in the State of Queensland. Section 291 of the *Criminal Code* prohibits unlawful killing unless it is authorised, justified or excused by law. Authorisations, justifications and excuses for killing are found in other parts of the Code and in other laws. Section 302 sets out the circumstances when killing is murder. Section 305 prescribes life imprisonment for murder. The *Supreme Court Act* empowers the Supreme Court to conduct trials of persons charged with murder. Thus, the law prohibiting murder is made up of provisions in many statutes. The law draws its components from several different statutes.

Bentham's contempt for the common law

Bentham's definition of law is stipulative. It identifies law exclusively with legislation enacted by a sovereign, although by his own admission that was not the common understanding of his time. Bentham embraced this definition for the utilitarian reason that it would produce greater happiness of the greater number.

Bentham argued that customary law and the common law lacked the 'signs of law'. A law, in Bentham's view, is known beforehand. It must set a standard by which conduct of people can be judged by courts to be legal or illegal. Adjudication is primarily a process of deduction from established law and found facts. Bentham saw in customary and common law the opposite process. The court determines whether an act is legal or illegal and people infer a rule of conduct from the court's decision. The rule is drawn inductively from the observation of what courts actually do. The law in its legislative form applies generally, whereas a judicial order binds only the parties. Bentham concluded that customary laws 'are nothing but so many autocratic acts or orders, which in virtue of the more extensive interpretation which the people are disposed to put upon them, have somewhat of the effect of general laws' (1970a, 158). He likened the common law process to the old Turkish practice of hanging a baker who was caught selling under-weight bread. The silent act of hanging had the desired effect on cheats. Bentham wrote: 'Written law is the law for civilised nations; traditionary law, for barbarians; customary law, for brutes' (1970a, 159).

Bentham was conscious that customary law and common law cannot be eliminated from a legal system without the comprehensive codification of all branches of the law. He pursued the cause of codification with passion and industry, producing three major works on the subject: *Papers relative to codification and public instruction* (1817), *Codification proposal, addressed to all nations professing liberal opinions* (1822–30) and *First lines of a proposed code of law for any nation compleat and rationalised* (1820–22). These have recently been consolidated in one volume (Bentham 1998).

History shows that Bentham failed in his mission, within his own country and in other parts of the English-speaking world. Bentham did not inspire the codes of civil law countries, as they pre-dated his writings. The civil law codes have their origins in the French Civil Code (*Code civil des Français*) enacted by Napoleon I in 1804. The failure of the codification movement in England is not

surprising. Bentham misconceived the nature of English common law. Common law, contrary to Bentham's hyperbole, provided guidance for conduct for both the people and the courts. The common law courts did not create the common law willy-nilly. In the large majority of cases, the courts enforced a known rule, articulated in precedents and followed in practice by most people. The common law possessed a virtue that Bentham simply failed to notice. It was the capacity for incremental legal change to reflect social evolution – something that a legislative process riddled with factional conflict lacks. In England, the common law was regarded not just as law but as a system of law that was the product of English genius. On Bentham's own greatest happiness principle, the English common law has done rather well in upholding the legitimate expectations of the people.

John Austin's command theory of law

In 1832, 50 years after Bentham's *Of Laws in General* was completed, John Austin published *The Province of Jurisprudence Determined* (1995 (1832)). In 1819 Austin moved to London from Suffolk with his family and became a neighbour of Bentham and James Mill, the pioneers of utilitarianism. He became a close friend of Bentham, whose thinking shaped his jurisprudence. *Province of Jurisprudence* contains the first 10 of the series of lectures on jurisprudence that Austin delivered at the University of London from 1829 to 1833. The lectures were not popular and had to be discontinued because of falling attendance. The published version, though, became the most influential text in English jurisprudence for more than 100 years.

Austin, like Hobbes and Bentham before him, embraced the idea of law as sovereign command. Like Bentham, he acknowledged that the term 'law' means different things to different people, but he argued that we would all be better off if we learned to distinguish between different kinds of laws. Austin was by no means Bentham's intellectual clone and we must note the important differences between them. Austin's work came under the most searching scrutiny in the latter part of the 20th century. His theory of law was dissected and heavily criticised by scholars within and outside the legal positivist tradition. Many of the criticisms are well made but it is evident that even the sternest critics, Hart and Kelsen, owed significant debts to Austin in their own work.

Austin's utilitarianism

The principle of utility was, for Bentham, the only basis of moral judgment. Bentham's moral theory was wholly materialistic. He argued that God's will is unknowable and what can be gathered from the scriptures is only 'that which is presumed to be his will on account of the conformity of its dictates to those of some other principle' (1970b, 31). Thus, Bentham rejected the notion that the

scriptures were a source of law. Conversely, Austin regarded the law of God as revealed in the scriptures to be a primary source of moral rules. He accorded to these laws the status of 'laws properly so called' (1995, 38). Austin thought, as Aquinas did, that there is a part of the law of God that is unrevealed and must be discovered through reason. As God wills the greatest happiness of all his creatures, reason leads us to the principle of utility. Austin wrote: 'From the probable effects of our actions on the greatest happiness of all, or from the tendencies of human actions to increase or diminish that aggregate, we may infer the laws which he has given, but has not expressed or revealed' (1995, 41). Austin devoted his Fourth Lecture to the defence of his thesis that utility is the index to the discovery of divine pleasure.

Austin, like Bentham, reasoned that aggregate happiness is served by identifying the law with sovereign will. However, he was unwilling to exclude from the category of 'law' the moral dictates of the scriptures. Hence, he created a sub-set of 'laws properly so called' – named 'positive law' – to signify laws made by the sovereign and its delegates. Positive law, Austin determined arbitrarily, is the only concern of jurisprudence. Positive law or 'the law simply and strictly so called' is the 'law set by political superiors to political inferiors' (Austin 1995, 18). The revealed law of God is the subject of theology.

Austin, unlike Kelsen later, did not set up a science of law that banished the history, philosophy and sociology of law to other disciplines. However, in limiting its province to sovereign law he sought, unsuccessfully, to remove from jurisprudence the study of customary law, international law and natural law.

Austin's respect for the common law

Austin's other major disagreement with Bentham concerned the role and worth of the common law. He did not share Bentham's disdain for the common law, although he agreed with Bentham that judges are the mere agents of the sovereign, authorised to adjudicate disputes and to supply a rule where one is needed. In Bentham's ideal world the law is fully codified and the courts have no role in legal development. Austin's utilitarianism led him to the opposite conclusion: that judicial law making is not only inevitable but is also an unambiguous public good. His complaint about the judiciary was not that they legislated but that they legislated too cautiously. In his pointed criticism of Bentham, Austin wrote:

> I cannot understand how any person who has considered the subject can suppose that society could possibly go on if judges had not legislated, or that there is any danger whatsoever in allowing that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature. (1995, 163)

Austin rightly rejected the robotic view of the judicial function. The world is simply too complex and dynamic for the law to be exclusively the product of a legislature whose members are preoccupied with immediate affairs of state and electoral politics. Questions arise in courts before legislatures are seized of them, and judges cannot refuse to judge for want of legislative direction. Moreover, as discussed presently, the language by which statutes lay down the law is open-textured and their application in cases at the margins (penumbral cases) depends on judicial choice. Only legislation of infinite and self-defeating complexity can possibly create a robotic judge. Even in civil law systems, where the law is extensively codified and the Code is pre-eminent, there is a need for judicially established principles (*jurisprudence constante*). The more important question concerns the limits of judicial discretion. Judges cannot legislate at will without destroying public confidence in the courts, and thereby their political and moral authority. Courts that defeat legitimate expectations of litigants, formed in reliance on legislation, common law and custom, are unlikely to retain the fidelity of the community that they are meant to serve. I return to this issue at many points in this book.

Austin's taxonomy

Austin sought to isolate what he thought was the proper subject of jurisprudence through painstaking classification of all that answers to the name 'law'. This includes – in addition to the laws of the political sovereign – divine law, moral laws, customary laws, laws of private associations, laws of households, and international law. Only some of these, according to Austin, are 'laws properly so called'. The criterion for a law to be 'properly so called' is that it derives from authority. The others are laws by analogy – laws only in the figurative sense. They resemble proper laws to varying degrees but are merely the opinions of persons as to what ought or ought not to be done.

Laws properly so called and positive law

Proper laws derive from authority, and there are two kinds of authority in Austin's legal universe: the authority of the Christian scriptures and the authority of the political superior. The scriptures are the source of the divine law – that which is set by God for his creatures. The political superior is the direct or circuitous source of human law properly so called, which Austin termed 'positive law'. Austin excluded the unrevealed part of the law of God from the class of laws properly so called, because it is founded on opinion and not text. He was not troubled by the fact that the meaning of scriptures is also often a matter of opinion that historically has divided the faithful. Austin considered the positive law to be the exclusive concern of jurisprudence, and the laws of God as the subject of theology (1995, 109).

As already mentioned, the common law, according to Austin, is law made by sovereigns through their delegates, the judges. Sovereign commands may be express or tacit. Sovereigns can change the common law at will but often allow it to stand during their pleasure. Austin wrote: 'Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are tacit commands of the sovereign legislature' (1995, 36). Elsewhere he stated that the sovereign is 'the author of the measureless system of judge-made rules of law, or rules of law made in the judicial manner, which has been established covertly by subordinate tribunals as directly exercising their judicial functions' (1995, 199). I discuss the fictional nature of this proposition later.

In his Fifth Lecture, Austin introduced a further subdivision of positive law. He distinguished laws set directly by the political superior or sovereign from laws set by private citizens in pursuance of their legal rights. The laws set directly by the sovereign include laws made by authorised officials or 'subordinate political superiors' such as ministers, judges and other agents of the state. As to laws made by private citizens in pursuance of their legal rights, Austin gave the examples of rules made by guardians for their wards and by slave owners for their slaves. The provisions in the will of a testator and the rules of a corporation would also be of this kind. The testator and the corporation are not agents of the state. However, since all legal rights are established by laws of the sovereign, the ultimate source of these private laws remains the sovereign. Austin's legal universe takes roughly the form shown in Figure 2.3.

Laws improperly so called

In Austin's theory, not all norms are proper laws, but only those that have been authoritatively established by God or by the sovereign. There are many kinds of law improperly so called. The common denominator of this class is that they are based on opinion and not authority. They resemble proper laws to varying degrees. Austin made a broad distinction within laws improperly so called. Some of them resemble proper laws closely and are called laws with reason. Others are only remotely analogous and are called law by 'caprice of the fancy' (Austin 1995, 108). They are laws only in the figurative sense. Austin termed the former 'laws by analogy' and the latter 'laws by metaphor'.

The kind most remote from proper law are the laws of science, which in Austin's lexicon are laws by metaphor. They do not command anything to be done or not done, but predict the effects of physical causes (Austin 1995, 149). They are called laws because they resemble proper laws whose commands usually are obeyed. (It should be mentioned that scientists take the opposite view: that their laws are the true laws as they predict cause and effect with certainty, whereas the laws of the legal system are imitations as their consequences are less certain.)

Laws by analogy are, in Austin's taxonomy, not law but positive morality. This class includes non-obligatory rules of social etiquette, household rules and moral rules. It also encompasses customary law, international law and constitutional

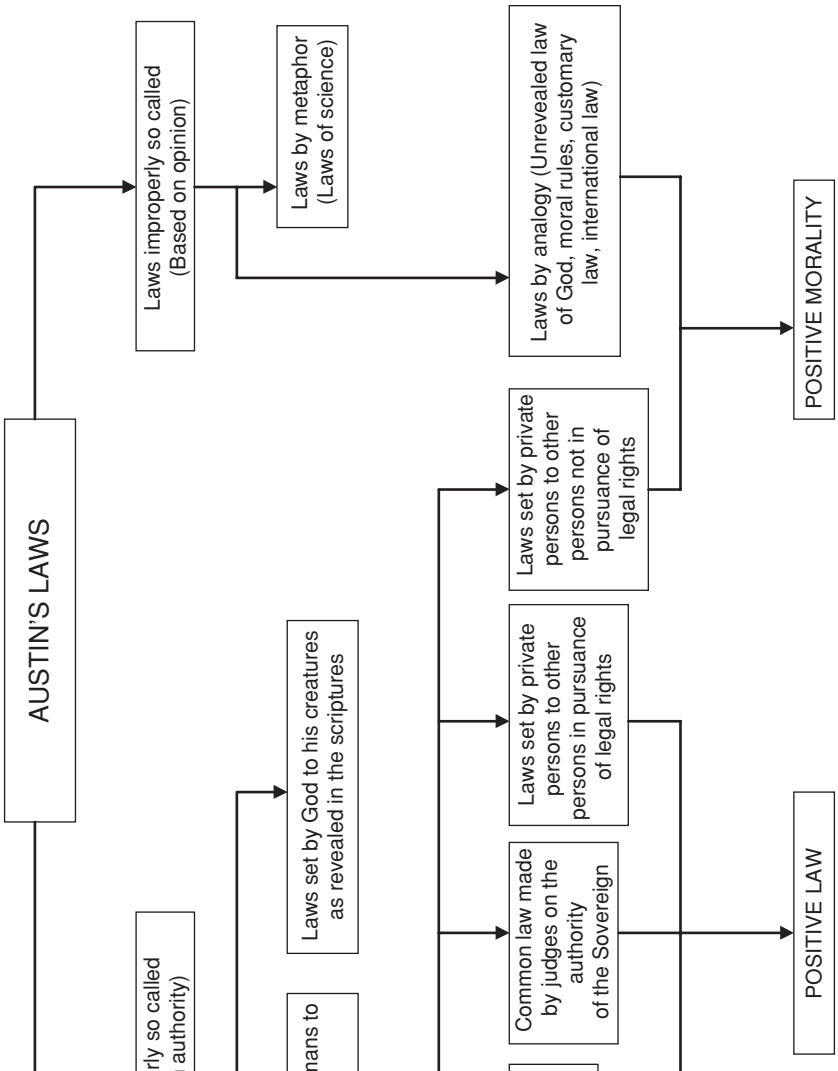

Figure 2.3 Austin's laws

law, which are considered to be binding according to general opinion. Austin recognised that customary law comprises rules that are spontaneously adopted by a community whose members live by them, and that their effect may be identical to that of positive law. Yet these rules do not fit within his category of 'laws properly so called', because they derive their force not from sovereign or divine command and sanction but from opinion and fear of social disapproval. Hence, they remain positive morality until transformed into legal rules by legislation or judicial recognition.

The law of nations (international law) is consigned to positive morality, as it does not flow from the will of a sovereign but 'consists of opinions and sentiments current among nations' (Austin 1995, 124). Austin thought that the great pioneers in international law such as Hugo Grotius and Samuel von Pufendorf confused the practice of nations (positive international morality) with their own ideal of a law of nations (1995, 160). What about treaties by which nations accept obligations towards other nations? These obligations depend once again on a custom – that treaties should be honoured in good faith (*pacta sunt servanda*).

The stipulative nature of Austin's taxonomy is palpable when we consider the role of customary law. Sometimes a custom is so useful and valued in society that it demands recognition as positive law. Sometimes a custom that has outlived its social utility may be so entrenched that it can only be extinguished by positive law. Austin acknowledged that a customary law (whether domestic or international) may have the same practical effect as a positive sovereign law (1995, 125–6). But in his legal universe it is not positive law, because it does not flow from the will of a determinate sovereign. No political sovereign, no law. Hence, international law, in Austin's lexicon, can become positive law only under a global empire whose rulers command the obedience of all subordinate states.

Austin's positive law

Positive law, according to Austin, comprises the commands of a political sovereign supported by sanctions on those who disobey. There are three key elements of this concept of law: (1) a political sovereign, (2) command, and (3) sanction. In Austin's theory a society that does not have a political sovereign does not have law in the strict sense of positive law. It will have what Austin termed 'laws improperly so called' or positive morality. Austin regarded the political sovereign as a necessary feature of an independent political society. Where there is no sovereign, there is no independent political society, and *vice versa*. Later positivists have found all these elements wanting, in reason and fact.

Sovereign

Austin wrote:

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

> superior, receive habitual obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. (1995, 166)

According to this description a sovereign possesses five essential attributes.

1. The sovereign is a determinate human superior

The sovereign, according to Austin, is a determinate human superior. It may consist of a single person, as in an absolute monarchy, or a group of persons, such as the Crown, Lords and Commons in the United Kingdom. In every case, one or many, the persons who make up the sovereign must be identifiable. This is one of the main reasons for Austin's view that customary law is not positive law. Customary law is the product of generally held opinion of an indeterminate community of persons. The persons who create customary law and the persons who are obliged by customary law are to a large extent the same individuals.

The sovereign must not only be determinate, it must be human. The law of God as revealed in the scriptures, according to Austin, is law properly so called but is not positive law, as it is not promulgated by a human superior.

2. The bulk of the people habitually obey the sovereign

This is common sense. It is an indispensable condition of a stable and functioning society that its rules are observed by most of the members most of the time. Widespread disobedience of the law usually means that political authority and the legal system have become ineffective. Such a state, according to Austin, is the state of nature. What is the position when the society is torn by civil war? Austin's answer is simple. If each warring section of the society habitually obeys its own separate political superior, the original society is no longer one but two independent societies. This is usually the case during secessionist wars where a region asserts its independence from the rest of the country. During the American Civil War (1861–65) the United States divided into two nations – the Union and the Confederacy. If, during civil strife, no person or body commands habitual obedience of any part of the country, there is a state of nature or anarchy (Austin 1995, 169). This is likely to happen when there is an attempt to overthrow a legal regime by violence and a struggle for supremacy follows. There is no Austinian positive law until the supremacy of one faction or the other is established.

3. The sovereign is not in the habit of obedience to any other human superior

The monarch of a kingdom within an empire, or the government of a state or province within a federation, will not be sovereign, according to Austin's definition, because its authority is subject to the will of a superior. Bentham did not insist on this element.

4. The sovereign's power cannot be legally limited

It cannot be limited by positive law, although it may be constrained by positive morality. Austin maintained that constitutional rules are rules of positive morality that the sovereign may disregard. He thought that a legally limited sovereign was a contradiction in terms. His sovereign, by definition, has no superior. If a sovereign's power is limitable it is because there is a superior power that can impose limits. In that case the superior power is the real sovereign. Yet we know that political authority in some countries is effectively limited by constitutional provisions enforced in a variety of ways, including judicial review by courts having power to invalidate unconstitutional acts of the legislature and the executive. As Herbert Hart pointed out in his blistering criticism of the command theory of law, even the British sovereign (the Crown in Parliament) is constituted by the law, including the law of royal succession. Law is thus prior to sovereignty (Hart 1997, 54). The sovereign of the United Kingdom, the Crown in Parliament, has reconstituted itself on a number of occasions, most recently by the *House of Lords Act 1999*. Each change was brought about by an Act of Parliament that was enacted according to the existing law. Hart's point is that the search for a legally unlimited sovereign is doomed.

Austin also asserted that a sovereign cannot place legal limitations on itself or its successors. Any such limitation is merely a recommended principle or maxim (Austin 1995, 213). A sovereign, as defined by Austin, may abrogate or disregard any self-imposed limitation. If the limitation is binding, then the sovereign is not the sovereign but some other superior by whose will it is binding. This is a much more interesting question in constitutional law and theory.

In the 19th century, the British Parliament enacted the Constitution Acts that created a legislature in each of the Australian colonies. The legislatures were given power to make law generally for the peace, order and good government of the colonies. They were not sovereign legislatures, as they remained subject to the laws of the Imperial Parliament. In 1865 the Imperial Parliament enacted the *Colonial Laws Validity Act*. Section 5 of that Act allowed the colonial legislatures a measure of power to impose procedural limitations in relation to a defined class of laws. Yet highly respected judicial opinions in Australia have asserted that, irrespective of the 1865 Act, the power to make law generally includes the power to diminish that power (*Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 418, 428; *Clayton v Heffron* (1960) 105 CLR 214 at 250). The ultimate test of this theory must be in relation to the British sovereign, the Crown in Parliament, which is the epitome of the Austinian sovereign if ever there was one. Can the Crown in Parliament limit its own power or reconstitute itself?

The question arose in *Jackson v HM Attorney-General (Fox Hunting Case)* [2005] 3 WLR 733. Lord Steyn and Baroness Hale of Richmond answered in the affirmative. The facts were as follows. The Crown, Lords and Commons acting as Crown in Parliament passed the *Parliament Act 1911*, which removed the power of the House of Lords to reject money bills and reduced its power to reject other

bills. Under this Act, the House of Lords could delay general legislation for two years, after which the Crown and the House of Commons (Crown in Commons) might enact the bill without the Lords' consent. In other words, Parliament was redefined as Crown in Commons for certain purposes. This is impossible in Austinian theory, unless Crown in Commons is regarded as a subordinate agent of Crown in Parliament. In 1949, Crown in Commons acting under the 1911 Act enacted the *Parliament Act 1949* to reduce further the power of the Lords. The *Parliament Act 1949* thus amended the *Parliament Act 1911*. According to the 1949 Act, the Lords' competence to resist a bill ended after one year. The *Hunting Act 2004* (which banned fox hunting with hounds) was passed by the Crown in Parliament under the procedure set by the *Parliament Act 1949*, against the wishes of the Lords. If the 1949 Act was invalid, so too would be the *Hunting Act 2004*. The appellants, who were a group of fox hunters, argued, as Austin would have, that the Crown in Commons was a subordinate body created by the sovereign, which is the Crown in Parliament, and that the 1911 Act could only have been amended by the triumvirate of Crown, Lords and Commons. The argument failed. During the course of his judgment Lord Steyn stated:

> But apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded. (761)

Baroness Hale of Richmond agreed, saying that '[if] Parliament can do anything, there is no reason why Parliament should not decide to re-design itself, either in general or for a particular purpose' (783).

How would Austin respond if he was with us? He might say that the judges simply got it wrong, since the sovereign cannot legally limit its power by reconstituting itself, or otherwise. Alternatively, he might say that the true sovereign, the Crown in Parliament, remains sovereign because it can repeal the 1949 Act. If this is not possible, he might argue that the judiciary, the Commons and Crown colluded to perpetrate a political revolution by which Crown in Commons was installed as the political superior. This was a key argument that the Attorney-General advanced in defence of the 1949 Act. Three of their Lordships conceded as much when they observed that the validity of the 1949 Act had been politically accepted by all parties for more than half a century (Lord Bingham of Cornhill at 750; Lord Nicholls of Birkenhead at 757; Lord Hope of Craighead at 773). Revolution or not, the decision has confirmed that the *Parliament Act 1949* is binding on the Crown in Parliament, the alleged sovereign of Britain.

5. Sovereignty is indivisible

The final attribute of Austin's sovereign is indivisibility: according to him, the notion of a divided sovereign is absurd. However, in many modern states power is divided among the legislative, executive and judicial branches of government.

Power is also divided territorially in the case of federations. There is much overlap and power sharing among the branches, and under the constitutions of many countries no one branch appears supreme. But not so in Austin's view. In Austinian theory judicial and executive actions are simply different ways of executing sovereign commands. Officials and judges are mere delegates or ministers of the ultimate law making body, the legislature. This is not the reality in countries where there are written constitutions and where courts have full powers of judicial review. The United States Supreme Court can and does invalidate federal or state law that in its opinion offends the Constitution. This does not make the Supreme Court the political superior. The Supreme Court cannot assert its power of review except on the application of a person with standing. Congress and the Executive can also interpret the Supreme Court's rulings. The system is one of political checks and balances, and it is hard to see an Austinian sovereign in the United States.

What of federations, where power is distributed between a central government and regional units and neither the regions nor the centre is the political superior? It is silly to suggest that great federations like the United States, Australia, Canada, Germany and Switzerland are for this reason lawless. Austin was seized of this problem, but could offer only a weak, though clever, response. The regional units and the federal government, Austin claimed, are jointly sovereign in each and every unit and in the federation (1995, 206). A regional unit is simultaneously a part of the sovereign (aggregate) body and a subordinate entity that is a delegate or minister of the federation. The will of the aggregate body is determined according to the federal compact and enforced by the courts of the units and the federal state. This is a painful fictionalisation of the actual workings of a federation such as the United States or the Commonwealth of Australia. Austin was saying that in a federation the sovereign is the constituent body, the body competent to change the constitution. If so, a federal sovereign rarely speaks, and when it does it speaks only about the constitutional compact. It is far more sensible to say that there is no Austinian sovereign at all in such federations, as the centre and the regions are without exception limited by the constitutional demarcation of powers. The dismissal of constitutional limitations as positive morality is another illustration of the stipulative nature of Austin's taxonomy.

The problem of the sovereign in representative democracy

Representative democracy complicates the task of identifying the sovereign. In some countries the legislators and ministers of state are directly or indirectly elected by enfranchised members of the society. In Austin's own country, England, the sovereign is the Crown in Parliament (Monarch, the Lords and Commons). The House of Commons is elected by those who have the right to vote at general elections. So are they part of the sovereign? Austin thought so. The members of the House of Commons are the delegates of those who elect them. Austin wrote: '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 king and the peers, with the electoral body of the commons' (1995, 194). Here is the problem. According to Austin, the sovereign cannot be both the commander and the commanded. If the sovereign is in the habit of obedience to the electorate, it is not the sovereign. At any rate, the electorate is the master of the most powerful component of the Crown in Parliament, the House of Commons, and thereby also installs the executive. Who, then, is the sovereign? It cannot be the electorate, as the electorate is the creature of Parliament, which has power to enfranchise or disenfranchise people. Our search for the sovereign in representative democracy ends in hopeless circularity.

Command, duty, sanction

Positive law, according to Austin, is produced by a sovereign's command. A command is not a request but an imperative that creates a duty by the presence of a sanction. A command involves: (1) a wish or desire conceived by a rational being that another rational being shall do or forbear; (2) an evil in case of noncompliance; and (3) intimation of the wish by words or other signs (Austin 1995, 24). A command cannot be separated from duty and sanction. They are aspects of a single event. Where there is a duty there is a command, and where there is a command there is a duty. In each case the duty arises from the existence of a sanction for breach.

Laws producing commands may be general, in the sense that they constitute rules of conduct applying to classes of persons or events. The rules of criminal law are general commands. They are impersonal and are not directed to particular individuals. Commands may also be occasional or particular. A command by which an individual's property is appropriated to the state is a particular command. In each case the command creates positive law.

Austin noted three kinds of commonly termed laws that are not imperative. These are not laws properly so called, but may be justifiably included within jurisprudence. (1) Declaratory laws do not create new duties but clarify or interpret existing legal relations. Austin conceded that imperative rules may be enacted under the guise of a declaration. (2) Laws to repeal law are not imperative commands. It should be noted that the repeal of some laws may create new duties or revive old ones. The repeal of a law exempting some part of a person's income from tax creates a liability to the tax. (3) Laws of imperfect obligation lay down rules without attaching a sanction for their breach (Austin 1995, 31–2). The statutory duty of the city council to keep the streets clean will fall within this category. It must be noted that laws that create rights and liberties in individuals are imperative, and hence, by Austin's definition, are laws properly so called. They are imperative because they create correlative duties on the part of another. Thus, a law that grants me the liberty to drive my car brings about a whole range of duties on the part of others to respect my liberty.

Law and morality

Austin distinguished positive law from positive morality. Positive morality is an aspect of morality generally. It is moral to be kind to fellow beings, to practise temperance, to give to charity and generally to be virtuous. These are moral *values* but not moral *rules*. In Austin's system, positive morality is made up of moral rules that resemble positive law. In every society, though, there are moral rules derived from moral values. Many rules of positive morality are co-extensive with rules of positive law. Rules against murder, rape, robbery, theft, and cheating are just a few obvious examples. What happens when a rule of positive law offends a rule of positive morality? We can give a legal answer or a political answer. In Austin's view, the legal answer is that positive law prevails. The political answer depends on how the conflict plays out in society. There are occasions when a rule of positive law is so obnoxious to the moral sense of the society that its enforcement is successfully resisted. In such instances the rule remains legally valid but is without practical effect.

Austin, unlike Bentham, was a man of faith and steadfastly maintained that the sovereign is bound to obey the divine law. This, though, is a moral duty and if the sovereign legislates against divine law it will nevertheless be law. Austin wrote: 'Now to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense' (1995, 158). Any other view is not only wrong but pernicious, as it can lead to anarchy (1995, 159).

Austin's achievement

Austin provided a taxonomy of things commonly called laws, and offered a definition of positive law as the true subject of jurisprudence. He gave no valid reason for so limiting the province of jurisprudence. In fact, his own *Lectures on Jurisprudence* was a treatise on the nature of all types of laws, including the law of God, customary law and international law. Despite the stipulative and often arbitrary nature of his definitions and classification, Austin's system sheds a great deal of light on the legal universe. The inaccuracies of his system are manifest and manifold and his casuistry is patent. But he presented a comprehensible model that offered 20th century legal positivists a clear set of ideas to adopt, criticise and refine.

Austin's theory, like those of Hobbes and Bentham, is ultimately a thesis in utilitarian moral philosophy. The utilitarian case for the rigid separation of law and morality rests on the belief that the object of knowing and improving the law is impeded by denying that bad laws are laws. Austin, like Bentham, sought to demystify the law, to make it more clear, certain and comprehensible. His contribution to this cause is undeniable. Austin was more insightful than Bentham in some respects. His recognition of the worth of judicial law making is an example. Austin consigned constitutional law, customary law and international law to the category of positive morality, but acknowledged their regulative force.

In Austin's scheme many rules of positive morality are the equals of positive law. So, does the name matter? As Shakespeare's Juliet said,

> What's in a name? that which we call a rose
> By any other name would smell as sweet ...

Herbert Hart's new beginning: the burial of the command concept of law

Herbert Lionel Adolphus Hart (1907–92) was Professor of Jurisprudence at the University of Oxford from 1952 to 1969. His work, particularly *The Concept of Law*, dominated British jurisprudence in the final decades of the 20th century. Legal positivism's critics were mostly those outside that tradition, until Hart arrived. Hart sought to rescue legal positivism from the factual and conceptual traps into which Bentham and Austin had led it. Like Bentham and Austin, Hart was a utilitarian in philosophical outlook, and like them he saw public benefit in separating law from rules of other kinds. But unlike Austin and Bentham, he realised that this cannot be done by identifying law exclusively with the commands of a sovereign. To do so is seriously to misunderstand the nature of law and the legal system. The command theory does not account for all the different kinds of rules that we justifiably call law.

The first part of Hart's book is a sustained criticism of the command theory. The command theory is premised on the existence of a sovereign commander whose power is unlimited and cannot be legally limited. Hart argued, correctly, that in many legal systems, including that of Britain, there is no such sovereign. The British sovereign is a creation of law, including the rules of royal succession. It is practically unreasonable to say that these rules are rules of morality but not law. The idea of law as a command that people obey because of the threat of sanction misses an important quality of law – the reflective acceptance of the law as binding by the people to whom it is directed. A person may compel another to obey a command by threatening evil, as when a robber demands my wallet by threatening to shoot me. But the robber is not making law but violating the law. Bentham and Austin would have agreed that the robber's command is not law because the robber is not the sovereign. Hart's answer is that a sovereign is no different from a robber if people obey their commands solely due to fear of sanction. It is misleading to understand law in this way.

Hart called his theory a version of soft positivism. It is 'soft' in two ways. First, it accepts that law may exist in society as a matter of practice and observance, even if it is not officially declared to be law. This is the practice thesis. Second, it accepts that the legal system may permit a court to apply a moral standard in resolving a case before it. This does not mean that morality trumps law, but only that the rules of recognition in the legal system allow the court discretion to take morality into account in identifying the law or in creating new law.

Rules and obligations

The key to understanding Hart's positivism is to appreciate the nature of obligation. There are occasions where we feel obliged to do or not do something, as when the robber threatens to shoot us if we don't hand over the money. However, it is very odd to say that we have an *obligation* in that situation. Hart argued that the concept of law as sovereign command backed by a threat overlooks the element of obligation that characterises law. We know that in some societies people are terrorised into obeying the commands of rulers. This is the robber situation writ large. Yet in normal society there are a vast number of rules that people observe, not because they fear retribution but because they think that it is right to do so. These rules are used by individuals to justify their actions, to make claims of right and to criticise the conduct of others. People count on these rules to be observed in going about their lives. This is an important insight. If most people do not voluntarily observe the law most of the time, there is something seriously the matter in society. Perhaps there is no society at all, as society is founded on shared rules of behaviour. This lack of observance is not the case in normal society. There are many laws that individuals do not like, but in viable societies most people will agree that the rules made according to certain accepted processes ought to be obeyed. Hence, a theory that identifies law solely with sovereign commands is flawed from the start.

The idea of a rule implies an obligation, but not all rules are thought to be obligatory. Rules of social etiquette and rules of grammar are rules. They are not just convergent habits but expected ways of doing things in a given society. But there may not be a sense of obligation attached to them. The sense of obligation arises from social pressure. The point at which a rule becomes a rule of obligation is uncertain, but the fact that it happens is not. There are degrees of social pressure. Where the pressure is generated by common hostility that produces feelings of guilt or shame but stops short of physical sanctions, we find moral rules imposing moral obligations. When the pressure takes the form of physical sanctions there is a primitive or rudimentary kind of law imposing legal obligations. The sanctions may be socially implemented even in the absence of a government. Ostracising, stigmatising and other forms of punishing existed in societies long before any kind of government was established. Obligation rules arise out of the common belief that they are necessary to maintain social life or a prized feature of it (Hart 1997, 87). They generally take the form of negative injunctions that limit the freedom of individuals for the common good: for example, thou shall not kill; thou shall not steal; thou shall not dishonour thy promises.

External and internal aspects of a legal rule

Hart argued that the appreciation of the sense of obligation allows us to perceive the internal aspects of a legal rule in addition to its external manifestation. He

claimed that the command theorists had lost sight of the internal aspect. The external aspect of a rule is its objective existence. The internal aspect of a rule reveals the sense of obligation to observe the rule. I may say: 'It is the law in the Kingdom of Saudi Arabia that persons must not consume alcohol'. I make a statement of observed fact and thereby capture the external aspect of the rule. However, I do not engage with the internal aspect of the rule as I do not have a sense of obligation to follow the rule. On the contrary, when I say that I have an obligation under Queensland law to observe speed limits when driving my car, I am not only stating the law as fact but I am expressing a sense of obligation not to drive faster than the speed limits. A person looking at a society from an extreme external point of view may only see regularities of behaviour. The proverbial Martian may conclude after observing a controlled intersection that vehicles are likely to stop when the red lamp lights up, and think no further about it. This is the extreme external point of view. A less extreme external point of view may make the Martian realise that the drivers of the vehicles accept the 'stop on red light' rule as binding. This is sometimes called the hermeneutic view. Drivers may see the rule from the fully internal point of view and may believe that they ought to stop at the red light even if there is no risk of an accident or of being arrested and punished. Hart conceded that often people do not accept a rule but follow it to avoid sanction, but observed that the challenge for the legal theorist 'is to remember both these points of view and not to define one of them out of existence' (1997, 91). He accused the proponents of the predictive theory of obligation of this very sin. Predictive theory, associated with the school of American realism (discussed in Chapter 4), rejects the notion of rules altogether and regards law as made up of predictions of what the courts actually do. According to predictive theory, the lawyer's task is to predict how a citizen's case will be decided by the court.

Neil MacCormick, another British positivist, noted that Hart's explanation of the internal point of view conflates two distinct points of view that need to be separated if we wish to understand accurately the concept of a rule. MacCormick accepted that the focus on the purely external aspect of a rule hopelessly distorts its nature. However, he pointed out that an inquiring external observer (unlike a robotic Martian) may understand that members of a society consider a rule as binding from a reflective internal point of view, although the observer may not have reason to accept the rule. I do not accept the rule that a person must not drink beer, but I can understand that most citizens of Saudi Arabia accept the rule willingly as worthy of observance. What I have is not an external point of view but a non-volitional *cognitively* internal point of view. In contrast, most Saudi Arabian citizens may accept the rule voluntarily and hence have a *volitionally* internal point of view. It is the shared volitionally internal point of view that gives rise to a rule (MacCormick 1979, 288–98). Raz also identified a third kind of viewpoint between the external and the internal. This is the detached viewpoint expressed in statements that lawyers and law teachers typically make in explaining the law on some matter (Raz 1979, 153). A person may use normative language without normative commitment (e.g. in France, drivers must drive on the right side of the

road). Hart accepted this refinement of his theory, conceding that it is possible for lawyers (and anyone else for that matter) 'to report in normative form the contents of a law from the point of view of those who do accept its rules without themselves sharing that point of view' (1983, 14).

Legal positivists and legal realists alike are empiricists who wish to rid the law of metaphysics and ground it firmly in fact. Hart was also an empiricist, but believed that the nature of a rule was only partly revealed by observation of its external effects. We do not mystify the notion of law by acknowledging its psychological dimension; we illuminate it.

Primary and secondary rules of obligation: emergence of a legal system

Every society, even the most primitive, displays obligation rules. It is hard to conceive a social order that does not rest on some commonly accepted rules of conduct. Some rules – such as those against murder, theft, violence and the breaking of promises – are ubiquitous. Others are indigenous. These are primary rules of obligation that arise spontaneously and pre-date the establishment of formal legislatures, courts and governments. Primary rules of obligation in primitive society are not simply regularities of habits or convergent practices of individuals. They are rules considered by members to be binding and enforced by social sanctions. Unlike the early positivists, Hart had no doubt that these may properly be called laws.

Small social groups bonded by kinship and shared beliefs living in a stable environment may survive by these rules alone. But as society gets larger and more complex, the shortcomings of a rudimentary set of laws based on diffused social pressure become evident and the need for a different type of rules is felt. Hart called these 'secondary rules of obligation'. There are three chief defects in a primitive system of laws. First, there is no authoritative means of resolving doubts about the meaning and application of laws. This is not a serious problem in close-knit groups who live by a few simple rules in a stable environment where disagreements can be resolved consensually. Legal uncertainties increase in larger societies, where most members are strangers and life is complex. Second, primary rules of obligation in primitive societies are relatively static. New rules crystallise slowly through convergence of practice and the build up of pressure to conform. Conversely, old rules that outlive their value linger while the pressure to conform dissipates slowly. The lack of a legislative body prevents society from deliberately adapting laws to changing conditions. Third, primitive society has nothing resembling courts that can authoritatively resolve disputes arising from the violation of laws, and no specialised agency to enforce judgments and mete out punishments.

Developed societies have secondary obligation rules that address these defects. The secondary rules provide for the authoritative recognition of legal

rules, for changing legal rules and for adjudicating disputes concerning the observance of legal rules. These rules typically establish courts, legislatures and executive governments. They define the powers of these bodies, lay down procedures for the exercise of powers and prescribe criteria for the recognition of primary legal rules. Rules of this type, by their union with primary legal rules, bring about a legal system. Whereas primitive society has a *set* of laws, modern society has a *system* of laws (Hart 1997, 234). Hart used the terms 'set' and 'system' in an arbitrary way. That laws can emerge spontaneously and exist as self-ordered systems without the assistance of secondary rules is well known in the evolutionary tradition in social theory, which began with the Scottish moral philosophers Hume, Smith and Ferguson and others and has continued to this day through the works of the Austrian school in economics and of modern complexity theorists. (I discuss this jurisprudential tradition in Chapter 10.) However, terminology notwithstanding, Hart's distinction allows us to see clearly the function and value of secondary rules of obligation.

In most countries the secondary rules of obligation are set out in a written constitution. In the United Kingdom they are part of the customary constitution. Written or unwritten, their existence depends on acceptance by legislators, courts, executive government, public service and other officials on whose conduct the legal system depends. Whereas primary rules of obligation apply to all people, secondary rules have particular application to officials. Official acceptance is the critical internal aspect that makes these rules possible. Figure 2.4 represents Hart's view of the universe of law.

The rule of recognition

Secondary obligation rules typically stand in a hierarchical relation to each other. This relation is determined by a superior rule that Hart called the rule of recognition. In most countries the rule of recognition is stated in the constitution. In England, it is accepted that the common law overrides custom and that laws of Parliament override common law. This does not mean that the Queen in Parliament is a sovereign in the Austinian sense. Austin's sovereignty is unlimited and illimitable. The Queen in Parliament is a superior source of law but it is also the creation of the rule of recognition. Hart also rejected Austin's view that common law is tacit sovereign commands, or that legislation is the ultimate source of all law. The common law is law, however precarious its existence. It is not derived from legislation, although legislation may alter it (Hart 1997, 101).

The rule of recognition provides the ultimate criterion for verifying the validity of laws. When parliament enacts laws and when judges find rules to be valid according to the rule of recognition, they are not obeying anyone's command. It is possible to say that they are obeying the rule of recognition by stretching the meaning of 'obey'. It is more exact to say that they are accepting and observing, from the internal point of view, the obligatory effect of the rule of recognition.

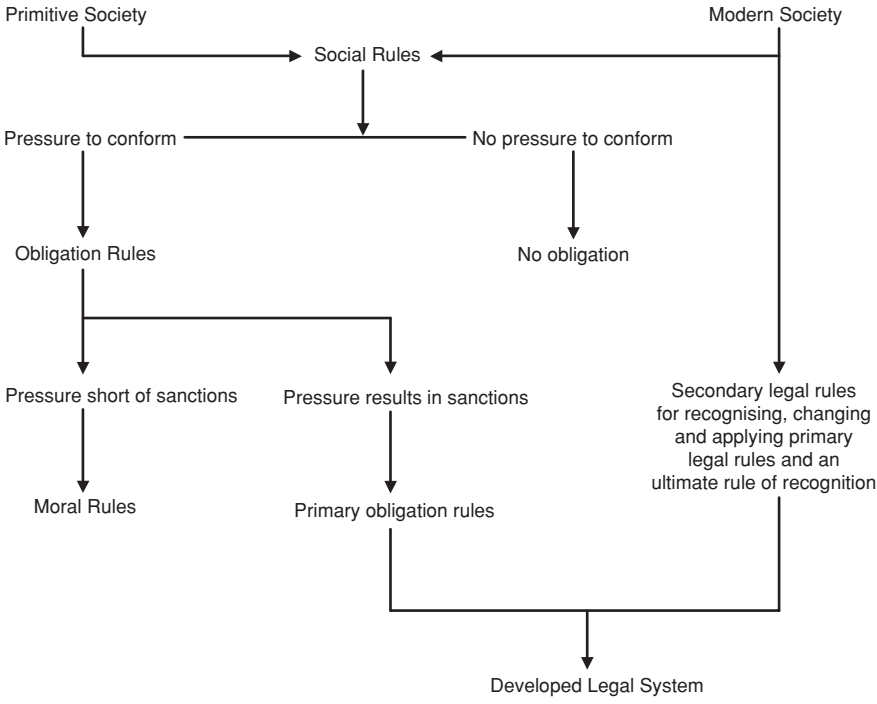

Figure 2.4 Hart's positivism

A legal system in the modern sense arises when two conditions converge. First, the primary rules that are considered valid by the rule of recognition are generally obeyed by citizens. Second, the rule of recognition is accepted by officials as the standard of official behaviour. (It must be noted that Hart sometimes used 'rule of recognition' to refer to all the rules concerning recognition, change and adjudication, and at other times to refer to the ultimate rule among these. I use the term in the latter sense for clarity.) The rule of recognition may change through peaceful transition, as when Britain granted its colonies degrees of self-government and finally independence. It could also change through foreign conquest or by violent domestic revolution, as frequently observed in parts of the world where stable constitutional democracy has not taken root. The primary rules of obligation may remain largely unaffected while the struggle over the rule of recognition goes on. This was not the case, though, in Russia and China, where communist revolutions simultaneously overthrew existing regimes and fundamentally changed the country's primary legal rules.

International law

According to the theory of law as sovereign command, international law is not proper law but is, if at all, positive morality. The theories that postulate that

law comprises rules derived from a common fundamental norm (such as Hans Kelsen's 'pure theory of law', discussed in the next chapter) must find a basic norm that validates all international law rules. This is not easy to locate in the absence of a global legislature or court comparable to those of municipal (national) legal systems. International law does not qualify as a legal system even by Hart's own theory, as it lacks an authoritative rule of recognition. Yet Hart had no difficulty in treating international law as law properly so called because he believed that there can be *law* without a *legal system*. International law rules resemble the primary rules of obligation in a primitive society. They are law because sovereign states consider them as obligatory and use them to press their claims and to evaluate and criticise the conduct of other states. The argument that international law is not law for want of effective enforcement is dismissed as based on the discredited command theory. Hart took more seriously the practical observation that there can be no law where there is free use of violence. A society of individuals who possess nearly equal strength can descend to lawlessness unless individual use of force is restrained. International law leaves room for self help and war. Often, even collective actions fail to stop aggression. So what sustains international law? Hart argued that the high risks that war carries even for the most powerful aggressors provide a natural deterrent against international anarchy (1997, 219).

Law and morality

Hart's famous debates with Lon Fuller and Ronald Dworkin about the separation of law and morality are discussed in Chapter 6. However, this discussion of British legal positivism should not be concluded without a brief explanation of Hart's position on this subject.

Hart, like his precursors in the positivist tradition, denied any *necessary* connection between law and morality. Legal positivists appreciate the many ways in which the law is connected to morality. Their argument is that the validity of a law does not depend on such a connection. Positivists offer scientific and moral reasons for keeping the morality and the validity of law separate. Their scientific thesis is: it is simply not true that all rules regarded as law satisfy a moral test. This is an assertion of observed fact. There are many laws in the law books that we may condemn as immoral. Yet we recognise them to be laws and in many cases we observe them willingly. The moral case is that we can make the law better if we clear up the confusion between the legality and the morality of laws. If we recognise that a morally bad enactment is a law, we can do something about it. If we deny that it is a law, it may never get fixed. As we shall see in later chapters, neither the scientific nor the moral thesis is free of controversy.

In considering Hart's position on law and morality we must keep in mind the important distinction between 'law' and 'legal system'. Hart was careful to distinguish the question of the validity of particular laws from the question of the efficacy of whole legal systems. A legal system exists when citizens generally

accept and observe the primary legal rules of obligation and officials similarly accept secondary rules of recognition, change and enforcement of laws. Acceptance is the basis of a legal system. A legal system that does not provide the most basic conditions for the survival of individuals may lose the fidelity of the people that sustains it. These are conditions that secure life, liberty, property and the performance of contracts (Hart 1997, 199). They are secured by forbearances of a moral kind that the law demands. We are unlikely to find anything resembling a legal system where these conditions are lacking. Hart agreed that a legal system requires a minimum content of natural law. The legality of particular laws that offend the morals of the community is a different question. A society may have law with or without a legal system. A legal system that is effective may produce laws that many consider to be morally repugnant. Yet they will be valid laws if they satisfy the criteria set by the rule of recognition. In his debate with Lon Fuller over the punishment of the German 'grudge informers' who for personal reasons procured the death or imprisonment of others under the Nazi regime's monstrous laws, Hart took the view that there was nothing to be gained by denying the legality of the Nazi laws. In such cases, he argued, it is better to say 'This is law, but too iniquitous to obey or apply' (1997, 210). We may have a moral duty to disobey inhuman laws but we do not advance clear thinking by denying them the status of law. I consider these views more fully in Chapter 6.

There is an internal aspect to both primary and secondary rules of obligation. An important question is whether the internal aspect of a legal rule necessarily adds a moral dimension to the rule. The internal aspect reflects the sense of having an obligation, as opposed to 'being obliged' by fear of sanction. This sense of obligation may be a moral sense, but Hart insisted that it need not be so. 'Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be more stable when they do so' (1997, 203). Allegiance to the system may be based on 'calculations of long term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do' (1997, 203).

Hart saw the many ways in which law may be connected to morals. But these were, for Hart, not *necessary* but *contingent* connections. The common stock of legal rules that we associate with civilised living are also moral rules. They include the rules against murder, assault, theft, robbery, rape, depriving freedom and damaging property and the rules concerning the keeping of promises. Morality constantly influences law making by legislators and judges. In some countries the constitution lays down moral tests in the form of fundamental rights and freedoms that every law must pass in order to be valid. These tests, Hart and other positivists argue, are enforceable not because of their morality but because they constitute an established rule of recognition. The language of law is open textured and hence leaves judges with discretion to take morality into account in identifying the existing law. Alternatively, the law may direct judges

to make new law according to their own judgment (Hart 1997, 254). Rules of statutory interpretation and the notions of legality, natural justice, procedural fairness and equity also import morality into judicial reasoning. But to Hart and other positivists these connections are only contingent, and not conceptual (1997, 268).

Hart's positivism is soft positivism. He stated that 'It will not matter for any practical purpose whether in deciding cases the judge is *making* law in accordance with morality (subject to whatever constraints imposed by law) or alternatively is guided by his moral judgment as to what already *existing* law is revealed by a moral test for law' (1997, 254). It mattered for Joseph Raz. According to Raz, judges are either applying law or developing law. No moral judgment is involved in the application of law. Judges may be guided by morality in developing law in much the same way as legislators, but in doing so they are not discovering law but making law. Morality, for Raz, can never be part of pre-existing law (1979, 49–50). Individuals engage in moral judgments in deciding what ought to be done or not done. The function of the law 'is to mark the point at which a private view of members of the society, or of influential sections or powerful groups within it, ceases to be their private view and becomes (i.e. lays a claim to be) a view binding on all members notwithstanding their disagreement with it' (Raz 1979, 51). The law, by authoritatively stating the rule to follow, relieves people of the interminable discussions about right conduct. Law, once made, admits no further moral arguments.

British positivism's contribution to jurisprudence

British legal positivism's contribution to jurisprudence is extensive and profound. Legal positivism at birth was part of the wider 18th century intellectual movement known as the Enlightenment, which turned away from tradition, superstition and irrationality to embrace empiricism and science. The command theory of law, despite its factual inaccuracies and theoretical shortcomings, serves to demystify the law by showing that law is based in fact and not belief. The theory is intuitively appealing to lawyers and laymen and with small refinements provides a useful way of understanding the legal universe. It can be said that Bentham and Austin made Hart and Kelsen possible. Twentieth century British positivists removed much of the coarseness from the theory.

Legal positivism's empiricism has exposed it to the suspicion that it is insensitive to the moral dimensions of social life. This is ill-founded. Legal positivism is the child of utilitarian moral theory, which seeks to advance the public good. Its message is that we can make the law better if we do not confuse it with morality. Positivists cannot be accused of confusing legal duty and moral duty. An unjust law is law, but a citizen may have moral reasons for disobeying it. Hart, Raz and other modern positivists have shown that the span between legal positivism and natural law thinking is not as great as once thought.

Jurisprudence, however, does not begin and end with the definition and description of formal law. Legal positivists concede that theirs is not the only prevalent conception of the law. There are many matters of interest about the law that are left untouched by legal positivism. How does the normative content of the law emerge? What are the history, anthropology and sociology of law? How do we measure the worth of particular laws? Do citizens have a moral duty to obey or disobey the law? Do judges have a moral duty not to enforce heinous laws of the kind enacted by the Nazi regime? How do we find the moral standards by which we may identify such a duty? Is the meaning of legal texts objectively ascertainable or are they socially constructed? These are interesting and legitimate questions that must not be banished from the province of jurisprudence. In the chapters that follow I address these questions and also consider the most important criticisms of legal positivism.

3

Germanic Legal Positivism: Hans Kelsen's Quest for the Pure Theory of Law

British legal positivism was founded on empiricism. Empiricist legal theorists reject metaphysical or mystical explanations of law and assert that law exists as social fact and nothing more. The main inspiration for Germanic legal positivism is not empiricism but the transcendental idealism of the German philosopher Immanuel Kant (1724–1804). Whereas British legal positivists regard law as fact distinct from morals, their Germanic counterparts seek to separate law from both fact and morals. This chapter discusses Germanic legal positivism principally through the work of its most famous proponent, Austrian legal philosopher Hans Kelsen.

Kelsen (1881–1973) was born in Prague but moved with his family to Vienna at the age of two. He taught at the universities in Vienna and Cologne and at the University of California at Berkeley. Kelsen was the author of the Austrian Constitution and the designer of the Austrian model of judicial review adopted by many countries.

The key elements of Kelsen's theory are these. Facts consist of things and events in the physical world. Facts are about what there *is*. When we wish to know what caused a fact we look for another fact. A stone thrown in the air comes down because of the force of Earth's gravity. There are seasons because the Earth's axis is tilted at 23.5 degrees. A norm, unlike a fact, is not about what there is but is about what *ought* to be done or not done. Whereas facts exist in the physical world, norms exist in the world of ideas. Facts are caused by other facts. Norms are imputed by other norms. The requirement that a person who commits theft ought to be punished is a norm. It does not cease being a norm because the thief is not punished. (He may not get caught.) The norm that the thief ought to be punished exists because another norm says so. Not all norms are laws. There are also moral norms. Legal norms are coercive; moral norms are

not. Moreover, a legal norm has the quality of 'validity'. A legal norm is valid if it is endowed with validity by another norm. Whereas physical things arise from causation, legal norms arise from validation by another valid norm. A norm that confers validity upon another norm owes its own validity to another norm, and so on. This regression cannot go on infinitely. Kelsen conceived the idea of a basic norm (*Grundnorm*), a kind of First Cause of the legal system beyond which we cannot speculate in a legal sense. The basic norm is presupposed. A legal norm exists because of a chain of validity that links it ultimately to the basic norm. The legal system is a system of legal norms connected to each other by their common origin, like the branches and leaves of a tree. This is only a thumbnail sketch of Kelsen's theory. Its intricacies and implications remain to be considered in the following pages.

Kelsen's writing is remarkably lucid in some parts but maddeningly dense in others. It seems at times that language fails to adequately express the subtleties of his theory. It is easy to misunderstand his theory of law. It is not possible to gain an accurate understanding of the pure theory without a reasonable grasp of the philosophy on which it is based – transcendental idealism. In particular, the claim of purity of the pure theory can be understood only through this mode of thought. (Note that the term 'idealism' is used in these pages in the philosophical sense explained hereafter, and not in the more commonplace sense of commitment to ideals.) Kelsen claimed that, despite its conceptual subtlety, he was merely making lawyers conscious of what they intuitively or subconsciously do in practice (1967, 204–5). This is partly true.

From empiricism to transcendental idealism

David Hume (1711–76) is considered the father of British empiricism, but he also provided the inspiration for transcendental idealism. Immanuel Kant, the instigator of the latter school, confessed that it was Hume's writings that interrupted his dogmatic slumber (1883 (1783), 6). Hume made two famous observations about the limits of human knowledge. First, he observed that there is an unbridgeable gap between the physical world *as it is* and the way we *perceive* it. There are two reasons for this. The first is that 'nothing is ever present to the mind but its perceptions, impressions and ideas . . . [t]o hate, to love, to think, to feel, to see; all this is nothing but to perceive' (Hume 1978 (1739–40), 67]). When we think of something we are actually thinking of other thoughts. We do not know what causes these perceptions to occur in our minds. But this does not matter since we have no choice but to live in this world of perceptions 'whether they be true or false; whether they represent nature justly, or be mere illusions of the senses' (1978, 84) We form systems of ideas (theories) by connecting perceptions. Here, according to Hume, we run into the second problem. We cannot actually prove the causes of things, although we expect from experience that certain events cause certain other events. By repeatedly observing that there is heat near a

fire, we conclude that fire is the cause of heat. This is not proof. We see fire and we feel heat but we do not see or feel the causal relation. Hume argued that we can never prove that something cannot come into existence without a cause or productive principle. Hence, the idea that everything has a cause cannot be intuitively self-evident or known *a priori*. Hume did not deny that things are caused by other things. His sceptical point was that our belief in causation is based not on intuition but on experience. Hence, knowledge about the world is hypothetical and fallible. Hume's theory works like this. I hear a sound. This is an impression. I assume from past experience that the sound is that of my kettle whistling as the water boils. When I check, the kettle is cold. Looking out of the window I see branches swaying and realise that I heard the sound of the wind among the trees.

Hume's second important insight concerning human knowledge was that it is impossible logically to derive what ought to be done from observed facts. This is the error of trying to derive the 'ought' from 'is' (Hume 1978, 469). Suppose we know as a fact that in a particular society all persons speak. It does not follow that John, who is a member of that society, *ought* to engage in speech. John, for instance, may have taken a vow of silence. If we say that John ought to speak because everyone else speaks, we draw an illicit inference of ought from fact. If we say that John has a duty to speak we must find some other source of obligation.

Hume was a sceptic but not an idealist. Idealism in its strict form is the belief that thoughts or ideas are all there is and that nothing exists outside our minds. Hume did not deny the existence of things; he only doubted our ability to know them as they really are. Hume's insights, particularly those concerning causation, shook the philosophical community and awoke Immanuel Kant from his intellectual slumber. In his seminal work, *Critique of Pure Reason*, Kant agreed with Hume that we cannot know objects as they really are. In other words, we cannot know the thing in itself (*Ding an sich*). But Kant firmly believed that things exist outside our minds. These he called *noumena*. What we know are only the impressions that things create in our minds. These he called *phenomena*. There is thus a noumenal world of things and a phenomenal world of our impressions about things. Our knowledge is of the latter world. However, Kant argued that we possess a form of *a priori* knowledge, or knowledge that is prior to any experience. This knowledge shapes our experience. Kant thought that we cannot think of any object except in relation to time and space. Hume thought the reverse – that we have a sense of time and space only because we perceive separate objects (1978, 35). Kant said that we cannot conceive of something that has no cause. As noted previously, Hume argued that we can. Kant had not read Hume's *Treatise* when he published the *Critique* in 1781 (Wolff 1960, 117). Hume never read the *Critique*, as he died in 1776. Hence their disagreement was never resolved, but that does not matter for the present discussion.

Kant, like Hume, was not an idealist in the strict sense: he believed that there are real things in the world although we cannot experience them directly. He

sought to distance himself from idealism by describing his system as *transcendental idealism*. The term 'transcendental' to Kant meant *a priori* (pre-existing) and transcendental idealism referred to his theory of *a priori* knowledge – knowledge that we have independent of experience. He wrote: 'I call all representations pure, in the transcendental meaning of the word, wherein nothing is met with that belongs to sensation' (1930, 22).

Kant also adopted Hume's insight about the impossibility of deriving 'ought' (*sollen*) from 'is' (*sein*). (Kelsen wrongly assumed that Kant was the first to discover the distinction (Kelsen 1998 (1923), 4). The error is inconsequential to our discussion.) Kant argued that scientific questions as to what is the case must be addressed by *pure reason*. This is the process of observation and logical deduction. Thus, we conclude from observations that the sum of the angles of a triangle happens to be 180 degrees irrespective of the dimensions of the triangle. Copernicus observed that the Earth moves in an elliptical orbit around the Sun. Moral questions cannot be answered in this way. A moral question is about what one ought to do or not do. Should a physician assist in euthanasia? Can war be justified, or adultery? Here we need to engage in *practical reason*. Kant searched for a universal and indisputable principle of moral judgment – a categorical imperative. In the *Groundwork of the Metaphysics of Morals* he set out this principle as follows: 'I ought to never act except in such a way that I can also will that my maxim should be a universal law' (1947, 70).

From transcendental idealism to the pure theory of law

Transcendental idealism is the epistemological foundation of Kelsen's 'pure theory of law', which presents law not as fact but as norms that exist in the realm of ideas. Facts are about what there *is*, whereas norms are propositions as to what *ought* to be done or not done. Kelsen said of his theory: 'It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements' (1967, 1). Specifically, Kelsen claimed that his theory is pure on two counts. First it distinguishes law from fact. As Paulsen remarked: 'At its core, Kelsen's legal theory does not consort with facts at all' (1998, 24). Second, it distinguishes law from morals. Kant's thoughts provided inspiration on both counts. The chief ingredients of Kelsen's pure theory are supplied by Kant's two distinctions between:

(a) the world of things (*noumena*) and the world of ideas (*phenomena*); and
(b) what *is* (*sein*) and what *ought* to be done or not done (*sollen*).

Law as norm

Kelsen applied the Kantian distinctions with the following results. The physical acts that give rise to law (passing of a statute, delivery of a judgment etc) belong in the world of things or fact. They occur in time and space so we perceive them with our senses. The question of whether these acts represent a legal norm (an 'ought') cannot be answered simply by observing the facts. It requires a mental inquiry about what the facts mean in a normative sense (Kelsen 1967, 2–4). For example, a group of persons assemble in a building called the Parliament House and engage in a debate about a document called the Terrorism Bill, which states that a person who commits an act of terrorism shall be punished by life imprisonment. (This actually means that terrorists *ought* to be punished, as the Act cannot guarantee that they *will* be caught and punished.) At the end of the debate there is a vote and a majority of the assembled group approve the Bill. The document is then certified as an Act of Parliament. What we have observed is not the law but a series of facts. The question for the legal scientist is whether these facts can be interpreted as giving rise to the norm that acts of terrorism ought to be punished with life imprisonment. What creates the norm is not Parliament's say-so but another norm that states that the will of Parliament expressed in a particular way ought to be obeyed.

Nature of norm

Kelsen wrote: 'Norm is the meaning of an act by which a certain behaviour is commanded, permitted or authorised' (1967, 5). A norm may take the form of a rule or a specific command. A police officer's order to stop traffic, the minister's order under the *Land Acquisition Act* to acquire a person's property and a judge's decree in a civil case are all norms. Kelsen's theory obliterates the distinction between rules and orders. A norm, according to Kelsen, need not supply a rule of conduct that can be known beforehand – a necessary condition for achieving the rule of law. However, not every expression of will directed to a person is a norm. An armed robber's demand that I hand over money is not a norm, whereas a tax collector's demand of money is a norm. The *subjective* meaning of the two acts is the same. Each wills that I hand over money. But only the latter demand has *objective* meaning in Kelsen's sense. It is objective because an antecedent valid norm authorised the demand (Kelsen 1967, 8). Thus, we may say that a norm is an 'ought' proposition that is objectively recognised. I may state in writing that in the event of my death my wife and child ought to be given all my property. This is an expression of my *subjective* will. It does not oblige anyone else to respect my wishes unless it is also *objectively* regarded by the community as binding. That is, others have cause to recognise my will as binding on them (Kelsen 1967, 4). For instance, if my writing is not witnessed as the law requires, my intent is not binding on others. Likewise, the subjective intent of the people who approved of the *Terrorism Act* will not be objectively valid

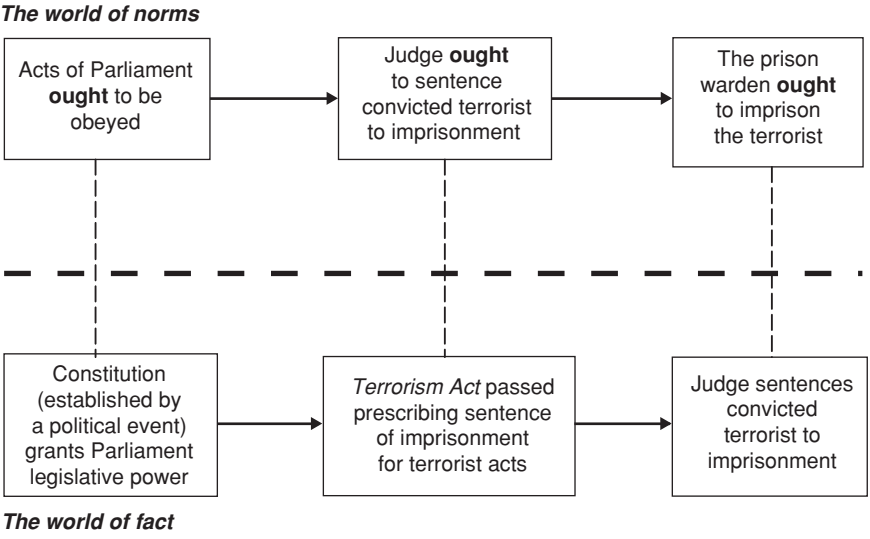

Figure 3.1 Transcendental idealism in the pure theory of law

unless it was expressed according to established legal requirements. Did the assembled group constitute Parliament? Was the enacting procedure correct? Is Parliament authorised to make law on the subject of crimes? The answers depend on other norms. Section 51 of the Australian Constitution states that Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the subjects enumerated in that section. A lawyer may conclude from this and other provisions of the Constitution that the provisions of an Act of Parliament on a prescribed subject ought to be observed by citizens, courts and officials alike. This type of inquiry takes place in the world of ideas. The transcendental character of Kelsen's theory is illustrated in Figure 3.1.

The vertical lines in the above figure do not indicate that the norms above the horizontal line are logically derived from the facts below the horizontal line. That is impossible. As first Hume and then Kant noted, an 'ought' cannot be inferred from an 'is'. Kelsen would explain that the norm above the line is simply an interpretation of the legal meaning of the fact below the line. Parliament by enacting the *Terrorism Act* wills that terrorists be punished by imprisonment. The enactment of the *Terrorism Act* is the event and not the norm. Its meaning is that terrorists *ought* to be imprisoned. This is the norm. But this norm flows not from the event but from another norm in the Constitution – that Parliament's enactments ought to be carried out. A natural scientist observes a physical event and concludes that another physical event *will* occur. A legal scientist observes a physical event and concludes that another physical event *ought* to occur. The natural scientist is directed to this scientific conclusion by a scientific law. The legal scientist is directed to this normative conclusion by another norm.

Kelsen used the term 'imputation' to signify the effect of a norm. We speak of causation in relation to the natural world. One physical event causes another event. Norms are not material things and one norm cannot cause another. A norm creates a duty to behave in a certain way by *imputing* a sanction to the breach of that duty (Kelsen 1967, 81).

Commands, authorisations and permissions

We typically associate the law with commands to do or not do something – for example, that we ought to repay our debts or that we ought not to commit theft. According to Kelsen there is no norm where there is no 'ought'. Yet many laws at first sight seem to lack an 'ought'. An Act of Parliament authorises (but does not compel) the minister to make regulations. My driving licence permits (but does not compel) me to drive my car on public roads. The *Social Security Act* grants me the right to receive a pension if I am unemployed or disabled but does not compel me to do anything. How do we explain these laws as norms? According to Kelsen, each of these laws has normative force. Such laws, in effect, say that people ought to 'endure' the actions of another person (Kelsen 1967, 16–17). The law under which I hold my driving licence means that people (including the police) ought to respect (endure) my liberty to drive. The law that authorises the minister to make traffic regulations means that the minister's regulations ought to be obeyed. The law that entitles me to a pension means that some official ought to pay me a sum of money.

Legislation, legal norm and statement of the law

It is vital to distinguish three elements of the legal process in order to gain an accurate understanding of Kelsen's theory. They are as follows:

1. legislation, judicial precedent or custom – this is a fact
2. the legal norm – this is the 'ought' proposition that results from the interpretation of the legislation, precedent or custom
3. the statement of the rule of law.

Legal norms represent the meaning we give to a particular series of facts. The statement in a statute that something ought to be done is not a norm but a fact. The norm is the meaning we give to this fact when considered with certain other facts. The Queensland Parliament enacted the *Criminal Code Act 1899*. Section 291 of the Act states: 'It is unlawful to kill any person unless such killing is authorised or justified or excused by law'. Other provisions of the law describe authorisations, justifications and excuses for killing. Section 302(1) states that a person who unlawfully kills another under the circumstances set out in that section commits murder. Section 305(1) states that 'any person who commits the crime of murder is liable to imprisonment for life'. Provisions of other Acts determine how a person is charged and tried and, if found guilty, how sentence is imposed and executed. From all of this we glean the norm that a person ought

not to commit murder. The coercive (hence legal) nature of this norm is evident only when all the interlocking provisions are taken into account.

Kelsen also drew an important distinction between a legal norm and the statement of a rule of law. A legal norm is a command. Hence it is neither true nor false. I ask you to leave my property. My statement is neither true nor false. It is simply the expression of my wish. Similarly, an Act of Parliament states: 'A person convicted of murder shall be sentenced to life imprisonment'. It is the expression of the will of Parliament. It may be valid or not valid, but not true or false. On the contrary, the statement 'According to the law of England murder is punishable by life imprisonment' can be true of false. The former statement in the statute *prescribes* behaviour. The latter statement *describes* what the law is (Kelsen 1967, 73).

Raz usefully pointed out that statements about the law may be morally committed or detached (1986, 89–91). Committed statements affirm in a moral sense the rules, rights and duties under the law. A person who says 'You have no right to enter my property' may be making a moral statement about the law. This kind of statement has no place in the science of law, according to the pure theory. Detached statements are those typically made by lawyers, who state the law without expressing a moral commitment. The position is as follows.

Act of Parliament	A person convicted of murder shall be sentenced to life imprisonment.
Legal norm	The court ought to sentence a person convicted of murder to life imprisonment.
Morally committed statement of the law	Persons who commit murder are rightly sentenced to life imprisonment.
Detached statement of the law	It is the law in England that a person convicted of murder is liable to be sentenced to life imprisonment.

Distinguishing legal and moral norms

Legal order as a coercive order

Kelsen, like other legal positivists, denied that there was a necessary connection between law and morality. A law that gives effect to a moral rule is law not because of its moral content but 'because it has been constituted in a particular fashion, born of a definite procedure and a definite rule of law' (Kelsen 1935, 517–18). A norm in the sense of an 'ought' could be legal or moral. Often it is both. The rule against theft is moral as well as legal. Law is not the only regulative system in society. Moral norms play an important role in guiding behaviour.

Moral norms, like legal norms, have both subjective and objective existence. A vegetarian may say that all persons ought to abstain from eating animal products. This is subjectively true for the vegetarian, but it has no objective existence in a society of committed meat eaters. Hence, it is not a moral norm of that society. On the contrary, my wish that people ought not to inflict gratuitous cruelty on animals will be objectively true in most civilised societies, and therefore be a moral norm in those societies.

Kelsen also argued that law and morals cannot be distinguished according to their respective content. The only kind of moral norm that cannot be a legal norm is one that is addressed wholly to a person's own mind, such as: 'Suppress your inclinations' (Kelsen 1935, 62). Kelsen regarded such morals rules as incomplete. A positive (complete) moral rule deals with both internal and external behaviour. So does a positive legal rule (Kelsen 1935, 60).

It is also not possible to distinguish moral and legal rules by the way they are created. There are two ways in which legal rules come about: by custom and by the will of a law making authority. Positive moral rules are also established by custom, or by the will of a moral authority such as a divine being, a prophet or a church. According to Kelsen, moral prescriptions derived from purely philosophical speculation have no force as rules unless they gain currency in society. That happens by force of custom or authority.

Legal and moral norms also cannot be distinguished by the methods of their application. Moral systems lack the kind of specialised enforcement agencies (courts, police etc) that we associate with legal systems. Yet, as Kelsen observed, primitive legal systems also lack such organs (1935, 62). How then can we distinguish legal from moral norms? The difference, according to Kelsen, lies in the fact that the legal order is a coercive order, whereas the moral order is not:

> The fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about a certain behaviour *by attaching to the opposite behaviour a socially organised coercive act*; whereas morals is a social order without such sanctions. The sanctions of the moral order are merely the approval of the norm-conforming and the disapproval of the norm-opposing behaviour and no coercive acts are prescribed as sanctions. (1935, 62; emphasis added)

This statement requires two clarifications. First, according to this view what is needed for a society to have law is the means of applying 'socially organised' coercion. Such means may exist (as in primitive societies) without specialised agencies such as courts and governments. This allows Kelsen to dispense with the requirement of a sovereign and to recognise that primitive law and international law are actually law.

The second clarification is that a law may exist even if no coercion is *in fact* applied. The thief may not get caught, or if caught and tried may be acquitted for want of evidence or because of judicial error. The moral norm states: 'A person ought not to commit theft'. The legal norm states: 'If a person commits theft, they ought to be punished'. The legal norm, like the moral norm, is not a statement of fact. It does not assure that what *ought to* happen will *in fact* happen.

Legal order is a dynamic order

Legal and moral order can be distinguished in another respect. Whereas moral order may be static or dynamic, legal order is always dynamic. Kelsen pointed out that legal order is dynamic in the sense that the content of its norms is variable

depending on the will of the norm creating authority. In contrast, the content of the norms of a static order is in a sense predetermined as they derive from the content of a higher norm. The lower norms are subsumed by the higher norm. This is the case with some moral systems. As Kelsen explained:

> From the norm to love one's neighbour one can derive the norm not to harm one's fellow man, not to damage him physically or morally, to help him in need and – particularly – not to kill him. Perhaps one might reduce the norm of truthfulness and love for one's fellow man to a still higher norm, such as to be in harmony with the universe. On this norm a whole moral order may be founded. Since all norms of an order of this type are already contained in the content of the presupposed norm, they can be deduced from it by way of logical operation, namely a conclusion from the general to the particular. This norm, presupposed as the basic norm, supplies both the reason for validity and the content of the norms deduced from it in a logical operation. (1935, 195)

It is important to notice that not all moral systems are static in the sense just described. Norms of a customary moral system may change as society adapts to changing circumstances. Moral systems founded on the authority of a church may also be changed legislatively. (Consider the changes with respect to homosexuality, divorce and contraception in some churches.) Kelsen's point is that legal order, unlike moral order, is always dynamic in the sense that the content of its norms is not predetermined. The norm creating authority determines what norms to create and with what content. Parliament may or may not prohibit polygamy or the consumption of cannabis. Parliament may outlaw trade monopolies or create a trade monopoly. The legal order is dynamic in this sense. This is not to say that the norm creating authority has unlimited discretion to determine the content of norms. The discretion of Parliament may be limited by constitutional provisions. The legislative discretion of the Australian Parliament is limited by the separation of powers doctrine and the federal distribution of powers, as well as the express and implied rights and freedoms guaranteed by the Constitution. Likewise, the powers of ministers and local authorities to make subordinate laws are constrained by the terms imposed by parent legislation. The key point is that norm creating authorities have discretion to determine content within the limits of their jurisdiction. A higher norm confers jurisdiction but does not dictate content.

Validity and the basic norm

Legal order differs from moral order because of its coercive character. This is an incomplete explanation of legal order. An armed robber's command that I hand over my wallet is coercive and so is the tax collector's command that I pay the state a part of my income. The reason the tax collector's command is law is that it is 'valid'. The robber's command is not law because it is not valid. So what is 'validity'?

In Kelsen's theory a valid norm is a norm that exists, and a norm that exists is valid (1945, 30). A norm's existence is obviously different from the existence of a physical thing like a chair or an animal. A norm is incorporeal. We cannot see it, hear it, touch it or smell it. So how do we know it exists? As Hume and Kant pointed out, an 'ought' (which is what a norm is) cannot be derived from an 'is'. It can only be derived from another 'ought', or norm. Thus, a norm is valid if it has been made in accordance with another valid norm. That is to say, it has been issued by a person or body that is authorised to do so by that other norm, in accordance with procedure stipulated by that norm. That norm is valid if it is made as authorised by another valid norm, and so on. Ultimately this chain of validity stops at a norm whose validity cannot be derived from another valid norm. It simply has to be presupposed if we are to make sense of the legal system. Let us see how this system works in practice.

Consider the norm that the prison warden ought to imprison X. This norm is valid because a judge has stated that X ought to be imprisoned after X was found guilty at the trial. The judge's order is valid because according to the *Crimes Act* a person found guilty (after trial) of the offence of doing Y ought to be sentenced by the judge to imprisonment. The *Crimes Act* is valid because according to the Constitution the commands of an Act of Parliament ought to be obeyed by judges. In the case of some legal systems the inquiry may extend further. The Constitution's validity may be derived from another Constitution. The validity of the Australian Constitution at the time of its commencement in 1901 was derived from the norm established by the *Commonwealth of Australia Constitution Act*, a statute enacted by the British Parliament.[1] That norm was valid because of the basic norm of the British Constitution that commands of the British Parliament (Crown in Parliament) issued in the form of Acts of Parliament ought to be obeyed by subjects. The last mentioned norm, it is found, is not derived from another valid norm. It was established by the political events that followed the Glorious Revolution of 1688. It is what Kelsen called the basic norm that must be presupposed. Kelsen described the basic norm thus:

> Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.) (1945, 201)

So how did the basic norm arise? The basic norm that the will of the Crown in Parliament expressed in the form of an Act ought to be obeyed was established following the political settlement that occurred after the Revolution of 1688, under which William of Orange and Mary of Scotland jointly took the throne of England and Scotland after conceding supreme legislative power to the Parliament at Westminster. However, following Kant and Kelsen (and before them Hume) we acknowledge that the basic norm (an 'ought' or *Sollen*) cannot be

1 I consider the legal position as it was in 1901 for simplicity. The basic norm of the Australian legal system has since changed, owing to political and legal developments that occurred after Federation.

derived from the historical event of the Revolution Settlement (an 'is' or *Sein*). Yet it is highly improbable that the basic norm would exist if the historical event had not happened. The Kelsenian explanation would be along the following lines. The actors that brought about the political settlement after the Glorious Revolution willed that the norms expressed by the Crown in Parliament ought to be obeyed as supreme law. This was the subjective meaning of what they did and said. This meaning was generally accepted within the polity; hence it became an objective norm. If key actors or the populace generally did not accept this norm, it would not have become the basic norm. This acceptance was not logically necessary. It was simply a political fact.

Basic norm of customary law systems

The reader will recall that according to 'command theories' of law (discussed in Chapter 2) customary law is not law until it is converted to law by the direct or indirect command of the political sovereign. In practical terms, it means that a customary law is not law until it is enacted by Parliament or recognised and enforced by a court of law. This view of the law leads to the necessary conclusion that a society that lacks a sovereign political authority lacks law. According to this view of the law many tribal societies are lawless. Hart's rejection of the 'command concept' of law allowed him to appreciate that law was a feature of all societies, primitive as well as modern. Primitive societies have laws in the form of primary obligation rules. Modern societies have in addition secondary obligation rules (rules of recognition) that enable primary rules to be authoritatively recognised, changed and enforced by specialised organs of the state such as parliaments and courts. Hart thought that it is the presence of the secondary rules that brings about a legal system. A primitive legal system has a *set* of laws but not a legal *system* (Hart 1997, 234).

Kelsen, like Hart, recognised that primitive society possesses legal norms. However, Kelsen's theory of the legal order was more abstract than Hart's idea of a legal system, and was broad enough to encompass both customary and developed legal systems. The existence of the basic norm is not dependent on the existence of formal norm creating authorities such as parliaments and courts. Every norm, including the basic norm, is the result either of deliberate human action or of custom. It is possible to locate the basic norm of a customary legal order. Kelsen explained:

> In a social community, a tribe, it is customary that a man who marries a girl pays a certain amount to her father or uncle. If the groom asks why he ought to do this, the answer is: because in this community such a payment has always been made, that is, because there is a custom to make this payment and *because it is assumed to be self-evident that the individual member of the tribe ought to behave as all other members customarily do*. This is the basic norm of the normative order that constitutes the community. (1967, 197; emphasis added.)

Logic of presupposing the basic norm

Validity of norms can be expressed in the form of syllogisms (Kelsen 1967, 202). A syllogism consists of a major premise, a minor premise and a conclusion derived from the two premises. A popular illustration is as follows:

Major premise: All humans are mortal.
Minor premise: Socrates is human.
Conclusion: Socrates is mortal.

The syllogistic process of reasoning in relation to norms is illustrated in the following example:

Major premise: People ought to behave according to the subjective commands of the City Council. (Objectively valid norm)
Minor premise: The City Council has commanded that people ought not to throw litter on the city streets. (Subjective command)
Conclusion: People ought not to throw litter on the street.

The major premise in the above syllogism can be questioned. Why should people behave according to the subjective wishes of the City Councillors? The answer is provided by another syllogism.

Major premise: All persons and authorities ought to behave according to the subjective commands of Parliament. (Objectively valid norm)
Minor premise: Parliament has commanded that people ought to behave according to the subjective commands of the City Council. (Subjective command)
Conclusion: People ought to behave according to the subjective commands of the City Council.

The reader will notice that in this scheme, the major premise of one syllogism is the conclusion of the higher syllogism. Ultimately, we encounter a major premise that cannot be stated in the form of a conclusion of yet another syllogism. It is possible that the major premise 'All persons and authorities ought to behave according to the subjective commands of Parliament' is such a premise because it is stated in the Constitution, which exists as cold, hard political fact. The major premise, therefore, cannot be stated in the form of the conclusion of another syllogism. If so, it has to be presupposed or else all the normative conclusions are false. Hence, Kelsen called the basic norm 'the transcendental-logical presupposition' (1967, 201).

Effectiveness and validity of the basic norm

A legal system is founded on a specific basic norm. We cannot arbitrarily choose a norm to be the basic norm. This is because the basic norm cannot be presupposed as valid if it is not effective. What is the point in saying that the basic norm of the United Kingdom is that one ought to behave as the Queen commands if the courts and everybody else only obey the commands of Parliament? Kelsen stated: 'The basic norm refers only to a constitution which is actually established

by legislative act or custom, and is effective' (1967, 210). The basic norm, like all other norms, is an interpretation of a set of facts. Without facts there are no norms. This is not a contradiction of the 'is' and 'ought' distinction. The basic norm is not derived from facts but is an interpretation of them.

All norms of a legal system derive their validity ultimately from the same basic norm, just as the leaves and branches of a tree arise from the same root base. The effectiveness of the basic norm depends on the effectiveness of the norms that are derived from it. Imagine a country where the basic norm of its legal system is that one ought to behave as the Dictator commands. The Dictator's commands are so terrible that people stop obeying them and the Dictator is not strong enough to force the people to obey them. There comes a point at which the norm 'One ought to behave as the Dictator commands' is no longer effective. As Kelsen wrote, 'A constitution is "effective" if the norms created in conformity with it are by and large applied and obeyed' (1967, 210). If they are widely disregarded, a different norm may emerge as the basic norm.

It is important to keep in mind that effectiveness is a condition of validity but is not validity itself (Kelsen 1967, 213). This is the consequence of the 'is' and 'ought' distinction. The effectiveness of the norm is part of reality. It furnishes a reason for the legal scientist to think that a norm, in the form of an 'ought', exists. But the reality does not always accord with the norm. A norm may be valid even when it fails on occasion to be effective in shaping conduct. Consider the norm 'One ought not to drive at more than 100 kph on the motorway'. If this norm is totally disregarded by motorists and never enforced by the police the norm is wholly ineffective, giving us no reason to think that the norm exists at all. What does not exist cannot be valid. But if most motorists observe the speed limit most of the time, the occasional infringement will not render the norm invalid, even though it is evident that the norm is ineffective from time to time. It is in the nature of norms that they are capable of being violated. If a norm is not capable of violation, if it is always fully effective, it is not a norm but a law of nature – an 'is' statement and not an 'ought' statement.

Logical unity of the legal order and determining whether a norm belongs to the legal order

The legal order, according to the pure theory, is a hierarchical order. Every norm of a legal order exists because of validity conferred on it by another norm within that order. The validity of every norm is ultimately derived from the basic norm. Hence, the legal order has a logical unity. A lower norm cannot contradict or violate a higher norm from which it derives validity. Kelsen argued that the logical unity of the legal order also makes the conflict of norms at the *same* level logically impossible.

In the physical world it makes no sense to say that something exists and it does not. Unicorns exist or they do not. Earth orbits the Sun or it does not. In the

words of Aristotle: 'It is impossible for the same man to suppose that the same thing is and is not. One cannot say of something that it is and that it is not in the same respect and at the same time.' (1968 (350 BC), 163) A statement about the physical world is either true or false, but not both.

A norm is neither true nor false. 'A person ought not to commit adultery' is not about what *is* but about what *ought not* to be done. Hence it is neither true nor false. However, the statement 'It is a norm of the legal order of this country that a person ought not to commit adultery' is either true or false, but not both (Kelsen 1967, 205–6). Its truth or falsity can be determined by consulting statutes and judicial precedents. It is possible that in a different legal order adultery is permitted. It is also possible that the same legal order may prohibit adultery during one period and permit the practice during another period. In such cases there is no conflict of norms. But adultery cannot be permitted and prohibited in the same legal order at the same time and in identical circumstances. It is physically possible that different norm creating authorities within the same legal order may issue contradictory commands. Parliament may prohibit something and the High Court may permit it. Federal and state parliaments may pass conflicting laws. A legal order, being a hierarchical order, usually has norms to resolve these conflicts. Thus, in Australia the High Court's ruling will override a law of Parliament and a valid federal law overrides an inconsistent state law. It is also physically possible that the same norm creating authority may unintentionally enact conflicting norms.

Conflicting norms may operate simultaneously in the practical sense. There are unconstitutional laws that no one has tested in a court. There are regulations in the statute book that are *ultra vires* the parent statutes. These may never be annulled, for want of challenge. This does not mean that the higher order norms are invalidated. The conflicting norms will have practical operation despite their logical inconsistency. What the pure theory says is that logically they cannot remain in conflict within the same legal order because all norms derive their validity ultimately from the same basic norm. A court that faces a conflict of norms will first look at the constitutional status of each norm. A higher order norm will override a lower order norm. If the conflict is between norms of the same hierarchical level, the court will seek to resolve it through interpretive methods. For example, a later law is presumed to prevail over a conflicting earlier law (*lex posterior derogat legi priori*). A special law is presumed to prevail over a more general law that conflicts with it (*lex specialis derogat legi generali*). These rules of interpretation are logical rules. If the norm creator issued a command in 2007 and another in 2008 on the same subject, it is logical to presume that the later command represents the norm creator's current wish. Similarly, it is logical to presume that the norm creator's special command is intended to qualify its more general command. What happens if the conflict remains irreconcilable after all the interpretive options are exhausted? In practice, the court will adopt one norm in preference to the other, or formulate a new norm. What the court will not do is refuse to resolve a question that is properly before it simply because the relevant

norms are irreconcilable. The court's decision in this type of case amounts to an act of legislation. The court's authority to legislate on such occasions is referrable to the norms conferring jurisdiction upon it. The resolution of such conflicts is part of the routine business of courts. What if there is an irreconcilable conflict within the same command, as when a norm creator says 'One must do X' and also 'One must not do X'? According to Kelsen, this command 'is simply meaningless and therefore no objectively valid legal norm exists' (1967, 208).

We are entitled to question whether logical unity is a necessary attribute of a legal order. We may embrace a different notion of a legal system, as I do elsewhere in this book. However, if we are thinking about the legal order as conceived by the pure theory, it is evident that logical unity is an essential feature of the legal order and that the order breaks down if conflicts of norms are not resolved when they occur.

Membership of a legal order

Branches belong to the same tree if they arise directly or indirectly from the same root system. Similarly, according to the pure theory, norms belong to the same legal system if their validity flows directly or indirectly from the same basic norm. The unifying factor in the case of the tree is the common root system, and in the case of the legal system it is the common basic norm, as shown in Figure 3.2.

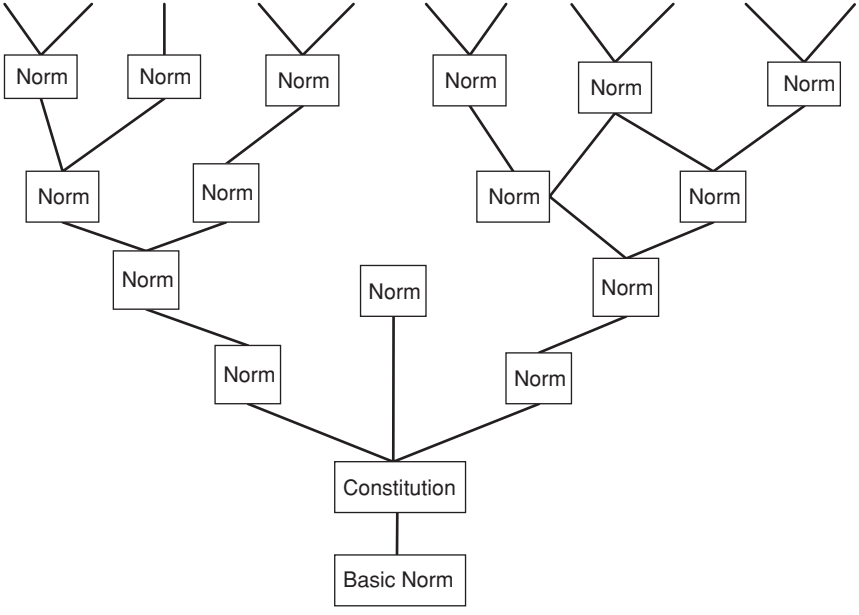

Figure 3.2 The tree of norms

How can we determine in practice whether a norm belongs to a legal system? Consider a judge called upon to decide whether driver X is guilty of the offence of

failing to stop on the red light at an intersection. The judge must decide whether there is a valid norm that X *ought* to stop on the red light. The judge observes that the *Traffic Act* requires motorists to stop on the red light, but that does not provide a complete answer to the question. The answer is found in the higher norm (in the Constitution), which states that Acts of Parliament ought to be observed. The judge will not generally ask the question: what validates the Constitution? However, the answer will be found in the norm that the Constitution ought to be obeyed. In other words the judge traces the validity of the norm about stopping at red lights to the basic norm of the legal system. If the norm cannot be so linked to the basic norm it is not a part of the legal order. The relation to the basic norm is the indispensable criterion for a norm to belong to the legal order.

The criticism of Joseph Raz

Raz disagreed with the last mentioned proposition and argued that the basic norm 'does not contribute anything to the criteria of identity and membership' (1980, 104). According to Raz, since all norms of a legal order are traceable to the constitution, the various chains of validity end there. Hence, he claimed: 'The tree diagram can exist even if the basic norm is omitted from it' (1980, 104). This argument is correct only if Kelsen's theory is abandoned. The constitution *of itself* is a fact. Constitutional norms are the meanings that the legal scientist gives to the constitution. The legal scientist gives normative force to the rules of the constitution only because a superior norm confers validity upon them. That superior norm is the basic norm. We must remember that Kelsen's tree is the tree of norms, not of facts. The norms established by the constitution are valid because the basic norm dictates that one ought to behave as the constitution prescribes. It is the basic norm that enlivens the constitution and hence all other norms that derive their validity from the constitution. Without it the tree collapses. We may reject Kelsen's pure theory on any number of grounds, but within that theory the basic norm is indispensable.

Raz developed a concept of a legal system resembling Kelsen's theory but dispensing with the basic norm. He stated that legislative power need not be created by law and that the first constitution is law because we know that it belongs to an efficacious legal system (Raz 1980, 138). He also insisted that the powers of the authors of the first constitution can be conferred upon them by an ordinary law of the legal system (1980, 138). Raz's theory can be supported, but only if we ignore the 'is/ought' problem and assume that legislation directly creates norms. The existence of a legislative enactment is a fact, whereas a norm is an 'ought'. Kelsen's point (following Hume and Kant) is that an 'ought' cannot be derived from a 'fact'; it can only be derived from another 'ought'. The pure theory results from the uncompromising observance of this disconnect. The need for a basic norm arises because norms cannot be derived from facts. The first constitution, of itself, cannot create norms of obligation. The norms of the constitution are obligatory because the basic norm states that the

first constitution (whether made with or without legal authority) ought to be obeyed.

Raz, like most legal positivists, conceived the law as fact and the legal system as a system of legal facts. This conception can be justified on the utilitarian ground that it simplifies the explanatory model and aligns it better with the way people think about the law and legal system. Lay persons do not care about Hume's empiricism or Kant's transcendental idealism. They do not care about the relation of 'is' and 'ought' or about the purity of legal theory. They want to know what the rules of the game are so that they can get on with their lives as best they can. Law as fact makes more intuitive sense, and in that sense *may* be of greater utility than the pure theory. This does not mean, however, that the pure theory is logically wrong.

Legitimacy and revolution

In an ongoing legal order, a norm remains valid until it is terminated by its own terms or by a higher norm. Some laws contain 'sunset clauses' according to which they cease to operate after the expiration of a prescribed period. Generally, though, norms established by a law remain valid until repealed by another norm enacted by another valid law. In other words, a valid norm remains valid until it is terminated in the way prescribed by the legal order founded on the basic norm. Kelsen called this the principle of legitimacy (1967, 209). The basic norm itself may be transformed in the manner prescribed by the basic norm. In other words, the basic norm may be changed legitimately. Written constitutions usually contain special rules by which they may be changed. The Australian Constitution may be amended by a procedure that requires approval by a special majority at a national referendum (section 128).

However, it is possible that a constitution may prohibit certain kinds of constitutional amendment. Article 79(3) of the German Constitution states that 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'. Articles 1 and 20 guarantee basic human rights and the democratic structure of the state. In short, the most fundamental values of the German Constitution are said to be unalterable. The Indian Supreme Court has taken the view that the basic features of the Indian Constitution cannot be altered by recourse to the amending procedure (*Kesavananda Bharathi Sripadagalvaru v The State of Kerala* AIR 1973 SC 1461). It is generally regarded by constitutional scholars that the *Act of Union 1707* cannot be repealed by the UK Parliament. This Act united the Parliaments of England and Scotland and hence is constitutive of the current sovereign Parliament of the United Kingdom (Smith & Brazier 1998, 77). Similarly, scholarly opinion takes the view that the UK Parliament cannot limit its own sovereign power (Smith & Brazier 1998, 78; *Vauxhall Estates Ltd v Liverpool Corporation*

[1932] 1 KB 733). Where a constitution or some aspect of it cannot be changed by a constitutional process, such change may nevertheless occur by way of a revolution.

Revolution

Sometimes the basic norm of the legal order changes by means not authorised by the basic norm. This can happen in a number of different ways – sometimes violently, sometimes by peaceful and consensual means. It happens when one state conquers another and imposes its own sovereign power over the conquered state. The establishment of Crown sovereignty over Britain's colonies subordinated local legal systems to the English law and constitution. It happens when a region of a country secedes from the whole and establishes its own legal order. Recent examples include the separation of: Bangladesh from Pakistan (1971); Eritrea from Ethiopia (1993); Slovenia (1991), Bosnia-Herzegovina (1991) and Croatia (1995) from Yugoslavia; East Timor from Indonesia (1999); and Kosovo from Serbia (2008). The basic norm also changes when an empire or federation breaks up into independent states. The basic norm may also be displaced by domestic events, as when the constitution is overthrown in a *coup d'etat* or by a popular uprising. The English Revolution of 1688, the American Revolution of 1776, the French Revolution of 1789 and the Russian Revolution of 1917 are monumental historical examples of such constitutional change.

Consensual revolution

The basic norm can be changed by peaceful and consensual means. Such change is revolutionary when the new basic norm does not derive its validity from the old basic norm. The constitutional evolution of the Australian Commonwealth provides a good illustration of revolution by consensus.

The Australian Constitution is a part of an Act of the UK Parliament passed in 1900 – the *Commonwealth of Australia Constitution Act 63 & 64 Victoria (Chapter 12)*. The Constitution was alterable by the UK Parliament, as it was not bound by its own laws. In 1931, the UK Parliament enacted the *Statute of Westminster*, which declared that no Act of Parliament of the United Kingdom shall extend to a dominion unless that dominion requested it and consented to it (section 4). The Statute was adopted by Australia in 1942 and from that date the UK Parliament refrained from making law for Australia in the absence of a request. In theory, the UK Parliament could have repealed the *Statute of Westminster*, but any UK law made for the Commonwealth of Australia without a request would have been regarded as ineffectual by Australian courts. The ultimate source of legislative power for the Commonwealth of Australia became the Australian Constitution. The reason for this change was the political reality that Australia would no longer recognise UK law directed at the federation. The power to legislate on request remained until it was relinquished by the UK Parliament by

the *Australia Act 1986* (UK). This is the position even though, as a sovereign legislature, the UK Parliament is not bound by its own previous laws, and may repeal them or may legislate against them. The UK Parliament has lost competence in relation to Australia through a revolutionary process in which it was a willing participant.

A revolution may also occur peacefully, when an independent nation makes a collective decision to adopt a new constitution in a manner unauthorised by the existing constitution. Such constitutions are known as autochthonous constitutions. The current US, Indian and Irish constitutions and the 1972 Sri Lankan Constitution were adopted by autochthonous processes. The US Constitution was adopted by the Constitutional Convention in Philadelphia in 1787 and ratified by conventions in the different states. The Indian Constitution in 1950 and the Sri Lankan Constitution in 1972 were adopted by specially created constituent assemblies. Ireland's 1937 Constitution, though enacted by the existing parliament (Dáil Éireann), was approved at a referendum as an autochthonous (independently established) constitution. In each case the new constitution marked a break with the past. Australia's Constitution is not an autochthonous constitution, although it was drafted by constitutional conventions and approved at referenda held in the several colonies. The draft so approved was enacted into law by the UK Parliament, ensuring legal continuity. The continuity was broken only by the political effects of the *Statute of Westminster Adoption Act 1942* and the *Australia Act 1986* (UK).

Revolution by force

The basic norm of a legal order may be displaced by force. The American, French and Russian revolutions are among the best known historical illustrations. In each case the existing basic norm was changed by violent struggle. In some cases the change is swift and decisive and in other cases the struggle for legal supremacy may stretch over many months or even many years, with the basic norm remaining in a state of uncertainty.

The American Revolution and the establishment of the US Constitution are remarkably instructive of the fluctuations of the basic norm in revolutionary conditions. The 13 British colonies that became the United States of America were subject to British law. Hence, the legal order of each colony was founded on the basic norm of the British Constitution. Though the colonists were subject to the laws of the British Parliament they were not represented in it. In 1775, following accumulated grievances, the colonies established their own governments in defiance of the British Crown. The British government's efforts to maintain its sovereignty by military force led to the War of Independence (also known as the Revolutionary War), which lasted six years. Significant events concerning the legal order occurred during this period of conflict. The colonies formed the Second Continental Congress, which on 4 July 1776 adopted the famous American Declaration of Independence. The Congress then proceeded to draft Articles of Confederation that were finally ratified by all states in 1781. The Articles

established a confederation called the 'the United States of America'. However, under Article 2, the states retained their separate sovereignty. States adopted their own separate constitutions. There was no certainty during this time about the basic norm of each state, as the outcome of the Revolutionary War remained uncertain. Eventually, the British forces were defeated, with substantial help from France, and in the *Treaty of Paris 1783* Britain recognised the independence of the American states. A period followed in which each of the 13 states functioned as independent political entities loosely confederated with each other. Each state had its own legal order based on its distinct basic norm. In 1787, the Congress of the Confederation invited delegates from each state to a convention in Philadelphia for the purpose of discussing improvements to the Articles of Confederation. Delegates from all the states except Rhode Island attended. After deliberation, the delegates agreed to expand their mandate and proceeded to draft a new constitution for the United States of America. They agreed that the Constitution would be binding on the ratifying states if a minimum of nine states ratified it. On 21 June 1788, New Hampshire became the ninth state to ratify the Constitution. The Constitution commenced its operation on the swearing in of George Washington as the President on 30 April 1789.

The change in the basic norm by revolution usually means that the courts of the country recognise it. This may happen in one of two ways. The courts may accept the new reality and interpret the events as creating a new legal order founded on the new basic norm. In 1958, the President of Pakistan in a *coup d'etat* proclaimed the annulment of the country's constitution and assumed supreme power. There was no effective political resistance to this move. When the legality of the action was questioned, the Chief Justice of Pakistan, the Honourable Muhammed Munir, declared that the effect of the 1958 annulment of the Constitution by the President 'is not only the destruction of the existing Constitution but also the validity of the national legal order' (*The State v Dosso* [1958] 2 PSCR 180, 184). In 1966 the Prime Minister of Uganda, in complete disregard of the 1962 Constitution, assumed all state powers and proclaimed a new constitution. There was no political opposition to this action. The Chief Justice of Uganda, Sir Udo Udoma, declared: '. . . our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its *de facto* and *de jure* validity' (*Uganda v Commissioner of Prisons; Ex parte Matovu* [1966] EA 514).

In Kelsenian terms, the superior courts of Pakistan and Uganda regarded the revolutionary acts and the absence of resistance to them as reasons for recognising a new basic norm. From one point of view the courts were interpreting the normative significance of certain political realities. From another point of view, the judicial rulings were themselves revolutionary acts that contributed to the effectiveness of the new basic norm.

Effects of revolution on existing law

A revolution in the *legal sense* is about changing the basic norm of the legal order. Not all attempted revolutions succeed. Some have temporary success when their leaders gain and hold power for a period before the old order is restored. The short-lived Confederacy of the United States and the white minority regime of Southern Rhodesia offer historical examples. In 1861, 11 southern states broke away from the American Union and established the Confederacy, which lasted until its defeat in the Civil War in 1865. In 1965 the white minority government of the British colony of Southern Rhodesia (now Zimbabwe) unilaterally declared its independence from the UK and ruled the country until 1979, when the nation returned to British sovereignty.

The legal situation must be considered in relation to the following scenarios:

1. The attempted revolution has failed and the basic norm remains unchanged.
2. The revolution has succeeded, there is no opposition to the new regime and a new basic norm is established.
3. The revolution is in progress and the outcome is uncertain owing to resistance.
4. The old order is restored after the initial success of the revolution.

An attempted revolution fails and the existing basic norm is unchanged

A revolution in the legal sense is a direct and deliberate violation of the basic norm. Revolutionary activity almost certainly will violate many other criminal laws, such as those concerning treason and mutiny. If the attempted revolution fails, the basic norm stands and so do all the norms that derive their validity from it. Hence, the commands and statutes of the revolutionaries have no legal effect. The fate of the revolutionaries will depend on how the authorities deal with them under existing norms. Often it is harshly.

The revolution succeeds and a new basic norm is established

A revolution changes the basic norm of the legal order, but it is unusual for the new rulers to make wholesale changes to the laws of the land. Many of the existing laws, particularly the private law, will remain unaffected. Thus, contracts of the past will continue to be enforced, property owners will retain title, torts will remain actionable and crimes will be punishable. The Bolshevik Revolution of October 1917 in Russia was an exceptional case. The revolutionary forces led by Vladimir Lenin aimed not only to take supreme power but also to radically change the laws of the land in order to socialise the means of production, exchange and distribution. They succeeded in establishing the first communist state. Similar revolutions followed in many countries where communist or workers' parties took power. In each case the laws were fundamentally altered. The Islamic Revolution in Iran in 1979 also brought about radical legal change. However, it

is more often the case that the new regime leaves the bulk of the general laws untouched.

What is the source of the post-revolution validity of the old laws? The ousted basic norm no longer supports them. Kelsen's answer is simple. If the old laws are regarded as valid it is because the new constitution has validated them expressly or tacitly (Kelsen 1967, 209). The content of these norms remains unchanged but the reason for their validity changes as the old basic norm is displaced by the new.

The revolutionary struggle is in progress and there is uncertainty about the basic norm

As noted previously, a revolutionary struggle may last many months or even years. The revolutionary group may even gain temporary control of the machinery of government. There will be uncertainty during such periods as to what the basic norm is, and hence uncertainty about the validity of specific laws. Courts that derive their authority from the old constitution may have to consider the validity of three types of laws or purported laws.

1. Existing non-political law

The first category comprises non-political laws that existed at the commencement of the revolution, which are validated by the basic norm that the revolution seeks to overthrow. In other words, these are the laws of the old regime. Of these existing laws, some are political and some non-political law. Non-political law here refers to private law governing matters such as contract, torts, property, marriage, succession, criminal law protecting person and property and the laws of evidence and procedure. Political law refers to the constitution and other laws that concern the powers of government and the political system. (The distinction between political and non-political law is one of convenience and is not always easy to draw, as shown by communist and Islamic revolutions.)

A rebel regime that is striving forcibly to change the political laws may not have an immediate interest in changing non-political laws. In such cases, as Kelsen suggested, the non-political laws may be deemed to be tacitly adopted by the rebel regime, and hence may be valid under both contending basic norms. A key reason for judicial willingness to recognise and enforce non-political law in these circumstances is the avoidance of hardship to innocent individuals.

2. Non-political law enacted by the rebel regime

The second category comprises laws of a non-political nature made by a rebel regime that is in temporary control. There are sound practical reasons for courts to apply the non-political laws of a rebel regime, chief among them being the avoidance of general lawlessness and hardship to individuals. Assume that the rebel regime makes a law that dispenses with the need for consideration in forming an enforceable contract, and that many contracts are concluded by persons relying on this enactment. It will be manifestly unjust if these contracts

are not enforced because they are invalid according to the old law. Again, if the criminal laws against theft, murder, assault and other injuries are not enforced because they have been modified by the rebel regime, the society will descend into chaos. This is, of course, a moral reason for enforcing the law. Is there a legal reason in the Kelsenian sense?

It is conceivable that the norm enacted by the rebel regime is validated by a norm of the legal order that the rebels are seeking to overthrow. This reasoning is known as the 'doctrine of necessity'. As the Privy Council stated, the doctrine holds: '. . . when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society' (*Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 726). The origin of the doctrine is found in Hugo Grotius' *De Jure Belli ac Pacis*:

> Now while such a usurper is in possession, the acts of government may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws, and suppression of the courts. (1927 (1625), 159)

This rationale was adopted by the US Supreme Court in a number of cases considering the validity of laws enacted by the Confederate states during the Civil War. In *Texas v White*, the Court stated:

> It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void. (74 US 700, 733 (1868))

The doctrine of necessity (or implied mandate) allows the courts to justify the enforcement of rebel laws, on the authority of a norm of the old legal order to which the courts owe allegiance.

3. Political law enacted by the rebel regime

The most difficult problems for the courts arise in relation to political laws enacted by a rebel regime for the time being in control of the machinery of government. The usurper in this scenario is in temporary command but has not gained lasting control of the state. Judges derive their jurisdiction from the old constitution, to which they have pledged loyalty. The ultimate source of their authority is the basic norm of the legal order challenged by the rebels. Consider a decree that

abolishes the parliament and grants legislative power to the commander of the rebel forces. This decree directly violates the constitution. If the court gives effect to the decrees of the commander, it will in effect recognise a new basic norm and thereby advance the revolution. (This new basic norm would be something like: 'The commander's decrees ought to be obeyed'.) The alternatives are for the judges to refuse enforcement of the commander's decrees (and risk retribution) or to stand down as judges. If the court is not physically situated within the territory controlled by the rebel regime, the judges will be less intimidated, but their decisions may be ineffective so long as the rebel regime controls the organs of enforcement.

Madzimbamuto v Lardner-Burke vividly illustrates the legal issues. Southern Rhodesia (later Zimbabwe) was a British colony administered under a constitution (*Constitution 1961*) that granted a high degree of autonomy to the local legislature and executive. The UK Parliament retained the power to legislate for the colony, including the power to amend the *Constitution 1961* at will. The highest appellate court of the colony remained the Privy Council sitting in London. The majority of the people of the colony were black Africans, but the government was dominated by minority whites led by the Prime Minister, Ian Smith. Britain was planning to grant the colony independence under a constitution that would have led to black majority rule. On 6 November 1965, Madzimbamuto was detained lawfully under a detention order made under emergency regulations in keeping with the *Constitution 1961*. The regulations were effective for three months and could have been extended only with the approval of the Legislative Assembly (*Constitution 1961*, s72). On 11 November 1965, Ian Smith and his Cabinet made a 'Declaration of Independence' that Southern Rhodesia was no longer a Crown colony but was an independent sovereign state. The Governor (Queen's representative in the colony) responded immediately with a public statement that the Declaration of Independence was unconstitutional, and on 16 November 1965 the UK Parliament passed the *Southern Rhodesia Act 1965*, which reaffirmed UK sovereignty over Southern Rhodesia, nullified the enactments of the Smith regime and suspended the power of the Legislative Assembly. The UK government, with the support of the international community, instigated a range of measures to reverse the revolution, including trade embargoes on the colony. The rebel regime disregarded the *Southern Rhodesia Act* and established itself as a *de facto* government. Although the state of emergency expired on 4 February 1966, Madzimbamuto continued to be held under new purported emergency regulations made by the rebel regime. When his detention was challenged, the High Court of Southern Rhodesia agreed that the Declaration of Independence was unlawful but that it was necessary for the court to give effect to the emergency regulations of the rebel regime because it was the only effective government in the colony. This argument was supposedly based on the doctrine of necessity.

The applicant appealed to the Privy Council. The majority of the Council (Lord Pearce dissenting) firmly rejected the High Court's reasoning and allowed the

appeal. They held that the practical difficulties of ruling against the usurper did not absolve the court from upholding valid law. The doctrine of necessity was overridden by the express commands of the sovereign UK Parliament:

> Her Majesty's judges have been put in an extremely difficult position. But the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorised by the United Kingdom Parliament, by the introduction of a doctrine of necessity which in their Lordships' judgment cannot be reconciled with the terms of the Order in Council. It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping Government, to such extent as may be necessary for that purpose. ([1969] 1 AC 645, 730–1)

Lord Pearce, in a dissenting opinion, spelled out the limits of the doctrine of necessity. The acts of the usurper may be recognised as valid so far as they:

(a) are directed to and reasonably required for ordinary orderly running of the state
(b) do not impair the rights of citizens under the lawful 1961 Constitution, and
(c) are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign (at 732).

Contrary to the majority view, Lord Pearce concluded that the detention orders, though unlawful, should be recognised (hence validated) under the doctrine of necessity. A principal reason was that the continuation of the emergency rule was consistent with the UK government's policy of seeking the reversal of the revolution through non-disruptive means (at 741–2). Lord Pearce's disagreement with the majority was not about the rule but about its application to the facts. These opinions, when put into Kelsenian terms, hold that the doctrine of necessity refers to a norm derived from the constitution under which the courts were established. Its validity is traceable to the basic norm of the old constitution, not the usurper's constitution. It must therefore yield to the overriding acts validly made under the old constitution. In *Madzimbamuto* the Privy Council explained the content of this norm as it exists in the legal order of the UK and its colonies. In another legal order, there may not be a norm of necessity, or the norm may have a different content.

The old legal order is restored after the initial success of the revolution

A rebel regime may be successful over a period of time but be eventually overthrown, with the result that the old regime is reinstated. In this scenario, the courts are no longer under the physical control of the usurper. In the previous scenario we considered the norm that would validate a usurper's enactment while the usurper was still in control. Here we consider the norm that would validate the usurper's enactment after the usurpation has ended. The first is a case of contemporaneous validation and the second a matter of retrospective validation. Why should the two cases be treated differently? Lord Pearce in *Madzimbamuto* offered the following explanation:

> If acts are entitled to some retrospective validity, there seems no reason in principle why they should not be entitled to some contemporaneous validity. It is when one comes to assess the question of public policy that there is a wide difference between the retrospective and contemporaneous. For during a rebellion it may be harmful to grant any validity to an unlawful act, whereas, when the rebellion has failed, such recognition may be innocuous. (at 733)

Lord Pearce suggested that the courts are more likely to validate rebel acts if the rebellion is at an end. The statement is consistent with Kelsen's view that the question of validity of a usurper's enactment is determined by a norm of the prevalent legal order. The judges' decision to confer or refuse validity to a rebel enactment will be valid law if it is authorised by a valid higher norm ultimately derived from the basic norm of the restored legal order.

International law

International law, according to the command theories of Bentham and Austin, is not law but positive morality. The principal reason for this view is that there is no global sovereign whose commands are habitually obeyed by nations. This was true in the time of Bentham and Austin and remains true today. The United Nations is not a global sovereign. Hart, who rejected the command concept of law, argued that international law is law in the same way that the law of primitive societies is law. Primitive societies lack specialised law making and law enforcing agencies, but display the operation of certain legal rules through diffused social pressure. Kelsen also compared international law to primitive law, but claimed that international law and national law are parts of a unified system of law derived from a single basic norm. Kelsen therefore took a monist view of international law, in opposition to the dualist view that regards international law and national law as separate systems of law.

The dualist view holds that international law is the law governing relations among states, and national law is the law regulating relations among individuals and between state and individuals. They are separate and independent systems of law (Triepel 1958 (1899); Anzilotti 1928). In many states, rules of international law do not become part of national law unless and until they are adopted as valid law by the appropriate law making authority of the state. The United Kingdom and Australia are among these states. A treaty ratified by the Australian or UK government will not be binding on citizens or officials unless its provisions are given domestic effect by an Act of Parliament. It is true that courts of these countries sometimes make use of international law principles and treaty obligations in interpreting statutes or developing the common law. Even in such instances, international law enters the state legal system not by its own force but by an act of state in the form of a judicial decision.

Dualism holds that a norm of national law and a norm of international law may contradict each other without the one invalidating the other, just as the