THE CONCEPT OF LAW

SECOND EDITION

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CLARENDON PRESS · OXFORD

IV

SOVEREIGN AND SUBJECT

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

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

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

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

1. THE HABIT OF OBEDIENCE AND THE CONTINUITY OF LAW

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

[1] See p. 19 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. THE PERSISTENCE OF LAW

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

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

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

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

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

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

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

[1] *Leviathan*, chap. xxvi.

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

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

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

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

[1] See pp. 136–47 below.

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

3. LEGAL LIMITATIONS ON LEGISLATIVE POWER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fourthly, we must distinguish between a legally unlimited

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

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

4. THE SOVEREIGN BEHIND THE LEGISLATURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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