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

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

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

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 half-way stages between birth and normal, independent existence and, again, between that and death, put out of joint our familiar ways of describing legal phenomena. They are worth our study because, baffling as they are, they throw into relief the full complexity of what we take for granted when, in the normal case, we make the confident and true assertion that in a given country a legal system exists.

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

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

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

exist in a social group which has a legal system. This amounts to replacing the simple conception that the bulk of society habitually obey the law with the conception that they must generally share, accept, or regard as binding the ultimate rule of recognition specifying the criteria in terms of which the validity of laws are ultimately assessed. Of course we can imagine, as we have done in Chapter III, a simple society where knowledge and understanding of the sources of law are widely diffused. There the 'constitution' was so simple that no fiction would be involved in attributing knowledge and acceptance of it to the ordinary citizen as well as to the officials and lawyers. In the simple world of Rex I we might well say that there was more than mere habitual obedience by the bulk of the population to his word. There it might well be the case that both they and the officials of the system 'accepted', in the same explicit, conscious way, a rule of recognition specifying Rex's word as the criterion of valid law for the whole society, though subjects and officials would have different roles to play and different relationships to the rules of law identified by this criterion. To insist that this state of affairs, imaginable in a simple society, always or usually exists in a complex modern state would be to insist on a fiction. Here surely the reality of the situation is that a 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.