. In this respect higher developed religions are distinguished from the primitive ones only so far as they add to the sanctions to be executed in this world those that are imposed in the other world - by God rather than by the spirits of the dead. These sanctions are transcendental not only in the sense that they originate from a superhuman and therefore supersocial authority, but that they are executed outside society and even outside this world within a transcendental sphere.

Different from the transcendental sanctions are those that not only take place in this world and within society, but are executed by the members of the society and may therefore be described as 'socially immanent' sanctions. These may consist merely in the approval or disapproval expressed by the fellow members or in specific acts directed against others, that is, in acts to be performed by certain individuals designated by the social order in a procedure regulated by this order. Then one can speak of socially organized sanctions. The oldest sanction of this kind is blood revenge as practiced in primitive society. This is a sanction by which the primitive social order reacts against the fact that a member of a group constituted by blood relationship (the narrower or wider family) kills the member of another group of this kind in a natural way or by magic. It is to be executed by the members of the latter against the members of the former group. Murder within a group originally was probably sanctioned only by the revenge taken by the spirit of the murdered on the murderer. But insofar as the spirit of the dead has power only within his own group, a murder committed by a member of another group can be revenged only by acts of the victim's relatives. Only the nonfulfillment of the

obligation for revenge is subject to the transcendental sanction of revenge from the soul of the murdered. It should be noted that blood revenge, the oldest socially organized sanction, originally worked only in the relation between groups. It developed to a sanction functioning within one and the same group only when the social community comprised several groups constituted by blood relationship and hence was larger than a mere family group.

Sociologically, the religious development was characterized by centralization of the superhuman authority, increase of its power, and increase of the distance between the authority and man. The many spirits of the dead were reduced to a few gods and finally to one all-powerful God transferred to another world. How much the social idea of retribution dominated this development shows the fact that when man in his faith imagined in addition to this world another world, then this other world, in accordance with the principle of reward and punishment, split into a heaven for the good and a hell for the evil.

It is remarkable that of the two sanctions, reward and punishment, the latter plays a much more important role in social reality than the former. This is shown not only by the fact that the most important social order, the legal order, essentially makes use only of punishment, but especially clearly under a social order which still has a purely religious character, that is, a social order guaranteed only by transcendental sanctions. The morally or legally correct behavior of primitive men, especially in the observance of the numerous prohibitions - the so-called tabus - is determined primarily by the fear of misfortunes imposed by a superhuman authority - the spirits of the dead - as a reaction against the violation of the traditional order. The hope of reward, if compared with the fear that dominates the life of the primitives, plays only a subordinate role. In the religious beliefs of civilized man, too, according to which divine retribution is not (or not only) imposed in this world but in the world beyond, fear of punishment after death takes first place. The image of hell as the place of punishment is much more vivid than the usually vague idea of a life in heaven which is the reward for piety. Even when no limits are imposed on man's wish-fulfilling phantasy, it produces a transcendental order which is not fundamentally different from that of the empirical society.

6. The Legal Order

a) *The Law: An Order of Human Behavior*

A theory of law must begin by defining its object matter. To arrive at a definition of law, it is convenient to start from the usage of language, that is, to determine the meaning of the word "law" as equivalent to the German word *Recht*, French *droit*, Italian *diritto*. Our task will be to examine whether the social phenomena described by these words *have* common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements for a concept of social-scientific cognition. The result of such an investigation could conceivably be that the word "law" and its equivalents in other language designates so many different objects that they cannot be comprehended in one concept. However, this is not so. Because, when we compare the objects that have been designated by the word "law" by different peoples at different times, we see that all these objects turn out to be *orders of human behavior*. An "order" is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm - as we shall

see -from which the validity of all norms of the order are derived. A single norm is a valid legal norm, if it corresponds to the concept of "law" and is part of a legal order; and it *is* part of a legal order, if its validity is based on the basic norm of that order.

The norms of a legal order regulate human behavior. At first sight it seems as if this sentence applied only to the social orders of civilized peoples, because in primitive societies the behavior of animals, plants, and even inanimate objects is also regulated by a legal order. For example, we read in the Bible that an ox that has killed a man ought to be killed - evidently as a punishment. In ancient Athens, there was a special Court, in which a stone or spear or any other object could be tried by which a man - presumably inadvertently - had been killed. In the Middle Ages it was possible to sue an animal, for example a bull that had caused the death of a man or grasshoppers that had destroyed a harvest. The accused animal was condemned and executed in formal legal procedure, exactly like a human criminal. If the sanctions, provided by the legal order, are directed not only against men but also against animals, this means that not only human behavior, but also the behavior of animals is legally commanded. This means further: if that which is legally commanded is to be regarded as the content of a legal duty, then not only men, but also animals are regarded as being obliged to behave in a certain way. This, in our modern point of view, absurd legal content is the result of animistic ideas, according to which not only men, but also animals, and inanimate objects have a "soul" and are therefore basically not different from human beings. Consequently sanctions, and therefore norms that establish legal duties, are applicable to men as well as animals and things. Although modern legal orders regulate only the behavior of men, not of animals, plants, and things it is not excluded that these orders prescribe the behavior of man toward animals, plants, and things. For example, the killing of certain animals (in general or at specific times), the damaging of rare plants or historically valuable buildings may be prohibited. But these legal norms do not regulate the behavior of the protected animals, plants, and things, but of the men against whom the threat of punishment is directed.

This behavior may be a positive action or nonaction - a lack of action, an omission, a forbearance, a refrainment from action. The legal order, as a social order, regulates positively the behavior of individuals only so far as it refers, directly or indirectly, to other individuals. The object of regulation by a legal order is the behavior of one individual in relation to one, several, or all other individuals - the mutual behavior of individuals. The relation of the behavior of one man to others may be an individual one: for example, the norm that obliges every man to refrain from killing other men; or the norm that obliges the debtor to pay the creditor or the norm that obliges everybody to respect the property of others. But the relation may also have a collective character. For example, the behavior prescribed by the norm obliging a man to do military service, is not the behavior of an individual versus another individual, but versus the entire social community - versus all individuals subject to the legal order. The same is true where suicide attempt is punishable. And in the same way the mentioned norms protecting animals, plants, and inanimate objects may be interpreted as social norms. The legal authority commands a certain human behavior, because the authority, rightly or wrongly, regards such behavior as necessary for the human legal community. In the last analysis, it is this relation to the legal community which is decisive for the legal regulation of the behavior of one individual to another. For the legal norm obliges the debtor

not only and, perhaps, not so much in order to protect the creditor, but in order to maintain a certain economic system.

b) *The Law: A Coercive Order*

The first characteristic, then, common to all social orders designated by the word “law” is that they are orders of human behavior. A second characteristic is that they are *coercive orders*. This means that they react against certain events, regarded as undesirable because detrimental to society, especially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil - such as deprivation of life, health, liberty, or economic values - which, if necessary, is imposed upon the affected individual even against his will by the employment of physical force. By the coercive act an evil is inflicted in the sense that the affected individual ordinarily regards it as such, although it may occasionally happen that this is not so. For example, somebody who has committed a crime may regret his action so much that he actually wishes to suffer the punishment of the law and therefore does not regard it as an evil; or somebody commits a crime in order to go to jail where he can be sure of food and shelter. But these are, of course, exceptions. Since, ordinarily, the affected individual regards the coercive act as an evil, the social orders, designated as “law” are coercive orders of human behavior. They command a certain human behavior by attaching a coercive act to the opposite behavior. This coercive act is directed against the individual who behaves in this way (or against individuals who are in some social relation to him). That means: the coercive order authorizes a certain individual to direct a coercive act as a sanction against another individual. The sanctions prescribed by the legal order are socially immanent (as distinguished from transcendental) sanctions; besides, they are socially organized (as distinguished from mere approval or disapproval).

By prescribing coercive acts, a legal order may not only react against a certain human behavior, but also against other socially detrimental facts, as will be described later. In other words: Whereas the coercive act prescribed by the legal order is always the behavior of a certain individual, the condition to which the coercive act is attached need not necessarily be the behavior of an individual but may be another fact, regarded as socially detrimental. As we shall see, the coercive act prescribed by the legal order may be interpreted as an action of the community constituted by the legal order and especially as a reaction of the legal community against a socially detrimental fact. That means that the coercive act may be *attributed* to this community; which is a figurative expression of the mental operation by which we refer the coercive act prescribed by the legal order to this legal order, the unity of which we personify as an acting entity. If the socially detrimental fact against which the community reacts with a coercive act is a definite human behavior, the reaction is interpreted as a sanction. That the law is a coercive order means that the legal norms prescribe coercive acts which may be attributed to the legal community. This does not mean that the execution of the sanctions each time requires the application of physical force; this is necessary only if execution meets resistance, which ordinarily does not happen.

Modern legal orders sometimes contain norms that provide for rewards, such as titles or decorations, for certain meritorious acts. But rewards are not an element common to all social orders designated as law; they are not an essential function of these orders. Within these

coercive orders they play a subordinate role. Besides, these norms authorizing certain organs to confer titles or decorations on individuals who have distinguished themselves in some way or another have a fundamental connection with the sanction-prescribing norms: For the use of a title or the display of a decoration is either legally not prohibited, that is, negatively permitted; or - and this is the usual situation - it is positively permitted, which means it is forbidden, unless expressly permitted. The legal situation, then, can only be described as a norm-stipulated restriction of the validity of a prohibitive norm; in other words, by referring to a coercive norm.

As a coercive order, the law is distinguished from other social orders. The decisive criterion is the element of force - that means that the act prescribed by the order as a consequence of socially detrimental facts ought to be executed even against the will of the individual and, if he resists, by physical force.

The coercive acts prescribed by the legal order as sanctions

Insofar as the coercive act prescribed by the legal order has the function of a reaction against a human behavior determined by the legal order, then this coercive act has the character of a sanction. The human behavior against which the coercive act is directed is to be considered as prohibited, illegal - as a delict. It is the opposite of *that* behavior that is regarded as commanded or legal, namely the behavior that avoids the application of the sanction. That the law is characterized as a "coercive order" does not mean - as is sometimes asserted - that it "enforces" the legal, that is, the commanded, behavior. This behavior is not enforced by the coercive act, because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded, manner. It is exactly for this case that the coercive act as a sanction is prescribed. Perhaps, however, the mentioned assertion should be taken to mean that the law, by prescribing sanctions, tries to induce men to behave in conformity with its command, in that the wish to avoid the sanctions becomes the motive that brings about this behavior. However this motivation in question is only a possible, not a necessary, function of the law; the legal - that is, the commanded ... behavior may be brought about by other motives also, especially by religious and moral ones. And this happens frequently enough. The coercion that is implied in the motivation is a psychic coercion, which is a possible effect of the idea an individual has of the law, and which takes place within this individual. And this psychic coercion must not be confused with the prescription of the coercive act, which takes place within the legal order. Every effective social order exerts some kind of psychic coercion, and some orders - such as the religious order - in much higher degree than the legal order. This psychic coercion, then, is not a characteristic that distinguishes the law from other social orders. The law is not a coercive order in the sense that it exerts a psychic coercion; but in the sense that it prescribes coercive acts, namely the forcible deprivation of life, freedom, economic and other values as a consequence of certain conditions: These conditions are in the first place - but not exclusively - a definite human behavior, which precisely by being a condition of a sanction assumes the character of legally prohibited (illegal) behavior - a delict.

The monopoly of force of the legal community

Although the various legal orders largely agree about the coercive acts which may be attributed to the legal community - they always consist in the deprivation of the mentioned goods - these orders differ concerning the conditions to which the coercive acts are attached. They differ particularly concerning the human behavior whose opposite should be brought about by stipulating the sanctions, that is, concerning the socially desired status, which consists in the legal behavior prescribed by the legal order; in other words, concerning the *legal value* constituted by the legal norms. The development of the law from primitive beginnings to its present stage in the modern state displays, concerning the legal value to be realized, a tendency that is common to all legal orders. It is the tendency gradually and increasingly to prohibit the use of physical force from man to man. Use of force is prohibited by making it the condition for a sanction. But the sanction itself is a use of force. Therefore the prohibition of the use of force can only be a limited one; and one must distinguish between a permitted and a prohibited use of force. It is permitted as a reaction against a socially undesirable fact, especially against a socially detrimental human behavior, as a sanction, that is, as an authorized use of force attributable to the legal community. This distinction does not yet mean, however, that the use of force other than legally authorized as reaction against an undesirable fact, is prohibited and therefore illegal. Primitive legal orders do not prohibit all other kinds of use of force. Even the killing of men is prohibited to only a limited degree. Only the killing of free fellow countrymen is considered to be a crime in primitive societies, not the killing of aliens or slaves. The killing of the latter, insofar as it is not prohibited, is - in the negative sense - permitted. But it is not authorized as a sanction! Gradually, however, the principle is recognized that every use of physical force is prohibited unless - and this is a limitation of the principle - it is especially authorized as a reaction against a socially detrimental fact attributable to the legal community. In this case, the legal order determines exhaustively the conditions under which (and the men by whom) physical force may be used. Since the individual authorized to use force may be regarded as an organ of the legal order (or of the community constituted by the legal order), the execution of coercive acts by these individuals may be attributed to the community. Then we are confronted with a monopoly of force of the legal community. The monopoly is decentralized if the individuals authorized to use force do not have the character of special organs acting according to the principle of division of labor but if the legal order authorizes all individuals to use force who consider their interests violated by the illegal conduct of others; in other words if the principle of self-help still prevails.

Legal order and collective security

When the legal order determines the conditions under which, and the individuals by whom, physical force is to be used, it protects the individuals who live under this order against the use of force by other individuals. When this protection has reached a certain minimum we speak of collective security, because the security is guaranteed by the legal order as a social order. This minimum of protection against the use of physical force can be regarded as existing even when monopoly of force is decentralized, that is, even when self-help still prevails. It is possible to consider such a state as the lowest degree of collective

security. However, we may speak of collective security only in a narrower sense if the monopoly of force of the legal community has reached a minimum of centralization, so that self-help is excluded, at least in principle. Collective security, in this narrower sense, exists when at least the question of whether in a concrete situation the law was violated and of who is responsible for it, is not answered by the parties involved, but by a special organ, an independent court; when, therefore, the question of whether in a concrete case, the use of force is a delict or legal and an act that may be attributed to the community, particularly a sanction, can be objectively decided.

Collective security, then, can have different degrees depending on the degree of centralization of the procedure by which in concrete cases the existence of the conditions is determined to which the coercive action of a sanction is attached; and by which this coercive action is carried out. Collective security reaches its highest degree when the legal order installs law courts with compulsory jurisdiction and central executive organs whose coercive means are so effective that resistance ordinarily is hopeless. This is the situation in the modern state, which represents a highly centralized legal order.

The aim of collective security is peace, because peace is the absence of the use of physical force. By determining the conditions and the executive organs for the use of force, by establishing a monopoly of force of the legal community, the legal order pacifies this community. But the peace of law is only a relative peace. The law does not exclude the use of physical force of man versus man. The law is not a forceless order, as postulated for by utopian anarchism. The law is an order of coercion and, as a coercive order - according to its evolution - an order of security, that is, of peace. But precisely as the concept of collective security may be defined in a narrower sense and applied only where the monopoly of force of society is centralized, so we may assume that a pacification of the legal community takes place only on that level of legal development in which self-help is prohibited, at least in principle, and collective security in the narrower sense of the word prevails. Actually, we can hardly assume even a relative pacification of the legal community as long as the law is still in a primitive condition. As long as no courts exist that objectively ascertain whether a prohibited use of force has taken place; as long as every individual who considers his rights violated by another is authorized to use force as a sanction; as long as the individual against whom force was used is authorized to react against this use of force by the use of force, which he can justify as a sanction (that is, as a reaction against a wrong suffered) as long as blood revenge is a legal institution and the duel legally permitted and even regulated by law; as long as only the killing of free fellow countrymen, but not the killing of aliens and slaves is regarded as a crime; as long, finally, as war is not prohibited by international law in the relations between states: one cannot very well assert that the state of law is necessarily a state of peace and that the securing of peace is an essential function of the law. All one can say is that the development of the law runs in this direction. Therefore, even if peace is regarded as an absolute moral value or as a value common to all positive moral orders - which, as we shall see later, is not the case - the securing of peace, the pacification of the legal community, cannot be considered as an essential moral value common to all legal orders; it is not the "moral minimum" common to all law.

The prohibition of all use of force reveals the tendency to enlarge the sphere of facts that are established by the legal order as condition of coercive acts; this tendency has developed far beyond this prohibition, by the attachment of coercive acts as consequences not only to the use of force, but also to other acts, and even to omissions of acts (This constitutes a significant modification of my view on the relation between law and peace as presented in my *General Theory of Law and State*, pp. 22.) If the coercive act established by the law is a reaction against socially detrimental behavior and if the function of such an establishment is to prevent such a behavior (individual or general prevention), then this act has the character of a sanction in the specific and narrower sense of the word; and the fact that a certain behavior is made the condition for a sanction in this sense means that this behavior is legally prohibited, a delict. There is a correlation between this concept of sanction and the concept of delict. The sanction is the consequence of the delict; the delict is the condition of the sanction. In primitive legal orders the reaction of the sanction against the delict is entirely decentralized. The reaction is left to the discretion of the individuals whose interests have been violated by the delict. They are authorized to identify *in concreto* as a delict what has been so identified by the legal order only *in abstracto*; and they are authorized to execute the sanction established by the legal order. The principle of self-help prevails. In the course of evolution this reaction against the delict is increasingly centralized, in that the identification of the delict and the execution of the sanction is reserved for special organs: the courts and executive authorities. Thereby the principle of self-help is limited, but it cannot be entirely eliminated. Even in the modern state, in which centralization has reached the highest degree, a minimum of self-help remains: self-defense. Besides, there are other cases in modern, centralized legal orders - cases that have been largely ignored in legal theory—in which, to a limited extent, the use of physical force is not reserved for special organs, but left to the discretion of individuals interested in it. We speak of the right of corporal punishment that even modern legal orders concede to parents as a means of educating their children. It is limited to the extent that it must not harm the child's health; but the decision, which behavior of the child is a condition of corporal punishment, that is, which behavior is pedagogically and hence socially undesirable, is in principle left to the parents who may pass this right to professional educators.

Coercive acts other than sanctions

As the state develops from a judicial to an administrative community, the sphere of facts that are made conditions for coercive acts grows. Now not only socially undesirable actions and omissions but also other facts, not having the character of delicts, are included. Among those facts is the suspicion that a definite individual has committed a delict. Special organs, having the character of police agents, may be legally authorized to deprive the suspected individual of his liberty in order to safeguard legal proceedings against him, in which it will be decided whether he has, in fact, committed the delict of which he is suspected. The condition for the deprivation of liberty is not a definite behavior of the individual, but the suspicion of such a behavior. Similarly, the police may be authorized by the legal order to take persons in so-called protective custody, that is, to deprive them of their liberty, in order to protect them against illegal aggression that threatens them. Further, modern legal orders prescribe the forced internment in institutions of insane individuals constituting a public

danger, and in hospitals of persons with contagious diseases. Further, property may be expropriated if necessary in the public interest, domestic animals may be destroyed if infected with an epidemic illness, buildings may be torn down by force to prevent their collapsing or the spread of a conflagration. The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of these states. All these acts constitute the same forced deprivation of life, liberty, and property as the sanctions of the death penalty, imprisonment, and civil execution. But, as we have said, they differ from sanctions insofar as they are not the consequence of a legally ascertained, socially undesirable action or omission of an individual; the condition is not a legally ascertained delict committed by an individual. Delict is a definite human behavior (an action or omission) which, because socially undesirable, is prohibited by the legal order and it is prohibited insofar as the legal order attaches to it (or, more correctly formulated: to the fact that it is ascertained in a legal procedure) a coercive act, as this fact is made by the legal order the condition of a coercive act. And this coercive act is a sanction (in the sense of a reaction against a delict) and as such distinguishable from other legally established coercive acts only in that the conditioning fact of the former is a legally ascertained human behavior, whereas the coercive acts which have not the character of sanctions are conditioned by other facts. Some of the coercive acts belonging to the second category may be interpreted as sanctions, if the concept of "sanction" is not limited to reactions against a definite human behavior whose actual existence is legally ascertained, but is extended to situations in which the coercive act is provided for as reaction against a delict - but against a delict whose commission by a definite individual has not yet been legally ascertained, though the individual may be suspected of having committed it and may therefore be arrested by the police: and to situations in which the coercive act is a reaction against a delict that has not even been committed yet but is expected in the future as a possibility - as in the cases of internment of dangerous psychopaths or persons of undesired opinions, religions, and races, insofar as they are interned in concentration camps to prevent them from a socially undesired behavior of which, rightly or wrongly, in the opinion of the legal authority, they are considered capable. Apparently, this motive is the basis for the limitations of liberty to which, in a war, the citizens of the one belligerent party living on the territory of the other are subjected by the latter. If we extend the concept of "sanction" in this sense, it is no longer congruent with "of a delict." Sanction in this wider sense of the word does not necessarily *follow* the delict.

Finally the concept of sanction may be extended to include all coercive acts established by the legal order, if the word is to express merely that the legal order reacts with this action against socially undesirable circumstances and qualifies in this way the circumstances as undesirable. This, indeed, is the common characteristic of all coercive actions commanded or authorized by legal orders. The concept of "sanction," understood in this broadest sense, then, the force monopoly of the legal community, may be formulated by the alternative: "The use of force of man against man is either a delict or a sanction."

The minimum of liberty

As a sanction-prescribing social order, the law regulates human behavior in two ways: in a positive sense, commanding such behavior and thereby prohibiting the opposite behavior; and, negatively, by not attaching a coercive act to a certain behavior, therefore not prohibiting this behavior and not commanding the opposite behavior. Behavior that legally is not prohibited is legally permitted in this negative sense. Since human behavior is either prohibited or not prohibited, and since, if not prohibited, is to be regarded as permitted by the legal order, any behavior of an individual subjected to a legal order may be regarded as regulated by it - positively or negatively. Insofar as the behavior of an individual is permitted by the legal order in the negative sense - and that means: not prohibited - the individual is legally free.

The freedom left to the individual by the legal order simply by not prohibiting a certain behavior must be distinguished from the freedom which is positively guaranteed to the individual by that order. The freedom of an individual which consists in permitting him a certain behavior by not prohibiting it, is guaranteed by the legal order only to the extent that the order commands the other individuals to respect this freedom; the order forbids them to interfere in this sphere of freedom, that is, the order forbids a behavior by which an individual is prevented from doing what is not prohibited and what therefore in this sense is permitted to him. Only then can the nonprohibited (in a negative sense permitted) behavior be looked upon as rightful: that is to say, as the content of a right, which is the reflex of a corresponding obligation.

However, not every behavior so permitted - in the negative sense of not being forbidden - is safeguarded by the prohibition of the opposite behavior of others; not every permitted behavior of one individual corresponds to an obligation of another individual. It is possible that a behavior is not prohibited by the legal order (and therefore, in this sense, permitted), without an opposite behavior of others being prohibited by the legal order, so that this opposite behavior is also permitted. A behavior may not be prohibited, for example, because it is not related to other individuals or at least does not hurt anybody. But not even every behavior that *does* hurt others is prohibited. For example, it may not be prohibited that the owner of a house install a ventilator into a wall situated directly at the borderline of his property. But, at the same time, it may not be prohibited that the owner of the neighboring property builds a house whose one wall directly adjoins the ventilator-equipped wall of the first house and thereby nullifies the effect of the ventilator. In this example, one party is permitted to prevent what the other party is permitted to do - namely to pipe air into one of his rooms by a ventilator.

If a behavior opposite to the not prohibited behavior of another individual is not prohibited, then a conflict is possible against which the legal order makes no provision. The legal order does not seek to prevent this conflict, like other conflicts, by prohibiting the opposite behavior. Indeed, the legal order cannot try to prevent all possible conflicts. Only one thing is prohibited practically universally by modern legal orders: to prevent another individual by force from doing what is not prohibited. For the exercise of physical force -

coercive action - is prohibited in principle, except where it is positively permitted for certain authorized individuals.

A legal order - like any normative social order - can command only specific acts or omissions of acts; therefore, no legal order can limit the freedom of an individual with respect to the totality of his external and internal behavior, that is, his acting, wishing, thinking, or feeling. The legal order can limit an individual's freedom more or less by commanding or prohibiting more or less. But a minimum of freedom, that is, a sphere of human existence not interfered by command or prohibition, always remains reserved. Even under the most totalitarian legal order there exists something like inalienable freedom; not as a right innate and natural, but as a consequence of the technically limited possibility of positively regulating human behavior. This sphere of freedom, however, can be regarded as legally guaranteed only to the extent that the legal order prohibits interference. In this respect the constitutionally guaranteed so-called civil liberties are politically particularly important. They are established by provisions of the constitution that limit the competence of the legislators to the extent that the latter are not authorized (or so authorized only under exceptional conditions to issue norms that command or forbid a certain behavior, such as the practice of a certain religion or the expression of certain opinions.

c) *The Law As a Normative Coercive Order; Legal Community and Gang of robbers*

The law as a coercive order is sometimes characterized by the statement that the law commands a certain behavior "under threat" of coercive acts, that is, of certain evils. But this formulation ignores the normative meaning with which coercive acts in general and sanctions in particular are stipulated by the legal order. The meaning of a threat is that an evil *will be* inflicted under certain conditions; the meaning of a legal order is that certain evils *ought to be* inflicted under certain conditions or - expressed more generally - that certain coercive acts ought to be executed under certain conditions. This is not only the subjective meaning of the acts by which the law is established but also their objective meaning. Only because this normative meaning is the objective meaning of these acts, do they have the character of law stipulating norm-creating, or norm-executing acts. The action of a highwayman who under threat commands somebody to surrender his money also has 'the subjective meaning of an "ought." If the situation created by such a command is described by saying that one individual expresses a will directed toward the behavior of another individual, then one merely describes the action of the first as an actually happening event. The behavior of the other individual, however, which is intended by the will of the first, cannot be described as something that actually takes place, because he does not yet behave and may not behave at all in the way that the first one had intended. It can only be described as something that according to the subjective meaning of the command ought to take place.

In this way every situation must be described in which one individual expresses a will directed toward the behavior of another individual. In this respect (namely, so far as only the subjective meaning of the acts are considered), there is no difference between describing the command of a robber and the command of a legal organ. The difference appears only when the objective meaning of the command is described, the command directed from one individual toward another. Then we attribute only to the command of the legal organ, not to

that of the robber, the objective meaning of a norm binding the addressed individual. In other words, we interpret the one command, but not the other, as an objectively valid norm; and then we interpret in the one case the connection of the nonfulfillment of the command with a coercive act merely as a "threat" (i.e., a statement that an evil *will be* inflicted), whereas in the other case, we interpret this connection to mean that an evil *ought to be* inflicted. Therefore we interpret the actual infliction of the evil in the second situation as the application or execution of an objectively valid norm, stipulating a coercive act as a sanction, but in the first situation - if we offer a normative interpretation - as a crime.

But why do we interpret the subjective meaning of the one act also as its objective meaning, but not so of the other act? Why do we suppose that of the two acts, which both have the subjective meaning of an "ought," only one established a valid, that is, binding, norm? In other words: What is the reason for the validity of the norm that we consider to be the objective meaning of this act? This is the decisive question.

By analyzing the judgments that interpret the acts as legal (that is, as acts whose objective meaning is norms) we get the answer to the question. Such an analysis reveals the *presupposition* that makes such an interpretation possible.

Let us start from the earlier-mentioned interpretation of the killing of one individual by another as the execution of a death sentence and not as murder. Our interpretation is based on the recognition that the act of killing constitutes the execution of a court decision that has commanded the killing as a punishment. This means: We attribute to the act of the court the objective meaning of an individual norm and in this way interpret the individuals who perform the act, as a court. We do this, because we recognize the act of the court as the execution of a statute (that is, of general norms stipulating coercive acts) in which we see not only the subjective but also the objective meaning of an act that had been established by certain individuals whom we consider, for this reason as legislators. For we regard the act of legislation as the execution of the constitution, that is, of general norms that, according to their subjective meaning, authorize these individuals to establish general norms prescribing coercive acts. In this way we interpret these individuals as legislative organs. By regarding the norms authorizing the legislative organ not only as the subjective but also as the objective meaning of an act performed by definite individuals, we interpret these norms as "constitution." For the historically first constitution such an interpretation is possible only, if we *presuppose* that one ought to behave according to the subjective meaning of the act, that one ought to perform coercive acts only under the conditions and in the manner the constitution stipulates; if, in other words, we presuppose a norm according to which (a) the act whose meaning is to be interpreted as "constitution" is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities. As will be developed later, this norm is the basic norm, of the national legal order. It is not established by a positive legal act, but is presupposed, *if* the act mentioned under (a) is interpreted as establishing a constitution and the acts based on the constitutions are interpreted as legal acts. To make manifest this presupposition is an essential function of legal science. This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order.

By making these statements we are considering, at this point, only a national legal order, that is, a legal order whose territorial sphere of validity is limited to the territory of a state. The reason for the validity of international law, whose territorial sphere of validity is not so limited, and the relationship of the international legal order to the national legal orders, are, for the present, outside our discussion. It was observed earlier that the validity of a norm (which means that one ought to behave as the norm stipulates) should not be confounded with the effectiveness of the norm (which means that one, in fact, does so behave); but that an essential relation may exist between the two concepts, namely, that a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective. That means: The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order. Only if the actual behavior of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behavior if, in other words, the subjective meaning is recognized as the objective meaning - only then are the acts interpreted as legal acts.

Now we are ready to answer the question why we do not attribute to the command of a robber, issued under threat of death, the objective meaning of a valid norm binding on the addressed victim; why we do not interpret this act as a legal act; why we *regard* the realization of the threat as a crime, and not as the execution of a sanction.

An isolated act of one individual cannot be regarded as a legal act, its meaning cannot be regarded as a legal norm, because law, as mentioned, is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system. How about a situation, however, in which an organized gang systematically jeopardizes a certain territory by forcing the people living there, under threat, to surrender their money? In this situation we will have to distinguish between the order that regulates the mutual behavior of the members of this robber gang and the external order, that is, the commands that the members of the gang direct at outsiders under the threat of inflicting evils. For it is only in relation to outsiders that the group behaves as a *robber* gang. If robbery and murder were not forbidden in the relations between the robbers, no community, no robber *gang* would exist. Nevertheless, even the internal order of the gang may be in conflict with the coercive order, considered to be a legal order, valid for the territory in which the gang is active. Why is the coercive order that constitutes the community of the robber gang and comprises the internal and external order not interpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robbers' coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity as being illegal behavior; if the members of the gang are deprived of their liberty or their lives by coercive acts that are interpreted as imprisonment and death sentences; and if thus the activity of the gang is terminated - in short, if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang.

If the validity of this coercive order is restricted to a certain territory and if it is effective within this territory in such a way that the validity of any other coercive order of this kind is excluded, then the coercive order may indeed be regarded as a legal order and the community constituted by it may be regarded as a "state" - even if its external activity is illegal according to positive international law. Thus, from the sixteenth to the beginning of nineteenth century so-called pirate states existed along the northwest coast of Africa (Algiers, Tunis, Tripolis) whose ships preyed upon navigation in the Mediterranean. These communities were "pirates" only with respect to their exercise of force on ships of other states, in defiance of international law. Yet, their internal order presumably prohibited mutual employment of force, and this prohibition was by and large obeyed, so that the minimum of collective security existed which is the condition for the existence of a relatively lasting community constituted by a normative order.

Collective security or peace - as we have said - is a function that the coercive orders designated as "law" have in various degrees when they have reached a certain level of development. This function is an objectively determinable fact. The scientific statement that a legal order is pacifying the legal community, is not a value judgment. Specifically, this statement does not mean that the realization of justice is essential to the law; this value, therefore, cannot be made an element of the concept of law and can therefore not serve as a criterion for the distinction between a legal community and a robber gang. This, however, is the distinction made by St. Augustine who says in his *Civitas Dei*: "Set justice aside then, and what are kingdoms but thievish purchases? because what are thieves' purchases but little kingdoms?" A state, which is according to Augustine a legal community, cannot exist without justice. "Where true justice is wanting, there can be no law. For what law does, justice does, and what is done unjustly, is done unlawfully." But what is justice? "Justice is a virtue distributing unto everyone his due. What justice is that then, that takes man from the true God and gives him unto the condemned fiends? Is this distribution according to due? Is not he that takes away thy possessions and gives them to one that has no claim to them, guilty of injustice, and is not he so likewise, that takes himself away from his Lord God, and gives himself to the service of the devil?"

According to this reasoning, the law is a just coercive order and is distinguished from the coercive order of the robbers by the justice of its content.

That justice cannot be the criterion distinguishing law from other coercive orders follows from the relative character of the value judgment according to which a social order is just. Saint Augustine recognizes as "just" only that order which gives each his due, and applies this empty formula by saying that an order is just only when it gives the true God -who, to him, is the Judeo-Christian God, not the gods of the Romans - what is his due, namely the worship that is expressed in a certain cult; therefore, according to Augustine, an order that does not conform with this postulate, cannot be law, and the community based on this order cannot be a state, but only a robber gang. With this, Roman Law is denied the character of law. If justice is assumed to be the criterion for a normative order to be designated as "law," then the capitalistic coercive order of the West is not law from the point of view of the Communist ideal of justice, nor the Communist coercive order of the Soviet Union from the point of view of the capitalist ideal of justice. A concept of law with such consequences is unacceptable by

a positivist legal science. A legal order may be judged to be unjust from the point of view of a certain norm of justice. But the fact that the content of an effective coercive order may be judged unjust, is no reason to refuse to acknowledge this coercive order as a legal order. After the victory of the French Revolution in the eighteenth century and after the victory of the Russian Revolution in the twentieth, the other states showed the distinct inclination not to interpret the coercive orders established by the revolution as legal orders and the acts of the revolutionary governments as legal acts, because the one government had violated the monarchic principle of legitimacy and the other had abolished private property of the means of production. For the last-named reason, even American courts refused to acknowledge acts of the revolutionary Russian government as legal acts; the courts declared that these were not acts of a state, but of a robber gang. However, as soon as the revolution-born coercive orders turned out to be effective, they were recognized as legal orders, the governments as state governments, and their acts as state acts, that is, legal acts.

d) Legal Obligations without Sanctions?

If the law is conceived of as a coercive order, then the formula by which the basic norm of a national legal order is expressed runs as follows: "Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution. The basic norm delegates the first constitution to prescribe the procedure by which the norms stipulating coercive acts are to be created. To be interpreted objectively as a legal norm, a norm must be the subjective meaning of an act performed in this procedure, hence in accordance with the basic norm; besides, the norm must stipulate a coercive act or must be in essential relation to such a norm. Together with the basic norm the definition of law as a coercive order is presupposed. From the definition of law as a coercive order follows that a behavior may be regarded as legally commanded (i.e., as the content of a legal obligation) only if the contrary behavior is made the condition of a coercive act directed against the individual thus behaving. It is to be noted, however, that the coercive act itself need not be commanded in this sense: its ordering and executing may be merely authorized.

Against the definition of law as a coercive order, that is, against the inclusion of the element of coercion into the concept of law, the objections have been raised (1) that legal orders actually contain norms that do not stipulate coercive acts: norms that permit or authorize a behavior, and also norms that command a behavior without attaching to the opposite behavior a coercive act; and (2) that the non-application of the norms that stipulate coercive acts are frequently not made the condition for coercive acts functioning as sanctions.

The second objection is not valid, because the definition of law as a coercive order can be maintained even if the norm that stipulates a coercive act is not itself essentially connected with a norm that attaches, in a concrete case, a sanction to the nonordering or nonexecuting of the coercive act if, therefore, the coercive act stipulated in the general norm is to be interpreted objectively not as commanded but only as authorized or positively permitted (although the subjective meaning of the act by which the general norm stipulates the coercive act is a commanding). As for the first objection, the definition of law as a *coercive* order can be maintained even with respect to norms that authorize a behavior not having the character of a coercive act; or norms that positively permit such a behavior insofar as they are

dependent norms, because they are essentially connected with norms that stipulate the coercive acts. A typical example for norms cited as arguments against the inclusion of coercion into the definition of law are the norms of constitutional law. It is argued that the norms of the constitution that regulate the procedure of legislation do not stipulate sanctions as a reaction against nonobservance. Closer analysis shows, however, that these are dependent norms establishing only one of the conditions under which coercive acts stipulated by other norms are to be ordered and executed. Constitutional norms authorize the legislator to create norms - they do not command the creation of norms; and therefore the stipulation of sanctions do not come into question at all. If the provisions of the constitution are not observed, valid legal norms do not come into existence, the norms created in this way are void or voidable. This means: the subjective meaning of the acts established unconstitutionally and therefore not according to the basic norm, is not interpreted as their objective meaning or such a temporary interpretation is annulled.

The most important case of norms which according to traditional science of law constitute legal obligations without stipulating sanctions, is the so-called natural obligation. Natural obligations are obligations whose fulfillment cannot be asserted in a court, and whose nonfulfillment is not the condition of a civil execution. Still, one speaks of a legal obligation, because that which, in fulfillment of a so-called natural obligation, has been given by one individual to another cannot be recovered as an unjustified enrichment. If this is so, however, it merely means: A general norm is valid stipulating that: (1) if the beneficiary of a performance to which the performer was legally not obligated refuses restitution, civil execution ought to be directed into the property of the beneficiary; and (2) the validity of this coercion-stipulating norm is restricted with respect to cases determined by the legal order. This situation, therefore, can be described as a restriction of the validity of a sanction-stipulating norm; it is not necessary to assume the existence of a sanctionless norm.

It is possible, of course, for a legislator to establish, in a procedure conforming with the basic norm, an act whose subjective meaning is a behavior-commanding norm, without (1) establishing an act whose subjective meaning is a norm prescribing a sanction as a reaction against the opposite behavior; and without (2) the possibility of describing the situation as "restriction of the validity of a sanction-stipulating norm." In this case the subjective meaning of the act in question cannot be interpreted as its objective meaning; the norm, which is the act's subjective meaning cannot be interpreted as a legal norm, but must be regarded as legally irrelevant.

And there are other reasons why the subjective meaning of an act established in conformity with the basic norm may be regarded as legally irrelevant: namely, if the subjective meaning of such an act is not a norm that commands, permits, or authorizes human behavior. A law, established strictly according to the constitution, may have a content that is not a norm, but the expression of a religious or political theory - for example, the statement that the law is given by God or that the law is just or that the law realizes the interest of the entire population. Or, to give another example in the form of a constitutionally established statute the nation's congratulations may be conveyed to the head of time state on the occasion of an anniversary of his accession to power; this may be done in this form merely to invest the congratulations with special solemnity. After all, since constitutionally established acts are

expressed by words, the acts may have any meaning whatever, not only the meaning of norms. If law is defined as norm at all, legal science cannot dispense with the concept of legally irrelevant contents.

Since the law regulates the procedure by which it is itself created, one might distinguish this legally regulated procedure as *legal form* from the *legal content* established by the procedure, and speak of a legally irrelevant legal content. In traditional science of law this thought is expressed to some extent by the distinction between law in the formal sense and law in the material sense. This distinction acknowledges the fact that not only general behavior-regulating norms are issued in the form of laws, but also administrative decisions, such as the naturalization of a person, the approval of the state budget, or judicial decisions (when, in certain cases, the legislator acts as a judge). But it would be more correct to speak of form of law and content of law rather than of law in the formal and in the material sense. However, the words "legal form" and "legal content" are unprecise and even misleading in this respect; in order to be interpreted as a legal act it is not only required that the act be established by a certain procedure, but also that the act have a certain subjective meaning. The meaning depends on the definition of law, presupposed together with the basic norm. If the law is not defined as a coercive order, but only as an order established according to the basic norm (and if, therefore, the basic norm is formulated as: one ought to behave as the historically first constitution prescribes), then sanctionless legal norms could exist, that is, legal norms that under certain conditions command a human behavior without another norm stipulating a sanction as a reaction against nonobservance. In this case the subjective meaning of an act, established in accordance with the basic norm - if this meaning is not a norm and in no relation to a norm - would be legally irrelevant. Then, a norm established by the constitutional legislator and commanding a certain behavior without attaching a coercive act to its nonobservance, could be distinguished from a moral norm only by its origin; and a legal norm established by custom could not be distinguished from a customarily established moral norm at all.

If the constitution has established custom as a law-creating fact, then all moral norms created by custom constitute a part of the legal order. Therefore, then, a definition of law, which does not determine law as a coercive order, must be rejected (1) because only by including the element of coercion into the definition of law is the law clearly distinguished from any other social order; (2) because coercion is a factor of great importance for the cognition of social relationships and highly characteristic of the social orders called "law"; and, (3) particularly, because by defining law as a coercive order, a connection is accounted for that exists in the case most important for the cognition of the law, the law of the modern state: the connection between law and state. The modern state is essentially a coercive order - a centralized coercive order, limited in its territorial validity.

Norms that are the subjective meaning of legislative acts and that command a certain behavior without the opposite behavior being made the condition of a sanction are very rare in modern legal orders. If the social orders designated as law *did* contain significant numbers of sanctionless norms, then the definition of law as a coercive order could be questioned; and if from the existing social orders designated as law the element of coercion were to disappear - as predicted by Marx's socialism - then these social orders would indeed fundamentally

change their character. They would - from the point of view of the offered definition of law - lose their legal character, and the social orders constituted by them would lose their character as states. In Marxian terms the state - and along with the state, the law - would wither away.

e) *Dependent Legal Norms*

It was pointed out earlier that: if one norm commands a certain behavior and a second norm stipulates a sanction as reaction against nonobservance, the two norms are tied to each other. This is particularly true if a social order - as the legal order - commands a certain behavior specifically by attaching a coercive act as sanction to the opposite behavior. Therefore a behavior according to such an order may be regarded as commanded - and in case of a legal order as legally commanded - only so far as the opposite behavior is the condition of a sanction. If a legal order, such as a statute passed by parliament, contains one norm that prescribes a certain behavior and a second norm that attaches a sanction to the nonobservance of the first, then the first norm is not an independent norm, but fundamentally tied to the second; the first norm merely designates - negatively - the condition under which the second stipulates the sanction; and if the second one positively designates the condition under which it stipulates the sanction, then the first one is superfluous from the point of view of legislative technique. For example: If a civil code contains the norm that a debtor ought to pay back the received loan to the creditor; and the second norm that a civil execution ought to be directed into the property of the debtor if the debtor does not repay the loan; then everything prescribed by the first norm is contained conditionally in the second. Modern criminal codes usually do not contain norms that prohibit, like the Ten Commandments, murder, adultery and other crimes: they limit themselves to attach penal sanctions to certain behavior. This shows clearly that a norm: 'You shall not murder' is superfluous, if a norm is valid: 'He who murders ought to be punished'; it shows, further, that the legal order indeed prohibits a certain behavior by attaching to it a sanction or that it commands a behavior by attaching a sanction to the opposite behavior.

Dependent are also those legal norms that positively permit a certain behavior. For - as shown before - they merely limit the sphere of validity of a legal norm that prohibits this behavior by attaching a sanction to the opposite. The example of self-defense has been cited earlier. Another example is found in the United Nations Charter. Article 2, paragraph 4, forbids all members to use force: the Charter attaches to the use of force the sanctions stipulated in Article 39. But the Charter permits in Article 51 the use of force as individual or collective self-defense by limiting the general prohibition of Article 2, paragraph 4. The named articles form a unit. The Charter could have combined them all in a single article forbidding all members to use force which does not have the character of individual or collective self-defense by making the thus restricted use of force the condition of a sanction. Yet another example: A norm prohibits the sale of alcoholic beverages, that is, makes it punishable; but this prohibition is restricted by another norm according to which the sale of these beverages, if a license is obtained, is not forbidden; that means that the sale is not punishable.

The second norm, restricting the sphere of *validity* of the first, is a dependent norm: it is meaningful only in connection with the first; both form a unit. Their contents may be

expressed in the single norm: "If somebody sells alcoholic beverages without a state license, he ought to be punished." The function of the merely negative permission, consisting in the nonprohibition by the legal order of a certain behavior, need not be considered here because negative permission is not granted by a positive norm.

A legal norm may not only restrict the sphere of validity of another norm, but may entirely annul the validity. These derogating norms too are dependent norms, meaningful only in connection with other, sanction-stipulating norms. Further, legal norms authorizing a certain behavior are dependent norms likewise, if "authorizing" is understood to mean: confer upon an individual a legal power, that is, the power to create legal norms. These authorizing norms designate only one of the conditions under which - in an independent norm - the coercive act is prescribed. These are the norms that authorize the creation of general norms: (1) the norms of the constitution which regulate legislation or institute custom as a law-creating fact; and (2) the norms that regulate judicial and administrative procedures in which the general norms created by statute or custom are applied by authorized courts and administrative officials through individual norms created by these organs.

To give an example: Suppose the legal order of a state prohibits theft by attaching to it in a statute the penalty of imprisonment. The condition of the punishment is not merely the fact that a man has stolen. The theft has to be ascertained by a court authorized by the legal order in a procedure determined by the norms of the legal order; the court has to pronounce a punishment determined by statute or custom; and this punishment has to be executed by a different organ. The court is authorized to impose, in a certain procedure, a punishment upon the thief, only if in a constitutional procedure a general norm is created that attaches to theft a certain punishment. The norm of the constitution, which authorizes the creation of this general norm, determines a condition to which the sanction is attached. The rule of law that describes this situation says: "If the individuals authorized to legislate have issued a general norm according to which a thief is to be punished in a certain way; and if the court authorized by the Code of Criminal Proceedings in a procedure prescribed by this code has ascertained that an individual has committed theft; and if that court has ordered the legally determined punishment; then a certain organ ought to execute the punishment." By thus phrasing the rule of law that describes the law, it is revealed that the norms of the constitution which authorize the creation of general norms by regulating the organization and procedure of legislation; and the norms of a Code of Criminal Procedure which authorize the creation of the individual norms of the judicial court decisions by regulating the organization and procedure of the criminal courts, are dependent norms; for they determine only conditions under which the punitive sanctions are to be executed. The execution of all coercive acts stipulated by a legal order ... including those that are ordered by an administrative procedure and those that do not have the character of sanctions - is conditioned in that manner. The constitutional creation of the general norms to be applied by courts and administrative agencies, and the creation of the individual norms by which these organs have to apply the general norms, are as much conditions of the execution of the coercive act as the ascertainment of the fact of the delict or as other circumstances which the legal norms have made the condition of coercive acts that are not sanctions. But the general norm that stipulates the coercive act under all these conditions is an independent legal norm - even if the coercive act is not commanded because

its nonexecution is not made the condition of a further coercive act. If we say that in this case the coercive act is authorized, then the word "authorized" is used in a wider sense. It then does not merely mean conferring a legal power in the sense of a power to create legal norms, but also conferring the power to perform the coercive acts stipulated by the legal norms. In a wider sense, then, this power may also be designated as a legal power.

Dependent norms are, finally, also those that further determine the meaning of other norms, by defining a concept used in a second norm or by authentically interpreting a second norm otherwise. For example, a Criminal Code might contain an article saying: "By murder is to be understood the behavior of an individual which intentionally causes the death of another individual." This article defines murder; however, the article has normative character only in connection with another article that says: "If a man commits murder, the authorized court ought to impose the death penalty." And this article, again, is inseparably connected with a third article that says: "The death penalty is to be carried out by hanging."

It follows, that a legal order may be characterized as a coercive order, even though not all its norms stipulate coercive acts; because norms that do not themselves stipulate coercive acts (and hence do not command, but authorize the creation of norms or positively permit a definite behavior) are dependent norms, valid only in connection with norms, that *do* stipulate coercive acts. Again, not all norms that stipulate a coercive act but only those that stipulate the coercive act as a reaction against a certain behavior (that is, as a sanction), command a specific, namely the opposite, behavior. This, therefore, is another reason why the law does not have exclusively a commanding or imperative character. Since a legal order, in the sense just described, is a coercive order, it may be described in sentences pronouncing that under specific conditions (that is, under conditions determined by the legal order) specific coercive acts ought to be performed. All legally relevant material contained in a legal order fits in this scheme of the rule of law formulated by legal science - the *rule of law* which is to be distinguished from the *legal norm* established by the legal authority.

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KELSEN'S THEORY OF LAW

Nomodynamics^{*}

THE LEGAL ORDER

A. The Unity of a Normative Order

a. The Reason of Validity: the Basic Norm

The legal order is a system of norms. The question then arises: What is it that makes a system out of a multitude of norms? When does a norm belong to a certain system of norms, an order? This question is in close connection with the question as to the reason of validity of a norm.

In order to answer this question, we must first clarify the grounds on which we assign validity to a norm. When we assume the truth of a statement about reality, it is because the statement corresponds to reality, because our experience confirms it. The statement "A physical body expands when heated" is true, because we have repeatedly and without exception observed that physical bodies expand when they are heated. A norm is not a statement about reality and is therefore incapable of being "true" or "false", in the sense determined above. A norm is either valid or non-valid. Of the two statements: "You shall assist a fellowman in need", and "You shall lie whenever you find it useful", only the first, not the second, is considered to express a valid norm. What is the reason?

The reason for the validity of a norm is not, like the test of the truth of an "is" statement, its conformity to reality. As we have already stated, a norm is not valid because it is efficacious. The question why something ought to occur can never be answered by an assertion to the effect that something occurs, but only by an assertion that something ought to occur. In the language of daily life, it is true, we frequently justify a norm by referring to a fact. We say, for instance: "You shall not kill because God has forbidden it in one of the Ten Commandments"; or a mother says to her child: "You ought to go to school because your father has ordered it." However, in these statements the fact that God has issued a command or the fact that the father has ordered the child to do something is only apparently the reason for the validity of the norms in question. The true reason is norms tacitly presupposed because taken for granted. The reason for the validity of the norm, You shall not kill, is the general norm, You shall obey the commands of God. The reason for the validity of the norm, You ought to go to school, is the general norm, Children ought to obey their father. If these norms are not presupposed, the references to the facts concerned are not answers to the questions why we shall not kill, why the child ought to go to school. The fact that somebody commands something is, in itself, no reason for the statement that one ought to behave in conformity with the command, no reason for considering the command as a valid norm, no reason for the validity of the norm the contents of which corresponds to the command. The reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm

^{*} Hans Kelsen, *General Theory of Law and State* Translated by Anders Wedberg 110-137 (1946).

leads back, not to reality, but to another norm from which the first norm is derivable in a sense that will be investigated later. Let us, for the present, discuss a concrete example. We accept the statement "You shall assist a fellowman in need", as a valid norm because it follows from the statement "You shall love your neighbor". This statement we accept as a valid norm, either because it appears to us as an ultimate norm whose validity is self-evident, or - for instance - Christ has bidden that you shall love your neighbor, and we postulate as an ultimate valid norm the statement "You shall obey the commandments of Christ." The statement "You shall lie whenever you find it useful", we do not accept as a valid norm, because it is neither derivable from another valid norm nor is it in itself an ultimate, self-evidently valid norm.

A norm the validity of which cannot be derived from a superior norm we call a "basic" norm. All norms whose validity may be traced back to one and the same basic norm form or system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. Whereas an "is" statement is true because it agrees with the reality of sensuous experience, an "ought" statement is valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid. The ground of truth of an "is" statement is its conformity to the reality of our experience; the reason for the validity of a norm is a presupposition, a norm presupposed to be an ultimately valid, that is, a basic norm. The quest for the reason of validity of a norm is not - like the quest for the cause of an effect - a *regressus ad infinitum*; it is terminated by a highest norm which is the last reason of validity within the normative system, whereas a last or first cause has no place within a system of natural reality.

b. The Static System of Norms

According to the nature of the basic norm, we may distinguish between two different types of orders or normative systems: static and dynamic systems. Within an order of the first kind the norms are "valid" and that means, we assume that the individuals whose behavior is regulated by the norms "ought" to behave as the norms prescribe, by virtue of their contents: Their contents has an immediately evident quality that guarantees their validity, or, in other terms: the norms are valid because of their inherent appeal. This quality the norms have because they are derivable from a specific basic norm as the particular is derivable from the general. The binding force of the basic norm is itself self-evident, or at least presumed to be so. Such norms as "You must not lie", "You must not deceive", "You shall keep your promise", follow from a general norm prescribing truthfulness. From the norm "You shall love your neighbor" one may deduce such norms as "You must not hurt your neighbor", "You shall help him in need", and so on. If one asks why one has to love one's neighbor, perhaps the answer will be found in some still more general norm, let us say the postulate that one has to live "in harmony with the universe." If that is the most general norm of whose validity we are convinced, we will consider it as the ultimate norm. Its obligatory nature may appear so obvious that one does not feel any need to ask for the reason of its validity. Perhaps one may also succeed in deducing the principle of truthfulness and its consequences from this "harmony" postulate. One would then have reached a norm on which a whole system of

morality could be based. However, we are not interested here in the question of what specific norm lies at the basis of such and such a system of morality. It is essential only that the various norms of any such system are implicated by the basic norm as the particular is implied by the general, and that, therefore, all the particular norms of such a system are obtainable by means of an intellectual operation, viz., by the inference from the general to the particular. Such a system is of a static nature.

c. The Dynamic System of Norms

The division of a particular norm may, however, be carried out also in another way. A child, asking why it must not lie, might be given the answer that its father has forbidden it to lie. If the child should further ask why it has to obey its father, the reply would perhaps be that God has commanded that it obey its parents. Should the child put the question why one has to obey the commands of God, the only answer would be that this is a norm beyond which one cannot look for a more ultimate norm. That norm is the basic norm providing the foundation for a system of dynamic character. Its various norms cannot be obtained from the basic norm by any intellectual operation. The basic norm merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities. The norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm. This authorization is a delegation. Norm creating power is delegated from one authority to another authority; the former is the higher, the latter the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created. A norm forms part of a dynamic system if it has been created in a way that is - in the last analysis - determined by the basic norm. A norm thus belongs to the religious system just given by way of example if it is created by God or originates in an authority having its power from God, "delegated" by God.

B. The Law as a Dynamic System of Norms

a. The Positivity of Law

The system of norms we call a legal order is a system of the dynamic kind. Legal norms are not valid because they themselves or the basic norm have a content the binding force of which is self-evident. They are not valid because of their inherent appeal. Legal norms may have any kind of content. There is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. The validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value. A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only. The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive and lose their validity. The statement "Any man who manufactures or sells alcoholic liquors as beverages shall be punished" is a valid legal norm if it belongs to a certain legal order. This it does if this norm has been created in a definite way ultimately determined by the basic norm of that legal order, and if it has not again been nullified in a definite way, ultimately determined by the same basic norm. The basic norm may, for instance, be such that a norm belongs to the system provided that it has been decreed by the parliament or created by custom or established by the courts, and has not been abolished by a

decision of the parliament or through custom or a contrary court practice. The statement mentioned above is no valid legal norm if it does not belong to a valid legal order - it may be that no such norm has been created in the way ultimately determined by the basic norm, or it may be that, although a norm has been created in that way, it has been repealed in a way ultimately determined by the basic norm.

Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to be the expression of the "will of nature" or of "pure reason." The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created. It qualifies a certain event as the initial event in the creation of the various legal norms. It is the starting point of a norm-creating process and, thus, has an entirely dynamic character. The particular norms of the legal order cannot be logically deduced from this basic norm, as can the norm "Help your neighbor when he needs your help" from the norm "Love your neighbor". They are to be created by a special act of will, not concluded from a premise by an intellectual operation.

b. Customary and Statutory Law

Legal norms are created in many different ways: general norms through custom or legislation, individual norms through judicial and administrative acts or legal transactions. Law is always created by an act that deliberately aims at creating law, except in the case when law has its origin in custom, that is to say, in a generally observed course of conduct, during which the acting individuals do not consciously aim at creating law; but they must regard their acts as in conformity with a binding norm and not as a matter of arbitrary choice. This is the requirement of so-called *opinio juris sive necessitatis*. The usual interpretation of this requirement is that the individuals constituting by their conduct the law-creating custom must regard their acts as determined by a legal rule; they must believe that they perform a legal duty or exercise a legal right. This doctrine is not correct. It implies that the individuals concerned must act in error: since the legal rule which is created by their conduct cannot yet determine this conduct, at least not as a legal rule. They may erroneously believe themselves to be bound by a rule of law, but this error is not necessary to constitute a law-creating custom. It is sufficient that the acting individuals consider themselves bound by any norm whatever.

We shall distinguish between statutory and customary law as the two fundamental types of law. By statutory law we shall understand law created in a way other than by custom, namely, by legislative, judicial, or administrative acts or by legal transactions, especially by contracts and (international) treaties.

C. The Basic Norm of a Legal Order

a. The Basic Norm and the Constitution

The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the

basic norm. To the question why a certain act of coercion – e.g., the fact that one individual deprives another individual of his freedom by putting him in jail – is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the Constitution, since it has been established by the competent organ in the way the Constitution prescribes.

If we ask why the Constitution is valid, perhaps we come upon an older Constitution. Ultimately we reach some Constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first Constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first Constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first Constitution is a real Constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the Constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have no such effect. All these legal norms belong to one and the same legal order because their validity can be traced back - directly or indirectly - to the first Constitution. That the first Constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order. The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by His command. Similarly, the basic norm of a legal order prescribes that one ought to behave as the "fathers" of the Constitution and the individuals - directly or indirectly - authorized (delegated) by the Constitution command. Expressed in the form of a legal norm: coercive acts ought to be carried out only under the conditions and in the way determined by the "fathers" of the Constitution or the organs delegated by them. This is, schematically formulated, the basic norm of the legal order of a single State, the basic norm of a national legal order. It is to the national legal order that we have here limited our attention. Later, we shall consider what bearing the assumption of an international law has upon the question of the basic norm of national law.

b. The Specific Function of the Basic Norm

That a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first Constitution as a binding norm. The answer might be that the fathers of the first Constitution were empowered by God. The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of the basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which

presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.

The basic norm is not created in a legal procedure by a law-creating organ. It is not – as a positive legal norm is – valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, etc.

By formulating the basic norm, we do not introduce into the science of law any new method. We merely made explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts, and at the same time repudiate any natural law from which positive law would receive its validity. That the basic norm really exists in the juristic consciousness is the result of a simple analysis of actual juristic statements. The basic norm is the answer to the question: how – and that means under what condition – are all these juristic statements concerning legal norms, legal duties, legal rights, and so on, possible?

c. The Principle of Legitimacy

The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.

This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called *coup d'État*. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the Constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order "remains" valid also within the frame of the new order. But the phrase "they remain valid", does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old Constitution prescribed. That Constitution is no longer in force; it is replaced by a new Constitution which is not the result of a Constitutional alteration of the former. If laws which were introduced under the old Constitution "continue to remain valid" under the new Constitution, this is possible only because validity has expressly or tacitly been vested in them by the new Constitution. The

phenomenon is a case of reception (similar to the reception of Roman law). The new order “receives”, i.e., adopts, norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. “Reception” is an abbreviated procedure of law-creation. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, Constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the Constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old Constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order - to which no political reality any longer corresponds - has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new Constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

d. Change of the Basic Norm

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical Constitution is valid, but a norm according to which the new republican Constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a Constitution, but as an illegal act, as the crime of treason, and this according to the old monarchical Constitution and its specific basic norm.

e. The Principle of Effectiveness

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old Constitution and, therefore, the legal norms based on this Constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not

a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a Constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid, not only when they are annulled in a Constitutional way, but also when the total order ceases to be efficacious. It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.

f. Desuetudo

This must not be understood to mean that a single legal norm loses its validity, if that norm itself and only that norm is rendered ineffective. Within a legal order which as a whole is efficacious there may occur isolated norms which are valid and which yet are not efficacious, that is, are not obeyed and not applied even when the conditions which they themselves lay down for their application are fulfilled. But even in this case efficacy has some relevance to validity. If the norm remains permanently inefficacious, the norm is deprived of its validity by "*desuetudo*." "*Desuetudo*" is the negative legal effect of custom. A norm may be annulled by custom, viz., by a custom contrary to the norm, as well as it may be created by custom. *Desuetudo* annuls a norm by creating another norm, identical in character with a statute whose only function is to repeal a previously valid statute. The much-discussed question whether a statute may also be invalidated by *desuetudo* is ultimately the question whether custom as a source of law may be excluded by statute within a legal order. For reasons which will be given later, the question must be answered in the negative. It must be assumed that any legal norm, even a statutory norm, may lose validity by *desuetudo*.

However, even in this case it would be a mistake to identify the validity and the efficacy of the norm; they are still two different phenomena. The norm annulled by *desuetudo* was valid for a considerable time without being efficacious. It is only an enduring lack of efficacy that ends the validity.

The relation between validity and efficacy thus appears to be the following: A norm is a valid legal norm if (a) it has been created in a way provided for by the legal order to which it belongs, and (b) if it has not been annulled either in a way provided for by that legal order or by way of *desuetudo* or by the fact that the legal order as a whole has lost its efficacy.

g. The "Ought" and the "Is"

The basic norm of a national legal order is not the arbitrary product of juristic imagination. Its content is determined by facts. The function of the basic norm is to make possible the normative interpretation of certain facts, and that means, the interpretation of facts as the creation and application of valid norms. Legal norms, as we pointed out, are considered to be valid only if they belong to an order which is by and large efficacious. Therefore, the content of a basic norm is determined by the facts through which an order is created and applied, to which the behavior of the individuals regulated by this order, by and large, conforms. The basic norm of any positive legal order confers legal authority only upon facts by which an order is created and applied which is on the whole effective. It is not required that the actual behavior of individuals be in absolute conformity with the order. On

the contrary, a certain antagonism between the normative order and the actual human behavior to which the norms of the order refer must be possible. Without such a possibility, a normative order would be completely meaningless. What necessarily happens under the laws of nature does not have to be prescribed by norms: The basic norm of a social order to which the actual behavior of the individuals always and without any exception conforms would run as follows: Men ought to behave as they actually behave, or: You ought to do what you actually do. Such an order would be as meaningless as an order with which human behavior would in no way conform, but always and in every respect contradict. Therefore, a normative order loses its validity when reality no longer corresponds to it, at least to a certain degree. The validity of a legal order is thus dependent upon its agreement with reality, upon its "efficacy". The relationship which exists between the validity and efficacy of a legal order – it is, so to speak, the tension between the "ought" and the "is" – can be determined only by an upper and a lower borderline. The agreement must neither exceed a certain maximum nor fall below a certain minimum.

h. Law and Power (Right and Might)

Seeing that the validity of a legal order is thus dependent upon its efficacy, one may be misled into identifying the two phenomena, by defining the validity of law as its efficacy, by describing the law by "is" and not by "ought" statements. Attempts of this kind have very often been made and they have always failed. For, if the validity of law is identified with any natural fact, it is impossible to comprehend the specific sense in which law is directed towards reality and thus stands over against reality. Only if law and natural reality, the system of legal norms and the actual behaviour of men, the "ought" and the "is", are two different realms, may reality conform with or contradict law, can human behavior be characterized as legal or illegal.

The efficacy of law belongs to the realm of reality and is often called the power of law. If for efficacy we substitute power, then the problem of validity and efficacy is transformed into the more common problem of "right and might." And then the solution here presented is merely the precise statement of the old truth that though law cannot exist without power, still law and power, right and might, are not the same. Law is, according to the theory here presented, a specific order or organization of power.

i. The Principle of Effectiveness as Positive Legal Norm (International and National Law)

The principle that a legal order must be efficacious in order to be valid is, in itself, a positive norm. It is the principle of effectiveness belonging to international law. According to this principle of international law, an actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, and the community constituted by this order is a State in the sense of international law, insofar as this order is, on the whole, efficacious. From the standpoint of international law, the Constitution of a State is valid only if the legal order established on the basis of this Constitution is, on the whole, efficacious. It is this general principle of effectiveness, a positive norm of international law, which, applied to the concrete circumstances of an individual national legal order, provides the individual basic norm of this national legal order. Thus, the basic norms of the different national legal orders are themselves based on a general norm of the international

legal order. If we conceive of international law as a legal order to which all the States (and that means all the national legal orders) are subordinated then the basic norm of a national legal order is not a mere presupposition of juristic thinking, but a positive legal norm, a norm of international law applied to the legal order of a concrete State. Assuming the primacy of international law over national law, the problem of the basic norm shifts from the national to the international legal order. Then the only true basic norm, a norm which is not created by a legal procedure but presupposed by juristic thinking, is the basic norm of international law.

j. *Validity and Efficacy*

That the validity of a legal order depends upon its efficacy does not imply, as pointed out, that the validity of a single norm depends upon its efficacy. The single legal norm remains valid as long as it is part of a valid order. The question whether an individual norm is valid is answered by recourse to the first Constitution. If this is valid, then all norms which have been created in a Constitutional way are valid, too. The principle of effectiveness embodied in international law refers immediately only to the first Constitution of a national legal order, and therefore to this order only as a whole.

The principle of effectiveness may, however, be adopted to a certain extent also by national law, and thus within a national legal order the validity of a single norm may be made dependent upon its efficacy. Such is the case when a legal norm may lose its validity by *desuetudo*.

D. The Static and The Dynamic Concept of Law

If one looks upon the legal order from the dynamic point of view, as it has been expounded here, it seems possibly to define the concept of law in a way quite different from that in which we have tried to define it in this theory. It seems especially possible to ignore the element of coercion in defining the concept of law.

It is a fact that the legislator can enact commandments without considering it necessary to attach a criminal or civil sanction to their violation. If such norms are also called legal norms, it is because they were created by an authority which, according to the Constitution, is competent to create law. They are law because they issue from a law-creating authority. According to this concept, law is anything that has come about in the way the Constitution prescribes for the creation of law. This dynamic concept differs from the concept of law defined as a coercive norm. According to the dynamic concept, law is something created by a certain process, and everything created in this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms a part of a certain legal order. And the answer is, a norm belongs to a certain legal order if it is created in accordance with a procedure prescribed by the Constitution fundamental to this legal order.

It must, however, be noted that not only a norm, i.e., a command regulating human behaviour, can be created in the way prescribed by the Constitution for the creation of law. An important stage in the law-creating process is the procedure by which general norms are created, that is, the procedure of legislation. The Constitution may organize this procedure of

legislation in the following way: two corresponding resolutions of both houses of parliament, the consent of the chief of State, and publication in an official journal. This means that a specific form of law-creation is established. It is then possible to clothe in this form any subject, for instance, a recognition of the merits of a statesman. The form of a law – a declaration voted by parliament, consented to by the chief of State, published in the official journal– is chosen in order to give to a certain subject, here to the expression of the nation's gratitude, the character of a solemn act. The solemn recognition of the merits of a statesman is by no means a norm, even if it appears as the content of a legislative act, even if it has the form of law. The law as the product of the legislative procedure, a statute in the formal sense of the term, is a document containing words, sentences; and that which is expressed by these sentences need not necessarily be a norm. As a matter of fact, many a law – in this formal sense of the term - contains not only legal norms, but also certain elements which are of no specific legal, i.e. normative, character such as, purely theoretical views concerning certain matters, the motives of the legislator, political ideologies contained in references such as “justice” or “the will of God”, *etc.*, *etc.* All these are legally irrelevant contents of the statute, or, more generally, legally irrelevant products of the law-creating process. The law-creating process includes not only the process of legislation, but also the procedure of the judicial and administrative authorities. Even judgments of the courts very often contain legally irrelevant elements. If by the term “law” is meant something pertaining to a certain legal order, then law is anything which has been created according to the procedure prescribed by the Constitution fundamental to this order. This does not mean, however, that everything which has been created according to this procedure is law in the sense of a legal norm. It is a legal norm only if it purports to regulate human behaviour and if it regulates human behaviour by providing an act of coercion as sanction.

The Hierarchy of the Norms

A. The Superior and the Inferior Norm

The analysis of law, which reveals the dynamic character of this normative system and the function of the basic norm, also exposes a further peculiarity of law: Law regulates its own creation in as much as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm. Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former. The relation between the norm regulating the creation of another norm and this other norm may be presented as a relationship of super and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. The legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms. The unity of these norms is constituted by the fact that the creation of one norm - the lower one - is determined by another - the higher - the creation of which is determined by a still higher norm, and that this *regressus* is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity.

B. The Different Stages of the Legal Order***a. The Constitution*****I. Constitution in a Material and a Formal Sense; Determination of the Creation of General Norms**

The hierarchical structure of the legal order of a State is roughly as follows: Presupposing the basic norm, the Constitution is the highest level within national law. The Constitution is here understood, not in a formal, but in a material sense. The Constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. The Constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes. The formal Constitution, the solemn document called "Constitution", usually contains also other norms, norms which are no part of the material Constitution. But it is in order to safeguard the norms determining the organs and the procedure of legislation that a special solemn document is drafted and that the changing of its rules is made especially difficult. It is because of the material Constitution that there is a special form for Constitutional laws or a Constitutional form. If there is a Constitutional form, then Constitutional laws must be distinguished from ordinary laws. The difference consists in that the creation, and that means enactment, amendment, annulment, of Constitutional laws is more difficult than that of ordinary laws. There exists a special procedure, a special form for the creation of Constitutional laws, different from the procedure for the creation of ordinary laws. Such a special form for Constitutional laws, a Constitutional form, or Constitution in the formal sense of the term, is not indispensable, whereas the material Constitution, that is to say norms regulating the creation of general norms, and - in modern law - norms determining the organs and procedure of legislation, is an essential element of every legal order.

A Constitution of the formal sense, especially provisions by which change of the Constitution is made more difficult than the change of ordinary laws, is possible only if there is a written Constitution, if the Constitution has the character of statutory law. There are States, Great Britain for instance, which have no "written" and hence no formal Constitution, no solemn document called "The Constitution". Here the (material) Constitution has the character of customary law and therefore there exists no difference between Constitutional and ordinary laws. The Constitution in the material sense of the term may be a written or an unwritten law, may have the character of statutory or customary law. If, however, a specific form for Constitutional law exists, any contents whatever may appear under this form. As a matter of fact, subject matters which for some reason or other are considered especially important are often regulated by Constitutional instead of by ordinary laws. An example is the Eighteenth Amendment to the Constitution of the United States, the prohibition amendment, now repealed.

2. Determination of the Content of General Norms by the Constitution

The material Constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the contents of future laws. The Constitution can negatively determine that the laws must not have a certain content, e.g., that the parliament

may not pass any statute which restricts religious freedom. In this negative way, not only the contents of statutes but of all the other norms of the legal order, judicial and administrative decisions likewise, may be determined by the Constitution. The Constitution, however, can also positively prescribe a certain content of future statutes; it can, as does, for instance the Constitution of the United States of America, stipulate “that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, etc...” This provision of the Constitution determines the contents of future laws concerning criminal procedure. The importance of such stipulations from the point of view of legal technique will be discussed in another context.

3. Custom as Determined by the Constitution

If, within a legal order, there exists by the side of statutory also customary law, if the law-applying organs, especially the courts, have to apply not only the general norms created by the legislative organ, the statutes, but also the general norms created by custom, then custom is considered to be a law-creating fact just as is legislation. This is possible only if the Constitution - in the material sense of the word - institutes custom, just as it institutes legislation, as a law-creating procedure. Custom has to be, like legislation, a Constitutional institution. This might be stipulated expressly by the Constitution, and the relation between statutory and customary law might be expressly regulated. But the Constitution itself can, as a whole or in part, be unwritten, customary law. Thus it might be due to custom that custom is a law-creating fact. If a legal order has a written Constitution which does not institute custom as a form of law-creation, and if nevertheless the legal order contains customary law besides statutory law, then, in addition to the norms of the written Constitution, there must exist unwritten norms of Constitution, a customarily created norm according to which the general norms binding the law-applying organs can be created by custom. Law regulates its own creation, and so does customary law.

Sometimes it is maintained that custom is not a constitutive, that is to say, a law-creating fact, but has only a declaratory character: it merely indicated the preexistence of a rule of law. This rule of law is, according to the natural law doctrine, created by God or by nature; according to the German historic school (at the beginning of the 19th century), it is created by the “spirit of the people” (*Volksgeist*). The most important representative of this school, **F.C. Von Savigny**, advocated the view that the law cannot be “made” but exists within and is born with the People since begotten in a mysterious way by the *Volkgeist*. He consequently denied any competence to legislate, and characterized customary observance not as cause of law but as evidence of its existence. In modern French legal theory the doctrine of the *Volksgeist* is replaced by that of “social solidarity” (*Solidarit sociale*). According to Leon Duguit and his school, the true, i.e. the “objective”, law (*droit objectif*) is implied by the social solidarity. Consequently, any act or fact the result of which is positive law – be it legislation or custom – is not true creation of law but a declaratory statement (*constatation*) or mere evidence of the rule of law previously created by social solidarity. This doctrine has influenced the formulation of Article 38 of the Statute of the Permanent Court of International Justice, by which the Court is authorized to apply customary international law: “The Court shall apply... international custom, as evidence of a general practice accepted as law.”

Both the German doctrine of the *Volksgesetz* and the French doctrine of *solidarité sociale* are typical variants of the natural-law doctrine with its characteristic dualism of a “true” law behind the positive law. What has been said against the latter can be maintained to refute the former. From the viewpoint of a positivistic theory of law the law-creating, and that means the constitutive, character of custom can be denied just as little as can that of legislation.

There is no difference between a rule of customary law and a rule of statutory law in their relationship to the law-applying organ. The statement that a customary rule becomes law only by recognition on the part of the court applying the rule is neither more nor less correct than the same statement made with reference to a rule enacted by the legislative organ. Each was law “before it received the stamp of judicial authentication”, since custom is a law-creating procedure in the same sense as legislation. The real difference between customary and statutory law consists in the fact that the former is a decentralized whereas the latter is a centralized creation of law. Customary law is created by the individuals subject to the law created by them, whereas statutory law is created by special organs instituted for that purpose. In this respect, customary law is similar to law made by contract or treaty, characterized by the fact that the legal norm is created by the same subjects upon whom it is binding. Whereas, however, conventional (contractual) law is, as a rule, binding only upon the contracting subjects, the individuals creating the norm being identical with those subject to the norm, a legal rule created by custom is binding not exclusively upon the individuals who by their conduct have constituted the law-creating custom. It is consequently not correct to characterize the law-creating custom as a tacit contract or treaty, as is sometimes done, especially in the theory of international law.

b. General Norms Enacted on the Basis of the Constitution; Statutes, Customary Law

The general norms established by way of legislation or custom form a level which comes next to the Constitution in the hierarchy of law. These general norms are to be applied by the organs competent thereto, especially by the courts but also by the administrative authorities. The law-applying organs must be instituted according to the legal order, which likewise has to determine the procedure which those organs shall follow when applying law. Thus, the general norms of statutory or customary law have a two-fold function: (1) to determine the law-applying organs and the procedure to be observed by them and (2) to determine the judicial and administrative acts of these organs. The latter by their acts create individual norms, thereby applying the general norms to concrete cases.

c. Substantive and Adjective Law

To these two functions correspond the two kinds of law, which are commonly distinguished: material or substantive and formal or adjective law. Beside the substantive criminal law there is an adjective criminal law of criminal procedure, and the same is true also of civil law and administrative law. Part of procedural law, of course, are also those norms which constitute the law-applying organs. Thus two kinds of general norms are always involved in the application of law by an organ: (1) the formal norms which determine the creation of this organ and the procedure it has to follow, and (2) the material norms which determine the contents of its judicial or administrative act. When speaking of the “application” of law by courts and administrative organs, one usually thinks only of the

second kind of norms; it is only the substantive civil, criminal, and administrative law applied by the organs one has in mind. But no application of norms of the second kind is possible without the application of norms of the first kind. The substantive civil, criminal, or administrative law cannot be applied in a concrete case without the adjective law regulating the civil, criminal, or administrative procedure being applied at the same time. The two kinds of norm are really inseparable. Only in their organic union do they form the law. Every complete or primary rule of law, as we have called it, contains both the formal and the material element. The (very much simplified) form of a rule of criminal law is: If a subject has committed a certain delict, then a certain organ (the court), appointed in a certain way, shall, through a certain procedure, especially on the motion of another organ (the public prosecutor), direct against the delinquent a certain sanction. As we shall show later, a more explicit statement of such a norm is: If the competent organ, that is the organ appointed in the way prescribed by the law, has established through a certain procedure prescribed by the law, that a subject has committed a delict, determined by the law, then a sanction prescribed by the law shall be directed against the delinquent. This formulation clearly exhibits the systematic relation between substantive and adjective law, between the determination of the delict and the sanction, on the one hand, and the determination of the organs and their procedure, on the other.

d. Determination of the Law-applying Organs by General Norms

The general norms created by legislation or custom bear essentially the same relation to their application through courts and administrative authorities as the Constitution bears to the creation of these same general norms through legislation and custom. Both functions - the judicial or administrative application of general norms, and the statutory or customary creation of general norms - are determined by norms of a higher level, formally and materially, with respect to the procedure and with respect to the contents of the function. The proportion, however, in which the formal and the material determination of both functions stand to one another, is different. The material Constitution chiefly determines by what organs and through what procedure the general norms are to be created. Usually, it leaves the contents of these norms undetermined or, at least, it determines their contents in a negative way only. The general norms created by legislation or custom according to the Constitution, especially the statutes, determine, however, not only the judicial and administrative organs and the judicial and administrative procedure but also the contents of the individual norms, the judicial decisions and administrative acts which are to be issued by the law-applying organs. In criminal law, for instance, usually a general norm very accurately determines the delict to which the courts, in a concrete case, have to attach a sanction, and accurately determines this sanction, too; so that the content of the judicial decision - which has to be issued in a concrete case - is predetermined to a great extent by a general norm. The degree of material determination may of course vary. The free discretion of the law-applying organs is sometimes greater, sometimes less. The courts are usually much more strictly bound by the substantive civil and criminal laws they have to apply than are the administrative authorities by the administrative statutes. This, however, is beside the point. Important is the fact that the Constitution materially determines the general norms created on its basis to a far less extent than these norms materially determine the individual norms enacted by the judiciary

and the administration. In the former case, the formal determination is predominant; in the latter case, formal and material determination balance one another.

e. Ordinances (Regulations)

Sometimes the creation of general norms is divided into two or more stages. Some Constitutions give certain administrative authorities, for instance, the chief of State or the cabinet ministers, the power to enact general norms by which the provisions of a statute are elaborated. Such general norms, which are not issued by the so-called legislative but by another organ on the basis of general norms issued by the legislator, are designated as regulations, or ordinances. According to some Constitutions, certain administrative organs - especially the chief of State or the cabinet ministers as chiefs of certain branches of administration - are authorized, under extraordinary circumstances, to issue general norms to regulate subject-matters which are ordinarily to be regulated by the legislative organ through statutes. The distinction between statutes and regulations (ordinances) is evidently of legal importance only when the creation of general norms is, in principle, reserved to a special legislative organ which is not identical with the chief of State or the cabinet ministers. The distinction is especially significant where there is a popularly elected parliament and the legislative power is in principle separated from the judicial and the executive powers. Disregarding customary law, general legal norms then must have a special form: they are to be the contents of parliamentary decisions, these decisions sometimes need the consent of the chief of State and require sometimes publication in an official journal in order to have legal force. These requirements constitute the form of a law. Since any contents whatsoever, and not only a legal norm regulating human behaviour, may appear under this form, one then has to distinguish between laws in a material sense (general legal norms in the form of law) and laws in a formal sense (anything which has the form of a law). It may happen that a declaration without any legal significance whatsoever is made in the form of a law. There exists, then, a legally indifferent content of the law-creating process, a phenomenon of which we have already spoken.

f. The "Sources" of Law

The customary and the statutory creation of law are often regarded as the two "sources" of law. In this context, by "law" one usually understands only the general norms, ignoring the individual norms which, however, are just as much part of law as are the general ones.

"Source" of law is a figurative and highly ambiguous expression. It is used not only to designate the above-mentioned methods of creating law, custom and legislation (the latter term understood in its widest sense comprising also creation of law by judicial and administrative acts and legal transactions) but also to characterize the reason for the validity of law and especially the ultimate reason. The basic norm is then the "source" of law. But, in a wider sense, every legal norm is a "source" of that other norm, the creation of which it regulates, in determining the procedure of creation and the contents of the norm to be created. In this sense, any "superior" legal norm is the "source" of the "inferior" legal norm. Thus, the Constitution is the "source" of statutes created on the basis of the Constitution, a statute is the "source" of the judicial decision based thereon, the judicial decision is the "source" of the duty it imposes upon the party, and so on. The "source" of law is thus not, as the phrase might

suggest, an entity different from and somehow existing independently from law; the “source” of law is always itself law: a “superior” legal norm in relation to an “inferior” legal norm, or the method of creating an (inferior) norm determined by a (superior) norm, and that means a specific content of law.

The expression “source of law” is finally used also in an entirely non-juristic sense. One thereby denotes also all those ideas which actually influence the law-creating organs, for instance, moral norms, political principles, legal doctrines, the opinions of juristic experts etc. In contradistinction to the previously mentioned “sources” of law, these “sources” do not as such have any binding force. They are not - as are the true “sources of law” - legal norms or a specific content of legal norms. It is, however, possible for the legal order, by obliging the law-creating organs to respect or apply certain moral norms or political principles or opinions of experts, to transform these norms, principles, or opinions into legal norms and thus into true sources of law.

The ambiguity of the term “source of law” seems to render the term rather useless. Instead of a misleading figurative phrase one ought to introduce an expression that clearly and directly describes the phenomenon one has in mind.

g. Creation of Law and Application of Law

1. Merely Relative Difference between Law-creating and Law-applying Function

The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creating. Each norm of this order is created according to the provisions of another norm, and ultimately according to the provisions of the basic norm constituting the unity of this system of norms, the legal order. A norm belongs to this legal order only because it has been created in conformity with the stipulations of another norm of the order. This *regressus* finally leads to the first Constitution, the creation of which is determined by the presupposed basic norm. One may also say that a norm belongs to a certain legal order if it has been created by an organ of the community constituted by the order. The individual who creates the legal norm is an organ of the legal community because and insofar as his function is determined by a legal norm of the order constituting the legal community. The imputation of this function to the community is based on the norm determining the function. This explanation, however, does not add anything to the previous one. The statement “A norm belongs to a certain legal order because it is created by an organ of the legal community constituted by this order” and the statement “A norm belongs to a legal order because it is created according to the basic norm of this legal order” assert one and the same thing.

A norm regulating the creation of another norm is “applied” in the creation of the other norm. Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites. It is not quite correct to classify legal acts as law-creating and law-applying acts; for, setting aside two borderline cases of which we shall speak later, every act is, normally, at the same time a law-creating and a law-applying act. The creation of a legal norm is - normally - an application of the higher norm, regulating its creation, and the application of a higher norm is - normally - the creation of a lower norm determined by the higher norm. A judicial decision, e.g., is an act by which a general norm, a

statute, is applied but at the same time an individual norm is created obligating one or both parties to the conflict. Legislation is creation of law, but taking into account the Constitution, we find that it is also application of law. In any act of legislation, where the provisions of the Constitution are observed, the Constitution is applied. The making of the first Constitution can likewise be considered as an application of the basic norm.

2. Determination of the Law-creating Function

As pointed out, the creation of a legal norm can be determined in two different directions: the higher norm may determine: (1) the organ and the procedure by which a lower norm is to be created, and (2) the contents of the lower norm. Even if the higher norm determines only the organ, and that means the individual by which the lower norm has to be created, and that again means authorizes this organ to determine at his own discretion the procedure of creating the lower norm and the contents of this norm, the higher norm is "applied" in the creation of the lower norm. The higher norm must at least determine the organ by which the lower norm has to be created. For a norm the creation of which is not determined at all by another norm cannot belong to any legal order. The individual creating a norm cannot be considered the organ of a legal community, his norm-creating function cannot be imputed to the community, unless in performing the function he applies a norm of the legal order constituting the community. Every law-creating act must be a law-applying act, i.e., it must apply a norm preceding the act in order to be an act of the legal order or the community constituted by it. Therefore, the norm-creating function has to be conceived of as a norm applying function even if only its personal element, the individual who has to create the lower norm, is determined by the higher norm. It is this higher norm determining the organ which is applied by every act of this organ.

That creation of law is at the same time application of law, is an immediate consequence of the fact that every law-creating act must be determined by the legal order. This determination may be of different degrees. It can never be so weak that the act ceases to be an application of law. Nor can it be so strong that the act ceases to be a creation of law. As long as a norm is established through the act, it is a law-creating act, even if the function of the law-creating organ is in a high degree determined by the higher norm. This is the case when not only the organ and the law-creating procedure but also the contents of the norm to be created are determined by a higher norm. However, in this case, too, an act of law-creating exists. The question whether an act is creation or application of law is in fact quite independent of the question as to the degree to which the acting organ is bound by the legal order. Only acts by which no norm is established may be merely application of law. Of such a nature is the execution of a sanction in a concrete case. This is one of the two borderline cases mentioned above. The other is the basic norm. It determines the creation of the first Constitution; but being presupposed by juristic thinking, its presupposition is not itself determined by any higher norm and is therefore no application of law.

h. Individual Norms Created on the Basis of General Norms

1. The Judicial Act as a Creation of an Individual Norm

As an application of law, traditional doctrine considered above all the judicial decision, the function of courts. When settling a dispute between two parties or when sentencing an

accused person to a punishment, a court applies, it is true, a general norm of statutory or customary law. But simultaneously the court creates an individual norm providing that a definite sanction shall be executed against a definite individual. This individual norm is related to the general norms as a statute is related to the Constitution. The judicial function is thus, like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norms both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the Constitution only in the former respect. But that is a difference in degree only.

2. The Judicial Act as a Stage of the Law-creating Process

From a dynamic standpoint, the individual norm created by the judicial decision is a stage in a process beginning with the establishment of the first Constitution, continued by legislation and custom, and leading to the judicial decisions. The process is completed by the execution of the individual sanction. Statutes and customary laws are, so to speak, only semi-manufactured products which are finished only through the judicial decision and its execution. The process through which law constantly creates itself anew goes from the general and abstract to the individual and concrete. It is a process of steadily increasing individualization and concretization.

The general norm which, to certain abstractly determined conditions, attaches certain abstractly determined consequences, has to be individualized and concretized in order to come in contact with social life, to be applied to reality. To this purpose, in a given case it has to be ascertained whether the conditions, determined *in abstracto* in the general norm, are present *in concreto*, in order that the sanction, determined *in abstracto* in the general norm, may be ordered and executed *in concreto*. These are the two essential elements of the judicial function. This function has, by no means, as is sometimes assumed, a purely declaratory character. Contrary to what is sometimes asserted, the court does not merely formulate already existing law. It does not only “seek” and “find” the law existing previous to its decision, it does not merely pronounce the law which exists ready and finished prior to its pronouncement. Both in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character. The decision applies, it is true, a pre-existing general norm in which a certain consequence is attached to certain conditions. But the existence of the concrete conditions in connection with the concrete consequence is, in the concrete case, first established by the court's decision. Conditions and consequences are connected by judicial decisions in the realm of the concrete, as they are connected by statutes and rules of customary law in the realm of the abstract. The individual norm of the judicial decision is the necessary individualization and concretization of the general and abstract norm. Only the prejudice, characteristic of the jurisprudence of continental Europe, that law is, by definition, only general norms, only the erroneous identification of law with the general rules of statutory and customary law, could obscure the fact that the judicial decision continues the law-creating process from the sphere of the general and abstract into that of the individual and concrete.

3. The Ascertainment of the Conditioning Facts

The judicial decision is clearly constitutive as far as it orders a concrete sanction to be executed against an individual delinquent. But it has a constitutive character also, as far as it ascertains the facts conditioning the sanction. In the world of law, there is no fact "in itself", no "absolute" fact, there are only facts ascertained by a competent organ in a procedure prescribed by law. When attaching to certain facts certain consequences, the legal order must also designate an organ that has to ascertain the facts in the concrete case and prescribe the procedure which the organ, in so doing, has to observe. The legal order may authorize this organ to regulate its procedure at its own discretion; but organ and procedure by which the conditioning facts are to be ascertained must be - directly or indirectly - determined by the legal order, to make the latter applicable to social life. It is a typical layman's opinion that there are absolute, immediately evident facts. Only by being first ascertained through a legal procedure are facts brought into the sphere of law or do they, so to speak, come into existence within this sphere. Formulating this in a somewhat paradoxically pointed way, we could say that the competent organ ascertaining the conditioning facts legally "creates" these facts. Therefore, the function of ascertaining facts through a legal procedure has always a specifically constitutive character. If, according to a legal norm, a sanction has to be executed against a murderer, this does not mean that the fact of murder is "in itself" the condition of the sanction. There is no fact "in itself" that A has killed B, there is only my or somebody else's belief or knowledge that A has killed B. A himself may either acquiesce or deny. From the point of view of law, however, all these are no more than private opinions without relevance. Only the establishment by the competent organ has legal relevance. If the judicial decision has already obtained the force of law, if it has become impossible to replace this decision by another because there exists the status of *res judicata* - which means that the case has been definitely decided by a court of last resort - then the opinion that the condemned was innocent is without any legal significance. As already pointed out, the correct formulation of the rule of law is not "If a subject has committed a delict, an organ shall direct a sanction against the delinquent", but "If the competent organ has established in due order that a subject has committed a delict, then an organ shall direct a sanction against this subject."

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HART'S CONCEPT OF LAW

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

^{*} H.L.A. Hart, *The Concept of Law* 79-99 (1961).

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 be 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 dispensable 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 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 aspects of rules.

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 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 acknowledgment 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 pressures 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 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 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.

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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 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 it holds 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

^{*} H.L.A. Hart, *The Concept of Law* 100-123 (1961).

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 the 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 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 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 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' statement 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 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 assessment 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 primacy 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 they 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 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 half-way 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 general 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 fulfillment 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 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 knowledge 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.

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RONALD DWORKIN**The Model Rules I,*****RULES, PRPCIPLES, AND POLICIES**

I want to make a general attack on positivism, and I shall use H. L. A. Hart's version as a target, when a particular target is needed. My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problem with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.

I just spoke of 'principles, policies, and other sorts of standards'. Most often I shall use the term 'principle' generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish between principles and policies. Although nothing in the present argument will turn on the distinction, I should state how I draw it. I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be- decreased is a policy, and the standard that no man may profit by his own wrong a principle. The distinction can be collapsed by construing a principle as stating a social goal (*i.e.*, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (*i.e.*, the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number). In some contexts the distinction has uses which are lost if it is thus collapsed.

My immediate purpose, however, is to distinguish principles in the generic sense from rules, and I shall start by collecting some examples of the former. The examples I offer are chosen haphazardly; almost any case in a law school casebook would provide examples that would serve as well. In 1889 a New York court, in the famous case of *Riggs v. Palmer*, had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: 'It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way

* Ronald Dworkin, *Taking Rights Seriously*, The Model Rules I, 22-31 (1977, Indian reprint 2010).

and under no circumstances be controlled or modified, give this property to the murderer.’ But the court continued to note that ‘all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.’ The murderer did not receive his inheritance.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

This all-or-nothing is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate — a game, for example. In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule, and decide that a batter who has had three strikes is not out. Of course, a rule may have exceptions (the batter who has taken three strikes is not out if the catcher drops the third strike). However, an accurate statement of the rule would take this exception into account, *and* any that did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited; there is, however, no reason in theory why they could not all be added on, and the more that are, the more accurate is the statement of the rule.

If we take baseball rules as a model, we find that rules of law, like the rule that a will is invalid unless signed by three witnesses, fit the model well. If the requirement of three witnesses is a valid legal rule, then it cannot be that a will has been signed by only two witnesses and is valid. The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule.

A principle like ‘No man may profit from his own wrong’ does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not *necessitate* a particular decision. If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction — a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that, does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

The logical distinction between rules and principles appears more clearly when we consider principles that do not even look like rules. Consider the proposition, set out under ‘(d)’ in the excerpts from the *Henningsen* opinion, that ‘the manufacturer is under a special obligation in connection with the construction promotion and sale of his cars’. This does not even purport to define the specific duties such a special obligation entails, or to tell us what rights automobile consumers acquire as a result. It merely states — and this is an essential link in the *Henningsen* argument — that automobile manufacturers must be held to higher standards than other manufacturers, and are less entitled to rely on the competing principle of freedom of contract. It does not mean that they may never rely on that principle, or that courts may rewrite automobile purchase contracts at will; it means only that if a particular clause seems unfair or burdensome, courts have less reason to enforce the clause than if it were for the purchase of neckties. The ‘special obligation’ counts in favor, but does not in itself necessitate, a decision refusing to enforce the terms of an automobile purchase contract.

This first difference between rules and principles entails another. Principles have a dimension that rules do not — the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.

Rules do not have this dimension. We can speak of rules as being *functionally* important or unimportant (the baseball rule that three strikes are out is more important than the rule that runners may advance on a balk, because the game would be much more changed with the first rule altered than the second). In this sense, one legal rule may be more important than another if it has a greater or more important role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight.

If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques.)

It is not always clear from the form of a standard whether it is a rule or a principle. ‘A will, is invalid unless signed by three witnesses’ is not very different in form from ‘A man may not profit from his own wrong’, but one who knows something of American law knows that he must take the first as stating a rule and the second as stating a principle. In many cases the distinction is difficult to make — it may not have been settled how the standard should operate, and this issue may itself be a focus of controversy. The first amendment to the United States Constitution contains the provision that Congress shall not abridge freedom of speech. Is this a rule, so that if particular law does abridge freedom of speech, it follows that it is

unconstitutional? Those who claim that the first amendment is 'an absolute' say that it must be taken in this way, that is, as a rule. Or does it merely state a principle, so that when an abridgement of speech is discovered, it is unconstitutional unless the context presents some other policy or principle which in the circumstances is weighty enough to permit the abridgement? That is the position of those who argue for what is called the 'clear and present danger' test or some other form of 'balancing'.

Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. The first section of the Sherman Act states that every contract in restraint of trade shall be void. The Supreme Court had to make the decision whether this provision should be treated as a rule in its own terms (striking down every contract 'which restrains trade', which almost any contract does) or as a principle, providing a reason for striking down a contract in the absence of effective contrary policies. The Court construed the provision as a rule, but treated that rule as containing the word 'unreasonable', and as prohibiting only 'unreasonable' restraints of trade.' This allowed the provision to function logically as a rule (whenever a court finds that the restraint is 'unreasonable' it is bound to hold the contract invalid) and substantially as a principle (a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is 'unreasonable').

Words like 'reasonable', 'negligent', 'unjust', and 'significant' often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rule depends. If we are bound by a rule that says that 'unreasonable' contracts are void, or that grossly 'unfair' contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified. If we were dealing, however, not with rule but with a policy against enforcing unreasonable contracts, or a principle that unfair contracts ought not to be enforced, the contracts could be enforced without alteration of the law.

The Model of Rules II[†]

Before I turn to the specific objections I listed, however, I want to consider one very general objection that I did not list, but which I believe, for seasons that will be clear, underlines several of those I did. This general objection depends on a thesis that Hart defended in *The Concept of Law*, a thesis which belongs to moral as well as to legal philosophy. It argues, in its strongest form, that no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing these rights and duties. If that is so, and if law is, as I suppose, a matter of rights and duties and not simply of the discretion of officials, then there must be a commonly recognized test for law in the form of a uniform social practice, and my argument must be wrong. In the first section of this essay I shall elaborate this powerful thesis, with special reference to the duty of judges to apply particular standards as law. I shall then argue that the thesis must be rejected. In the remaining sections I shall, on some occasions, recast my original arguments to show why they depend on rejecting it.

Social Rules

I shall begin by noticing an important distinction between two of the several types of concepts we use when we discuss our own or other people's behavior. Sometimes we say that on the whole, all things considered, one 'ought' or 'ought not' to do something. On other occasions we say that someone has an 'obligation' or a 'duty' to do something, or 'no right' to do it. These are different sorts of judgments: it is one thing, for example, simply to say that someone ought to give to a particular charity and quite another to say that he has a duty to do so, and one thing to say simply that he ought not to drink alcohol or smoke marijuana and quite another to say that he has no right to do so. It is easy to think of cases in which we should be prepared to make the first of each of these claims, but not the second.

Moreover, something might well turn, in particular cases, on which claim we did feel was justified. Judgments of duty are commonly much stronger than judgments simply about what one ought to do. We can demand compliance with an obligation or a duty, and sometimes propose a sanction for non-compliance, but neither demands nor sanctions are appropriate when it is merely a question of what one ought, on the whole, to do. The question of when claims of obligation or duty are appropriate, as distinct from such general claims about conduct, is therefore an important question of moral philosophy, though it is a relatively neglected one.

The law does not simply state what private citizens ought or ought not to do; it provides what they have a duty to do or no right to do. It does not, moreover, simply advise judges and other officials about the decisions they ought to reach; it provides that they have a duty to recognize and enforce certain standards. It may be that in some cases a judge has no duty to decide either way; in this sort of case we must be content to speak of what he ought to do.

[†] Ronald Dworkin, *Taking Rights Seriously*, The Model Rules II, 46-68 (1977, Indian reprint 2010).

This, I take it, is what is meant when we say that in such a case the judge has 'discretion'. But every legal philosopher, with the exception of the most extreme of the American legal realists, has supposed that in at least some cases the judge has a duty to decide in a particular way, for the express reason that the law requires that decision.

But it is a formidable problem for legal theory to explain why judges have such a duty. Suppose, for example, that a statute provides that in the event of intestacy a man's property descends to his next of kin. Lawyers will say that a judge has a duty to order property distributed in accordance with that statute. But what imposes that duty on the judge? We may want to say that judges are 'bound' by a general rule to the effect that they must do what the legislature says, but it is unclear where that rule comes from. We cannot say that the legislature is itself the source of the rule that judges must do what the legislature says, because that explanation presupposes the rule we are trying to justify. Perhaps we can discover a basic legal document, like a constitution, that says either explicitly or implicitly that the judges must follow the legislature. But what imposes a duty on judges to follow the constitution? We cannot say the constitution imposes that duty without begging the question in the same way.

If we were content to say merely that judges *ought* to follow the legislature, or the constitutions, then the difficulty would not be so serious. We might provide any number of reasons for this limited claim; for example, that everyone would be better off in the long run, on balance, if judges behaved in this way. But this sort of reason is unpersuasive if we want to claim, as our concept of law seems to assume, that judges have a *duty* to follow the legislature or the constitution. We must then try to find, not just reasons why judges should do so, but grounds for asserting that duty, and this requires that we face the issue of moral philosophy I just named. Under what circumstances do duties and obligations arise?

Hart's answer may be summarized in this way. Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behavior *constitutes* a social rule, and imposes a duty. Suppose that a group of churchgoers follows this practice (a) each man removes his hat before entering church, (b) when a man is asked why he does so, he refers to 'the rule' that requires him to do so, and (c) when someone forgets to remove his hat before entering the church he is criticized and perhaps even punished by the others. In those *circumstances*, according to Hart, practice conditions for a duty imposing rule are met. The community has a social rule to the effect that men must not wear hats in church, and that social rule imposes a duty not to wear hats in church. That rule takes the issue of hat-wearing in church out of the general run of issues which men may debate in terms of what they ought to do, by creating a duty. The existence of the social rule, and therefore the existence of the duty, is simply a matter of fact.

Hart then applies this to the issue of judicial duty. He believes that in each legal system the practice conditions are met by the behavior of judges, for a social rule that imposes a duty to identify and apply certain standard as law. If, in a particular community, those officials (a) regularly apply the rules laid by the legislature in reaching their decisions, (b) justify this practice by appeal to 'the rule' that judges must follow the legislature, and (c) censure any

official who does not follow the rule, then, on Hart's theory, this community can be said to have a social rule that judges must follow the legislature. If so, then judges in that community have a duty to do so. If we now ask why judges have a duty to follow social rules, after the fashion of our earlier quibble, Hart will say that we have missed the point. It belongs to the concept of a duty, on his account, that duties are created by social rules of the sort he describes.

But Hart's theory as so far presented is open to an objection that might be put in the following way. When a sociologist says that a particular community 'has' or 'follows' a particular rule, like the no-hat-in-church rule, he means only to describe the behaviour of that community in a certain respect. He means only to say that that community suppose that they have a particular duty and not that He agrees. But when a member of the community himself appeals to that rule, for the purpose of criticising his own or someone else's behaviour then he means not simply to describe the behaviour of the other people but to evaluate it. He means not simply that others believe that they have a certain duty, but that they *do* have that duty. We must therefore recognise a distinction between two sorts of statements each of which uses the concept of a rule. The sociologist, we might say, is asserting a *social* rule, but the churchgoer is asserting a *normative* rule. We might say that the sociologist's assertion of a social rule is true (or warranted) if a certain factual state of affairs occurs, that is, if the community behaves in the way Hart describes in his example. But we should want to say that the churchgoer's assertion of a normative rule is true (or warranted) only if a certain normative state of affairs exists, that is, only if individuals in fact do have the duty that they suppose they have in Hart's example. The judge trying a lawsuit is in the position of the churchgoer, not the sociologist. He does not mean to state, as a cold fact, simply that most judges believe that they have a duty to follow what the legislature has said; he means that they do in fact have such a duty and he cites that duty, not others' beliefs, as the justification for his own decision. If so, then the social rule cannot, without more, be the source of the duty he believes he has.

Hart anticipates this objection with an argument that forms the heart of his theory. He recognizes the distinction I have drawn between assertions of a 'social rule' and assertions of a 'normative rule', though he does not use these terms. However, he denies, at least as to the cases he discusses, that these two sorts of assertions can be said to assert two different sorts of rules. Instead, he asks us to distinguish between the *existence* of a rule and its *acceptance* by individual members of the community in question. When the sociologist asserts the existence of a social rule he merely asserts its existence: he says only that the practice-conditions for that rule have been met. When the churchgoer asserts its existence he also claims that these practice-conditions are met, but *in addition* he displays his *acceptance* of the rule as a standard for guiding his own conduct and for judging the conduct of others. He both identifies a social practice and indicates his disposition to conform his behavior to it. Nevertheless, insofar as each refers to a rule, it is the same rule, that is, the rule that is constituted by the social practice in question.

The difference between a statement of a social rule and a statement of a normative rule then is not a difference in the type of rule each asserts, but rather a difference in the attitude

each displays towards the social rule it does assert. When a judge appeals to the rule that whatever the legislature enacts is law, he is taking an internal point of view towards a social rule; what he says is true because a social practice to that effect exists, but he goes beyond simply saying that this is so. He signals his disposition to regard the social practice as a justification for his conforming to it.

So Hart advances both a general theory about the concept of obligation and duty, and a specific application of that theory to the duty of judges to enforce the law. For the balance of this initial section, I shall be concerned to criticize the general theory, which I shall call a social rule theory, and I shall distinguish strong *and* weaker version of that theory. On the strong version, whenever anyone asserts a duty, he must be understood as presupposing the existence of a social rule and signifying his acceptance of the practice the rule describes. So if I say that men have a duty not to lie, I must mean at least that a social rule exists to that effect, and unless it does my statement must be false. On a weaker version, it is simply *sometimes* the case that someone who asserts a duty should be understood as presupposing a social rule that provides for that duty. For example, it might be the case that a churchgoer who says that men must not wear hats in church must be understood in that way, but it would not follow that the man who, asserts a duty not to lie must be understood in the same way. He might be asserting a duty that does not in fact depend upon the existence of a social rule.

Hart does not make entirely plain, in the relevant pages of *The Concept of Law*, which version he means to adopt, though much of what he says suggests the strong version. But the application of his general theory to the problem of judicial duty will, of course, depend upon which version of the social rule theory he means to snake out. If the strong version is right, then judges who speak about a fundamental duty to treat what the legislature says as law, for example, must presuppose a social rule to that effect. But if some weaker version of the social rule theory holds, then it simply might be the case that this is so, and further argument would be needed to show that it is.

The strong version of the theory cannot be correct if it proposes to explain all cases in which people appeal to duties, or even to all cases in which they appeal to rules as the source of duties. The theory must concede that there are some assertions of a normative rule that cannot be explained as an appeal to a social rule, for the reason that no corresponding social rule exists. A vegetarian might say, for example, that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any circumstance. Obviously no social rule exists to that effect: the vegetarian will acknowledge that very law then now recognize any such rule or any such duty and indeed that is his complaint.

However, the theory might argue that this use of the concepts of rule and duty designates a special case, and belongs in fact to a distinct kind of moral practice that is parasitic upon the standard practice the theory is designed to explain. The vegetarian must be understood, on this account, really to be saying not that men and women presently have a duty not to take life, but rather that since there are very strong grounds for saying that one *ought* not to take life, a social rule to that effect *ought* to exist. His appeal to 'the rule' might suggest that some such rule already does exist, but this suggestion is a sort of figure of speech, an attempt on his

part to capture the imperative force of social rules, and extend that force to his own very different sort of claim.

But this defense misunderstands the vegetarian's *claim*. He wants to say, not simply that it is desirable that society rearrange its institution so that no man ever has the right to take life, but that in fact, as things stand, no one ever does have that right. Indeed, he will want to urge the existence of a moral duty to respect life as a reason why society should have a social rule to that effect. The strong version of the social rule theory does not permit him to make that argument. So that theory can accommodate his statements only by insisting that he say something that he does not want to say.

If the social rule theory is to be plausible, therefore, it must be weakened at least to this extent. It must purport to offer an explanation of what is meant by a claim to duty (Or an assertion of a normative rule of duty) only in one sort of case, namely, when the community is by-and-large agreed that some such duty does exist. The theory would not apply in the case of the vegetarian, but it would apply in the case of the churchgoer. This weakening would not much affect the application of the theory to the problem of judicial duty, because judges do in fact seem to follow much the same rules in deciding what to recognize as the law they are bound to enforce.

But the theory is not plausible even in this weakened form. It fails to notice the important distinction between two kinds of social morality, which might be called *concurrent* and *conventional* morality. A community displays a concurrent morality when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule. It displays a conventional morality when they do. If the churchgoers believe that each man has a duty to take off his hat in church, but would not have such a duty but for some social practice to that general effect, then this is a case of conventional morality. If they also believe that each man has a duty not to lie, and would have this duty even if most other men did, then this would be a case of concurrent morality.

The social rule theory must be weakened so as to apply only to cases of conventional morality. In cases of concurrent morality, like the lying case, the practice-conditions Hart describes would be met. People would on the whole not lie, they would cite 'the rule' that lying is wrong as a justification of this behavior, and they would condemn those who did lie. A social rule would be constituted by this behavior, on Hart's theory, and a sociologist would be justified in saying that the community 'had a rule' against lying. But it would distort the claim that members of the community made, when they spoke of a duty not to lie, to suppose them to be *appealing* to that social rule, or to suppose that they count its existence necessary to their claim. On the contrary, since this is a case of concurrent morality, the fact is that they do not. So the social rule theory must be confined to conventional morality.

This further weakening of the theory might well reduce its impact on the problem of judicial duty. It may be that least some part of what judges believe they must do represents concurrent rather than conventional morality. Many judges, for example, may believe that they have a duty to enforce decision of a democratically elected legislature on the grounds of

political principles which they accept as having independent merit, and not simply because other judges and officials accept them as well. On the other hand, it is at least plausible to suppose that this is not so, and that at least the bulk of judges in typical legal systems would count some general judicial practice as an essential part of the case for any claim about their judicial duties.

However, the social rule theory is not even an adequate account of conventional morality. It is not adequate because it cannot explain the fact that even when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty. Suppose, for example, that the members of the community which 'has the rule' that men must not wear hats in church are in fact divided on the question of whether 'that' rule applies to the case of male babies wearing bonnet. Each side believes that its view of the duties of the babies or their parents is the sounder, but neither view can be pictured as based on a social rule, because there is no social rule on the issue at all.

Hart's description of the practice-conditions for social rules is explicit on this point: a rule is constituted by the conforming behaviour of the bulk of a population. No doubt he would count, as conforming behavior, behaviour that everyone agrees would be required in a particular case even though the case has not arisen. So the social rule would 'cover' the case of a red-headed man, even if the community did not happen to include one as yet. But if half the churchgoers claim that babies are required to take off their bonnets and the other half denies any such requirement, what social rule does this behavior constitute? We cannot say either that it constitutes a social rule that babies must take off their bonnets, or a social rule that provides that they do not have that duty.

We might be tempted to say that the social rule about men wearing hats in church is 'uncertain' as to the issue of babies. But this involves confusion of just the sort that the social rule theory is meant to avoid. We cannot say that the social rule is uncertain when all the relevant facts about social behavior are known, as they are in this case, because, that would violate the thesis that social rules are constituted by behavior.

A social rule about wearing hats in church might be said to be uncertain when the facts about what people did and thought had not yet been gathered, or, perhaps, if the question of babies had not yet arisen, so that it was unclear whether the bulk of the community would be of one mind or not. But nothing like this kind of uncertainty is present here; the case has arisen and we know that members of the community do not agree. So we must say, in this kind of case, not that the social rule about wearing hats in church is uncertain, but rather that the only social rule that the behavior of the community constitutes is the rule that prohibits grown men from wearing hats in church. The existence of that rule is certain, and it is equally certain that no social rule exists on the issue of babies at all.

But all this seems nearly fatal to the social rule theory, for this reason: when people assert normative rules, even in cases of conventional morality, they typically assert rules that differ in scope or in detail, or, in any event, that would differ if each person articulated his rule in further detail. But two people whose rules differ, or would differ if elaborated, cannot be appealing to the same social rule, and at least one of them cannot be appealing to any social

rule at all. This is so even though they agree in most cases that do or might arise when the rules they each endorse are in play. So the social rule theory must be weakened to an unacceptable form if it is to survive at all. It must be held to apply only in cases, like some games, when it is accepted by the participants that if a duty is controversial it is no duty at all. It would not then apply to judicial duties.

The theory may try to avoid that conclusion in a variety of ways. It might argue, first, that when someone appeals to a rule, in a controversial case, what he says must be understood as having two parts: first, it identifies the social rule that does represent agreement within the community (that grown men must not wear hats in church) and then it urges that this rule *ought* to be extended to cover more controversial cases (babies in church). The theory might, in other words, take the same line towards a controversial appeal to rules as I said it might in the case of the vegetarian. But the objection I made in discussing the vegetarian's case could then be made, with much greater effect, as a general critique of the theory as a whole. People, at least people who live outside philosophy texts, appeal to moral standards largely in controversial circumstances. When they do, they want to say not that the standard ought to apply to the case in hand, whatever that would mean, but that the standard does apply; not that people ought to have the duties and responsibilities that the standard prescribed, but that they do have them. The theory could hardly argue that all these claims are special or parasitic employments of the concept of duty; if it did, it would limit its own application to the trivial.

The theory might be defended, alternatively, in a very different way: by changing the concept of a social rule that it employs. It might do this by fixing on the fact that, at least in the case of conventional morality, certain verbal formulations of a rule often become standard, like the form, 'men must take off their hats in church.' On the revised concept, a social rule exists when a community accepts a particular verbal formulation of its duties, and uses that formulation as a guide to conduct and criticism; the rule can then be said to be 'uncertain' to the degree that the community disagrees about the proper application of some one or more terms in the standard formulation, provided that it is agreed that the controversial cases must be decided on the basis of one or another interpretation of these terms. The revision would provide an answer to the argument I made. The churchgoers do accept one single social rule about their hat-wearing responsibilities, namely the rule that men must not wear hats in church. But that rule is uncertain, because there is disagreement whether 'men' includes male babies, or whether 'hats' includes bonnets.

But this revision of the concept places much too much weight upon the accident of whether members of the community in question are able to, or do in fact, locate their disagreements about duties as disagreements in the interpretation of some key word in a particular verbal formulation that has become popular. The churchgoers are able to put their disagreement in this form, but it does not follow that they all will. The verbal formulation of the rule might have been different without the underlying social facts having been different, as if people were in the habit of saying that only women may cover their heads in church; in that case the disagreement would have to be framed, not as a disagreement over whether 'women' includes 'male babies' but whether the popular version was a correct statement of the right normative rule.

Moreover, the theory would lose most of its original explanatory power if it were revised in this way. As originally presented it captured, though it misrepresented, an important fact, which is that social practice plays a central role in justifying at least some of our normative claims about individual responsibility or duty. But it is facts of consistent practice that count, not accidents of verbal behavior. Our moral practices are not exercises in statutory interpretation.

Finally, the social rule theory might retain Hart's original definition of a social rule, a description of uniform practice, but retreat in a different way and cut its losses. It might give up the claim that social rules ever set the *limit* of a man's duties, but keep the idea that they set their *threshold*. The function of social rules in morality might then be said to be this: social rules distinguish what is settled by way of duties, not simply in the factual sense that they describe an area of consensus, but in the conceptual sense that when such consensus exists, it is undeniable that members of that community have at least the duties it embraces, though they may, and perhaps may properly, refuse to honor these duties. But the social rule does not settle that individuals have no rights or duties beyond its terms even in the area of conventional morality; the fact that the social rule does not extend to some case, like the case of babies in church, means rather that someone asserting a duty in that case must rely on arguments that go beyond a simple appeal to practice.

If the social rule theory is revised in this way it no longer supports Hart's thesis of a social rule of recognition in the way that the original theory I described does. If judges may have a duty to decide a case in a particular way, in spite of the fact that no social rule imposes that duty, then Hart's claim that social practice accounts for all judicial duty is lost. I should like to point out, however, the weakness that remains in even this revised form of the social rule theory. It does not conform with our moral practice to say even that a social rule stipulates the minimum level of rights and duties. It is generally recognized, even as a feature of conventional morality, that practices that are pointless, or inconsistent in principle with other requirements of morality, do not impose duties, though of course, when a social rule exists, only a small minority will think that this provision in fact applies. When a social rule existed, for example, that men extend certain formal courtesies to women, most people said that women had a right to them; but someone of either sex who thought these courtesies an insult would not agree.

This fact about conventional morality, which the social rule theory ignores, is of great importance because it points toward a better understanding of the connection between social practice and normative judgments than that theory provides. It is true that normative judgments often assume a social practice as an essential part of the case for that judgment; this is the hallmark, as I say of conventional morality. But the social rule theory misconceives the connection. It believes that the social practice *constitutes* a rule which the normative judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states. The fact that a practice of removing hats in church exists justifies asserting a normative rule to that effect — not because the practice constitutes a rule which the normative judgment describes and endorses, but because the practice creates ways of giving offense and

gives rise to expectations of the sort that are good grounds for asserting a duty to take off one's hat in church or for asserting a normative rule that one must.

The social rule theory fails because it insists that a practice must somehow have the same *content* as the rule that individuals assert in its name. But if we suppose simply that a practice may justify a rule, then while the rule so justified may have the same content as the practice, it may not; it may fall short of, or beyond it. If we look at the relationship between social practice and normative claims in this way, then we can account, smoothly, for what the social rule theory labors to explain. If someone finds a social practice pointless, or silly, or insulting, he may believe that it does not even in principle justify asserting any duties or normative rules of conduct, and in that case he will say, not that it imposes a duty upon him which he rejects, but that, in spite of what others think, it imposes no duty at all.

If a community has a particular practice, moreover, like the no-hat- in-church practice, then it will be likely, rather than surprising, that members will assert different normative rules, each allegedly justified by that practice. They will disagree about whether babies must wear bonnets because they will differ about whether, all things considered, the fact of the practice justifies asserting that duty. Some may think that it does because they think that the practice as a whole establishes a form of insult or disrespect that can be committed vicariously by an infant's parents. Others may disagree, for a variety of reasons. It is true that they will frame their dispute, even in this trivial case, as a dispute over what 'the rule' about hats in church requires. But the reference is not to the rule that is constituted by common behavior, that is, a social rule, but the rule that is justified by common behavior, that is, a normative rule. They dispute precisely about what *that* rule is.

It may be that judicial duty is a case of conventional morality. It does not follow that some social rule states the limit, or even the threshold, of judicial duty. When judges cite the rule that they must follow the legislature, for example, they may be appealing to a normative rule that some social practice justifies, and they may disagree about the precise content of that normative rule in a way that does not represent merely a disagreement about the facts of other judges' behavior. The positivist may be right, but he must make out his case without the short-cut that the social rule theory tries to provide.

Does 'Institutional Support' Constitute A Rule Of Recognition?

In Chapter 2 I said that principles, like the principle that no man may profit from his own wrong, could not be captured by any simple rule of recognition, like the rule that what Parliament enacts is law. The positivist, I said, has this choice. He might argue that these principles are not part of the law, because the judge has no duty, but only discretion, to take them into account. Or he might concede that they are law, and show how a more complicated social rule of recognition might be constructed that does capture such principles. Of course, the positivist might combine these strategies: he might argue that a more complex rule of recognition would capture some of the principles that judges cite, and then argue that judges have no duty to enforce any principles but these.

Dr Raz wishes to combine both strategies in that way. His principal reliance is on the argument, which I shall consider in the next section, that judges have

discretion, but no duty, to employ certain principles. But he believes that judges do have a duty to take into account at least some principles, and that these can be brought under something like a social rule of recognition, through the notion of what he calls a 'judicial custom'. Suppose a particular principle is in fact cited by many judges over a period of time as a principle that must be taken into account. Then that very practice, he points out, would constitute a distinct social rule which would then stand, along with rules of recognition of the conventional sort that Hart had in mind, within a cluster of social rules that together provide a test for law.

But, for two reasons, this concept of judicial custom cannot carry the argument very far. First, the great bulk of the principles and policies judges cite are controversial, at least as to weight; the weight of the principle that no man may, profit from his own wrong, for example, was sufficiently controversial to provoke a dissent in *Riggs v. Palmer*. Second, a great many appeals to principle are appeals to principles that have not been the subject of any established judicial practice at all; this is true of several of the examples I gave from the decision in the *Henningsen* case, which included principles that had not in fact been formulated before, in anything like the same fashion, like the principle that automobile manufacturers have a special responsibility to the public.

So Raz's notion of judicial custom would not distinguish many of the principles that judges treat as principles they must take into account. We shall therefore have to consider very seriously his argument that judges in fact have no duty to give effect to principles that are not the subject of such a judicial custom. But first I want to consider a different and more complex idea of how the notion of a social rule of recognition can be adapted to capture principles as well as rules.

Professor Sartorius agrees with me in rejecting the idea that when judges appeal to principles in hard cases they do so in the exercise of some discretion. If he wishes to embrace the first thesis I distinguished, therefore, he must describe a form of social rule that does in fact capture or at least provide for all these principles. This he attempts to do, and he proposes to use my own arguments against me. He admits that the development of a fundamental test for law would be extremely laborious, but he believes that it is in principle possible. He believes, further, that the nerve of any such ultimate test would lie in the concept of 'institutional support' that I developed in Chapter 2. He quotes the following passage from that chapter as authority for his own position:

[I]f we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle were cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it). Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found the more weight we could claim for the principle.

Of course Professor Sartorius would want to develop this doctrine of institutional support in much more detail than that. I myself should elaborate it in the following way, and his

article suggests that he might accept this elaboration. Suppose we were to gather together all the rules that are plainly valid rules of law in, for example, a particular American state, and add to these all the explicit rules about institutional competence that we relied upon in saying that the first set of rules were indeed valid rules of that jurisdiction. We would now have an imposing set of legal materials. We might then ask what set of principles taken together would be necessary to *justify* the adoption of the explicit rules of law and institutional rules we had listed. Suppose that each judge and lawyer of that state were to develop a 'theory of law' which described that set of principles and assigned relative weights to each (I ignore the fact that the labor of a lifetime would not be enough for a beginning). Each of them might then argue that his set of principles must count as principles of the legal system in question... But some clarification is now needed. Sartorius could not mean that any particular lawyer's theory of law provides a *social* rule of recognition

So Sartorius must say, not that any particular lawyer's theory of law supplies a social rule of recognition, but rather that the test of institutional support *itself* is such a social rule. He might say, that is, that the social rule of recognition is just the rule that a principle must be applied as law if it is part of the soundest theory of law, and must be applied with the weight it is given by that theory. On this view, the different theories of law different lawyers would offer are simply different theories about how that social rule should be applied to particular cases.

But I do not see how one can put the matter that way, and still retain the idea that the test of institutional support provides 'specific criteria' of 'pedigree' rather than 'content'. The concept of a theory of law, in the way I described it, does not suppose that principles and policies explain the settled rules in the way in which a legal historian might explain them, by identifying the motives of those who adopted these rules, or by calling attention to the pressure groups which influenced their enactments, if a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior.

The simple example I gave earlier illustrates the point. If I disagree with another lawyer about the relative force to be given to older precedents, I will urge a theory of law that takes a view of the point of precedent that supports my case. I might say that the doctrine of precedent serves equality of treatment before the law, and that simplicity of treatment becomes less important and even perverse as the time elapsed between the two occasions increases. He might reply that the point of precedent is not so much equality as predictability of decision, which is best served by ignoring distinctions of age between precedents. Each of us will point to features of adjudicating that support one view against the other. If one of us could find none, then, as I said in the quoted passage, his case would be weak. But the choice between our views will not depend only on the number of features each can find. It will depend as well

on the moral case I can make for the duty of equal treatment that my argument presupposes, because the thesis that this duty justifies precedent assumes that the duty exists.

I do not mean to say that no basis can be found for choosing one theory of law over another. On the contrary, since I reject the doctrine of discretion described in the next section, I assume that persuasive arguments *can* be made to distinguish one theory as superior to another. But these arguments must include arguments on issues of normative political theory, like the nature of society's duty of equality, that go beyond the positivist's conception of the limits of the considerations relevant to deciding what the law is. The test of institutional support provides no mechanical or historical or morally neutral basis for establishing one theory of law as the soundest. Indeed, it does not allow even a single lawyer to distinguish a set of legal principles from his broader moral or political principles. His theory of law will usually include almost the full set of political and moral principles to which he subscribes; indeed it is hard to think of a single principle of social or political morality that has currency in his community and that he personally accepts, except those excluded by constitutional considerations, that would not find some place and have some weight in the elaborate scheme of justification required to justify the body of laws. So the positivist will accept the test of institutional settlement as filling the role of his ultimate test for law only at the cost of abandoning the rest of his script.

If that is so, the consequences for legal theory are considerable. Jurisprudence poses the question: what is law? Most legal philosophers have tried to answer this question by distinguishing the *standards* that properly figure in arguments on behalf of legal rights and duties. But if no such exclusive list of standards can be made, then some other way of distinguishing legal rights and duties from other sorts of rights and duties must be found.

KARL VON SAVIGNY'S THEORY OF LAW**System of Modern Roman Law^{*}**

In the general consciousness of a people lives positive law and hence we have to call it people's law (*Volksrecht*). It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth; in that case the will of individuals might perhaps have selected the same law, perhaps however and more probably very varied laws. Rather is it the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same. Since therefore we acknowledge an invisible origin of positive law we must as to that origin, renounce documentary proof: but this defect is common to our and every other view of that origin, since we discover in all peoples who have ever presented themselves within the limits of authentic history an already existing positive law of which the original generation must lie beyond those limits. There are not wanting proofs of another sort and suitable to the special nature of the subject-matter. Such a proof lies in the universal, uniform recognition of positive law and in the feeling of inner necessity with which its conception is accompanied. This feeling expresses itself most definitely in the primeval assertion of the divine origin of law of statutes; a more manifest opposition to the idea of its arising from accident or the human will is not to be conceived. A second proof lies in the analogy of other peculiarities of peoples which have in like manner an origin invisible and reaching beyond authentic history, for example, social life and above all speech. In this is found the same independence of accident and free individual choice, the same generation from the activity of the spirit of the people working in common in each individual; in speech too from its sensible nature, all this is more evident and recognizable than in law. Indeed the individual nature of a particular people is determined and recognized solely by those common directions and activities of which speech as the most evident obtains the first place.

The form however in which law lives in the common consciousness of a people is not that of abstract rules but as the living intuition of the institutions of law in their organic connection, so that whenever the necessity arises for the rule to be conceived in its logical form, this must be first formed by a scientific procedure from that total intuition. That form reveals itself in the symbolical acts which display in visible shape the essence of the jural relation and in which the primitive laws express themselves more intelligibly and thoroughly than in written laws.

In this view of the origin of positive law, we have at present kept out of sight the progress of the life of a people in time. If we now look also at this operation upon law we must above all ascribe to it an establishing force. The longer the convictions of law live in a people, the more deeply they become rooted in it. Moreover law will develop itself by use and what originally was present as a mere germ will by practice assume a definite shape to the

^{*} M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* pp. 921-925 (7th ed., 2001).

consciousness. However in this way the changing of law is also generated. For as in the life of single men, no glimpse of complete passiveness can be perceived but a continual organic development, so is it with the life of peoples and with each single element of which that concrete life is composed. Thus we find in speech a constant gradual shaping and development and in like manner in law. This gradual formation is subject to the same law of generation from inner power and necessity, independent of accident and individual will, as its original arising was. But the people experiences in this natural process of development, not merely a change in general, but it experiences it in a settled, regular series of events and of these each has its peculiar relation to the expression of the spirit of the people in which the law is generated. This appears in the clearest and strongest manner in the youth of a people for then the connection is more intimate, the consciousness of it is more generally diffused and is less obscured by the variety of individual cultivation. Moreover in the same degree in which the cultivation of individuals becomes heterogeneous and predominant and in which a sharper division of employment, of acquirements and of ranks produced by these, enters, the generation of law which rests upon the common consciousness becomes more difficult; and this mode of generation would disappear altogether if new organs for that purpose were not formed by the influence of these self-same new circumstances; these organs of legislation and the science of law of which the nature will be immediately explained.

This new development of law may have an entirely different relation to the originally existing law. New institutions of law may be generated by it, the existing law transformed or it may be entirely swept away if it has become foreign to the thought and need of the age.

People (Volk)

The generation of law has been preliminarily posited in the peoples as the active, personal subject. The nature of this subject will not be more accurately defined. If in the examination of the jural relation, we remove by abstraction, all its special content, there remains over as a common nature, the united life of a plurality of men, regulated in a defined manner. We might naturally be led to stop short at this abstract conception of a plurality and regard law as its discovery, without which the external freedom of no individual could subsist, but such an accidental meeting of an undefined multitude is a conception both arbitrary and entirely wanting in truth: and even if they found themselves so met together, the capacity for producing law would be entirely wanting since with a need the power of at once supplying it, is not given. In fact we find so far as history informs us upon the matter, that wherever men live together, they stand in an intellectual communion which reveals as well as establishes and develops itself by the use of speech. In this natural whole is the seat of the generation of law and in the common intelligence of the nation penetrating individuals, is found the power of satisfying the necessity above recognized.

The boundaries however of individual nations are certainly undefined and wavering and this state of doubt also shows itself in the unity of variety of the laws engendered in them. Thus as to kindred races it may appear uncertain whether they are to be regarded as one people or as several; in like manner we also frequently find in their law not an entire consonance, probably however an affinity.

Even where the unity of a people is undoubted, within its limits are often found inner circles which are included in a special connection side by side with the general union of the people, as cities and villages, guilds and corporations of every sort which altogether form popular divisions of the whole. In these circles again a special generation of law may have its seat as particular law, side by side with the general law of the nation which by that particular law is on many sides complete or altered.

When we regard the people as a natural unity and merely as the subject of positive law, we ought not to think of the individuals comprised in that people at any particular time; that unity rather runs through generations constantly replacing one another, and thus it unites the present with the past and the future. This constant preservation of law is effected by tradition and this is conditioned by, and based upon, the not sudden but ever gradual change of generations. The independence of the life of individuals, here asserted of law, appertains first to the unchanged continuation of the rules of law: it is secondly too the foundation of the gradual formation of law and in this connection we must ascribe to it a special importance.

This view in which the individual people is regarded as the generator and subject of positive or practical law may appear too confined to some who might be inclined to ascribe that generation rather to the general spirit of humanity than to that of a particular people. On closer examination these two views do not appear conflicting. What works in an individual people is merely the general human spirit which reveals itself in that people in a particular manner. The generation of law is a fact and one common to the whole. This is conceivable only of those between whom a communion of thought and action is not only possible but actual. Since then such a communion exists only within the limits of an individual people so here also can practical law alone be created, although in its production, the expression of a generative principle common to men in general, is perceived, but not the peculiar will of individual peoples, of which perhaps no single trace might be found in other peoples. For this product of the people's mind is sometimes entirely peculiar to a single people, though sometimes equally present in several peoples.

Customary Law

This name may easily mislead us into the following course of thinking. When anything whatever needed to be done in a jural relation, it was originally quite indifferent what was done; accident and arbitrary will anyhow settled the decision. If the same case presented itself a second time, it was easier to repeat the same decision than to deliberate upon a new one and with each fresh repetition, this procedure of necessity appeared more convenient and more natural. Thus after a while such a rule would become law as had originally no greater claim to prevail than an opposite rule and the cause of origin of this law was custom alone. If one looks at the true bases of positive law, at the actual substance of it, he will see that in that view, cause and effect are exactly reversed. That basis has its existence, its reality in the common consciousness of the people. This existence is an invisible thing; by what means can we recognize it? We do so when it reveals itself in external act when it steps forth in usage, manners, custom; in the uniformity of a continuing and therefore lasting manner of action we recognize the belief of the people as its common root and one diametrically opposite to bare chance. Custom therefore is the badge and not a ground of origin of positive law. However

this error which converts custom into a ground of origin has also an ingredient of truth which must now be reduced to its proper dimensions. Besides those bases universally recognized in the consciousness of a people and undoubted, there are many determinations as to details which have in themselves a less certain existence; they may obtain such an existence, by being through constant practice brought more definitely to the consciousness of the people itself....

Legislation

...If we enquire first as to the contents of written law, they are already determined by the mode of derivation of the law-giving power; the already present people's law supplies those contents or what is the same thing, written law is the origin of people's law. If one were to doubt that, one must conceive the lawgiver as standing apart from the nation; he however rather stands in its centre, so that he concentrates in himself their spirit, feelings, needs, so that we have to regard him as the true representative of the spirit of the people. It is also entirely erroneous to regard this position of the legislator, as dependent upon the different arrangement of the legislative power in this or that Constitution. Whether a prince makes the law or a senate or a large collection of people formed by election or perhaps the agreement of several such powers is furnished for legislation, the essential relation of the legislator to the people's law is not at all changed and it is again owing to the error of the conception censured above, if some believe that real people's law is only contained in the laws made by selected representatives....

The influence of legislation upon the progress of law is more important than upon its original formation. If through changed manners, views, needs, a change in the existing law becomes necessary or if in the progress of time entirely new legal institutions are necessary, these new elements may indeed be introduced into the existing law by the same innate invisible power which originally generated the law. It is however precisely here that the influence of legislation may become most obviously beneficial, nay indispensable. Since those operative principles only enter gradually, there of necessity arises an interval of uncertain law and this uncertainty is brought to an end by the expression of the law....

Lastly into the history of every people, enter stages of development and conditions which are no longer propitious to the creation of law by the general conditions which are no longer propitious to the creation of law by the general consciousness of a people. In this case this activity, in all cases indispensable, will in great measure of itself devolve upon legislation...

Juristic Law

It is a natural consequence of the development of nations that as culture progresses, special activities and acquirements should separate and thus form separate occupations for the different classes. Thus also law, originally the common property of the collective people, by the more extended relations of active life is developed in so special a manner that it can no longer be mastered by the knowledge uniformly spread among the people. Then is formed a special order of persons skilled in law who as an actual part of the people, in this order of thought represent the whole. The law is in the particular consciousness of this order, merely a continuation and special unfolding of the people's law, it leads henceforth a double life; in outline it continues to

live in the common consciousness of the people, the more minute cultivation and handling of it, is the special calling of the order of jurists...

Relation between Sources of Law

From the previous exposition it follows that originally all positive law is people's law and that side by side with this spontaneous generation, comes legislation (often even in early times) enlarging and propping it up. Then by the progressive development of the people, legal science is added; thus in legislation and the science of law, two organs are furnished to people's law, each of which simultaneously leads its independent life. If lastly in later times, the law-forming energy departs from the people as a whole, it continues to live in these organs. Then since the largest and most important parts of the old people's law have been incorporated into legislation and legal science, that law shows itself very little in its original shape but merely appears through their medium. Thus it may happen that people's law may be almost hidden by legislation and legal science in which it lives on, and that the true origin of existing positive law, may be easily forgotten and misunderstood. Legislation especially, in its external influence has such a preponderance, that the delusion easily arises that it is the sole true ground of origin of law and that all others must be considered in the subordinate position of a mere supplement or adjunct to it. Law however is never a healthy condition, unless these law-forming powers work harmoniously together, none of them isolating itself from the others; and since legislation and legal science are the continuous product of individual consciousness and reflection, it is also of importance that correct views of the origin of positive law, and of the true connection of the powers co-operating in that production, should obtain and assert the mastery.

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SIR HENRY MAINE'S HISTORICAL MATERIALISM

Ancient Law^{*}

Themistes

The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun rising, culminating, and setting was a person and a divine person; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration...

Even in the Homeric poems we can see that these ideas are transient. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them.

Customary Law

The important point for the jurist is that aristocracies were universally the depositaries and administrators of law. They seem to have succeeded to the prerogatives of the king, with the important difference, however, that they do not appear to have pretended to direct inspiration for each sentence. The connection of ideas which caused the judgments of the patriarchal chieftain to be attributed to superhuman dictation still shows itself here and there in the claim of a divine origin for the entire body of rules, or for certain parts of it, but the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interposition. What the juristical oligarchy now claims is to monopolise the *knowledge* of the laws, to have the exclusive possession of the principles by which quarrels are decided. We have in fact arrived at the epoch of Customary Law. Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste. Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny. Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which

^{*} M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* pp. 925-928 (7th ed., 2001).

accurate preservation of the customs of the race or tribe could be at all approximated to. Their genuineness was, so far as possible, insured by confiding them to the recollection of a limited portion of the community.

The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case-law is sometimes spoken of as unwritten, and there are some English theorists who assure us that if a code of English jurisprudence were prepared we would be turning unwritten law into written - a conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to knowledge or rules, principles, and distinctions which were not entirely revealed to the bar and to the lay-public. Whether all the law which they claimed to monopolise was really unwritten, is exceedingly questionable; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the Courts at Westminster Hall began to base their judgments on cases recorded, whether in the year-books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way.

From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenised seaboard of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each community. Everywhere, in the countries I have named, laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favour of what is called codification had any part or place in the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge, and at all events their exclusive possession of the law was a formidable impediment to the success of those popular movements which began to be universal in the western world. But, though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing. Inscribed tablets were seen to be a better depository of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise.

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organisation can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals...

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its values, seems to me to be sufficiently ascertained. All the forms of Status take notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from *Status to Contract*.

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Historical and Anthropological Approaches^{*}

The historical outlook will be dealt with in this chapter. It comprises, on the one hand, inquiries into the past and evolution generally with the object of elucidating the position today. The question to be answered is to what extent the 'oughts' of contemporary laws have been fashioned by the past. This is what some of the jurists, who belong to what is known as the Historical School, have purported to do. On the other hand, there are inquiries into the past, especially into primitive and undeveloped communities, which are conducted for their own sake in order to discover what 'law' might appropriately be taken to mean in them. Such inquiries are distinguishable as the Anthropological approach and will be touched on at the end of the chapter.

Historical School

The Historical School arose more or less contemporaneously with Analytical positivism at the beginning of the nineteenth century, and should be regarded as another manifestation of the reaction against natural law theories. It did not emerge as something novel in European thought, for it had been germinating long before then. The reaction against natural law theories provided a rich bed in which the seeds of historical scholarship took root and spread.

The prelude to the historical approach to law is the story of the study and reception of Roman law in Europe. The gradual disappearance and decay of Roman law in the ages which followed the dissolution of the Roman Empire were arrested by a revival of academic interest in that system in the eleventh century in France and Italy and principally at the law school in Bologna. This new interest took the form of adding to the texts explanatory glosses and commentaries. The Glossators accepted Justinian's boast that conflicts had been eliminated from his codification, and they devoted their ingenuity to reconciling and explaining away the many conflicts that did undoubtedly exist. There was another more significant side to their work, which was that they endeavoured to fit the problems of their feudal society into Roman terminology and thus paved the way for the later reception of Roman law into Europe. The work of the Glossators culminated in the *Glossa Ordinaria* of Accursius in the early twelfth century, which superseded all previous glosses and came to be accepted as the final resolution of the conflicting opinions of individual Glossators. The scholars who followed them were known as the Post-Glossators or Commentators. The most interesting feature of their work is the way in which they attempted to relate the Roman law to contemporary problems, but they used for this purpose, not the original texts, but the *Glossa*. So it was that when Roman law was eventually received into Europe in the fifteenth and sixteenth centuries it was a diluted version adapted from the *Glossa* that was received.

The Renaissance kindled fresh interest in the teachings of the Romans themselves. The outstanding name in this connection is that of Cujas, a Frenchman, who resorted to the Roman originals underneath the accumulated silt of commentary and gloss. He did more: he was the first scholar to understand Justinian's *Corpus Juris* in historical perspective. It is difficult to appreciate nowadays how lacking in historical sense people were in those days. The tendency

^{*} R.W.M. Dias, *Jurisprudence* 375-393 (5th ed., 1985).

was to regard the *Corpus Juris* more or less as a simultaneous product, rather than a collection of materials which had been changing and developing over centuries. More than one hundred years spanned the jurists of the Classical period, whose writings comprise the Digest, while between them and Justinian another three centuries elapsed. This lack of historical sense led to elaborate and fanciful explanations of differences which were easily explicable on historical grounds. The admirable work of Cujas, however, was confined to the academic sphere and failed to penetrate through to practice. For this there was good reason. As long as Roman law remained 'the law' in the countries of Europe, inconsistencies had to be reconciled and historical explanations of their origin were of no avail. The living law could not be self-contradictory. Accordingly, there developed a gulf between the academic jurist and the practitioner, which also explains why the historical approach remained for so long in the background.

The position of Germany at the start of the nineteenth century deserves special mention, since this was the cradle of the Historical School. Roman law functioned as the common law subject to canon law, imperial enactments and customary law, so far as this was still extant. The Roman law was assumed to have been accepted as a whole, not in fragments, in the form of Justinian's codification as found in the works of the Glossators and Commentators. The practical problems which lawyers had to solve had altered with the ages, but the methods of applying the law differed little from that of the Italian courts in the time of the Glossators. Moreover, the panorama of the law as a whole was confusing, for local variations were innumerable. In these circumstances a proposal was made by Thibaut, of Heidelberg, in 1814 for a code on the lines of the Code Napoleon [For review of the events of 1814 leading to Savigny's publication, see Stammler 'Fundamental Tendencies in Modern Jurisprudence' (1923) 21 Mich L.R. 623]. This was immediately answered by von Savigny (1779-1861) in an essay entitled *On the Vocation of our Age for Legislation and Jurisprudence* [Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, hereafter referred to as '*On the Vocation*'], with which, in the words of Ihering, a new jurisprudence was born. So powerful was his influence that the move towards codification was effectively halted and it was not until 1900, after many years of sustained agitation, that Germany ultimately acquired her code, the *Bürgerliches Gesetzbuch*.

Although Thibaut's proposals were the immediate stimulus for the rise of the Historical School, other factors had combined to prepare the way. The first of these has already been mentioned, namely, the reaction against the unhistorical assumptions of the natural law theorists. As these were exposed as hollow and false, so the need was felt for a realistic investigation into historical truths. Secondly, the attempt to found legal systems based on reason without reference to past or existing circumstances had proved to be revolutionary, culminating in the French Revolution, with all its brutalities. A reaction set in against the rationalism that promoted such barbarity. This was a factor which weighed heavily with Savigny, a conservative nobleman, who acquired a deep and lasting hatred for the revolution. Thirdly, the French conquests under Napoleon aroused the nationalism of Europe. Fourthly, the French had spread the idea of codified law, and the reaction against anything French carried with it hostility to codification. Finally, the influence of certain early pioneers in the new way of thinking should not be ignored. Montesquieu had maintained that law was shaped

by social, geographical and historical considerations; Burke in England had voiced the same sentiment by pointing to the importance of tradition as a guide to social change. These factors, boosted by the genius of Savigny, started European thought along a new road.

Savigny was born in Frankfurt in 1779, and was nurtured in the natural law discipline. His interest in historical studies was kindled at the universities, first of Marburg and then of Göttingen, and was greatly encouraged when he became acquainted with Niebuhr at the University of Berlin. He also acquired a lasting veneration for Roman law. In 1803 appeared his first major work, *Das Recht des Besitzes* (***The Law of Possession***). He traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. Savigny next set himself the task of laying the foundation for future historical labours by producing a basic history of the development of Roman law in medieval Europe. It was his thesis that Roman law had been received into Germany so long ago that her legal soul had become a mixture of Roman and local laws. In this great work, ***The History of Roman Law in the Middle Ages***, which appeared in six volumes between 1815 and 1831, he analysed the Roman element to its roots, and in his other great work, ***The System of Modern Roman Law***, he analysed Roman and local laws. These two together form an imperishable monument to his learning and industry. He was also supremely conscious of his mission, which was *not* opposed to reform; it was to preach the warning that reforms, which went against the stream of a nation's continuity, were doomed [Savigny was Prussian Minister of Legislation]. He emphasised that the muddled and outmoded nature of a legal system was usually due to a failure to comprehend its history and evolution. The essential pre-requisite to the reform of German law was, for him, a deep knowledge of its history. Historical research was therefore the indispensable means to the understanding and reform of the present, and he said, somewhat belatedly it is true, but nonetheless clearly:

The existing matter will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it a vivid creative energy – obtain the mastery over it by a thorough grounding in history and thus appropriate to ourselves the whole intellectual wealth of preceding generations [Savigny Introduction to ***The System of Modern Roman Law***].

His warning, then, was that legislators should look before they leap into reform, but he spoilt this advice by over-generalisation. The core of Savigny's thesis is to be found in his essay *On the Vocation*. The nature of any particular system of law, he said, was a reflection of the spirit of the people, who evolved it. This was later characterised as the *Volksgeist* by Puchta, Savigny's most devoted disciple. All law, according to him, is the manifestation of this common consciousness. He wrote,

Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality [Puchta, ***Outlines of the Science of Jurisprudence*** (trans. Hastie)].

A nation, to him, meant only a community of people linked together by historical, geographical and cultural ties. The boundaries of some nations may be clearly defined, but not of other nations, and this is reflected in the unity or variety of their respective laws. Even where the unity of a people is clear, there may lie within it 'inner circles' of variations, such

as cities and guilds. He then went on to elaborate the theory of the *Volksgeist* by contending that it is the broad principles of the system that are to be found in the spirit of the people and which become manifest in customary rules. From this premise it followed that law is a matter of unconscious growth. Any law-making should therefore follow the course of historical development. Custom not only precedes legislation, but is superior to it, and legislation should always conform to the popular consciousness. Law is thus not of universal application; it varies with peoples and ages. The *Volksgeist* cannot be criticised for being what it is. It is the standard by which laws, which are the conscious product of the will as distinct from popular conviction, are to be judged. An individual jurist may misapprehend the popular conviction, but that is another matter. In place of the moral authority, which the natural lawyers of the preceding age had sought to posit behind law, the Historical School substituted social pressure, which provided the bridge between the work of the Historical School and that of the Sociological School.

This view of the nature of law dovetailed with Savigny's historical method of work, for if law is a reflection of people's spirit, then it can only be understood by tracing their history. It is clear, all the same, that in his revolt against the lack of historical sense, which characterised natural law theory, he swung the pendulum of legal thought too much the other way. To point out Savigny's exaggerations, however, is not to detract from the importance of his contribution.

On the idea of *Volksgeist* several comments should be made.

(1) There is an element of truth in it, for there is a stream of continuity and tradition; the difficulty lies in fixing it with precision. Savigny, however, made too much of it. As with most pioneers, he drew too sweeping an inference from modest premises. The idea of the *Volksgeist* certainly suited the mood of the German peoples. It was a time of the growing sense of nationhood, a desire for unification, an interest in the dramatic marking the appearance of the Romantic movement. German thinking, also, seems prone to personify the abstract, and to attribute a mystical coherence to ideals. Gierke's personification of corporate existence, was an example: Savigny's *Volksgeist* is another. The idea of a *Volksgeist* is acceptable in a limited way. Thus, the psychological associations built up around the law-making institutions in a particular state could be regarded as a manifestation of the *Geist* of that community. Savigny, however, extrapolated his *Volksgeist* into a sweeping universal. He treated it as a discoverable thing; but it is common experience that even in a small group (*a fortiori* in a nation) people hold different views on different issues. 'The' spirit does not exist. So Savigny's thesis is probably best treated as the juristic contribution to Romanticism. In this it would appear that his historical sense deserted him, for it amounts, in effect, to the adoption of an *a priori* preconception. It will be remembered that in dealing with possession he did much the same thing, namely, to draw an inference from limited data, and then to use it as an *a priori* talisman.

(2) The transplanting of Roman law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of a *Volksgeist*. It postulates, if anything, some quality in law other than popular consciousness. His endeavour to establish that the reception of Roman law had taken place so long ago as to make the Germanic *Volksgeist*

an expression of it was unconvincing. Apart from this, a survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the French Code in Egypt without any apparent violence to popular susceptibilities. The French Code was also introduced into Holland during the Napoleonic era, displacing the Roman-Dutch common law, and it is significant that after the overthrow of Napoleon the Dutch never went back. They had, however, taken Roman-Dutch law to their colonies in the Cape of Good Hope and Ceylon (now Sri Lanka) with the odd result that it flourishes today in two such dissimilar national climates as southern Africa and Sri Lanka, although it has long since disappeared in its homeland. The reception of English law in so many parts of the world is also evidence of supra-national adaptability and resilience. Indeed, the protest in South Africa today is that far too much English law has been allowed to overlay the 'national' Roman-Dutch law.

(3) The *Volksgeist* theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. Every man is a product of his time, but occasionally there are men who by their genius are able to give legal development new directions. The Classical jurists of Rome, Littleton, Coke, may be cited as examples. This is especially the case in modern times when new doctrines are deliberately introduced by a handful of policy-makers. Ehrlich pointed out that customs are norms of conduct, juristic laws are norms for decision. They are always the creation of jurists.

(4) The last two points lead to the further objection that the influence of the *Volksgeist* is at most only a limited one. The national character of law seems to manifest itself more strongly in some branches than in others, for example, in family law rather than in commercial or criminal law. Thus, the general reception of Roman law in Europe did not include Roman family law. Even more significant is the fact that the successful introduction of alien systems into India and Turkey affected the indigenous family laws least of all. The inference appears to be that very few branches of law, perhaps only family law and succession to some extent, are really 'personal' to a nation. A further distinction may have to be drawn between the creative influence of the *Volksgeist* and its adaptative and abrogative influence. It is undoubtedly the case that doctrines have been, and are constantly being, introduced by individuals. The most that indigenous tradition can do is to bring about practical modifications of these gradually and by degrees. Turkey provides an example, where new marriage laws, which were contrary to the existing traditional laws, were introduced as a matter of deliberate policy. The result from a juristic point of view was a fascinating process of action and reaction between the old and the new law. It might be thought that this bears out Savigny's contention that legislation should conform to existing traditional law, or it is doomed. In a sense so it does, but an example such as this also reveals something else. It shows that in modern times the function of the *Volksgeist* is that of modifying and adapting rather than creating, and that, in any case, even this function manifests itself only in the very 'personal' branches of the law. There is less evidence today of its creative force and none of its influence over the whole body of the law. If one thinks in the time-frame of the moment, the *Volksgeist* is of little or no relevance, for many existing laws have come from 'outside'. Savigny's theory only makes sense to a limited extent in a continuum. Even so,

the *Volksgeist* is discernible only in retrospect, but he sought to make it a test of validity, i.e. to use it in the present time frame where it is irrelevant. This confusion in his frames of reference left his theory open to attack.

(5) Law is sometimes used deliberately to change existing ideas; and it may also be used to further inter-state co-operation in many spheres. Even in Germany one may instance Bismarck's shrewd and successful attempt to cut the ground from under the feet of the socialist movement by introducing the Railway and Factories Accident Law 1871, well before social conditions were ripe.

(6) Many institutions have originated, not in a *Volksgeist*, but in the convenience of a ruling oligarchy, e.g. slavery.

(7) Many customs owe their origin to the force of imitation rather than to any innate conviction of their righteousness.

(8) Some rules of customary law may not reflect the spirit of the whole population, e.g. local customs. Savigny, it will be remembered, did allow for these by recognising the existence of 'inner circles' within a society. The question remains: if law is the product of a *Volksgeist*, how is it that only some people and not all have evolved a special rule? On the other hand, some customs, e.g. the Law Merchant, were cosmopolitan in origin: they were not the creatures of any particular *nation* or *race*. In short, it is not at all clear who the *Volk* are whose *Geist* determines the law.

(9) Important rules of law sometimes develop as the result of conscious and violent struggle between conflicting interests within the nation, and not as a result of imperceptible growth, e.g. the law relating to trade unions and industry. Evolution does not follow an inexorably determined path.

(10) A different objection to the *Volksgeist* came from Savigny's opponents. They pointed out that, taken literally, his thesis would thwart the unification of Germany permanently by emphasising the individuality of each separate state and by fostering a parochial sense of nationalism.

(11) An inconsistency in Savigny's work was that, while he was the protagonist of the *Volksgeist* doctrine, he worked at the same time for the acceptance of a purified Roman law as the law of Germany. There was in Germany in his day a vigorous school of jurists who strongly advocated the resuscitation of ancient Germanic laws and customs as the foundation of a modernised German system. The leader of this school, Eichorn, was a fellow professor with Savigny at the University of Berlin. Savigny never opposed the work of Eichorn, but he opposed the expulsion of Roman law. The obvious objection to Savigny is that his endeavour to preserve Roman law as the law of Germany was inconsistent with his idea of the *Volksgeist* of the German nation. One explanation lies in his personal devotion to Roman law. Another is that in his earliest work on possession he had been able to expose the misinterpretations of Roman law by later commentators, and this possibly implanted in his mind the idea that the Romans were better craftsmen than incompetent moderns. Even so the point apparently overlooked by Savigny was that, whatever may have been the case with possession, in other branches of the law these post-Roman interpretations were 'adaptations,' rather than 'perversions,' to meet

contemporary needs. It might even be argued that the so-called 'misinterpretations' were indeed expressions of the *Volksgeist* of each different country. Another and better reason for the preservation of Roman law might have been that, in view of its long established reception, to dispense with it would have unsettled three centuries of development. In order to account for the original reception of an alien system Savigny argued that at that date the Germanic law was incapable of expressing the *Volksgeist*. This questionable proposition fails to show how an alien system was better able to express it than the indigenous law. Far from the law being a reflection of the *Volksgeist*, it would seem that the *Volksgeist* had been shaped by the law.

Such are the objections to Savigny's idea of the *Volksgeist*. Other aspects of his work also need mention. His veneration for Roman law led him to advance certain dubious propositions. For instance, there was in Roman law a strict adherence to the doctrine of privity of contract with few exceptions, i.e. no one other than parties to a contract can be entitled or obliged under it. The law of negotiable instruments, of course, is a contradiction of this. Savigny accordingly condemned negotiable instruments as 'logically impossible.' This reveals one of the more unfortunate results of devotion to a postulate as well as the limitations of the *Volksgeist* idea. It could hardly be supposed that the populace had any feeling in the matter one way or the other, while the feelings of the commercially minded were strongly in favour of negotiable instruments. Indeed, the crucial weakness of Savigny's approach was that he venerated past institutions without regard to their suitability to the present.

The *Volksgeist*, according to Savigny, only formulates the rudimentary principles of a legal system. He saw clearly enough that it could not provide all the detail that is necessary. He accordingly maintained that as society, and consequently law, becomes more complex, a special body of persons is called into being whose business is to give technical, detailed expression to the *Volksgeist* in the various matters with which the law has to deal. These are the lawyers, whose task is to reflect accurately the prevailing *Geist*. This is nothing but a fictitious assumption, in no way related to reality, to cover up an obvious weakness in his principal contention. As Sir Carleton Allen said, it is not possible to pretend that the rule in *Shelley's* case, for instance, is rooted in the instincts of the British. Savigny's thesis, however, contained another and even more awkward implication. The only persons who talked of the *Volksgeist* were academic jurists, unversed in the practical problems of legal administration. Therefore, the *Volksgeist* resolved itself into what these theorists imagined it to be. On the other hand, it is possible that there is a limited sense in which Savigny's contention is acceptable. It has already been pointed out that the *Volksgeist* manifests itself, if at all, only in a few branches of the law and, even in these, by way of modifying and adapting any innovations that may be introduced. So, Savigny's proposition might be taken to mean simply that in these spheres of the law it would be helpful if legislators took account of tradition when framing new laws.

Consistently with this theory, Savigny further maintained that legislation was subordinate to custom. It should at all times conform to the *Volksgeist*. It has been pointed out that he did not oppose legislation or reform by way of codification at some appropriate time in the future, but his attitude was generally one of pessimism. He certainly opposed the project of immediate codification on several grounds. In the first place, he pointed to the defects of

contemporary codes which, to his mind, preserved adventitious, subsidiary and often unsuitable rules of Roman law, even while they rejected its main principles. Secondly, in matters on which there is no *Volksgeist*, a code, in his opinion, might introduce new and unadaptable provisions and so add to the prevailing difficulties. Such an argument would appear to have been disposed of by the subsequent experience of many countries. Thirdly, he argued that codification could never cater exhaustively for all problems that are likely to arise in the future and hence was not a suitable instrument for the development of law. Fourthly, he suggested that an imperfect code would create the worst possible difficulties by perpetuating the follies underlying it. On the other hand, when lawyers were in a position to create a perfect code, no code would then be necessary since the lawyers could adequately cope with the problems that arise. Fifthly, he argued, even more oddly, that codification would highlight the loopholes and weaknesses of the law and so encourage evasion. The short answer to the last two contentions is that they leave out of account the possibility of amendment and alteration. Codification, in Savigny's view, should be preceded by 'an organic, progressive, scientific study of the laws,' by which he meant of course historical study. Reform should await the results of the historians' work. It is true that reformers should not plunge into legislation without paying some heed to the past as well as to the present. Savigny was over-cautious in this respect, for as Allen observed, his doctrines had the unfortunate tendency 'to hang traditions like fetters upon the hands of reformatory enterprises.' So little in fact did the historians contribute in the years that followed that drastic legislative action became imperative; which it did in 1900.

Savigny's work, on the whole, was a salutary corrective to the methods of the natural lawyers. He did grasp a valuable truth about the nature of law, but ruined it by overemphasis.

Another writer of whom some mention should be made is Gierke (1841-1921) [*Natural Law and the Theory of Society 1500-1800* (trans. Barker) and Barker's introduction], who was profoundly interested in the 'associations,' which has always exercised a peculiar fascination for German thinkers. Associations have significance in law, and are sometimes treated as persons. Gierke denied that the recognition of an association as a person depended on the state. The reality of social control lies in the way in which autonomous groups within society organise themselves. He then proceeded to trace the progress of social and legal development in the form of a history of the law and practice of associations and propounded a classification of associations on the following lines: firstly, he contrasted groups organised on a territorial basis, such as the state, with those organised on a family or extraterritorial basis; then he contrasted associations founded on the idea of fraternal collaboration (*Genossenschaften*) with those founded on the idea of domination (*Herrschaften*). In his view legal and social history is most accurately portrayed as a perpetual struggle between the *Genossenschaft* and the *Herrschaft*. Thus, in feudal society men were organised in tight hierarchical groups based on the holding of property; this system was opposed in the Middle Ages by the emergence of collaborative groups such as the guild and the city. These degenerated in turn, and with the Renaissance and Reformation the state appeared as the significant factor in social organisation. In his own day Gierke felt that the collaborative principle had prevailed and that the state encouraged the growth of independent collaborative organisations within its own

framework. The pivot of social control, then, lay not in state organisation but rather in these collective bodies within the state.

Gierke represented a collectivist, rather than an individualist, approach. To this extent his work touched on that of the sociologists, but his interpretation of this development on historical lines entitles him to be ranked among the historians. His doctrines of mass psychology, though largely fanciful, anticipated modern inquiries. He also never quite succeeded in reconciling the independence of autonomous bodies with the supreme power of the state. He devised a pyramidal structure, which made society consist of a hierarchy of corporate bodies culminating in the state. He wished at the same time to defend the independent existence of the lesser corporate bodies and to limit absolute state power by arguing that the state was the expression of reason and the sense of right. This, of course, was easily brushed aside by those who wished to use Gierke's doctrines as a justification for absolute totalitarian power.

Anthropological Approach

Anthropological investigations into the nature of primitive and undeveloped systems of law are of modern origin and might be regarded as a product of the Historical School. Pride of place will here be accorded to Sir Henry Maine (1822-1888), who was the first and still remains the greatest representative of the historical movement in England. It is not easy to place Maine's contributions to the theory of law. He began his work with a mass of material already published on the history and development of Roman law by the German Historical School, and he was able to build upon that and also to bring to bear a more balanced view of history than is found in Savigny. Maine, however, went further. He was learned in English, Roman and Hindu laws and also had knowledge of Celtic systems. In this respect he parted company with the German historians. Instead of stressing the uniqueness of national institutions, he brought to bear a scientific urge to unify, classify and generalise the evolution of different legal orders. Thus he inaugurated both the comparative and anthropological approaches to the study of law, and history in particular, which was destined to bear abundant fruit in the years to come.

Maine set out to discover whether a pattern of legal development could be extracted from a comparative examination of different systems, especially between Roman law and the common law. What he sought were laws of historical development. He was led to distinguish between what he called 'static' and 'progressive' societies. The early development of both types is roughly the same and falls, in his thesis, into four stages. The first stage is that of law-making by personal command, believed to be of divine inspiration, e.g. Themistes of ancient Greece, and the dooms of the Anglo-Saxon kings. The second stage occurs when those commands crystallise into customs. In the third stage the ruler is superseded by a minority who obtain control over the law, e.g. the pontiffs in ancient Rome. The fourth stage is the revolt of the majority against this oligarchic monopoly, and the publication of the law in the form of a code, e.g. the XII Tables in Rome.

'Static, societies, according to Maine, do not progress beyond this point. The characteristic feature of 'progressive' societies is that they proceed to develop the law by three methods - fiction, equity and legislation. Ample examples of the use of fiction are to be

found in Roman and early English law. The operation of equity and legislation has been considered in the earlier chapters of this book.

As a general inference Maine believed that no human institution was permanent, and that change was not necessarily for the better. Unlike Savigny, he favoured legislation and codification. He recognised that the advance of civilisation demanded an increasing use of legislation, and he often contended that the confused state of English law was due to its preeminently judge-made character. Codification is an advanced form of legislative development, and represents the stage at which all the preceding phases of development are woven into a coherent whole. He also did not share Savigny's mystique of the *Volkgeist*.

Side by side with these doctrines Maine developed another thesis. In early societies, both 'static' and 'progressive', the legal condition of the individual is determined by status, i.e. his claims, duties, liberties etc. are determined by law. The march of 'progressive' societies witnesses the disintegration of status and the determination of the legal condition of the individual by free negotiation on his part. This was expressed in one of Maine's most famous generalisations:

The movement of progressive societies has hitherto been a movement from *Status to Contract*.

An evaluation of Maine's work must take into account the pioneer character of his comparative investigations. Since his day the study of anthropology has developed into a separate branch of learning. Modern research over a wider field and with better equipment has corrected Maine's work at many points, and departed from it at others. One should be charitable about his errors and marvel at his genius in accomplishing so much. Some comment should, however, be made about the development from status to contract. There was much to support it. In Roman law there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage, and the acquisition of a limited contractual capacity by children and slaves. In English law the bonds of serfdom were relaxed and eventually abolished. Employment came to be based on a contractual basis between master and servant. Maine's own age was one in which legislation was removing the disabilities of Catholics, Jews, Dissenters and married women. He witnessed the triumph in the American Civil War of the North, a community based on contract, over the feudal and status-regulated South. In the modern age, however, a return to status has been detected. In public affairs, and in industry in particular, the individual is no longer able to negotiate his own terms. This is the age of the standardised contract, and of collective bargaining. Such developments, however, should not be held against Maine. He was not purporting to prophesy and, indeed, he expressly qualified his proposition by saying that the development had 'hitherto' been a movement towards contract.

Modern anthropologists have had the advantage of following the trails blazed by Maine and by others after him with the added advantage of being able to profit from the researches of fellow-workers in many directions. It is not surprising, therefore, to find that Maine's conclusions about primitive law have now been discredited or modified. The idea that early development passed through the successive stages of personal judgments, oligarchic monopoly and code has been abandoned as drawing too simple a picture. Primitive societies are seen to have been more complex than had been supposed. There have been several forms

of such societies, so there is an initial problem of determining what sorts of societies should be classified as 'primitive'. It is now thought that there were seven grades of them, the First and Second Hunters, the First, Second and Third Agricultural Grades, and the First and Second Pastoral Grades. The agricultural and pastoral grades are to some extent parallel. The degree of development of social institutions does bear some correspondence with the degree of economic development. From all this it will be gathered that primitive societies exhibit a wide range of institutions; there is nothing like a single pattern as Maine had supposed.

There has also been modification of the sequence, as stated by Maine, of later development, namely by means of fiction, equity and legislation. Deliberate legislation is now seen to have been an early method of law-making with fiction and equity coming in at a later stage. The codes, which one finds at the culmination of the primitive period, were chiefly collections of earlier legislation.

Primitive law was by no means as rigid as Maine had supposed, nor were people inflexibly bound by it. Field-work among 'contemporary primitives' has revealed that considerable latitude is inherent in the content of their customary practices. For instance, Malinowski's first-hand experience of life among certain Pacific islanders enabled him to demonstrate how, eg their practices made allowance for good and bad harvests, or take due account of an excess of generosity on the part of individuals. Observations by Gluckman of the Barotse in Northern Rhodesia have shown that the very indeterminate character of their standards permits a desirable flexibility in application. Rigidity develops at a much later period. Above all, it is generally agreed that even in primitive societies people do control their destinies, that they are by no means blindly subservient to custom. The conscious purpose of achieving some and precedes the adaptation of human behaviour, and the adaptation of behaviour is followed by adaptation of the structure of social organisation.

It used to be accepted that law and religion were indistinguishable in primitive societies. This view has given way to an increased recognition of the secular character of primitive law. The exact extent to which law and religion were associated, seems, however, to be in some doubt. Diamond, for example, criticises Maine most strongly for his assertion that they were indistinguishable; the association of the two, in his view, is a comparatively late development. Hoebel, on the other hand, defends Maine on this point. Hocart believed that the dualism between religion and the secular authority (the state) originated in a division of function of between a 'sky-king', who was the supreme regulator and as such responsible for law, and an 'earth-king', who was charged with the task of dealing with evil and wrongdoing; the former was reflective and unimpassioned, the latter quick in decision and violent in action. The role of the 'sky-king' would seem to have combined religion and law. further, if Hocart is right there seems to be implicit in this the distinction between the primitive, prescriptive patterns of conduct and the secondary machinery of sanction; which leads on to the next point.

It is likewise agreed among anthropologists that there is, at any rate as far as contemporary primitive societies are concerned, a phenomenon that can be isolated from religious and other social observances and for which the term 'law' would be convenient. Bohannan has suggested that law comes into being when customary reciprocal obligations become further institutionalised in a way that society continues to function on the basis of rules. These concern mainly the relations of individuals *inter se* and groups, i.e. primary

patterns of conduct importing an 'ought'. Gluckman has shown that among the Barotse the laws consist mainly of positive injunctions, 'you ought', rather than negative, 'you ought not'. These 'oughts' of primitive law are distinguishable from others by the nature of the obligation to obey them. It was a cardinal point of Malinowski's thesis, supported by Hogbin, that obedience to customs rests on the reciprocity of services. People do unto others what the law bids them do because they depend on some service in return as part of their mutual co-existence. It is spontaneous and incessant goodwill that promotes and preserves social existence. It is possible that Malinowski underestimated the part played by sanction. It might also be that the ceremonial with which these services are usually rendered underlines their obligatory character, but this is of minor significance. Moreover, it is obedience, not disobedience, that is contemplated by law, the primary rule, not sanction. Yet some mechanism there has to be for dealing with cases of conflict and breach. As long as obedience prevails there is no call for this machinery. Examples of its working are also of interest. For instance, the records kept by Gluckman of the judicial processes among the Barotse show that the main task is reconciliation rather than the ordering of sanctions, which implies that even at the secondary stage an attempt is made to ensure conformity with the primary pattern of conduct. Sanctions apply only when reconciliation has failed or is not possible. One form which these take is to abandon the wrongdoer to the avenger, who has the moral support of the community behind him. In other cases, compensation may be payable to the victim, and it is a matter of dispute whether vengeance preceded compensation or whether they existed side by side. This is why it is difficult to distinguish between civil and criminal wrongdoing in early societies. The question depended on whether the action was thought to affect the society or only individual. In the result, the conclusion which most anthropologists have reached is that what is called 'law' should be described in terms of its function and the attitude of the people towards it rather than in terms of form or enforcement. It would appear to be something compulsory observed and certainly far from what is commanded or backed by sanction.

Lastly, another point, which has emerged from modern investigations, is the disposal of the belief in communism as the primitive form of society. This may be seen in many ways, particularly in the prevalence of jealously protected private ownership of socially productive weapons and institutions, such as spells, incantations and, above all, ritual.

So far not much has been said, save indirectly, of the organisation of government. In this connection the outstanding contribution of Hocart deserves mention, especially as his name is insufficiently known among jurists. On the evidence collected from a large number of widely separated tribes in many parts of the world, Hocart came to the conclusion that the functions of modern government were gradually fitted into the framework of a machinery that was previously fulfilling other functions. In other words, the framework of government was there before there was any governing to be done. Man does not consciously seek government; he seeks life, and with that end in view he does one thing after another, evolving and adapting special procedures and techniques, till he finds himself governed. The means by which primitive societies sought life was ritual. The lives and well-being of individuals depended on the life and well-being of society. Ritual was therefore a social affair and society had to organise itself for it. The structure of ritual was such that different rules were assigned to

different individuals and groups. In all this one may detect the origin of caste; the various castes that one finds, the fisher, the farmer, the launderer, the potter, etc., may not have derived from the trades that the people actually pursued, but from the roles they fulfilled in the ritual. There probably was some connection between trade and a role, for no doubt it was usual to assign to a person the role which he was fitted to fulfil whenever this was possible.

It was the organisation, founded on ritual, that was adapted for purposes of government. Since the king could not play every role simultaneously, he assigned to each chieftain a particular role which had a particular objective. The aim of the ritual was the control of nature so as to render it bounteous and abundant. The particular form which the ritual assumed in any given case depended on the aspect of nature which was to be controlled, whether sunshine or rain or harvest or game etc. To the group that was identified with some aspect of nature was entrusted the ritual concerning it. It follows from this, first, that only the group that exclusively owned a particular ritual was competent to perform it; secondly, every ritual had its leader; thirdly, the performers did not merely imitate nature as it happened to be at the moment, but as they wanted it to behave, e.g. to shed rain at a time of drought - an 'ought' not an 'is'; fourthly, in order to control nature the performers had to become one with nature and identify themselves with it; and fifthly, such equivalence was accompanied by the 'words,' which thus acquired special significance.

There was always a tendency for rituals to coalesce in one person or group of persons. The greatest cumulator was the king, and this process of cumulation is centralisation. Even after the king had begun to fulfil several roles, his chiefs had to stand ready to lend their assistance if called on to do so. In the role of the sun the king became the supreme regulator of the world, and this regulative function assumed greater and greater importance and eventually became the mark of the king. The aim of the ritual, as has been remarked, was to make nature bounteous. It followed that nature should itself be amply provided before a generous return could be expected of it. The king being identified with nature, the prosperity of the people could only be achieved by making the king prosperous. Revenue and tribute were the means of making him so.

In these and various other ways Hocart discerned the outlines of government, the organs of which were fitted into the existing framework of ritual. It is not possible in this short space to pursue his demonstration further, nor to consider his parallel investigations into the meaning of ceremonial statements, doctrines and courtesies relating to monarchy even today. One thing which his analysis has endorsed is the prescriptive nature and function of primitive law.

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Roscoe Pound^{*}

Nowhere has the study of laws in society been taken up with such industry and enthusiasm as in America. Here, the law school and the jurist enjoy a status akin to that of jurists on the Continent and superior to that of their counterparts in Great Britain. These factors have combined to produce an American movement in sociological jurisprudence of great importance which draws its exponents both from the faculty and the bench. Outstanding among these was Pound (1870-1964), of the Harvard Law School. As with Bentham, his theme was a constant one, maintained in his extensive writings throughout a long period.

Sociological jurisprudence, according to Pound, should ensure that the making, interpretation and application of laws take account of social facts. Towards achieving this end there should be (a) a factual study of the social effects of legal administration, (b) social investigations as preliminaries to legislation, (c) a constant study of the means for making laws more effective, which involves, (d) the study, both psychological and philosophical, of the judicial method, (e) a sociological study of legal history, (f) allowance for the possibility of a just and reasonable solution of individual cases, (g) a ministry of justice in English-speaking countries, and (h) the achievement of the purposes of the various laws. This comprehensive programme covers, as is evident, every aspect of the social study of laws. It is not possible to follow Pound's elaboration of each of these aspects, and all that can be done here is to outline his thought.

The common law, he said, still bears the impress of individual rights. So in order to achieve the purposes of the legal order there has to be (a) a recognition of certain interests, individual, public and social, (b) a definition of the limits within which such interests will be legally recognised and given effect to, and (c) the securing of those interests within the limits as defined. When determining the scope and subject-matter of the system the following five things require to be done: (i) preparation of an inventory of interests, classifying them; (ii) selection of the interests which should be legally recognised; (iii) demarcation of the limits of securing the interests so selected; (iv) consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited; and (v) evolution of the principles of valuation of the interests.

Pound likened the task of the lawyer to engineering, an analogy which he used repeatedly. The aim of social engineering is to build as efficient a structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste. It involves the balancing of competing interests. For this purpose interests were defined as 'claims or wants or desires (or, I would like to say, expressions) which men assert *de facto*, about which the law must do something if organised societies are to endure. It is the task of the jurist to assist the courts by classifying and expatiating on the interests protected by law. Pound's arrangement of these, elaborated in detail, was as follows:

A. Individual Interests. These are claims or demands or desires involved in and looked at from the standpoint of the individual life. They concern:-

^{*} R.W.M. Dias, *Jurisprudence*, 431-35 (1985).

- (1) **Personality.** This includes interests in (a) the physical person, (b) freedom of will, (c) honour and reputation, (d) privacy, and (e) belief and opinion.
- (2) **Domestic relations.** It is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of (a) parents, (b) children, (c) husbands, and (d) wives.
- (3) **Interest of substance.** This includes interests of (a) property, (b) freedom of industry and contract, (c) promised advantages, (d) advantageous relations with others, (e) freedom of association, and (f) continuity of employment.

B. Public Interests. These are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life.

‘The claims asserted in title of a politically organised society; as one might say for convenience, the claims of the state, the political organization of society.’

There are two of them:

- (1) **Interests of the state as a juristic person.** These, as pointed out earlier, are not applicable in this country where the position of the Crown has obviated the need for the personification of the state. They include (a) the integrity, freedom of action and honour of the state’s personality, and (b) claims of the politically organised society as a corporation to property acquired and held for corporate purposes.
- (2) **Interests of the state as guardian of social interests.** This seems to overlap with the next major category.

C. Social Interests. These are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalised as claims of the social group. This is much the most important category, since most, if not all, the interests in category A would be statable here from a social, rather than an individual, point of view. Social interests are said to include

- (1) **Social interest in the general security.**

‘The claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence.’

This embraces those branches of the law which relate to (a) general safety, (b) general health, (c) peace and order, (d) security of acquisitions, and (e) security of transactions.

- (2) **Social interest in the security of social institutions.**

‘The claim or want or demand involved in life in civilised society that its fundamental institutions be secure from those forms of action and courses of conduct which threaten their existence or impair their efficient functioning.’

This comprises (a) domestic institutions, (b) religious institutions, (c) political institutions, and (d) economic institutions. Divorce legislation might be adduced as an example of the conflict between the social interest in the security of the institution of the marriage and the individual interests of the unhappy spouses. Pound pointed out that the law has at times attached disabilities to the children of illegitimate and adulterous unions with the object of preserving the sanctity of marriage. The example is not altogether fortunate, since

the extent to which such vicarious suffering has deterred would-be offenders is minimal. Then again, there is tension between the individual interest in religious freedom and the social interest, at any rate in some countries, in preserving the dominance of an established church.

(3) *Social interest in general morals.*

‘The claim or want or demand involved in social life in civilised society to be secured against acts or courses of conduct offensive to the moral sentiments of the general body of individuals therein for the time being.’

This conveys a variety of laws, for example, those dealing with prostitution, drunkenness and gambling.

(4) *Social interest in the conservation of social resources.*

‘The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter may be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.’

Thus this social interest clashes to some extent with the individual interest in dealing with one’s own property as one pleases. It covers (a) conservation of natural resources, and (b) protection and training of dependants and defectives, i.e. conservation of human resources.

(5) *Social interest in general progress*

‘The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.’

This has three aspects, (a) Economic progress, which covers (i) freedom of use and sale of property, (ii) free trade, (iii) free industry, and (iv) encouragement of invention by the grant of patents. Now, (i) and (ii) are less marked today than they used to be. Indeed, it might even be said that progress has been achieved by a reversal of them. The policy of free trade, which has as its corollary the disapproval of monopolies, might appear to have been indorsed by legislation against restrictive practices. While this is true of private monopolies, it should be noted that there is an ever-growing demand for monopolies in the state or state-controlled institutions. The encouragement of invention by the grant of patents, too, is somewhat suspect, for it opens the possibility of acquiring patents in order to suppress inventions. On the whole, therefore, item (a) is the least happy.

The interest in general progress also includes (b) political progress, which covers (i) free speech, and (ii) free associations; and (c) cultural progress, which covers (i) free science, (ii) free letters, (iii) free arts, (iv) promotion of education and learning, and (v) aesthetics.

(6) *Social interest in individual life.*

‘The claim or want or demand involved in social life in civilised society that each individual be able to live a human life therein according to the standards of the society.’

It involves (a) self-assertion, (b) opportunity, and (c) conditions of life.

Having listed the interests recognised by law, Pound considered the means by which they are secured. These consist of the device of legal person and the attribution of claims, duties, liberties, powers and immunities. There is also the remedial machinery behind them, which aims sometimes at punishment, sometimes at redress and sometimes at prevention. He also addressed himself to the question of how in any given case the interests involved are to be balanced or weighed. Interests, he insisted, should be weighed ‘on the same plane’, as it were. One cannot balance an individual interest against a social interest, since that very way of stating them may reflect a decision already made. One should transfer the interests involved on to the same ‘plane,’ preferably in most cases to that of the social plane, which is the most general. Thus, freedom of the person might be regarded as an individual interest, but it is translatable as an interest of the society that its members should be free. But, assuming that a choice has been made, the extent to which it can be given effect in any given case depends on the texture of the legal institutions that are involved. Some are more flexible than others and permit a freer play for the balancing process. Elsewhere Pound classified the institutions of the law as follows. There are, first, rules, which are precepts attaching definite consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in cases not covered by rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles and conceptions with regard to particular situations or types of cases in logically independent schemes so that reasoning may proceed on the basis of the scheme and its logical implications. Finally, there are standards prescribing the limits of permissible conduct, which are to be applied according to the circumstances of each case.

Such, then, is the substance of Pound’s theory. That his contribution is considerable goes without saying. He more than anyone helped to bring home the vital connection between laws, their administration and the life of society. His work also set the seal on prior demonstrations of the responsible and creative task of lawyers, especially the judges. In so far as his theory laid such heavy emphasis on the existence of varied and competing interests and the need for adjustment between them, it will have enduring value. There are, however, some other respects in which his views are less happy.

In the first place, Pound’s engineering analogy is apt to mislead. What, for instance, is the ‘waste and friction’ in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product, and the stresses and strains to be allowed to each part are worked out with a view to producing the best bridge of that kind in that place. With laws there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing, and the pressures behind interests are changing

too. Therefore, the value or importance to be allotted to each interest cannot be predetermined.

Pound assumed that *de facto* claims pre-exist laws, which are required to 'do something' about them. Some claims, however, are consequent on law, e.g. those that have resulted from welfare legislation. Besides, what does 'do something' about them mean? It is not enough to say that law has to select those that are to be recognised. 'Recognition' has many gradations, which makes it necessary to specify in what sense an interest is recognised as such. Thus, the cult of Scientology is not outlawed, but it has been officially condemned, which makes it difficult to say in what sense the law recognises or does not recognise it.

It is not interests as such, but the yardsticks with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself, in which case it is not the interest as an interest, but as an ideal that will determine the relative importance between it and other interests. Thus, whether the proprietary right of a slave-owner is to be upheld or not depends upon whether sanctity of property or sanctity of the person is adopted as the ideal. The choice of an ideal, or even a choice between competing ideals, is a matter of decision, not of balancing; and it is with the choice made by judges and the ideals which they adopt that lawyers are concerned.

The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some 'scale' or 'yardstick' with reference to which they are measured. One does not weigh interests against one another, even 'on the same plane.' Only with reference to some ideal is it possible to say that the upholding of one interest is more consonant with, or more likely to achieve it than another, which means that with reference to that given ideal the one interest is entitled to preference over the other. This leads to another consideration. The 'weight' to be attached to an interest will vary according to the ideal that is used. For example, with reference to the ideal of freedom of the individual all interests pertaining to individual self-assertion will carry more weight and social interests; but with reference to the ideal of the welfare of society the reverse might be true. The point is that the whole idea of balancing is subordinate to the ideal that is in view. The march of society is gauged by changes in its ideals and standards for measuring interests.

In any case, all questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. An interest is not presented to a judge preclassified as part of an overall scheme, but in relation to one or more other interests in a given situation. Each situation has a pattern of its own, and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are to be measured. Therefore, the listing of interests is not as important as the views which particular judges take of given activities and the criteria by which they evaluate them.

How does one know when interests exist, how are they made articulate? The answer is: when presented in litigation. Lists of interests can be drawn up, not in advance of, but after the various interests have been contended for in successive cases.

The recognition of a new interest is a matter of policy. The mere presence of a list of interests is, therefore, of limited assistance in helping to decide a given dispute. What this and the last paragraph suggest is that interests need only be considered as and when they arise in disputes; the matter that is of importance is the way in which they are viewed and evaluated by the particular judge.

In any case, lists of interests are only the products of personal opinion. Different writers have presented them differently. With reference to Pound's own elaborate scheme, it is to be observed that his distinction between categories B and C, Public and Social interests, is doubtful. Even the distinction between A and C, Individual and Social interests, is of minor significance. As Pound himself says, in most cases it is preferable to transfer individual interests on to the plane of social interests when considering them. On the suggestion previously made, it is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed. None of these remarks is intended to detract from the value of Pound's analysis of the interests themselves. All that is urged is that as a guide to the administration of laws the listing of interests is unhelpful.

It is difficult to see how the balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority. How does one 'balance' such interests? Whichever interest is favoured, the decision will be resented by those espousing the other, a compromise will most likely be resented by both. There is a different problem where a substantial proportion of the populace is parochially minded and have little or no sense of nationhood. The prime task in such countries is the creation of interests and the emphasis is, once more, on the need for ideals. Pound's theory cannot be accepted too generally.

It is worth while repeating that the criticism here is not that Pound ignored ideals of guidance, but that he seems to have devoted too little attention to them. His awareness of them is evident, for example, in his own distinction between 'natural natural law' and 'positive natural law'. The former, according to him, is 'a rationally conceived picture of justice as an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order effective for its ideal end'. The latter is 'a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies of universal problems and so taken to give legal precepts of universal validity. It is submitted with respect that it would have been preferable had he enlarged on the criteria of evaluating interests instead of developing particular interests. It is possible that his work has not had the practical impact that it ought to have had because of this somewhat sterile preoccupation with interests and too little attention to the criteria of evaluation.

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JUDICIAL PROCESS

The Case of the Speluncean Explorers^{*}

By

Lon L Fuller

In the Supreme Court of Newgarth, 4300

The defendants, having been indicted for the crime of murder, were convicted and sentenced to be hanged by the Court of General Instances of the County of Stowfield. They bring a petition of error before this Court. The facts sufficiently appear in the opinion of the Chief Justice.

TRUPENNY, J. The four defendants are members of the Speluncean Society, an organization of amateurs interested in the exploration of caves. Early in May of 4299 they, in the company of Roger Whetmore, then also a member of the Society, penetrated into the interior of a limestone cavern of the type found in the Central Plateau of this Commonwealth. While they were in a position remote from the entrance to the cave, a landslide occurred. Heavy boulders fell in such a manner as to block completely the only known opening to the cave. When the men discovered their predicament they settled themselves near the obstructed entrance to wait until a rescue party should remove the detritus that prevented them from leaving their underground prison. On the failure of Whetmore and the defendants to return to their homes, the Secretary of the Society was notified by their families. It appears that the explorers had left indications at the headquarters of the Society concerning the location of the cave they proposed to visit. A rescue party was promptly dispatched to the spot.

The task of rescue proved one of overwhelming difficulty. It was necessary to supplement the forces of the original party by repeated increments of men and machines, which had to be conveyed at great expense to the remote and isolated region in which the cave was located. A huge temporary camp of workmen, engineers, geologists and other experts was established. The work of removing the obstruction was several times frustrated by fresh landslides. In one of these, ten of the workmen engaged in clearing the entrance were killed. The treasury of the Speluncean Society was soon exhausted in the rescue effort, and the sum of eight hundred thousand frelars, raised partly by popular subscription and partly by legislative grant, was expended before the imprisoned men were rescued. Success was finally achieved on the thirty-second day after the men entered the cave.

Since it was known that the explorers had carried with them only scant provisions and since it was also known that there was no animal or vegetable matter within the cave on which they might subsist, anxiety was early felt that they might meet death by starvation before access to them could be obtained. On the twentieth day of their imprisonment it was learned for the first time that they had taken with them into the cave a portable wireless machine capable of both sending and receiving messages. A similar machine was promptly installed in the rescue camp and oral communication established with the unfortunate men

^{*} Lon L. Fuller, "The Case of Speluncean Explorers", 62 *Harvard Law Review* 616-664 (1949).

within the mountain. They asked to be informed how long a time would be required to release them. The engineers in charge of the project answered that at least ten days would be required even if no new landslides occurred. The explorers then asked if any physicians were present and were placed in communication with a committee of medical experts. The imprisoned men described their condition and the rations they had taken with them, and asked for a medical opinion whether they would be likely to live without food for ten days longer. The chairman of the committee of physicians told them that there was little possibility of this. The wireless machine within the cave then remained silent for eight hours. When communication was re-established the men asked to speak again with the physicians. The chairman of the physicians' committee was placed before the apparatus and Whetmore, speaking on behalf of himself and the defendants, asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians' chairman reluctantly answered this question in the affirmative. Whetmore asked whether it would be advisable for them to cast lots to determine which of them should be eaten. None of the physicians present was willing to answer the question. Whetmore then asked if there were among the party a judge or other official of the Government who would answer this question. None of those attached to the rescue camp was willing to assume the role of advisor in this matter. He then asked if any minister or priest would answer their question, and none was found who would do, so. Thereafter no further messages were received from within the cave and it was assumed (erroneously, it later appeared) that the electric batteries of the explorers' wireless machine had become exhausted. When the imprisoned men were finally released it was learned that on the twenty-third day after their entrance into the cave Whetmore had been killed and eaten by his companions.

From the testimony of the defendants, which was accepted by the jury, it appears that it was Whetmore who first proposed that they might find the nutriment without which survival was impossible in the flesh of one of their own number. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him. The defendants were at first reluctant to adopt so desperate a procedure, but after the conversations by wireless related above, they finally agreed on the plan proposed by Whetmore. After much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of the dice.

Before the dice were cast, however, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice. When it came Whetmore's turn, the dice were cast for him by one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he had no such objections. The throw went against him and he was then put to death and eaten by his companions.

After the rescue of the defendants, and after they had completed a stay in a hospital where they underwent a course of treatment for malnutrition and shock, they were indicted for the murder of Roger Whetmore. At the trial, after the testimony had been concluded, the foreman of the jury (a lawyer by profession) inquired of the Court whether the jury might not find a

special verdict, leaving it to the court to say whether on the facts as found the defendants were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure and it was adopted by the court. In a lengthy special verdict the jury found the facts as I have related them above and found further that if on these facts the defendants were guilty of the crime charged against them, then they found the defendants guilty. On the basis of this verdict, the trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced them to be hanged, the law of our Commonwealth permitting him on discretion with respect to the penalty to be imposed. After the release of the jury, its members joined in a communication to the Chief Executive asking that the sentence be commuted to an imprisonment of six months. The trial judge addressed a similar communication to the Chief Executive. As yet no action with respect to these pleas has been taken, as the Chief Executive is apparently awaiting our disposition of this petition of error.

It seems to me that in dealing with this extraordinary case the jury and the trial judge followed a course that was not only fair and wise, but the only course that was open to them under the law. The language of our statute is well known:

“Whoever shall willfully take the life of another shall be punished by death.”

N.C.S.A. (N.S.) § 12-A. This statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves.

In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law and I propose to my colleagues that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is ever reason to believe that these requests for clemency will be heeded, coming as they do from those who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. It is highly improbable that the Chief Executive would deny these requests unless he were himself to hold hearings at least as extensive as those involved in the trial below, which lasted for three months. The holding of such hearings (which would virtually amount to a retrial of the case) would scarcely be compatible with the function of the Executive as it is usually conceived. I think we may therefore assume that some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law.

FOSTER, J. I am shocked that the Chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted and should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error. For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a

dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.

For myself, I do not believe that our law compels the monstrous conclusion that these men are murderers. I believe, on the contrary, that it declares them to be innocent of any crime. I rest this conclusion on two independent grounds, either of which is of itself sufficient to justify the acquittal of these defendants.

The first of these grounds rests on a premise that may arouse opposition until it has been examined candidly. I take the view that the enacted or positive law of this Commonwealth, including all of its statutes and precedents, is inapplicable to this case, and that the case is governed instead by what ancient writers in Europe and America called "the law of nature".

This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it. We are not accustomed to applying the maxim *cessante ratione legis, cessat et ipsa lex* to the whole of our enacted law, but I believe that this is a case where the maxim should be so applied.

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where the life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of a given area of the earth's surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law. Now I contend that a case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a positive sense, their underground prison was separated from our courts and writ-serves by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants, they were, to use the quaint language of nineteenth-century writers, not in a "state

of civil society” but in a state “state of nature”. This has the consequence that the law applicable to them is not the enacted and established law of this Commonwealth, but the law derived from those principles that were appropriate to their condition. I have no hesitancy in saying that under those principles they were guiltless of any crime.

What these men did was done in pursuance of an agreement accepted by all of them and first proposed by Whetmore himself. Since it was apparent that their extraordinary predicament made inapplicable the usual principles that regulate men's relations with one another, it was necessary for them to draw, as it were, a new charter of government appropriate to the situation in which they found themselves.

It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract or agreement. Ancient thinkers, especially during the period from 1600 to 1900, used to base government itself on a supposed original social compact. Skeptics pointed out that this theory contradicted the known facts of history, and that there was no scientific evidence to support the notion that there was no scientific evidence to support the notion that any government was ever founded in the manner supposed by the theory. Moralists replied that, if the compact was a fiction from a historical point of view, the notion of compact or agreement furnished the only ethical justification on which the powers of government, which include that of taking life, could be rested. The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing a new some order to make their life in common possible.

Fortunately, our Commonwealth is not bothered by the perplexities that beset the ancients. We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Sophistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter.

If, therefore, our hangmen have the power to end men's lives, if our sheriffs have the power to put delinquent tenants in the street, if our police have the power incarcerate the inebriated reveler, these powers find their moral justification in that original compact of our forefathers. If we can find no higher source for our legal order, what higher source should we expect these starving unfortunates to find for the order they adopted for themselves?

I believe that the line of argument I have just expounded permits of no rational answer. I realize that it will probably be received with a certain discomfort by many who read this opinion, who will be inclined to suspect that some hidden sophistry must underlie a demonstration that leads to so many unfamiliar conclusions. The source of this discomfort is, however, easy to identify. The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society. We have an illustration of this truth in the very case, before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations

they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers to carry out an arrangement which would save four lives at the cost of one?

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?

This concludes the exposition of the first ground of my decision. My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for purposes of argument that I am wrong in saying that the situation of these men removed them from the effect of our positive law, and I assume that the Consolidated Statutes have the power to penetrate five hundred feet of rock and to impose themselves upon these starving men huddled in their underground prison.

Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another" is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it. Illustrations of its application are numberless and are to be found in every branch of the law. In *Commonwealth v. Staymore* the defendant was convicted under a statute making it a crime to leave one's car parked in certain area for a period longer than two hours. The defendant had attempted to remove his car, but was prevented from doing so because the streets were obstructed by a political demonstration in which he took no part and which he had no reason to anticipate. His conviction was set aside by this Court, although his case fell squarely within the wording of the statute. Again, in *Fehler v. Neegas* there was before this Court for construction a statute in which the word "not" had plainly been transposed from its intended position in the final and most crucial section of the act. This transposition was contained in all the successive drafts of the act, where it was apparently overlooked by the draftsmen and sponsors of the legislation. No one was able to prove how the error came about, yet it was apparent that, taking account of the contents of the statute as a whole, an error had been made, since a literal reading of the final clause rendered it inconsistent with everything that had gone before and with the object of the enactment as stated in its preamble. This Court refused to accept a literal interpretation of the statute, and in effect rectified its language by reading the word "not" into the place where it was evidently intended to go.

The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self-defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self-defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self-defense cannot be reconciled with the *words* of the statute, but only with its *purpose*.

The true reconciliation of the excuse of self-defense with the statute making it a crime to kill another is to be found in the following line of reasoning. One of the principal objects underlying any criminal legislation is that of deterring men from crime. Now it is apparent that if it were declared to be the law that a killing in self-defense is murder such a rule could not operate in a deterrent manner. A man whose life is threatened will repel his aggressor, whatever the law may say. Looking therefore to the broad purposes of criminal legislation, we may safely declare that this statute was not intended to apply to cases of self-defense.

When the rationale of the excuse of self-defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. Accordingly, if we read this statute intelligently it is apparent that it does not apply to this case. The withdrawal of this situation from the effect of the statute is justified by precisely the same considerations that were applied by our predecessors in office centuries ago to the case of self-defense.

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute gives to its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duty expressed will of the Chamber of Representatives. The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly raise a question of the distinction between intelligent and unintelligent fidelity. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.

I therefore conclude that on any aspect under which this case may be viewed these defendants are innocent of the crime of murdering Roger Whetmore, and that the conviction should be set aside.

TATTING, J. In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter. In passing on this tragic case I find that my usual resources fail me. On the emotional side I find myself torn between sympathy for these men

and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.

As I analyze the opinion just rendered by my brother Foster, I find that it is shot through with contradictions and fallacies. Let us begin with his first proposition: these men were not subject to our law because they were not in a "state of civil society" but in a "state of nature". I am not clear why this is so, whether it is because of the thickness of the rock that imprisoned them, or because they were hungry, or because they had set up a "new charter of government" by which the usual rules of law were to be supplanted by a throw of the dice. Other difficulties intrude themselves. If these men passed from the jurisdiction of our law to that of "the law of nature", at what moment did this occur? Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made? These uncertainties in the doctrine proposed by my brother are capable of producing real difficulties. Suppose, for example one of these men had had his twenty-first birthday while he was imprisoned within the mountain. On what date would we have to consider that he had attained his majority - when he reached the age of twenty-one, at which time he was, by hypothesis, removed from the effects of our law, or only when he was released from the cave and became again subject to what my brother calls our "positive law"? These difficulties may seem fanciful, yet they only serve to reveal the fanciful nature of the doctrine that is capable of giving rise to them.

But it is not necessary to explore these niceties further to demonstrate the absurdity of my brother's position. Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, sworn and empowered to administer the laws of that Commonwealth. By what authority do we resolve ourselves into a Court of Nature? If these men were indeed under the law of nature, whence comes our authority to expound and apply that law? Certainly *we* are not in a state of nature.

Let us look at the contents of this code of nature that my brother proposes we adopt as our own and apply to this case. What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence - for through my brother passes over in convenient silence the effect of Whetmore's withdrawal, this is the necessary implication of his argument.

The principles my brother expounds contain other implications that cannot be tolerated. He argues that when the defendants set upon Whetmore and killed him (we know not how, perhaps by pounding him with stones) they were only exercising the rights conferred upon them by their bargain. Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course

he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.

All of these considerations make it impossible for me to accept the first part of my brother's argument. I can neither accept his notion that these men were under a code of nature which this Court was bound to apply to them, nor can I accept the odious and perverted rules that he would read into that code. I come now to the second part of my brother's opinion, in which he seeks to show that the defendants did not violate the provisions of N.C.S.A. (N.S.) § Par. 12-A. Here the way, instead of being clear, becomes for me misty and ambiguous, though my brother seems unaware of the difficulties that inhere in his demonstrations.

The gist of my brother's argument may be stated in the following terms: No statute, whatever its language, should be applied in a way that contradicts its purpose. One of the purposes of any criminal statute is to deter. The application of the statute making it a crime to kill another to the peculiar facts of this case would contradict this purpose, for it is impossible to believe that the contents of the criminal code could operate in a deterrent manner on men faced with the alternative of life or death. The reasoning by which this exception is read into the statute is, my brother observes, the same as that which is applied in order to provide the excuse of self-defense.

On the face of things this demonstration seems very convincing indeed. My brother's interpretation of the rationale of the excuse of self-defense is in fact supported by a decision of this court, *Commonwealth v. Parry*, a precedent I happened to encounter in my research on this case. Though *Commonwealth v. Parry* seems generally to have been overlooked in the texts and subsequent decisions, it supports unambiguously the interpretation my brother has put upon the excuse of self-defense.

Now let me outline briefly, however, the perplexities that assail me when I examine my brother's demonstration more closely. It is true that a statute should be applied in the light of its purpose, and that *one* of the purposes of criminal legislation is recognized to be deterrence. The difficulty is that other purposes are also ascribed to the law of crimes. It has been said that one of its objects is to provide an orderly outlet for the instinctive human for retribution. *Commonwealth v. Scape*. It has also been said that its object is the rehabilitation of the wrongdoer. *Commonwealth v. Makeover*. Other theories have been propounded. Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?

A similar difficulty is presented by the fact that although there is authority for my brother's interpretation of the excuse of self-defense, there is other authority which assigns to that excuse a different rationale. Indeed, until I happened on *Commonwealth v. Parry* I had never heard of the explanation given by my brother. The taught doctrine of our law schools, memorized by generations of law students, runs in the following terms: The statute concerning murder required a "willful" act. The man who acts to repel an aggressive threat to his own life does not act "willfully", but in response to an impulse deeply ingrained in human nature. I suspect that there is hardly a lawyer in this Commonwealth who is not familiar with this line of reasoning, especially since the point is a great favorite of the bar examiners.

Now the familiar explanation for the excuse of self-defense just expounded obviously cannot be applied by analogy to the facts of this case. These men acted not only "willfully" but with great deliberation and after hours of discussing what they should do. Again we encounter a forked path, with one line of reasoning leading us in one direction and another in a direction that is exactly the opposite. This perplexity is in this case compounded, as it were for we have to set off one explanation, incorporated in a virtually unknown precedent of this Court, against another explanation, which forms a part of the taught legal tradition of our law schools, but which, so far as I know, has never been adopted in any judicial decision.

I recognize the relevance of the precedents cited by my brother concerning the displaced "not" and the defendant who parked overtime. But what are we to do with one of the landmarks of our jurisprudence, which again my brother passes over in silence? This is *Commonwealth v. Valjean*. Though the case is somewhat obscurely reported, it appears that the defendant was indicted for the larceny of a loaf of bread, and offered as a defense that he was in a condition approaching starvation. The court refused to accept this defense. If hunger cannot justify the theft of wholesome and natural food, how can it justify the killing and eating of a man? Again, if we look at the thing in terms of deterrence, is it likely that a man starve to death to avoid a jail sentence for the theft of a loaf of bread? My brother's demonstrations would compel us to overrule *Commonwealth v. Valjean*, and many other precedents that have been built on that case.

Again, I have difficulty in saying that no deterrent effect whatever could be attributed to a decision that these men were guilty of murder. The stigma of the word "murderer" is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have awaited for a few days at least before carrying out their plan. During that time some unexpected relief might have come. I realize that this observation only reduces the distinction to a matter of degree, and does not destroy it altogether. It is certainly true that the element of deterrence would be less in this case than is normally involved in the application of the criminal law.

There is still a further difficulty in my brother Foster's proposal to read an exception into the statute to favor this case, though again a difficulty not even intimated in his opinion. What shall be the scope of this exception? Here the men cast lots and the victim was himself originally a party to the agreement. What would we have to decide if Whetmore had refused from the beginning to participate in the plan? Would a majority be permitted to overrule him? Or, suppose that no plan were adopted at all and the others simply conspired to bring about Whetmore's death, justifying their act by saying that he was in the weakest condition. Or again, that a plan of selection was followed but one based on a different justification than the one adopted here, as if the others were atheists and insisted that Whetmore should die because he was the only one who believed in an afterlife. These illustrations could be multiplied, but enough have been suggested to reveal what a quagmire of hidden difficulties my brother's reasoning contains.

Of course I realize on reflection that I may be concerning myself with a problem that will never arise, since it is unlikely that any group of men will ever again be brought to commit the dread act that was involved here. Yet, on still further reflection, even if we are certain that no similar case will arise again, do not the illustrations I have given show the lack of any

coherent and rational principle in the rule my brother proposes? Should not the soundness of a principle be tested by the conclusions it entails, without reference to the accidents of later litigational history? Still, if this is so, why is it that we of this Court so often discuss the question whether we are likely to have later occasion to apply a principle urged for the solution of the case before us? Is this a situation where a line of reasoning not originally proper has become sanctioned by precedent, so that we are permitted to apply it and may even be under an obligation to do so?

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. When I feel myself inclined to accept the view of my brother Foster, I am repelled by a feeling that his arguments are intellectually unsound and approach mere rationalization. On the other hand, when I incline toward upholding the conviction, I am struck by the absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen. It is to me a matter of regret that the Prosecutor saw fit to ask for an indictment for murder. If we had a provision in our statutes making it a crime to eat human flesh, that would have been a more appropriate charge. If no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser, I think, not to have indicted them at all. Unfortunately, however, the men have been indicted and tried, and we have therefore been drawn into this unfortunate affair.

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.

KEEN, J. I should like to begin by setting to one side two questions which are not before this Court.

The first of these is whether executive clemency should be extended to these defendants if the conviction is affirmed. Under our system of government, that is a question for the Chief Executive, not for us. I therefore disapprove of that passage in the opinion of the Chief Justice in which he in effect gives instructions to the Chief Executive as to what he should do in this case and suggests that some impropriety will attach if these instructions are heeded. This is a confusion of governmental functions – a confusion of which the judiciary should be the last to be guilty. I wish to state that if I were the Chief Executive I would go farther in the direction of clemency than the pleas addressed to him propose. I would pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed. I want it to be understood that this remark is made in my capacity as a private citizen who by the accident of his office happens to have acquired an intimate acquaintance with the facts of this case. In the discharge of my duties as judge, it is neither my function to address directions to the Chief Executive, nor to take into account what he may or may not

do, in reaching my own decision, which must be controlled entirely by the law of this Commonwealth.

The second question that I wish to put to one side is that of deciding whether what these men did was “right” or “wrong”, “wicked” or “good”. That is also a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land. In putting this question to one side I think I can also safely dismiss without comment the first and more poetic portion of my brother Foster’s opinion. The element of fantasy contained in the arguments developed there has been sufficiently revealed in my brother Tatting’s somewhat solemn attempt to take those arguments seriously.

The sole question before us for decision is whether these defendants did, within the meaning of N.C.S.A. (N.S.) § Par. 12-A, willfully take the life of Roger Whetmore. The exact language of the statute is as follows: “Whoever shall willfully take the life of another shall be punished by death”. Now I should suppose that any candid observer, content to extract from these words their natural meaning, would concede at once that these defendants did “willfully take the life” of Roger Whetmore.

Whence arise all the difficulties of the case, then, and the necessity for so many pages of discussion about what ought to be so obvious? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this Commonwealth.

Now, of course, my brother Foster does not admit that he is actuated by a personal dislike of the written law. Instead he develops a familiar line of argument according to which the court may disregard the express language of a statute when something not contained in the statute itself, called its “purpose”, can be employed to justify the result the court considers proper. Because this is an old issue between myself and my colleague, I should like, before discussing his particular application of the argument to the facts of this case, to say something about the historical background of this issue and its implications for law and government generally.

There was a time in this Commonwealth when judges did in fact legislate very freely, and all of us know that during that period some of our statutes were rather thoroughly made over by the judiciary. That was a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other. There is no need to recount here the factors that contributed to that unseemly struggle for power, though they included the unrepresentative character of the Chamber, resulting from a division of the country into election districts that no longer accorded with the actual distribution of the population, and the forceful personality and wide popular following of the then Chief Justice. It is enough to observe that those days are behind us, and that in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of

the legislative branch of our government. From that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice. I am not concerned with the question whether the principle that forbids the judicial revision of statutes is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them. My brother Forster is one of that group; his way of dealing with statutes is exactly that of a judge living in the 1900's.

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster will have had an opportunity to see it at work in every branch of the law. I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute as applied to the case before him.

The process of judicial reform requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator", in the pursuit of this imagined "purpose", overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.

My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brother thinks he knows exactly what was sought when men made murder a crime, and that was something he calls "deterrence". My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a "purpose" in any ordinary sense of the term. Primarily, such a statute reflects a deeply-felt human conviction that murder is wrong and that something should be done to the man who commits it. If we were forced to be more articulate about the matter, we would probably take refuge in the more sophisticated theories of the criminologists, which, of course, were certainly not in the minds of those who drafted our statute. We might also observe that men will do their own work more effectively and live happier lives if they are protected against the threat of violent assault. Bearing in mind that the victims of murders are often unpleasant

people, we might add some suggestion that the matter of disposing of undesirables is not a function suited to private enterprise, but should be a state monopoly. All of which reminds me of the attorney who once argued before us that a statute licensing physicians was a good thing because it would lead to lower life insurance rates by lifting the level of general health. There is such a thing as over explaining the obvious.

If we do not know the purpose of § Par. 12-A, how can we possibly say there is a “gap” in it? How can we know what its draftsmen thought about the question of killing men in order to eat them? My brother Tatting has revealed an understandable, though perhaps slightly exaggerated revulsion to cannibalism. How do we know that his remote ancestors did not feel the same revulsion to an even higher degree? Anthropologists say that the dread felt for a forbidden act may be increased by the fact that the conditions of a tribe's life create special temptations toward it, as incest is most severely condemned among those whose village relations make it most likely to occur. Certainly the period following the Great Spiral was one that had implicit in it temptations to anthropophagy. Perhaps it was for that very reason that our ancestors expressed their prohibition in so broad and unqualified a form. All of this is conjecture, of course, but it remains abundantly clear that neither I nor my brother Foster knows what the “purpose” § of Par. 12-A is.

Considerations similar to those I have just outlined are also applicable to the exception in favor of self-defense, which plays so large a role in the reasoning of my brothers Foster and Tatting. It is of course true that in *Commonwealth v. Parry* an obiter dictum justified this exception on the assumption that the purpose of criminal legislation is to deter. It may well also be true that generations of law students have been taught that the true explanation of the exception lies in the fact that a man who acts in self-defense does not act “willfully”, and that the same students have passed their bar examinations by repeating what their professors told them. These last observations I could dismiss, of course, as irrelevant for the simple reason that professors and bar examiners have not as yet any commission to make our laws for us. But again the real trouble lies deeper. As in dealing with the statute, so in dealing with the exception, the question is not the conjectural *purpose* of the rule, but its *scope*. Now the scope of the exception in favor of self-defense as it has been applied by this Court is plain: it applies to cases of resisting an aggressive threat to the party's own life. It is therefore too clear for argument that this case does not fall within the scope of the exception, since it is plain that Whetmore made no threat against the lives of these defendants.

The essential shabbiness of my brother Foster's attempt to cloak his remaking of the written law with an air of legitimacy comes tragically to the surface in my brother Tatting's opinion. In that opinion Justice Tatting struggles manfully to combine his colleague's loose moralisms with his own sense of fidelity to the written law. The issue of this struggle could only be that which occurred, a complete default in the discharge of the judicial function. You simply cannot apply a statute as it is written and remake it to meet your own wishes at the same time.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation. A hard decision is never a popular decision. Judges have been celebrated in literature for their sly

prowess in devising some quibble by which a litigant could be deprived of his rights where the public thought it was wrong for him to assert those rights. But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.

Indeed, I will go farther and say that not only are the principles I have been expounding those which are soundest for our present conditions, but that we would have inherited a better legal system from our forefathers if those principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of the hodgepodge of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial treatment.

These concluding remarks are, of course, beyond any duties that I have to discharge with relation to this case, but I include them here because I feel deeply that my colleagues are insufficiently aware of the dangers implicit in the conceptions of the judicial office advocated by my brother Foster.

I conclude that the conviction should be affirmed.

HANDY, J. I have listened with amazement to the tortured ratiocinations to which this simple case has given rise. I never cease to wonder at my colleagues' ability to throw an obscuring curtain of legalisms about every issue presented to them for decision. We have heard this afternoon learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation. My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the cave - whether it was unilateral or bilateral, and whether Whetmore could not be considered as having revoked an offer prior to action taken thereunder.

What have all these things to do with the case? The problem before us is what we, as officers of the government, ought to do with these defendants. That is a question of practical wisdom, to be exercised in a context, not of abstract theory, but of human realities. When the case is approached in this light, it becomes, I think one of the easiest to decide that has ever been argued before this Court.

Before stating my own conclusions about the merits of the case, I should like to discuss briefly some of the more fundamental issues involved - issues on which my colleagues and I have been divided ever since I have been on the bench.

I have never been able to make my brothers see that government is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are, of course, fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further distinctions are invented and imported into the situation. When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.

Now I realize that wherever you have rules and abstract principles lawyers are going to be able to make distinctions. To some extent the sort of thing I have been describing is a necessary evil attaching to any formal regulation of human affairs. But I think that the area which really stands in need of such regulation is greatly overestimated. There are, of course, a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here some restraint on discretion and dispensation, some adherence to form, some scruple for what does and what does not fall within the rule, is, I concede, essential. Perhaps the area of basic principle should be expanded to include certain other rules, such as those designed to preserve the free civilmoign system.

But outside of these fields I believe that all government officials, including judges, will do their jobs best if they treat forms and abstract concepts as instruments. We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.

The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense. My adherence to this philosophy has, however, deeper roots. I believe that it is only with the insight this philosophy gives that we can preserve the flexibility essential if we are to keep our actions in reasonable accord with the sentiments of those subject to our rule. More governments have been wrecked, and more human misery cause, by the lack of this accord between ruler and ruled than by any other factor that can be discerned in history. Once drive a sufficient wedge between the mass of people and those who direct their legal, political, and economic life, and our society is ruined. Then neither Foster's law of nature nor Keen's fidelity to written law will avail us anything.

Now when these conceptions are applied to the case before us, its decision becomes, as I have said, perfectly easy. In order to demonstrate this I shall have to introduce certain realities that my brothers in their coy decorum have seen fit to pass over in silence, although they are just as acutely aware of them as I am.

The first of these is that this case has aroused an enormous public interest, both here and abroad. Almost every newspaper and magazine has carried articles about it; columnists have shared with their readers confidential information as to the next governmental move; hundreds of letters-to-the-editor have been printed. One of the great newspaper chains made a

poll of public opinion on the question, "What do you think the Supreme Court should do with the Speluncean explorers?" About ninety per cent expressed a belief that the defendants should be pardoned or let off with a kind of token punishment. It is perfectly clear, then, how the public feels about the case. We could have known this without the poll, of course, on the basis of common sense, or even by observing that on this Court there are apparently four-and-a-half men, or ninety per cent, who share the common opinion.

This makes it obvious, not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent accord. Declaring these men innocent need not involve us in any undignified quibble or trick. No principle of statutory construction is required that is not consistent with the past practices of this Court. Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defense. If a more detailed demonstration of the method of reconciling our decision with the statute is required, I should be content to rest on the arguments developed in the second and less visionary part of my brother Foster's opinion.

Now I know that my brothers will be horrified by my suggestion that this Court should take account of public opinion. They will tell you that public opinion is emotional and capricious, that it is based on half-truths and listens to witnesses who are not subject to cross-examination. They will tell you that the law surrounds the trial of a case like this will elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account. They will warn you that all of these safeguards go for naught if a mass opinion formed outside this framework is allowed to have any influence on our decision.

But let us look candidly at some of the realities of the administration of our criminal law. When a man is accused of crime, there are, speaking generally, four ways in which he may escape punishment. One of these is a determination by a judge that under the applicable law he has committed no crime. This is, of course, a determination that takes place in a rather formal and abstract atmosphere. But look at the other three ways in which he may escape punishment. These are: (1) a decision by the Prosecutor not to ask for an indictment; (2) an acquittal by the jury; (3) a pardon or commutation of sentence by the executive. Can anyone pretend that these decisions are held within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all the forms of the law will be observed?

In the case of the jury we do, to be sure, attempt to cabin their deliberations within the area of the legally relevant, but there is no need to deceive ourselves into believing that this attempt is really successful. In the normal course of events the case now before us would have gone on all of its issues directly to the jury. Had this occurred we can be confident that there would have been an acquittal or at least a division that would have prevented a conviction. If the jury had been instructed that the men's hunger and their agreement were no defense to the charge of murder, their verdict would in all likelihood have ignored this instruction and would have involved a good deal more twisting of the letter of the law than any that is likely to tempt us. Of course the only reason that didn't occur in this case was the fortuitous

circumstance that the foreman of the jury happened to be a lawyer. His learning enabled him to devise a form of words that would allow the jury to dodge its usual responsibilities.

My brother Tatting expresses annoyance that the Prosecutor did not, in effect, decide the case for him by not asking for an indictment. Strict as he is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense. The Chief Justice, on the other hand, wants the application of common sense postponed to the very end, though like Tatting, he wants no personal part in it.

This brings me to the concluding portion of my remarks, which has to do with executive clemency. Before discussing that topic directly, I want to make a related observation about the poll of public opinion. As I have said, ninety per cent of the people wanted the Supreme Court to let the men off entirely or with a more or less nominal punishment. The ten per cent constituted a very oddly assorted group, with the most curious and divergent opinions. One of our university experts has made a study of this group and has found that its members fall into certain patterns. A substantial portion of them are subscribers to "crank" newspapers of limited circulation that gave their readers a distorted version of the facts of the case. Some thought that "Speluncean" means "cannibal" and that anthropophagy is a tenet of the Society. But the point I want to make, however, is this: although almost every conceivable variety and shade of opinion was represented in this group, there was, so far as I know, not one of them, nor a single member of the majority of ninety per cent, who said, "I think it would be a fine thing to have the courts sentence these men to be hanged, and then to have another branch of the government come along and pardon them." Yet this is a solution that has more or less dominated our discussions and which our Chief Justice proposes as a way by which we can avoid doing an injustice and at the same time preserve respect for law. He can be assured that if he is preserving anybody's morale, it is his own, and not the public's, which knows nothing of his distinctions. I mention this matter because I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world.

I come now to the most crucial fact in this case, a fact known to all of us in this Court, though one that my brothers have seen fit to keep under the cover of their judicial robes. This is the frightening likelihood that if the issue is left to him, the Chief Executive will refuse to pardon these men or commute their sentence. As we all know, our Chief Executive is a man now well advanced in years, of very stiff notions. Public clamor usually operates on him with the reverse of the effect intended. As I have told my brothers, it happens that my wife's niece is an intimate friend of his secretary. I have learned in this indirect, but, I think, wholly reliable way, that he is firmly determined not to commute the sentence if these men are found to have violated the law.

No one regrets more than I the necessity for relying in so important a matter on information that could be characterized as gossip. If I had my way this would not happen, for I would adopt the sensible course of sitting down with the Executive, going over the case with him, finding out what his views are, and perhaps working out with him a common program for handling the situation. But of course my brothers would never hear of such a thing.

Their scruple about acquiring accurate information directly does not prevent them from being very perturbed about what they have learned indirectly. Their acquaintance with the facts I have just related explains why the Chief Justice, ordinarily a model of decorum, saw fit in his opinion to flap his judicial robes in the face of the Executive and threaten him with excommunication if he failed to commute the sentence. It explains, I suspect, my brother Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants. It explains also why even my legalistic brother Keen emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive "in my capacity as a private citizen". (I may remark, incidentally, that the advice of Private Citizen Keen will appear in the reports of this court printed at taxpayers' expense).

I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government, and this truly tragic case has deepened my sense of discouragement and dismay. I only wish that I could convince my brothers of the wisdom of the principles I have applied to the judicial office since I first assumed it. As a matter of fact, by a kind of sad rounding of the circle, I encountered issues like those involved here in the very first case I tried as Judge of the Court of General Instances in Fanleigh Country.

A religious sect had unfrocked a minister who, they said, had gone over to the views and practices of a rival sect. The minister circulated a handbill making charges against the authorities who had expelled him. Certain lay members of the church announced a public meeting at which they proposed to explain the position of the church. The minister attended this meeting. Some said he slipped in unobserved in a disguise; his own testimony was that he had walked in openly as a member of the public. At any rate, when the speeches began he interrupted with certain questions about the affairs of the church and made some statements in defense of his own views. He was set upon by members of the audience and given a pretty thorough pommeling, receiving among other injuries a broken jaw. He brought a suit for damages against the association that sponsored the meeting and against ten named individuals who he alleged were his assailants.

When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings. As I studied the case I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense. The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence.

I was led to this conclusion by the following considerations. The melee in which the plaintiff was injured had been a very confused affair, with some people trying to get to the center of the disturbance, while others were trying to get away from it; some striking at the

plaintiff, while others were apparently trying to protect him. It would have taken weeks to find out the truth of the matter. I decided that nobody's broken jaw was worth that much to the Commonwealth. (The minister's injuries, incidentally, had meanwhile healed without disfigurement and without any impairment of normal faculties). Furthermore, I felt very strongly that the plaintiff had to a large extent brought the thing on himself. He knew how inflamed passions were about the affair, and could easily have found another forum for the expression of his views. My decision was widely approved by the press and public opinion, neither of which could tolerate the views and practices that the expelled minister was attempting to defend.

Now, thirty years later, thanks to an ambitious Prosecutor and a legalistic jury foreman, I am faced with a case that raises issues which are at bottom much like those involved in that case. The world does not seem to change much, except that this time it is not a question of a judgment for five or six hundred frelars, but of the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years. I conclude that the defendants are innocent of the crime charged, and that the conviction and sentence should be set aside.

TATTING, J. I have been asked by the Chief Justice whether, after listening to the two opinions just rendered, I desire to reexamine the position previously taken by me. I wish to state that after hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case.

The Supreme Court being evenly divided, the convicted sentence of the Court of the General Instances is *affirmed*. It ordered that the execution of the sentence shall occur at 6 a.m., Friday, April 2, 4300, at which time the Public Executioner is directed to proceed with all convenient dispatch to hang each of the defendants by the neck until he is dead.

Postscript

Now that the court has spoken its judgment, the reader puzzled by the choice of date may wish to be reminded that the centuries which separate us from the year 4300 are roughly equal to those that have passed since the Age of Pericles. There is probably no need to observe that the *Speluncean Case* itself is intended neither as a work of satire nor as a prediction in any ordinary sense of the term. As for the judges who make up Chief Justice Truepenny's court, they are, of course, as mythical as the facts and precedents with which they deal. The reader who refuses to accept this view, and who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth. The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.

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Revival of Natural Law in the Twentieth Century^{*}

Stammler

Another development was 'natural law with a variable content,' of which Stammler (1856-1938) was an exponent. He distinguished between technical legal science, which concerns a given legal system, and theoretical legal science, which concerns rules giving effect to fundamental principles. The former deals with the content of the law, the latter relates them to ultimate principles. He thus proceeded to distinguish between the 'concept of law' and the 'idea of law,' or justice, and he approached the concept of law as follows. Order is appreciable through perception or will. Community, or society, is 'the formal unity of all conceivable individual purposes, and by this means the individual may realise his ultimate best interests. 'Law', says Stammler, 'is necessary *a priori*, because it is inevitably implied in the idea of co-operation'. A just law aims at harmonising individual purposes with that of society. Accordingly, he sought to provide a formal, universally valid definition of law without reference to its content. He defined it as 'a species of will, other-regarding, self-authoritative, and inviolable'. Law is a species of will because it is concerned with orderings of conduct, other-regarding because it concerns a man's relations with other men, self-authoritative because it claims general obedience, and inviolable because of its claim to permanence. The idea of law is the application of the concept of law in the realisation of justice. Every rule is a means to an end, so one must seek a universal method of making just laws. A just law is the highest expression of Man's social activity. Its aim is the preservation of the freedom of the individual with the equal freedom of other individuals. In the realisation of justice the specific content of a rule of positive law will vary from place to place and from age to age and it is this relativity which has earned for the theory the name of 'natural law with a variable content'. In order to achieve justice, a legislator has to bear in mind four principles. These are, firstly, two Principles of Respect:

- (1) 'The content of a person's volition must not depend upon the arbitrary will of another'.
- (2) 'Every legal demand can only be maintained in such a way that the person obligated may remain a fellow creature'.

Secondly, there are two Principles of Participation:

- (1) 'A person lawfully obligated must not be arbitrarily excluded from the community'.
- (2) 'Every lawful power of decision may exclude the person affected by it from the community only to the extent that the person may remain a fellow creature'.

With the aid of these four principles Stammler set out to solve actual problems which may confront the law courts. His solutions may sometimes be questioned on the ground that they do not necessarily follow from his principles, or that they are not the only possible just solutions. He did not deny validity to laws which fail to conform to the requirements of justice. His scheme is a framework for determining the relative justness of a rule or a law and

^{*} R.W.M. Dias, *Jurisprudence*, 479-488 (1985).

for providing a means for bringing it nearer to justice. The approach is Kantian in so far as it is maintained that human beings possess certain *a priori* forms of apprehending the idea of law. The difference lies in the variability that is allowed in its content and in the collectivist, rather than individualist, slant of the whole theory. Despite its ingenuity it has not found wide acceptance. It is in America that contemporary natural law theory might be said to have found something like a congenial home.

John Rawls

A thorough-going attempt to formulate a general theory of justice is that of Professor John Rawls (b. 1921) of Harvard University, who writes mainly from the angle of philosophy and political science rather than of law. Natural law is not dealt with as such; but in so far as his scheme is based on reason, concerns social justice and purports to be comprehensive, it is naturalistic in conception. Since its publication in 1971 it has received wide attention.

Professor Rawls assumes that society is a more or less self-sufficient association of persons, who in their mutual relations recognise as binding certain rules of conduct specifying a system of co-operation. Principles of social justice are necessary for making a rational choice between various available systems. The way in which a concept of justice specifies basic rights and duties will affect problems of efficiency, co-ordination and stability. This is why it is necessary to have a rational conception of justice for the basic structure of society. Practical rationality has three aspects, namely, value, right and moral worth. The 'concept of right' relates to social systems and institutions, individuals, international relations and also the question of priority between principles. With regard to social systems and institutions, the concept of right yields 'Principles of Justice' and 'Efficiency'.

The approach to principles of social justice through utilitarianism and institutionism respectively is considered critically and rejected. The latter in particular is faced with the difficulty of answering, first, Why should intuitive principles be followed? and, secondly, What guidance is there for choosing between conflicting principles in a given case? Professor Rawls endeavours to meet the first question by grounding his own principles in the exercise of reason in an imaginary 'original position'; and the second by calling in aid certain 'principles of priority'. He arrives at his theory as follows.

Fairness results from reasoned prudence; and principles of justice, dictated by prudence, are those which hypothetical rational persons would choose in a hypothetical 'original position' of equality. The insistence on prudence excludes gamblers from participating in the 'original position', but will bring in, on the whole, those who are conservatively inclined. The concept of the 'original position' is not quite a modernised version of the 'social contract', nor is it offered as being anything other than a pure supposition. On the one hand, people in this 'original position' are assumed to know certain things, e.g. general psychology and the social sciences, but, on the other hand, a 'veil of ignorance' drapes them with regard to certain other things, e.g. the stage of development of their society and especially their own personal conditions, places in that society, material fortunes etc. In short, all this is designed to exclude personal self-interest when choosing the 'Basic Principles of Justice' so as to ensure their generality and validity. What is needed is a form of justice which will benefit everyone, i.e. the disinterested individual's conception of the common good. Leaving aside

the whole fictitious nature of this 'original position', it is necessary to question the underlying assumption that what would be judged prudent in these hypothetical circumstances will eventually coincide with what people in actual societies will regard as just. Moreover, the 'veil of ignorance' introduces needless complexities into what is no more than the simple requirement of impartial judgment.

The Basic Principles of Justice are generalised means of securing certain generalised wants, 'primary social goods', comprising what is styled the 'thin theory of the good', i.e. maximisation of the minimum (as opposed to a 'full theory'). These primary social goods include basic liberties, opportunity, power and a minimum of wealth. The *First Principle* of Justice is: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'. The basic liberties include equal liberty of thought and conscience, equal participation in political decision-making and the rule of law which safeguards the person and his self-respect. The *Second Principle* is: 'Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. The 'just savings principle' is designed to secure justice between generations and is described as follows. 'Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation'. With the aid of these Principles Professor Rawls seeks to establish a just basic structure. There has to be a Constitutional convention to settle a Constitution and procedures that are most likely to lead to a just and effective order; next comes legislation; and lastly the application of rules to particular cases. In this way it is claimed that the Basic Principles will yield a just arrangement of social and economic institutions.

Many criticisms have been levelled at various aspects of Professor Rawls's philosophic methods and economics into which it is unnecessary to enter. One attack, launched by more than one critic, has been to question whether his conclusions follow from his 'original position'. For instance, distribution of goods is said to follow need, not merit. How does the 'original position' yield this? Again, would people in this position necessarily choose liberty? Professor Rawls does not specify any particular period in history, so that people may find themselves in a time when there is need for power rather than liberty, or, as one critic suggests, the need may be for food in a time of famine rather than liberty. The answer to the last point might be that, as Professor Rawls says elsewhere, liberty is to have priority only *after* a certain point; but this raises another difficulty with regard to his priority principle, as will appear. Even so, when looked at from an economic or philosophical point of view, it is not easy to see how the balance between liberty and needs follows from the 'original position'. Indeed, the 'veil of ignorance' is so restrictive that one wonders how people in that carefully defined state of nescience could arrive at any of the Rawlsian conclusions. Although they are supposed to know general psychology and social science, they are ignorant of the stage of development of their society; what is not clear is whether people in a primitive state of development are supposed to possess the sophisticated psychological and social scientific knowledge of modern people. The insistence on excluding motivations of self-

interest as well as knowledge of the state of society is designed to make the choice disinterested, but nonetheless it remains personal. It has been pointed out that the fact that something is good for the individual does not imply that it will, therefore, be good for society. Thus, the benefit to an individual of being able to exercise a liberty may be lost to him if it were enjoyed by all. If, then, the Basic Principles do not necessarily follow from the 'original position', their ultimate acceptance (if, indeed, they do come to be accepted) must derive from their intrinsic moral appeal rather than reason. Thus, the fact that particular principles may have been thought suitable in an 'original position' of limited knowledge and uncertainty is no basis for continuing to impose them later in the face of change conditions and fuller knowledge. If it is contended that people would have chosen the principles anyway even in the light of later knowledge, this can only happen because they are thought to be just *per se*. The 'original position' then becomes irrelevant. All this shows that the concept of the 'original position' and the 'veil of ignorance' and what it covers and does not cover only provide a semblance of justification for reaching certain desired conclusions.

An objection to intuitionism is, as Professor Rawls points out, that it gives no guidance in choosing between conflicting principles. To meet this difficulty he offers certain "Principles of Priority". Such priority is 'lexical', i.e. the first has to be fully satisfied before the second falls to be considered. The *First Priority Rule* is the priority of liberty: 'liberty can be restricted only for the sake of liberty'. He continues: '(a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those with the lesser liberty'. The *Second priority Rule* is the lexical priority of justice over efficiency and welfare: '(a) an inequality of opportunity must enhance the opportunity of those with the lesser opportunity; (b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship'. These principles, in effect, ensure that as between liberty and need, liberty prevails; as between need and utility, need prevails; and as between liberty and utility, liberty prevails.

An objection to the lexical priority of liberty is that if equal liberty is accorded such priority, then anything involving unequal liberty can never fall to be considered since the former has to be fully satisfied before one passes to something else. More seriously, Professor Rawls concedes that liberty is to be given this kind of priority only *after* certain basic wants are satisfied; but if liberty is not prior to needs all the time, lexical priority becomes meaningless.

With reference to the individual, Professor Rawls contends that reason yields principles of natural duties and fairness. The former include the duty to uphold just institutions, to help in establishing just arrangements, to render mutual aid and respect, not to injure or harm the innocent. The fairness principle gives rise to obligations, including promises; and in connection with fairness he strikes a topical note when discussing civil disobedience. The principle is that one should play one's part as specified by the rules of the institution as long as one accepts its benefits ('fair-play'), and provided the institution itself is just, or at least nearly just, as judged by the two Basic Principles of Justice. Civil disobedience is said to be justified when 'substantial injustice' occurs, all other methods of obtaining redress fail and disobedience inflicts no injury on the innocent. In these circumstances disobedience is an appeal to the society's sense of justice, which, it is said, is evidenced by the reluctance of the

community to deal with it. This is hardly in accord with observed facts; it is more realistic to say that such reluctance is rooted more often than not in apathy and even fear, no matter how strongly people may condemn the disobedience.

In the result it would seem that Professor Rawls has not succeeded in showing how his principles, desirable as they may be, derive from reason. Leaving that aside, however, it should be noted that the thrust of his theory is for stability, especially in Part Three of his book where he deals with objectives, and in his emphasis on obedience grounded in fair-play.

Law is only one institution of social justice in Professor Rawls's scheme. Professors Clarence Morris and Jerome Hall make it their exclusive concern, which makes their theories less extensive in scope.

LON L. FULLER, THE MORALITY OF LAW[‡]

Legal Morality and Natural Law

What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as “the enterprise of subjecting human conduct to the governance of rules.” These natural laws have nothing to do with any “brooding omnipresence in the skies.” Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God’s law. They remain entirely terrestrial in origin and application.

Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man’s moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women. If the question be raised whether any of these subjects, or others like them, should be taken as objects of legislation, that question relates to what I have called the external morality of law.

As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding the word “procedural” should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term “procedural” is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be. In the actual history of legal and political thinking what association do we *find* between the principles I have expounded in my second chapter and the doctrine of natural law? Do those principles form an integral part of the natural law tradition? Are they invariably rejected by the positivist thinkers who oppose that tradition? No simple answer to these questions is possible.

The Consequences of Failure

The attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the

[‡] Lon L. Fuller, *The Morality of Law*, 40, 96-117, 184-86 (1949, Indian reprint 2006).

rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration. A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract. (pp.38-39)

The citizen's predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality. A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retrospective legislation that no law is immune to change ex post facto if it suits the convenience of those in power.

In supporting the power of the judiciary to declare acts of Congress unconstitutional Hamilton pointed out that the judiciary can never be entirely passive toward legislation; even in the absence of a written constitution judges are compelled, for example, to develop some rule for dealing with contradictory enactments, this rule being derived not "from any positive law, but from the nature and reason of the thing." A continuing debate in this country relates to the question whether in interpreting the Constitution the courts should be influenced by considerations drawn from "natural law." I suggest that this debate might contribute more to a clarification of issues if a distinction were taken between a natural law of substantive ends and a natural law concerned with procedures and institutions. It should be confessed, however, that the term "natural law" has been so misused on all sides that it is difficult to recapture a dispassionate attitude toward it.

What is perfectly clear is that many of the provisions of the Constitution have the quality I have described as that of being blunt and incomplete. This means that in one way or another their meaning must be tilled out. Surely those whose fate in any degree hinges on the creative act of interpretation by which this meaning is supplied, as well as those who face the responsibility of the interpretation itself, must wish that it should proceed on the most secure footing that can be obtained, that it should be grounded insofar as possible in the necessities of democratic government and of human nature itself. I suggest that this ideal lies most nearly within our reach in the area of constitutional law concerned with what I have called the internal morality of the law. Within this area, interpretation can often depart widely from the explicit words of the Constitution and yet rest secure in the conviction that it is faithful to an intention implicit in the whole structure of our government

Legal Morality and the Concept of Positive Law

Our next task is to bring the view of law implicit in these chapters into its proper relation with current definitions of positive law. The only formula that might be called a definition of *law* offered in these writings is by now thoroughly familiar: law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort. Let us compare the implications of such a view with others that might be opposed to it.

Most theories of law either explicitly assert, or tacitly assume, that a distinguishing mark of law consists in the use of coercion or force. That distinguishing mark is not recognized in this volume. In this respect the concept of law I have defended contradicts the following definition, proposed by an anthropologist seeking to identify the distinctive “legal” element among the various forms of social order that make up a primitive society: “for working purposes law may be defined in these terms: A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.”

The notion that its authorization to use physical force can serve to identify law and to distinguish it from other social phenomena is a very common one in modern writings. In my opinion it has done great harm to clarity of thought about the functions performed by law. It will be well to ask how this identification came about.

In the first place, given the facts of human nature, it is perfectly obvious that a system of legal rules may lose its efficacy if it permits itself to be challenged by lawless violence. Sometimes violence can only be restrained by violence. Hence it is quite predictable that there must normally be in society some mechanism ready to apply force in support of law in case it is needed. But this in no sense justifies treating the use or potential use of force as the identifying characteristic of law. These considerations explain, but do not justify, the modern tendency to see physical force as the identifying mark of law.

In summary of the view I have advanced I may repeat that I have tried to see law as a purposive activity, typically attended by certain difficulties that it must surmount if it is to succeed in attaining its ends. Again, the distinguishing mark of law is said to lie in a means, namely “force,” that is typically employed to effectuate its aims. There is no recognition that, except as it makes the stakes higher, the use or nonuse of force leaves unchanged the essential problems of those who make and administer the laws. Finally, there are theories that concentrate on the hierarchic structure that is commonly thought to organize and direct the activity I have called law, though again without recognizing that this structure is itself a product of the activity it is thought to put in order.

The Minimum Content of a Substantive Natural Law

In his *Concept of Law* H.L.A. Hart presents what he calls “the minimum content of natural law” (pp. 189-95). Starting with the single objective of human survival, conceived as operating within certain externally imposed conditions, Hart derives, by a process I would describe as purposive implication, a fairly comprehensive set of rules that may be called those of natural law. What is expounded in his interesting discussion is a kind of minimum morality of duty. Like every morality of duty with minimum natural law says nothing about the question, who shall be included in the community which accepts and seeks to realize cooperatively the shared objective of survival? In short, who shall survive? No attempt is made to answer this question. Hart simply observes that “our concern is with social arrangements for continued existence, not with those of a suicide club.” In justifying his starting point of survival Hart advances two kinds of reasons. One amounts to saying that

survival is a necessary Condition for every other human achievement and satisfaction. With this proposition there can be no quarrel.

But in addition to treating survival as a precondition for every other human good, Hart advances a second set of reasons for his starting point—reasons of a very different order. He asserts that men have properly seen that in “the modest aim of survival” lies “the central indisputable element which gives empirical good sense to the terminology of Natural Law.” He asserts further that in the teleological elements that run through all moral and legal thinking there is “the tacit assumption that the proper end of human activity is survival.” He observes that “an overwhelming majority of men do wish to live, even at the cost of hideous misery.” In making these assertions Hart is, I submit, treading more dubious ground. For he is no longer claiming for survival that it is a necessary condition for the achievement of other ends, but seems to be saying that it furnishes the core and central element of all human striving. This, I think, cannot be accepted. As for the proposition that the overwhelming majority of men wish to survive even at the cost of hideous misery, this seems to me of doubtful truth. If it were true, I question whether it would have any particular relevance to moral theory.

Hart’s search for a “central indisputable element” in human striving raises the question whether in fact this search can be successful. I believe that if we were forced to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows.

In the first place - staying within the limits of Hart’s own argument has been able to survive up to now because of his capacity for communication. In competition with other creatures, often more powerful than he and sometimes gifted with keener senses, man has so far been the victor. His victory has come about because he can acquire and transmit knowledge and because he can consciously and deliberately effect a coordination of effort with other human beings. If in the future man succeeds in surviving his own powers of self-destruction, it will be because he can communicate and reach understanding with his fellows. Finally, I doubt if most of us would regard as desirable survival into a kind of vegetable existence in which we could make no meaningful contact with other human beings. Communication is something more than a means of staying alive. It is a way of being alive. It is through communication that we inherit the achievements of past human effort. The possibility of communication can reconcile us to the thought of death by assuring us that what we achieve will enrich the lives of those to come. How and when we accomplish communication with one another can expand or contract the boundaries of life itself. In the words of Wittgenstein, “The limits of my language are the limits of my world.”

THE END