V

LAW AS THE UNION OF PRIMARY AND SECONDARY RULES

1. A FRESH START

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

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

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

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

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

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

2. THE IDEA OF OBLIGATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of private individuals having rights correlative to the obligations.

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

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

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

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

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

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

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

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

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

3. THE ELEMENTS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI

THE FOUNDATIONS OF A LEGAL SYSTEM

1. RULE OF RECOGNITION AND LEGAL VALIDITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. NEW QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. THE PATHOLOGY OF A LEGAL SYSTEM

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] [1952] 1 TLR 1245.

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

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