LAW WITHOUT ORDER

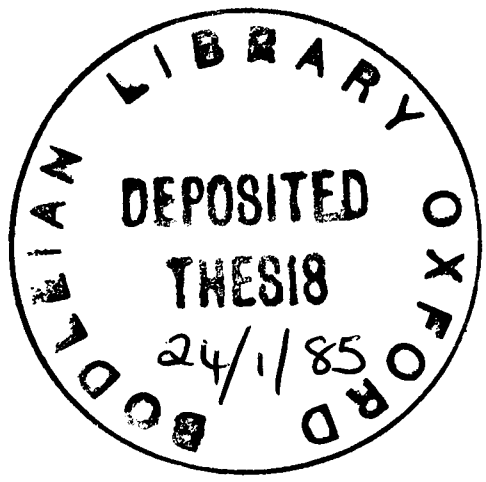
A Critique of Systematic Theories of Law

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LAW WITHOUT ORDER; A Critique of Systematic Theories of Law

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ABSTRACT

The aim of this thesis is to challenge the tradition of theories of law to be theories of legal system. It argues that the frequently criticized individual failings of these theories are due to their common mistake in attempting to understand law in systematic forms at all.

"Positivist" systems are composed of rules, norms or reasons (Hart, Harris and Raz respectively). These are linked into structured wholes by their sources. Dworkin's "Content" system links the content of "principles" into a whole which provides the "best justification" of law. It is argued that from the point of view of legal actors, let alone social observers, neither kind of legal system adequately encompasses or describes law.

Sociological theories of legal system are usually systems of individual roles and institutional functions that jointly perform the social function of law. These are rejected because legal institutions rarely fulfil their allotted function, yet do so much else besides.

A non-systematic theory of society is then proposed. This helps explain why law, as a key part of that society, is unlikely to be understood in systematic terms. It also provides a model for a non-systematic theory of law. Both law and society are seen to comprise three kinds of social relations, power (including authority), unintended effect, and value-effect (including norms). Unpatterned sets of relations found between persons in more frequent or intense interaction with each other than outsiders form institutions. These social relations are such that they generate disordered conflict within and between institutions, the former muting the latter.

Law is seen as a set of institutions that are part of, and subject to, that conflict. It holds a special place within society because much of the conflict is channelled through the social relations within law.

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ABBREVIATIONS

AL	Raz, J.	Authority of Law (Oxford Uni. Press, 1979)
ARSP	Archiv fur Rechts- und Sozialphilosophie	
ASS	Balu, P.M. (ed.)	Approaches to the study of Social Structure (Open Books, London, 1976)
BP	Crozier, M.	The Bureaucratic Phenomenon (Tavistock, London, 1964)
CIO	Salaman and Thompson (eds.)	Control and Ideology in Organisations (Open Uni. Press, Milton Keynes, 1980)
CL	Hart, H.L.A.	Concept of Law (Oxford Uni. Press, 1961)
CLS	Raz, J.	Concept of a Legal System (Oxford Uni. Press)
DNB	Dworkin, R.	Draft of Book circulated to seminar students, 1981, 1982 *
FSC	Coser, L.A.	The Functions of Social Conflict (Routledge & Kegan Paul, London, 1956)
Idea	Winch, P.	The Idea of a Social Science (Routledge & Kegan Paul, London, 1958)
IESS	International Encyclopaedia of Social Sciences (MacMillan and Free Press, New York, 1968)	
ISAs	Althusser, L.	"Ideological State Apparatuses", Lenin and Philosophy and Other Essays (New Left Books, London, 1971).
ISP	Laszlo, I.	Introduction to Systems Philosophy
JP	Llewelyn, K.	Jurisprudence (Uni. Of Chicago Press, 1962)
LAP	Moore, S.F.	Law as Process (Routledge & Kegan Paul, London, 1978)
LIMS	Unger, R.M.	Law in Modern Society (Free Press, New York, 1976)
LLS	Harris, J.W.	Law and Legal Science (Oxford Uni. Press, 1979)
LM&S	Hacker and Raz (eds.)	Law, Morality and Society: Essays in Honour of H.L.A. Hart (Oxford Uni. Press)
LOP	Chambliss and Siedman	Law, Order and Power (Addison-Wesley, Reading, 1971)
LPhil	Harris, J.W.	Legal Philosophies (Butterworths, London, 1980)
LRC	Tigar and Levy	Law and the Rise of Capitalism (Monthly Review Press, New York, 1977)

* Where only a page number is given the reference is to the 1981 draft whose pages were numbered consecutively. Where a chapter is cited as well, the reference is to the 1982 draft.

LSLR	Stone, J.	Legal System and Lawyers Reasoning (Maitland, Sydney, 1968)
LSS	Bredemeier, H.C.	"Law as a Social System" in Aubert (ed.) Sociology of Law (Penguin, 1969)
LTh	McCormick, N.	Legal Reasoning and Legal Theory (Oxford Uni. Press, 1979)
McCH	McCormick, N.	H.L.A. Hart (edward Arnold, London, 1981)
ML	Collins, H.	Marxism and Law (Oxford Uni. Press, 1982)
NLNR	Finnis, J.W.	Natural Law and Natural rights (Oxford Uni. Press, 1980)
O&D	Roberts, S.	Order and Dispute (Penguin, 1979)
OLI	Hirst, P.	On Law and Ideology (MacMillan, London, 1979)
PAO	Salaman and Thompson (eds.)	People and Organisations (Longman, Harlow, 1973)
PFBU	Wrong, D.	Power: Its Forms, Bases and Uses (Blackwell, Oxford, 1979)
PRN	Raz, J	Practical Reason and Norms (Hutchinson, London, 1975)
PT	Kelsen, H.	Pure Theory of Law (Uni. of California Press, Berkeley, 1970)
SAL	Podgorecki and Whelan (eds.)	Sociological Approaches to Law (Crrom Helm, London, 1981)
SD	Stone, J.	Social Dimentions of Law and Justice (Maitland, Sydney, 1966)
SLSS	Evan, W.M. (ed.)	Sociology of Law : A Socio-Structural Approach (Free Press, New York, 1980)
ST(1)	Emery, F.E. (ed.)	Systems Thinking Vol. 1 (Penguin, 1981)
ST(2)	Emery, F.E. (ed.)	Systems Thinking Vol. 2 (Penguin, 1981)
STh	Coser and	Sociological Theory
TRS	Dworkin, R.	Taking Rights Seriously (New Impression with Reply to Critics, Duckworth, London, 1978)
TLP	Nagel and Neef	The Legal Process: Modelling the System
WG	Honore, A.M.	"What is a Group?" 61 ARSP 161

Full citations of all books and articles referred to in the thesis will be given in the Bibliography. In the text, books other than the above will be cited by author and title. Articles other than the above will be cited by author, journal (using the same abbreviations as the Index of Legal Periodicals, except that "Review" is abbreviated to "R"), volume and page.

CHAPTER 1

INTRODUCTION

1.1 THE ORTHODOXY OF LAW-AS-SYSTEM

The claim that law forms a system would at first sight appear to be universally endorsed by those who write about and practise law. Most speak easily of the legal system and would never query the conjunction of the two notions. Indeed Geoffrey MacCormack has noted how common it is to use the terms "law" and "legal system" interchangeably.[1] Yet this very readiness of use and interchangeability highlights the weakness rather than the strength of general beliefs about law's systematic quality. For most lawyers, and even some legal theorists, "law" and "legal system" are just synonymous terms that can be plugged into the same sentences and used in the same situations.[2] For them, "legal system" usually conveys no more meaning than "law".

The belief that the law forms a legal system is only given real content and prominence by jurisprudential theory. So, unsurprisingly, it is to jurisprudential theory that we must turn in order to find any theoretical justification for the widespread practice of regarding law as a system. Certainly such theoretical justifications are not in short supply. Most writers use the word system freely[3] and describe law in what

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1. "'Law' and 'Legal System'" (1979) 42 MLR 285.
2. Perhaps to be used in successive utterances to avoid monotony.
3. E.g. Hart CL. p.90, Dworkin LM&S p. 82 & DNB Ch.V p.2, Evan SLSS xv ff. The frequency and freedom of use is underlined by the number of entries in the indices of books on jurisprudence and the number of times it crops upon the title or subtitle of the jurisprudential

can clearly be recognized as systematic terms.[4] Indeed most theories of law are theories of one or other kind of legal system.

Despite this almost universal agreement that law forms a system, the kind of system it forms is hotly debated. Each major school of jurisprudential thought offers a different theory of legal system, usually incompatible with other theories, and vigorously criticized by their proponents.[5] Indeed there appears to be a shifting majority against each and every type of system. In denying, as this thesis does, that there is system in law, it is merely joining the majority against each individual theory.[6] The only departure in this thesis is that, after rejecting all current systematic theories, it does not attempt to provide another systematic theory to fill the gap. It suggests instead that law is best seen as not systematic at all.

Some would seek to rule this departure out of order because they regard systemness as a necessary or defining feature of law.[7] As the purpose of this thesis is to consider whether it is appropriate to see law as systematic or not, systemness must be rejected as a part of the definition of law and the question treated as at least arguable. Most theorists would accept this, following Kamenka's dictum that:

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works considered and referred to here e.g. LSLR, CLS, Auerbach 11 Wisc. LR 607, Caraciolo 65 ARSP, Eckhoff 22 Scand. LR 39, Hughes 35 NYULR 1001, Payne 18 Wm & Mary LR 287 (D'Amato and Farago throw in the systematic hip word "cybernetics" in 14 UWOnt LR 171 and 14 Valp ULR 371). Emphasis varies, of course, depending on the purpose which the theory is propounded.

4. See section 1.3.
5. E.g. Hart attacks Austin's, Kelsen's and Parson's systems (CL pp.35, 110) and Dworkin attacks Hart's (TRS p.14).
6. This is not to say that being with the majority in Jurisprudence is any better title to truth than being in the majority in Mediaeval Astronomy, merely that the unaniminity is a paradoxical one.
7. PT p.47. CLS p.1.

"definitions are neither true nor false, but more or less useful".[8] Certainly, if this thesis succeeds in describing something that would be clearly recognizable as law, it may reject a definition of law that regards law as necessarily systematic as not linguistically useful. If it succeeds in convincing the reader that no system can be found within what we regard as law, definitional insistence that law is systematic would lead to the conclusion that we have no law.

Nevertheless, though not accepting the proposition that law forms a system as definitionally true, this thesis does acknowledge, in Quinian vein, that for many legal theorists it is one of their most entrenched organizing beliefs about law.[9] As such it is very hard to dislodge because there is a tendency, when confronted with difficulties (or "recalcitrant experiences") to reject or modify other beliefs first, allowing someone to hold on to the belief that law is systematic almost indefinitely. Thus it is common to find theorists taking more and more unrealistic positions ignoring or denying the existence of various aspects of law or trying to call them irrelevant in order to protect their beliefs in law's systemness.[10] Each of the systems theories can be seen as encapsulating one or more valuable insights about law. But because they hold just as strongly their belief in law's systemness, they are forced to abandon the insights of other theorists, and sometimes even to blur or distort their own. These other theorists reject the theories which ignore their pet insights. But as they adhere to the orthodoxy of law's

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8. Kamenka in Friedrich (ed.) Nomos VIII: Revolution p.135.
9. See Quine and Ullian The Web of Belief.
10. Stone acknowledges the contrary evidence, notes what he calls the "teeming disorder" and the "hurly burly of legal norms" and goes on to say "that merely shows just what sort of order it is"(!). Stone LSLR p.26.

systemness they create new theories of legal system incorporating their own insight; and to protect it, they must, in turn, reject the insights that the other theorists have had. Perhaps it does not exaggerate too much to say that the disagreements between systems theorists are due to their common belief in legal systems and that this leads them into arguments about what is sufficiently unimportant to be thrown out in order to protect it. Their common belief is their common error which leads to a common criticism - the distortion they must apply to law to make it fit the system.

In the face of such entrenched beliefs all that can be done is to make life as difficult as possible for the believer in legal systems by providing as many recalcitrant experiences as possible to dislodge that belief. Consequently, this thesis will make multiple criticisms of each theory to show the sacrifices it has made to preserve its particular image of law as a system. This will be done for major examples of three types of legal systems theory: positivist, content and sociological.[11] Naturally enough, theories of legal system will not be rejected without something to put in their place. To this end the outlines of a non-systematic theory of law will be offered, incorporating some of the most valuable insights of the rejected theories - able to coexist again after the excision of their belief in law as system.

This is not to say that the legal systems theorists discussed in this thesis see law as so thoroughly systematic as to be without even the slightest tinge of disorder. Most acknowledge centripetal tendencies which make impossible the realization of a perfectly systematic view of law. By describing law as systematic, they are saying that law has a

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11. Elaborated in Chapters 2, 3 and 4 respectively.

backbone of system with disorderly fringes.

This thesis hopes to provide a different picture of law - as largely disordered and unsystematic. The picture will be of something without any overall system or order, but with pockets of order or systematization within it.[12] It will be offered initially as an alternative, against which systematic images of law can be tested for their usefulness. It will be claimed to provide a better departure point, not only in the description of law, but in many other contexts in which we are called upon to use the word "law".

It is this competition, between various systematic pictures of law and my disordered one, that this thesis will attempt to create and then resolve. The reader is invited to become, as Llewelyn declared himself to be, a system sceptic,[13] and regard the systematic nature of law not as an assumption but, if anything, the conclusion of a tight argument that has withstood "the slings and arrows" of at least one doubting doctoral candidate.

1.2 WHY THE QUESTION IS IMPORTANT

Understanding anything with which man comes in contact is always worthwhile to some degree, especially when that contact is as intense and continuous as that with law. It helps to satisfy man's natural curiosity about his environment, and to predict the law's effects on him. But it is doubly important because man's contact with the law is not merely passive - he interacts with it in that he is not only affected by law but seeks actively to change or preserve it. If our contact were merely passive then some reliable method of predicting its "behaviour" would be

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12. For a detailed discussion of why these pockets of order do not make the theory a systematic one. See sub-section 1.5(2).
13. JP pp.93-94.

sufficient, though not as satisfying as a theory which explained why it so behaved. But to alter or preserve something successfully, it is much more important to understand its nature, what sort of beast it is and how it works. Our approach to both changing and defending law as a whole will be affected by whether we regard law as systematic or not. Whichever it is sought to do, the orthodox view that law forms a system is comforting. Many who might be called "conservatives" believe there is a "legal system" which protects in a co-ordinated way, those things that they most value in a community. Many "radicals" largely agree, dissenting only on what values really are protected or whether the values protected should be endorsed. They take comfort from seeing one enemy to strike at, one entity to replace. As Wallace puts it, both agree that violation of any law "starts to unravel an intricate functional fabric".[14] This is the fear of the one and the hope of the other. Somewhere in between is the liberal reformer, who hopes that, by capturing the centre of the system, he can modify the goals or values it furthers or protects. But if there is no legal "system", then there is cold comfort for all. For the conservative: if law is not systematic, it may not comprehensively embody any values, his or other's! The hope of the radical, that pulling the right string will unravel the intricate functional fabric, is dashed. He must instead begin the laborious task of changing society piece by piece. I would argue that the intractibility of our society and its law to either reform or revolution is precisely due to its lack of systematic organisation, so that when the revolutionary strikes or the reformer moves, there is no one system to attack, no one key institution to change. Lack of change is the result of social and legal <u>dis</u>order

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14. Wolff (ed.) <u>Rule of Law</u> (1973).

producing social and legal inertia rather than, as is more usually supposed, social and legal order providing social and legal stability. Awareness of this may necessitate fundamentally different strategy and tactics for all participants in the political fray.

Although few of us spend our time grappling with problems of socio-legal change, most of our activities touch upon, and are touched by, law. Legal theorists are particularly concerned with the activities of judging, legislating, advising and advocacy. In addition, the activities of bureaucrats, police, criminals and business executives are particularly touched upon by parts of the law. Most are usually concerned with a small part of the law - lawyers specialize, criminals specialize, executives are touched by consumer law, police with the criminal law, bureaucrats with the Act(s) they administer. Even judges specialize, sitting in divisions and finding certain cases constitutionally, statutorily, or practically barred from their jurisdiction. At any one time, they are usually concerned with even narrower areas of law in the cases they argue and laws they break, skirt, enforce, and interpret respectively. Furthermore, most have learned particular ways of doing their jobs, which include the methods for dealing with (and to some extent, the attitudes towards) the law as it touches them (i.e. they are "trained"). This allows them to do their jobs "unperturbed by doubts and disputations" about law and whether it is systematically organised.[15] Yet an appreciation of law in general and especially whether it is systematic, and therefore whether their activities are a part of a larger system, is important. It can affect their attitudes to law, the way it affects them and the way they try to affect or use it. Those at the centre of the previously imagined system,

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15. LSLR p.162.

legislators and judges, may have their egos deflated and realize that further action beyond mere decision-making is necessary to transform their pronouncements into law. Those at the periphery may realise their effectively greater autonomy and with it their increased opportunities (and, perhaps, responsibility?) Judges may see themselves making individual decisions rather than welding a logical masterpiece. Lawyers may delve more confidently into the labyrinth looking for those parts of the legal morass that can help their clients. Citizens will see the law as neither an ass nor a liberal jewel but as the actions of many individual officials and concern themselves with those actions that affect them.

Thus the question is important not only so that we can understand and appreciate an important human phenomenon, but also in the practice of activities that affect and are affected by law.

1.3 "SYSTEM" AND "LAW"

In questioning whether law can usefully be seen as systematic, it is necessary to consider the meanings that can usefully be ascribed to "system" and "law": although there is no point in adopting restrictive definitions of either word.

System

Despite the orthodoxy of the view that law forms a system, what is meant by "system" in the various theories is not always either clear[16] or uniform. Most theorists are reasonably certain about the theory they are advocating and that what they are advocating constitutes a system. But they rarely indicate which of their theoretical claims are in their view

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16. Some indeed use the term very loosely so that their writings offer little more enlightenment than the layman's synonomous treatment of law and legal system (see section 1.1).

necessary to establish law's systematic quality and which claims go further to provide more detailed description or fulfill other purposes.[17]

Under these circumstances it is useful to consider general views about the nature of systems as found in definitions, explications and ideal types propounded in "general systems theory".[18] This is a body of theoretical and philosophical thought which attempts to discover what is common to the use of the term "system" in the many and varied disciplies in which it is found. They want to find some common features of the river systems of geography, the digestive systems of mammalian biology, the solar systems of astrophysics, the atomic systems of nuclear physics, the economic and political systems of the social sciences, the weapons systems of modern war and, especially, the computer systems of the new technologies and the production and management systems of large companies.[19] In so doing they hope to find out what it is about those systems that is "systematic". Having done so, systems theory hopes to hone the concept, and to develop a common vocabulary and expository technique so that systems thinking can be more fruitfully used in existing areas and made useful for new ones. Some hope to go further to establish a new "paradigm" for all knowledge.[20] Whatever its ambitions, general systems theory is based on belief that certain properties are common to many or all of the systems found in the real world. They also believe that those common properties and the most useful concept of system can

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17. This is because they are telling us what sort of a system law is claimed to be rather than what claims would be necessary to establish any kind of system at all.
18. E.g. ISP, ST(1), ST(2).
19. Emery looks for them from the simplest bacteria to the social "system" to the U.S.A. Laszlo looks for them from the atom up to the universe.
20. von Bertallanfy 3 Metaphilosophy 142.

best be created free from the biases and distortions that may be found in systems concepts developed in relation to particular disciplines.

The reason for delving into general systems theory is to provide a focus for our consideration of various theories (see infra.) It is not the purpose of this section to adopt a restrictive definition of "system". There is no point in idle controversy over whether a theorist has wrongly appropriated the term "system" to his conception of organization. Even if such debates could be won, the consequence of defeat would mean that his conception would merely have to be given a new name. Such statements will be challenged not on the basis of the terms used in describing law as a system, but on how closely the description corresponds with reality, and how useful such a statement is in understanding law.

Most conceptions of system found in general systems theory display a core of features common to most uses of the word. These are highlighted in Dewey's explication of the term[21] and echoed in other discussions of systems in general.

> "The term system is employed to designate a whole from the standpoint of the methodic connection and arrangements of its constituent members."

Here Dewey mentions that a system is a whole, but that its wholeness is peculiarly tied to the interrelations between its parts.

> "It differs from such terms as aggregate, collection and inventory, in expressly conveying the way inherent bonds bind together ... the parts of the whole [and] it differs from such terms as organism, totality and whole in expressly connoting that the parts are interdependent."

The same point is made by Angel who speaks of the "parts of a social

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21. See his entry on "system" in Baldwin (ed.) Dictionary of Philosophy & Psychology.

system fitting together to form a whole",[22] and Chalmers-Johnson for whom a system is "a group of interdependent variables which are arranged to form a whole".[23]

We see then that the system requires a wholeness factor,[24] something which allows us to see the system as a unity.[25] Thus a river system may be seen as a whole because it drains a certain area of land, a digestive system is a whole because it performs the function after which it is named, and the little system within an atom is a whole because it is a unit which combines with other similar units to form compounds. But it must also have parts or elements,[26] for a system comprising an undivided whole would be unintelligible[27] and a system without any components would be redundant.[28] These elements must have some independent existence, or at least some way of being considered independently. Otherwise they would not constitute elements but merely part of something else. One could not consider a quarter of a helium nucleus as part of a sub-atomic system but

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22. 7 IESS 380.
23. Revolutionary Change p.40. See also ISP p. 36.
24. Laszlo sees this as a property of the system rather than its parts (ISP p. 35) and hence something which clearly makes a system more than a mere summation of those parts (ISP p. 100).
25. As Buckley put it, it must be treatable as an entity (Sociology and Modern Systems Theory p. 41ff). This "entitivity" that the wholeness factor confers on the system means that when we turn our attention to the system in its environment it can be seen to have some degree of continuity and boundary (loc. cit.) and to act quasi-independently of that environment (Fieblemann & Friend ST(1) p. 42).
26. In our examples the elements may be particular branches of rivers, particular organs, and the sub-atomic particles respectively.
27. It would have been pointless to describe atoms or rocks as systems until it was realized that they were composed of smaller particles. And even if, as is now usually the case, something can be broken down into smaller elements, it is pointless to speak of it as a system if the speaker merely refers to the entity as a whole. Thus a geologist may see a rock as a system of crystals but for a mason it is a single entity and an atom is a system for a nuclear physicist but not for a chemist.
28. Angyal ST(1) p.31; Jordan ST(2) p.24.

one could when it is understood as a proton or neutron.

These elements must be related to each other in some way - otherwise they would be, as Dewey puts it, a mere "aggregate, collection or inventory".[29] The same point is implicit in Emery and Trist's definition of a system as a set of interrelated elements and in Laszlo's view that what you add to the elements to get a whole is the ordered relations between them.[30] For example, the elements of a river or digestive system are related in the way their contents flow from part to part and the elements of our sub-atomic system are related by electromagnetism and subnuclear forces. When Dewey requires that the inherent bonds be "orderly" and Laszlo describes the abovementioned addition as "ordered relations" they are referring to a final requirement of a system that almost all system theorists insist on - structure.[31] This is found in the way the rivers of a river system all join together to flow into the sea at a specific point. It is found in the essentially linear pathway of food remains through the organs of a digestive system and it is found in the way sub-atomic particles of the atomic system are structured into a nucleas and surrounding electron clouds.

Two ideas are involved in this requirement of structure. Firstly the relations must form a network by which every element is ultimately linked directly or indirectly to every other.[32] The second is that the network must conform to some pattern or order[33] - a merely random set of interlocking relationships being insufficient to provide structure for a

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29. Dewey op.cit.
30. Emery & Trist ST(1) p.322, ISP p.36.
31. E.g. Selznick ST(1) p.302. Angyal ST(1) p. 27, Feibleman and Friend ST(1) p. 42 ISP p. 101, Buckley op. cit. Ch.2.
32. Ackoff and Emery ST(1), p. 380, see also Feiblemann and Friend ST(1) p. 42.
33. ISP p. 101.

system. Compare the marks on ice left by a few independent novice skaters and those left by a champion figure-skater. Both involved a network of lines which all link up, but only the latter has the pattern to be structured. Others express this second idea as a requirement that a system's relations be "organized".[34] This conveys the same notion that some pattern, order or sense has been brought to what would otherwise be a random formless set of relations. If it goes further it does so in connoting that the pattern or order has been purposively constructed or is the kind that might have resulted from such purposive construction. However, such connotations are not required by the concept of structure adopted here.[35]

So here we have a general view of systems and their characteristics. They are wholes, they have elements and those elements have relations which form a structure.[36]

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34. ISP p. 42. See also Fitzgerald "Laws and Systems" 14 W Ont LR 224. Note that sometimes a third idea is implied - that of stability in the network of relationships. However, there are many systems in which this stability appears to be lacking. Indeed in several, the system itself supposedly changes those relations in response to the environment. Consequently many writers do not mention stability (e.g. Dewey) and many writers reject it as a requirement of system (e.g. Laszlo ISP p. 108). It is not required here.
35. Although structure in the sense of a patterned network of relations is a general requirement it is emphasized that the type of pattern is not confined to traditional hierarchical or tree-like structures. In modern systems theory, the range of patterns is very wide, including some of fearsome complexity (e.g. Herbst ST(2) p. 245, Beer ST(2) p. 259).
36. Naturally enough, other definitions of system include many other features. For an extreme example, Von Bertallanfy includes "hierarchic structure, teleology, differentiation, steady state character and goal directness" (3 Metaphilosophy 142). Others restrict the types of wholes, structures and especially relations that can be found in systems. Such definitions restrict their usefulness as a general concept of system for different applications. They are better seen as partial descriptions of the type of system the writers have in mind for their own application. If however the reader should insist on such a full-blown definition of system it merely provides more hurdles for the systems theorists to clear and makes it easier for the author to contend that they have failed to do so.

This view of system is the one adopted here. As we have seen, this view accords with most general definitions of "system". More importantly, we will find that it is echoed in almost all the theorists considered in the next three chapters. Their descriptions of legal systems explicitly or implicitly include reference to these features[37] and frequently highlight their importance.[38]

Thus for most theories this general conception acts as a focus for considering their claimed systematic qualities. It indicates what we should be looking for (indeed without outside criteria we would not know which part of a theory which claimed law was systematic we should look at). It allows a uniform type of exposition. Each theory can be expounded in a form which tells us what that theory has to say about the type of system law is claimed to be. By expounding the theory in this form we are getting an answer to our question - what justification can be found in jurisprudential theory for seeing law as a legal system. This allows us to discuss theories where the theorist has not clearly outlined just what it is about his theory of law that is systematic. It also means that even where the theorists themselves are not primarily concerned with

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37. Something which is underlined by the fact that they can all be expounded in terms of their elements, relations, structure and wholeness.

38. E.g. Hart emphasizes that it is the union of primary and secondary rules that makes the legal system (section 2.2), Kelsen and Harris emphasize the unity of law in the eyes of the legal scientist. Raz emphasizes the legal system's wholeness in a manner similar to Laszlo, by insisting that some of the properties of law are properties of the system rather than its elements (section 2.14). Both Raz and Harris emphasize the necessity of relations and structure for legal systems (sections 2.11, 2.15). Dworkin emphasizes the wholeness of law and, among sociological writers, Evan particularly emphasizes the structure of law.

describing law in systematic terms, their theories can still help us to answer our question. This is because once they are expounded in this form they can squarely be seen as offering what are, in the terms of this thesis, systematic theories of law. They are theories which provide content and substance to the general supposition that law forms a system, and hence theories which need to be considered in determining whether law can usefully be seen as systematic.

Thus it is not necessary that the theorists themselves emphasize law's systematic character or that that character is important for them, or indeed that they perceive their own theories in systematic terms. It is sufficient that their theories contain the ingredients for constructing systematic theories which provide potential answers to our question.[39] Of course, for most of the theorists considered, the systematic character of their theories is important to, and is emphasized by, the writers themselves. This fact is partly indicated by their frequent use of the term and, more importantly, by the large proportion of their writings that can be encompassed within their theories as recast in terms of the elements, relations, structure and wholeness of what is or becomes "their" system.

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39. Indeed, were it not possible to construct such theories the overall argument would be strengthened not weakened. If it is claimed that it is just not possible to construct such a systematic theory or that, for one reason or another, it should not be so constructed, then the critic has done a large part of my job for me. He or she will have effectively said that the theory or theorists provides no justification for the tendency to link the notions of "law" and "system". The more theorists for which the critics performed this service, the fewer theories would have to be considered. I do not, however, regard myself so fortunate and will deal with three major forms of systems theory derivable from three major jurisprudential traditions.

A similar technique is used by Dworkin[40] to derive answers to the question: "how should judges decide disputes?" He claims that "theories of law should have the same general aims as a theory of justice: they should develop moral theories about the kinds of circumstances in which judges, as political officials, should take action one way or another".[41] He does not doubt that Austin, Hart and other positivists would reject that aim and that such an aim is inconsistent with what they say. Nevertheless, he claims that "we could make something useful of their theories only by supposing them to be making arguments about how officials should believe, however much they would deny that characterization".[42] Dworkin's approach is possibly a little more calavier than that adopted here, but it is essentially the same one of taking from a theory that which can be used to help answer the question in which the writer is interested.[43]

Although this technique can be used to determine the usefulness of a theory to the answering of our question, it does not necessarily impugn the theory's usefulness in answering other questions. Neither does it, nor is it intended to, lead to the rejection of such a theory in its entirety. Not all of the theory is incorporated within the exposition of a legal system derived from the theorist's writings. For instance, some of Hart's notions, such as the minimum content of natural law, lie outside such a system and are thus neither accepted nor rejected. Other aspects

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40. DNB p. 3 and DNB Ch.1 p. 21, 22.
41. DNB Ch. 1 p. 21.
42. DNB Ch. 1 p. 22.
43. Dworkin is more extreme in his willingness to construct, from the writings of others, theories with aims directly inconsistent with those expressed by them. He moves further away in heavily modifying the content of those theories when they fail to achieve his aim.

of the theory, such as the importance of sources in the thinking of judges, are regarded as important insights. Freed from their systematic context, they are given what the author claims to be better and fuller expression within a non-systematic exposition of law. However, where most of the theories that Dworkin expounds are not primarily designed to answer his question, most of the theories considered in this thesis <u>are</u> primarily designed to provide a systematic view of law.[44] Thus a failure to answer our question cuts far closer to the bone than a failure to answer Dworkin's.

There are three further factors about the criticisms that follow which make them generally damaging to the theories considered. First, so much of each theory considered is covered by the systematic exposition that a rejection of that systematic theory leaves very little.[45] Secondly, some of the criticisms actually mounted would, if accepted, fundamentally change the criticized theory's utility for any purpose (e.g. the criticism of sociological systems theory that institutions cannnot realistically be ascribed "functions"[46]). Third, some of the criticisms mounted go directly to other stated aims of the theory (e.g. the criticism of Dworkin's theory that it does not describe judicial reasoning because of it unsuitability as a theory of adjudication[47]).

The final and most important advantage of this method of exposition is that it facilitates comparison between the different systems theories on offer. We can compare the type of elements, relations, structures and

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44. Given, as already mentioned, their positive statements and the fact that so much of their theory is covered by its exposition in systematic terms.
45. Although, of course, much can be rescued when the systematic aspects are removed.
46. See section 4.10.
47. See section 3.5.

wholeness.[48] Because, of course, the type of wholeness factor, the type of elements, the types of relations, and the type of structure may vary. Indeed we shall see how these variations account for many of the differences between the legal systems theories considered.[49] We can also see some of the ways a theory may fail in that it may be difficult to establish the existence of the postulated elements, relations, etc. in the law of a country like ours. Indeed some of the variations between the theories can be explained on the basis that one school criticizes the usefulness of the type of elements, relations etc. postulated, by another school and substitutes another. A simple example would be the realist criticism of formalist elements (rules) which led them to substitute different elements (actions, predictions, psychological states, etc.) in their own theories.

Although most writers who use the term legal system include these four features in their theory, a few require less of a system. Luckily such cases are rare among legal theorists (apart from those who merely use the term legal system as a synonym for law, conveying no extra meaning). More often, a description is proposed that includes all four features but on closer inspection we can only find three or less in law. In such cases the view of system offered here acts as a yardstick, not to rule the weaker system "out of court", but to question whether, if law conforms to

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48. This is a technique Buckley uses extensively in relation to sociological systems theory (Sociology and Modern Systems Theory).
49. For example, we shall see that the elements of positivist systems are rules but Dworkin's system includes principles as well. We shall see that the relations between positivist elements are relations of authority, but those between Dworkin's are of justification. We shall also see how law forms a whole in Dworkin's theory by constituting a judge's best theory of law producing a single right answer whereas the wholeness of law in sociological theory is provided by the claim that it performs certain functions in society.

this weaker system, it is descriptively useful to call such law a system or to highlight its lack of systematic qualities by not so calling it. Even if the reader does accept a lesser view of system, discussing the proposed system in terms of these four features has at least helped illuminate the kind of system law is said to be.

It is suggested, however, that whereas a systems theory will fail if law is found to lack the postulated elements or relations[50] (a lack of which several theories are claimed to suffer in the succeeding chapters), the presence of one or both of these does not go far towards establishing the presence of a system. The fact that something can be broken down into elements merely indicates the possibility of analysis (chaff scattered in the wind has component elements but no system linking them). The fact that those elements are related merely indicates the acknowledgment, common to both systems theorists and their opponents, of the general interconnectedness of things due to the existence of cause and effect or the fact that men link different things in their minds.[51] Thus when I

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50. For reasons stated above.
51. I am assuming that these two propositions are distinct, although Kantians who see causation as a priori would disagree.

offer my own non-systematic theory of law in chapters 5 and 6,[52] the reader will find some discussion of what might be called the elements of my theory of law and a great deal of discussion of the relations between them.[53] But that does not make mine a systematic theory. Although systems must have elements and relations they need at least structure and almost certainly wholeness as well to be, in any successful sense, a system. It is explicitly denied that these elements and relations can be

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52. It depicts law as part of a society that is composed of individuals and the social relations between them. Those social relations include relations of power (which include "authority" - see section 5.2), unintended effect (section 5.4) and value-effect (which include "norms" - see section 5.5) Institutions are formed from the unpatterned sets of relations found between those in closer, more frequent, or more intense interaction with each other than outsiders (section 5.9). The nature of these social relations and the way they mix, interact and mingle is such that they generate disordered conflict within and between institutions. This explains why those sets of relations are unpatterned and why theories that insist on finding either intra- or inter-institutional structures among those relations are rejected in Chapter four. This combination of conflict both within and between institutions in which the former mutes the latter also explains why disorder is compatible with relative social peace. Law is depicted as an integral part of this scene, comprising some of the institutions which are integral and subject to that conflict (chapter 6). Indeed much of the conflict is channelled through thouse legal institutions.

53. The elements could be seen as individuals within or affected by legal institutions (see sections 5.1 & 6.1). The relations would be found in the "social relations" (discussed in sections 5.2-5.5 & 6.3) between members of legal institutions and between such members and non-members. I hestitate a little in calling the former "elements" of my theory of law. It would be more accurate to designate them elements of <u>society</u>. Law is conceived as comprising some of the relations between those elements of society. Nevertheless someone determined to label my theory systematic would no doubt have to call these, or possibly the social relations themselves, the elements of my "legal system". In the latter case the determined systems theorist would have to see the elements related to each other via the minds of the individuals at either end of legal relations (see section 5.3).

usefully seen as formed into a structure or a whole[54] and theories which make such claims are criticized.[55] Given the number and variety of relations found in law it might be possible to satisfy the network aspect of structure by connecting all the elements of law, although some of the links will be pretty tortuous and indirect and may have to pass through non-legal institutions. As such it would be little more than a reflection of the general interconnectedness of things within society and the network would not be a particularly legal one and would be an unlikely basis for a legal system. But however unsatisfactorily the network aspect is met, the real problem is that the relations within my theory cannot be seen as patterned, ordered or organized. The richness, complexity and variety of such relations, the number of different directions in which they lead, together with their variability, inconsistency and discontinuity deny the possibility of any such characterization. (Furthermore they provide major reasons why the systematic theories of law discussed in chapters 2, 3 and 4 fail.)

The theory I offer is equally lacking a wholeness factor. The elements and relations of law discussed in the later chapters are not pictured as linked together into a whole. Instead the image of law contained therein pictures those relations constantly taking us out of any supposed pattern of relations, out of any supposed whole. It is also

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54. See section 5.9 and, briefly, note 52 supra.
55. See section 4.11. Again, of course, it would be open to a reader to insist on a lesser view of system, requiring only elements and relations. By so doing he would have converted my non-systematic theory into a systematic one. This thesis would become, in his terms, one about the non-tenability of those systems theories which depict law as a structured whole. But even in such cases as these where the explication of "system" contained in this section is rejected, it still maintains its utility in comparing the sorts of theories involved.

argued that the nature of the elements and relations forming law is such as to promote overall disunity rather than unity in law.[56]

Note on the use of the word "Systematic"

In this thesis the adjective "systematic" is merely used as a shorthand to indicate that what it refers to can be described in terms of a system. A systematic theory is one that attempts such a description. The only issue which needs to be clarified is that the word systematic refers to a property of the thing described rather than a common property of its constituent parts. This is like saying that a "large" regiment is taken to mean a regiment with many men (a property of "regiment") rather than one with many big soldiers (a property of the elements of the regiment). Consequently, a systematic theory is one which claims to find a system covering all or most of what it describes rather than one which claims to find some systems within what it describes. A systematic theory of the atom will attempt to describe it in terms of a system covering both

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56. The difference between a non-systematic theory that discusses law in terms of its elements and relations and a systematic theory which sees them forming a structured whole may be clarified by the following analogy. Law as expounded in systems theory may be likened to the structured of a crystal in which the elements (in this case atoms or molecules) are related to other elements in a recognizable pattern within a reasonably well-defined whole. Law as expounded in non-systematic theory is more like a dense pocket of gas in which the elements are related to many others in a completely unpatterned way and in which the elements mingle and merge with the surrounding gasses so that it does not form a structured whole. Of course, in both examples the types of elements and relations may fall into a limited number of distinct categories and it is profitable to study them. They help us to understand clearly the nature of the solid and the gas respectively. However, whereas our study of these in the former case leads us to understand why a reasonably patterned solid is formed, our study of the latter leads us to understand why it is in a constant state of chaos, why no structure can form and why there is constant interaction between the elements within that portion of gas and elements outside it. Indeed we will understand that such relations with outside elements will be as many, varied and as rich as purely internal relations. In short we will understand why the elements and relations do not form a structure or constitute a whole.

the nucleus and the surrounding electrons rather than finding system in each. Similarly, we would expect a systematic theory of law to describe it in terms of a system which covers most or all of law. Thus, when this thesis questions whether law is best seen as "systematic", it is merely restating the query raised in section 1.1 - i.e. is there an adequate theory of law which, by describing law in terms of a legal system, justifies the widespread tendency to equate the two.[57]

Law

The difficulties with the word "law" are hardly new to Jurisprudence. Law encompasses many activities and aspects of social life. Its use reflects this, cropping up in a fascinating variety of "language-games".[58] In each of these, "law" is a descriptive word used to refer to some perceived feature or features of social life in which the language-game occurs. (These features may involve people, objects, actions, ideas in the social environment of the language-game participants.) Such language-games range from a child asking his parent why he stopped at the traffic light and being told that it is "the law", to language-games played out at legislative chambers, police stations, solicitors' offices, courts and seminar rooms. The features that are picked out by its use vary correspondingly - no one feature or set of features will always be present. Indeed a feature may seem central in one use yet its opposite central in another (sanctions may be central to the

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57. The problems raised by theories which appear to cover only some of the phenomena involved in law and the problems caused by the admitted existence of small pockets of systematization are discussed in section 1.5.
58. This is a Wittgensteinian concept which places the use of words in the context of human interaction and social life in general. A "language-game" involves the use of a word and the activities by the speaker and others that accompany it.

use of the word "law" among criminals yet freely entered agreements may be central in treaty-based International Law). No particular set of features will be jointly sufficient but the word frequently will be used where several features are present. Thus there will be a good deal of continuity - a continuity which explains our preparedness to use the same word. Gasking used the term "cluster concepts" for such words[59] and Wittgenstein has coined the term "family likeness" to capture the sense in which the uses of the words are similar.[60] A long, but still not exhaustive, list of features associated with law in its many uses might be: written, socially relevant; created by a public body; backed by coercion; enforced by courts and police; possessing moral force, obeyed or used by most of the people most of the time; expressible in the form of a rule; in accord with the content of natural law and the values of members of the society that spawned it; general, promulgated, non-retroactive, clear, non-contradictory, not requiring impossible action and infrequently changed. "Law", as used in different language-games, will refer to some (rarely, if ever, all) of these features and the language-game that involves argument over the use of the word will be most prevalent where someone is trying to use "law" to refer to only a small number of them.

The answer to the question "What is law?" is a list of the features of social life which in various combinations are called "law" by members of the society in question.[61]

But this answer does not provide a concept of law for any particular use. As noted previously, each language-game picks out only some of the

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59. 1960 Aust J of Phil 1.
60. Philosophical Investigations 23.
61. For other societies the list of features is added to and subtracted from so that the uses of the word law between societies bears the same family likeness as the uses of the word within societies.

features that law exhibits. This is because in each language-game, and in the more general activity of which that language-game forms a part, only certain features of the law come into contact with, and are significant for, the word-user. Indeed, it is this activity, in which the theorist or his audience is engaged that, being touched by law, leads to and gives practical impetus to a desire to understand law.

The answer to the question "What is law?" becomes a set of features of social life used to describe law that is claimed to be most useful to someone in the performance of a certain activity. The question that this thesis poses about whether or not law is systematic becomes:

> "Is it more helpful to a person in the pursuit of that activity to see the elements of law so picked out as, in some sense, systematically ordered?"

1.4 POINT OF VIEW

This still leaves us with the question of the activity from whose point of view law's systemness is to be discussed. This thesis primarily discusses it from the point of view of a "social observer", someone involved in the activity of describing and understanding law as a part of society. This corresponds to a type of "external" point of view noted, but passed over, by Hart.[62] This views the behaviour of the people engaged in the many activities involved in, and touched by, law. It takes note of the external manifestations of their behaviour as well as their internal attitudes towards it. These attitudes are not adopted by the social observer - that would be to take the internal point of view. Nor is law described as it appears to someone who has those attitudes - the "detached" internal point of view of Harris and Raz (and, for the most

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62. CL p.86.

part, Hart). These attitudes are merely regarded as relevant psychological facts, important in explaining and predicting behaviour, but with no special place in its description.

This is a departure from the jurisprudential tradition of adopting a "legal" point of view, delimited by a distinctive "legal" activity, in order to describe or understand law. The reason for this departure is that there are so many activities within law - those of judges, barristers, policemen, bureaucrats, legislators, etc. This is not merely an idle catalogue of legal specialties. These activities lead participants into contact with different areas of law (s.1.2), and to label different aspects of law "significant" - thereby generating different conceptions of law. The judge comes in contact only with certain areas of the law and only when there is a dispute or an alleged breach of a criminal provision. The judge's activity might be described as applying the law to the resolution of disputes that come before him, drawing for his decision on the legal materials presented. To him law might appear as a large number of binding norms of varying strength. A barrister's contact with the law is limited by the sort of practice he has and the sort of disputes that people who can afford his fee get involved in. His own activity could be described as finding, formulating and enunciating arguments advantageous to his client's interest which can be put in a court of law. For him, the law might be seen as a storehouse of debating points, or as the personnel before whom he argues them. The solicitor's contact with law is limited by similar factors. Unless he is a litigator, his activity does not deal with disputes, but with the arrangement of clients' affairs. For him the law may be seen as certain words and officials and his activity as taking advantage of the

opportunities provided (e.g. in contracts and companies), and avoiding the pitfalls (e.g. liability to tax) associated with those words and officials. One could continue, but the message is clear. These legal activities lead their participants into contact with different areas of the law and to have different views of it - sufficiently different to qualify as the basis of different points of view.

These several activities within law mean that law cannot be adequately understood from the point of view of any one of them. Just as the attitudes of judges are important in comprehending the activity of judging, so the attitudes of barristers are important in understanding the activity of the bar. Thus to understand law which includes both activities and the interaction between them, it is not sufficient to adopt the attitudes of either.[63]

Not only are there many activities within law, but those activities are controversial. There are rival descriptions of them adopted and used by various participants.

Some would describe a solicitor's activity as advising clients on the law rather than helping them around it. This dispute is so fundamental as to amount to a quite different point of view with a different image of law. The former description of a solicitor's activity and point of view sees law as something having normative force, the latter almost the

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63. There is also a peculiarity in the way most legal actors see law which makes the point of view of a legal activity particularly difficult to use in understanding law. They rarely regard themselves as a part of law. They usually see law as something outside themselves, something to do with the actions of others that imposes constraints on them. But that view is a distortion, because it constantly plays down the role of the person whose point of view is adopted, and shifts law to a phenomenon involving others.

opposite - something without value but rather an obstacle to be avoided if possible in the pursuit of the client's ends.

The nature of judicial activity is particularly controversial. Some theorists see judges choosing the decision they personally feel to be the best among those arguable under existing precedent; others see judges choosing the decision that is entailed by the "best" justification of past decisions. The former involves a view of law as a partly incomplete and inconsistent mass of sources, the latter as something amenable to rational reconstruction.

So even if we were to choose one of the above activities as <u>the</u> legal one, we would still be unable to answer questions about law until we have entered and resolved for ourselves the argument over the correct description of that activity, what are the appropriate goals of that activity and hence what parts of law are relevant and significant in our descriptions of it. It is contended that we can only resolve this question about the appropriate description of an activity within law by having fixed in our minds a clear image of <u>law</u>, the very thing the adoption of the legal point of view was designed to provide. Thus the task of picturing law and deciding whether it is systematic or not must be regarded as logically prior to the adoption of a "legal point of view".

Many objections can and have been made against adopting observer-type points of view but space allows the discussion of only two:

(1) MacCormick illustrates how uninstructive the most complete physical description of a man's actions and the most faithful reporting of a man's words can be without an appreciation of what they mean to him. He

does this with an example from Gulliver's Travels when the Lilliputians fail to appreciate what Gulliver's watch is and what he does with it.[64]

Such criticism does not catch the social observer point of view adopted here which takes full cognizance of Gulliver's attitudes to his watch. In fact, MacCormick's example is two-edged. When Swift had the Lilliputians describe the watch as Gulliver's "God", he was making a significant point about the way we treat time and regiment our lives by the hours of the day - a point that was much clearer from an external point of view. Indeed the whole of Gulliver's Travels is an attempt to provide an insight into Swift's own society, derogatorily reduced in size, by imagining himself outside looking at it from an external point of view.

(2) Dworkin specifically attacks the usefulness of statements about law made from the standpoint of an "independent observer",[65] especially statements which assert that there is no single right answer to a question of law. He imagines these being made by a philosopher to a convention of judges who sentence him to three years at law school for his insolence. When brought before the judges again, the philosopher can argue points of law as well as they can, but still insists on saying that, from the point of view of an independent observer, there is no right answer. Dworkin asks whether the philosopher has really been legally trained. If not, then, "it is neither surprising, nor relevant that such an observer would be incompetent to form opinions about what the participants do."[66] The trouble with this argument is that it requires the assumption of precisely that which was to be concluded - that the view of the participant is to be preferred to that of the independent observer. Furthermore, even without

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64. L Th p.275 ff.
65. TRS p.279.
66. TRS p.284.

any knowledge of how judges may do it, the ignorant observer can still see that different judges do assert different answers claiming them to be true. Presumably, legal training would then allow him to explain how this occurred.

But this is where Dworkin's most pointed argument is to be found. He says that if the independent observer is legally trained then he finds he can start making assertions about the truth of legal propositions preferring one answer about a controversial question of law to another and giving reasons for the preference. Such a person is estopped from saying that there is no right answer by his own tendency to say that one is more right than the other. He can observe this disagreement, but now that he is involved in it, he has to say that the other lawyers are wrong. This is an intriguing argument because most jurisprudential writers do have legal training and are very good black letter lawyers, if and when they want to be.

But is the prospect so dim? Are lawyers sucked into opposing camps by the merest whiff of controversy? One could, of course, ask about the nature of the independent observer's legal training. If he had been taught and converted by positivists (particularly likely as Dworkin sees himself surrounded by them), he may make some comment like:

> "I lean a little this way on the basis of existing decisions but, if I were a judge, this leaning would constitute insufficient reason for me to decide the case this way so a quasi-legislative decision would be made, to be governed by whatever techniques I use for making such decisions. As I am not a judge, I will have to consider what will influence this quasi-legislative judgement before I can predict or appreciate what will happen in court."

Another reply takes a different tack, claiming that you can be in an argument and still observe that the argument is inconclusive. To do this, a little is borrowed from a perspective that is as respectably "legal" as that of Dworkin's judges - that of a barrister. A barrister can construct

legal arguments but can still see them as just that - arguments. In any one case he can construct several arguments in the alternate. He will not construct a Herculean "best theory" of law with a single right answer. Not only would the judges deny him the time, but this would "put all his eggs in the one basket". Furthermore, he may well choose which arguments to put to the court, perhaps avoiding those which might annoy one of the judges, thereby making him less receptive to other arguments. Even in giving an opinion, he will be assessing the chances of the actual or potential disputants having their arguments accepted. For him, there are not right or wrong answers so much as arguments that are winners, losers, or "arguable". You may say: "Aha! But he will have his own preference as to the argument representing the right answer!" This is not necessarily so - he may believe that there is no merit to either side or that the reasons why one side should win one are so divorced from the terms of the legal debate as to be completely useless in court.

For the barrister involved in his work, for us in theorising about law, it is important to understand how others view law as they go about their activities that affect and are affected by law. It is important for him to know how judges see law, and if different judges see law differently (reflecting not least the different legal theorists who have taught or influenced them), how each of those he appears before sees it. Likewise, it is important for us to know the various ways judges see law in explaining their actions, fitting them into an overall view of law and deciding whether there is system in it. But it is worth reiterating that for us these are facts observed in attempting to piece together a picture of that part of society called law, rather than conceptions to be shared. Once we have formed that picture, we will be in a better position to decide how we think someone in the various positions of judge,

barrister, citizen, etc., could most fruitfully see law. This thesis will be considering one of the key questions in piecing together the elements in the social observer's picture of law - whether or not those elements can best be seen as systematically ordered.[67]

1.5 TWO POTENTIAL PROBLEMS

In determining whether or not law is better seen in systematic terms the social observer faces two potential problems.

(1) One of these difficulties is created by the variation in scope among legal system theories and the wide range of phenomena included within the varying conceptions of law.[68] Many systems theorists narrow the scope of their systems by limiting the range of phenomena included within them.[69] On the other hand, the social observer would be unlikely to adopt a restricted approach to the range of social phenomena he includes within law - it is difficult for him to consider and understand, in isolation,

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67. The consequence of the answers to that question for the points of view of the various participants are briefly mentioned in section 6.14 but space limitations have precluded further discussion.
68. See section 1.3.
69. For example, we shall see how Hart limits his system to the rules followed and applied by legal officials (section 2.2), Dworkin limits his to part of the reasoning of judges. Sometimes the limitations are not deliberate; for example, because the functions they attribute to legal institutions turn out, on closer examination, to be only some of the effects of legal institutions, many sociological systems are limited to only some of what the theorist and the social observer would consider to be part of law. Whether deliberate or not these limitations are frequently criticized by other theorists. For instance, section 2.8 indicates many of the criticisms levelled at positivists by other writers for excluding from their theory (i) the rules followed and applied by lower courts and non-court legal officials (ii) the rules of customary and conventional law (iii) principles, policies and ethical beliefs that judges use to decide cases (iv) the actual operation of the courts and other legal institutions etc.

phenomena that are so interconnected with other phenomena.[70] Thus, propounded theories of legal system may cover only some of the phenomena the social observer considers to be law. If the social observer were to accept the systems theorist's account of these phenomena would it amount to a "systematic theory of law"?[71]

In this thesis this problem is treated as a hypothetical one. It is contingent on the non-acceptance of some of this thesis's most major claims, i.e. that the social observer would reject the various systems theories as adequate discriptions of even the limited phenomena they seek to cover. Nevertheless, for those who consider that contingency fulfilled, the solution to the problem should be put as follows:

This thesis poses the question whether systematic theories are more useful in understanding law than non-systematic ones. The question is posed from the social observer's point of view and concerns law as it appears from that point of view - i.e. including those features of social life used to describe law and included within a concept of law useful to the activity of social observation. A theory which covers only a few of those features or only the minor ones is not, and cannot be, a theory of law from the point of view of the social observer - and it cannot be said to have provided an affirmative answer to our question. At most it can only be a theory about a part of law.

Of course, if a part of law, even one comprising few or minor legal phenomena, were describable in systematic terms, it would provide some

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70. Neither is it likely that a legal practitioner contemplating his own activity, or a student contemplating a career within law, would adopt a restrictive approach. If he is to understand an activity he will need to appreciate the legal context in which it takes place.
71. In the sense used in this thesis i.e. a theory of law in terms of a legal system.

hope for legal systems theories. It could form part of a future, larger theory that may be created either by a process of extending the system to include further and more major phenomena or by the creation of a larger system linking different systematic parts. It would also provide hope that if some legal phenomena are of the kind that can be described in systematic terms, then other legal phenomena may be likewise describable. But until that larger theory is created this would remain merely a hope. The task of creating the larger theory would still have to be performed. And the more phenomena yet to be included and the more diverse those phenomena are, the greater would be that task remaining.[72] It is in this light that this thesis tackles the hypothetical problem of systematic theories which cover limited phenomena.[73] It points out just how many legal phenomena remain outside the ambit of such theories and also how those phenomena are so incompatible with the phenomena covered b

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72. Although the success of these theories that attempt to describe a part of law in systematic terms does not mean that law as a whole is systematic, the failure of these theories does not necessarily mean that law is unsystematic. Another theory might always be just over the horizon. Nevertheless it may at least provide a suggestion that law is not the kind of stuff that is amenable to description in systematic terms. It might, as I suggest, lead us to look elsewhere, to non-systematic theory, for an adequate description. This is, of course, what I do. Within that non-systematic description of law as a complex human phenomenon we find some of the reasons why systematic theories, whether broad or narrow, will fail. This is analogous to a situation in which there is a moor through parts of which various runners have failed to run a mile in a straight line. This does not mean that no one could run straight for a mile or even right across the moor. However, the repeated failures might lead us to try running in a different manner (e.g. along the contours). If we are successful we might get a better idea of the terrain, concluding that it is rocky and heavily eroded. This in turn would explain the reasons why earlier efforts at running a straight mile failed and why future attempts to cross the whole moor in a straight line would likewise fail.
73. As in sections 2.8, 3.6 and 4.10.

y the system as to rule it highly unlikely that they could be fitted into any enlarged system.[74]

Even where a systematic theory covers few legal phenomena and could not form a part of a legal systems theory, it could still be thought useful in understanding law. But the less it incorporated, the less useful it would be for this purpose.[75] Furthermore, if, as this thesis would still claim, the rest of law is unsystematic, then a non-systematic theory is still needed to explain and describe the "law" which includes both systematic and non-systematic parts and the relations between them.[76]

(3) A similar and at first sight more serious difficulty appears to be posed by a largely mutual concession made by both sides of the argument. Systems theorists rarely insist that law is completely ordered. And, as already noted,[77] this writer does not maintain, nor is the social observer expected to find, a set of elements that are completely and utterly disordered. It is merely maintained that seeing law as systematic with disorderly fringes is neither as helpful nor as fruitful as seeing law as essentially disordered but containing pockets of order within it. This raises the question of how we are going to judge which view of law, as

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74. E.g. (i) content systems created by different judges reflect, inter alia, the different values of their creators and contain contradictory principles and could not be combined into a wider content system - see section 3.6
(ii) some of the effects of legal institutions left out by functionalists are the direct opposites of those labelled the "function" of the institutions - see section 4.10.
75. Even less would it provide a justification or explanation of the general tendency to treat law as systematic and to equate law and legal system. The more limited the phenomena covered by the theory of legal system the less likely that it covers the phenomena considered to be "law" by those who readily link the two.
76. It would also throw renewed doubt on the systematic theory itself in that it would be improbable or at least strange for something whose elements are constantly and intensely interacting with something unsystematic to retain its systematic quality.
77. See section 1.1 supra.

essentially systematic or essentially non-systematic is preferable, and also the question of whether there are sufficient "pockets of order" to colour the whole phenomenon systematic and hence make theories of legal system successful and preferable theories of law.

The answer to this question is three-fold. First there is a purely quantitative reply. It will be argued that the pockets of system are so limited in size and number that few would consider them to constitute a significant proportion of law.[78] If law were analogized to a patch-work quilt with systematic pockets represented by striped patches and non-systematic pockets to plain patches, then this writer would be arguing that the striped patches were small, few, and far between. Secondly, even if the reader were convinced that these pockets were significant, this would not make law as a whole systematic unless those pockets were themselves related to each other. Even if it were accepted that law were made up entirely of systematic pockets, the question would still remain as

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78. It should be emphasized that the pockets of order conceded by this writer are not those claimed by the various theorists considered but are far more limited covering far fewer phenomena. Nor is it conceded that the pockets of order in some way link aspects of all laws into a system. As we shall see, the pockets of order are not found in alleged judicial acceptance of a set of secondary rules that validate primary rules: neither are they found in a background theory that can justify all, or even large parts of, the institutional history of courts; nor are they found in a set of interlocking functions of interdependent legal institutions. The pockets are more limited, found in, respectively: the acceptance by individual judges of individual personalised secondary rules which validate bodies of rules, in the use by judges of single values to organise and alter small sections of case law, and in the limited capacity and tendency of institutional members to reinforce each others activity thus permitting institutions to achieve effects far beyond the capacity of individual members. The partial ordering found among these phenomena is something to be taken into account and included within a theory of law but it is argued that in attempting to extend that limited ordering (even to cover the phenomena that they consider constitute the legal system and/or law) they distort and sometimes even completely lose the insight contained in their observation of that ordering.

to how those pockets were related to each other. Unless these systematic pockets are related to each other to form an overall structure (either one that links the pockets themselves into a patterned network or one that links the law within those pockets) law as a whole would not form a system. Carrying the patch-work quilt analogy further, even if there are many striped patches, they are not necessarily running in the same direction. A patch-work quilt made entirely of different striped patches running in different directions is not a striped quilt. For the quilt itself to be considered striped, the striped squares would have to be arranged in stripes (e.g. a line of vertically striped squares then a line of horizontally striped squares) on the stripes within the squares would have to be subsumed within longer stripes extending the length or breadth of the quilt.

With each system it is argued that any pockets of order are likely to be incompatible with other pockets and cannot be linked into such an overall system.[79] Any theorists trying to use these pockets of order to claim that law forms a system must overcome those arguments and find that overall structure. Certainly he or she cannot rely on the mere existence of such pockets, even if they are far larger and more numerous than this thesis concedes.

However, it must not be forgotten that the importance or significance of the pockets of order to law's overall systematic quality must be related to our basic question, which is whether law is more usefully seen

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79. See sections 2.6, 3.6, 4.11 where it is argued that pockets of order or system would only exist through the systematizing attempts of different individuals. Consequently they will be stamped with the conflicting characteristics and values of those individuals, making them incompatible and incapable of being linked into an overall system.

as essentially systematic or essentially unsystematic. The utility of the competing views of law depends on the activity engaged in. It has already been argued that the point of view from which this question should initially be asked is that associated with the activity of the social observation of law in which the social observer seeks to understand law as a whole prior to understanding and choosing a more limited activity to pursue within it. This provides us with the third answer. To the social observer, who is trying to understand law, it is insufficient to know that some parts of law are ordered. To understand even that part of law he needs to know how and where it fits in with the rest. If law is only systematic in small pockets, then he will need a non-systematic theory to understand even those pockets properly: no part of law can be understood without knowing how it fits in with the rest and how it relates with other pockets of law, systematic or otherwise. Hence non-systematic theory would be necessary to understand the systematic portions as well as the non-systematic ones and is the only adequate theory of law which includes them both.[80]

1.6 STRUCTURE OF THE ARGUMENT

From the various schools of thought in jurisprudence it is possible to find or construct three main types of legal system: positivist, content and sociological. Each constitutes a potential theoretical justification for the widespread tendency to think of law as a system. Each represents an attempt to describe law by taking on board some of the features of social life that are generally recognized as legal and showing them to be systematically arranged. These descriptions are not always

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80. Whereas systematic theory would not be necessary to understand the non-systematic portions.

primarily from the social observer's point of view but they are always alleged to be relevant to it. These types of legal systems and some of their variations will be considered in the next three chapters.

Chapter 2 will deal with three positivist theories - those of Hart, Harris and Raz.[81] Chapter 3 will deal with Dworkin's content theory and Chapter 4 with sociological and realist theorists who have treated law as systematic. Each theory will be recast from the social observer's point of view in terms of the elements of law,[82] their relations, the structure of those relations and that which makes them a whole. A hypothetical social observer will then consider whether the postulated system can be said to exist within law i.e. whether the elements exist, whether they can be said to be related in the way suggested into the structure described and into the whole claimed. On one or more of these bases each kind of legal system will be rejected as non-existent in our kind of society. Some will also be rejected on the ground that even if they did exist they would encompass so few of the features of social life we regard as law that law (as most social observers would understand it) would remain largely unsystematic.[83]

Despite this universal rejection of theories of legal system, it will be argued that each has made valuable contributions to the understanding of law (though these are often blurred or distorted by their inclusion in a theory of legal system) which are important in the description of law as

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81. In each chapter the theorists discussed will tend to, but will not necessarily, be those who most emphasize the systematic qualities of law. The theorists chosen are those with the strongest theories of law and from whose theories can be extracted the most powerful theories of legal system.
82. For a discussion of the methodology involved in this see section 1.3 supra.
83. Supra section 1.4.

non-systematic. The foundations of such a non-systematic description of law are laid in Chapter 5 which sees society as inevitably lacking in system. In Chapter 6 law is seen as a part of such a society and hence describable in the same non-systematic terms. The final section of Chapter 6 will note some of the consequences this theory has for the "internal" points of view of those engaged in legal activities of judging, advocacy etc. for whom the question's importance was initially posed.

CHAPTER 2:

POSITIVIST SYSTEMS

2.1 LEGAL POSITIVISM

Legal Positivism provides the natural starting point for discussing theories of legal system. Those who call themselves "positivists" not only use the term "system" more liberally than most other theorists but law's systematic character is, for many, the most central feature of their image of law. Unsurprisingly, they have some of the most precisely conceived images of legal system in jurisprudence.

The same precision cannot be found in defining positivism itself. It was born out of natural law theories by emphasising the role of human institutions in determining the law.[1] As this emphasis grew[2] positivists started to see themselves as distinct from the natural lawyers in that they saw law as a human and social phenomenon rather than a divine, metaphysical or natural one. This characteristic has endured from Bentham who insisted that law was the command of a political sovereign (rather than God, nature or reason) down to Raz's "social thesis" which holds the identification of law to be a "matter of social fact".[3]

The social facts the earlier positivists had in mind were the activities of certain legislative institutions whose output was taken to be law. Later positivists concentrated more on adjudicative institutions, taking their inputs to be law (e.g. Raz sees law as the inputs from "social sources" - § 2.13).

Other social factors were all but excluded. As new theories

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1 This was partly a reaction to the distortions forced on law by some attempts to systematise it around a set of externally based moral principles.

2 In line with the actual increase in power of those institutions.

3 AL p. 37.

suggested that law was a function of social practices (Ehrlich), interests (Jhering, Pound, Stone), productive forces (Marx) and judicial psychology (Frank, Olivecrona)[4], these social factors were added to the list of exclusions. Kelsen's list of exclusions was the most comprehensive (it would have done justice to an insurance contract) excluding all that psychology, sociology, ethics and political theory had to offer. But virtually all modern positivists, and certainly the three considered here, share the view that law is to be found by looking exclusively at a very small number of social factors.

This has an important consequence for the type of system the positivists see in law. It is an independent self-contained one in which the elements, relations and structure are described independently of outside social forces. Its systemness is internal rather than being derived from its position in and relation to the outside world (as is the case for sociological systems - see ch. 4).

Positivist systems share other characteristics. The elements tend to be rules or norms rather than actions or events. In early theories they were personal commands of a real person, later they became institutionalised, depersonalised, "depsychologised" and finally were not described as commands at all. But the rules, norms and reasons, that took their place retained some of the characteristics of a command in being verbal, and in having a certain "bindingness".[5]

The relations between the elements are usually held to be "legal" rather than "causal". They are related either by the meaning of the words in the norms or rules, or in the authority one confers on another. The structures have tended to be pyramidal with one key norm or rule at the top. Wholeness is usually provided either by that structure or by the key norm or rule itself.

Despite these similarities, the various theories tend to be so well developed that it is neither necessary nor desirable to refine and

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4 See §2.8.

5 The nature of which is a continuing puzzle and to which positivists offer a variety of solutions.

reconstruct these features into a composite "positivist" legal system (as will be necessary for sociological systems of law). Three theories are dealt with here - those of Hart, Harris and Raz. There are many others, most notably those of Austin, Bentham and Kelsen, but none are as defensible as the three considered here. Naturally enough, the three theories considered overlap considerably, but there is so much variation between them that positivist systems cannot be dismissed without discussing all three.

Each will be considered in turn to determine whether, from the point of view of the social observer, they amount to arguments for finding system in law. Each will be rejected on that basis, yet each will be shown to have provided valuable insights into law which can be used in constructing a non systematic picture of law. Hart's will be considered first and most fully as it has the most to say to the social observer. The last two will be considered more briefly and where they are subject to the same criticisms as Hart's, the arguments will merely be referred to rather than repeated.

2.2 HART'S THEORY

For Hart: "The Union of Primary and Secondary rules is at the centre of a legal system".[6] Primary rules are rules that impose duties on human beings to act or not to act. They are found in all forms of law, but by themselves they do not constitute a system, merely "primitive law". Legal systems need the addition of "secondary rules". The exact distinction between the two types of rules is uncertain, as Hart offers several distinctions which draw the dividing line at different points.[7] Nevertheless secondary rules can all be said to be "rules about rules" and specifically include three identifiable types - rules that establish exactly which rules are valid (rules of recognition) how and by whom they can be changed (rules of change) and how and by whom they can be enforced (rules of adjudication). Hart sees the addition of these rules remedying

6 CL p. 96.
7 McCH p. 103.

certain "defects" in primitive law - rules of recognition reduce uncertainty, rules of change make laws less rigid and rules of adjudication provide more efficient and centralised enforcement. But they also turn what would otherwise be a set of rules into a system by providing for relations between the secondary rules and the primary rules they regulate (e.g. between the rule of recognition and the rules the adjudicator is authorised to enforce). The rules of recognition also enable a hierarchical structure to be formed (with the ultimate rule of recognition at the top and the constitution statutes and by-lawsat successively lower levels) and provide a criterion by which the system can be viewed as a "whole".

The point of view from which this system is supposed to exist is never clearly specified. Hart's reference to the book as an "essay in descriptive sociology" and his description of social rules would seem to indicate a social observer viewpoint. But he also says that law should be seen "essentially from the internal point of view".[8] As he makes statements from both internal and external points of view, it cannot be either exclusively, but must in some way incorporate both. In fact, he starts by taking something very like the social observer's point of view in his discussion of social rules. But, as the book progresses, the balance changes. He makes fewer external observations of behaviour, and more comments about the meaning of rules to judges from their internal point of view. Hart progresses through increasingly "purer" internal viewpoints, so that by the time he comes to discuss the "open texture" of rules he is treating them as Kelsenian "pure norms".[9] Hart's point of view becomes the "detached" internal one with just a little added sociological comment.

Hart's system is principally described from the internal point of view and exists for those who share it. Yet it is a description in which the social observer is expected to take great interest because of the

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8 CL p. 96.
9 LLS p. 62.

sociological significance of some who, he claims, share this internal view of the legal system - the "officials". Indeed Hart would presumably consider the system to exist for the social observer as well if two social facts, the minimum conditions for the existence of a legal system, can be discovered in the society under observation (i) the secondary rules are accepted by the officials and (ii) the population generally complies with the primary rules.

The system Hart's theory claims a social observer would find in the law of countries like ours has all the usual ingredients: elements, relations, structure and a wholeness factor. However, there are problems for a social observer in accepting that (i) elements, relations and structure, and hence the legal system, exist as described (many of these problems being due to the distortions involved in trying to fit them into the system) and (ii) that even if it could be said to exist, the legal system plays such a part in law that he is justified in calling "law" systematic.

2.3 THE ELEMENTS OF HART'S SYSTEM - PRIMARY RULES

Hart lists two kinds of rules, primary and secondary, both of which must be present for there to be a legal system.[10] Hart characterizes primary rules as duty-imposing in the sense that they require persons subject to the rule "to do or abstain from certain actions".[11] Problems with this formulation have been raised by several writers.[12] But any fuller picture of primary rules is clouded by the fact that Hart offers two models for them. The first is contained in his celebrated notion of a "social rule" which exists if:

(i) there is regularity of behaviour
(ii) there is an insistent general demand for conformity to it
(iii) great social pressure is brought to bear on those who deviate
(iv) physical sanctions are a prominent or usual form of that pressure (this is what makes it a social rule of law)
(v) the rule is felt as an obligation by a large proportion of the members of the relevant social group. From an internal point of view those members feel that the rule ought to be obeyed and that it provides a good reason for critical reaction and social pressure applied to those

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10 CL p. 111.
11 CL p. 78.
12 E.g. McCH Chs. 6, 8.

whose behaviour does not conform to it.

This model of a rule has led some to treat Hart's view of law as very behaviourist.[13] The first characteristic is clearly pure behaviourist description - the extreme external point of view. The last four could be taken to indicate that a fuller external point of view is used - that of someone who looks to psychological facts. But this does not capture the sense in which Hart sees rules as both internal and external.

Hart sees such rules as two things rolled into one. They are "Janus-faced" having both an internal and an external aspect visible from their respective points of view. It is a rule stating what ought to be done and it is also a statement about the behaviour of members of the social group. To Hart it is important that social rules are neither one nor the other but <u>both</u> - that the feeling of obligation is the internal manifestation and the relevant behaviour is the external manifestation <u>of the same thing</u>.

There are many problems with Hart's concept of a social rule. Unfortunately for the positivist emphasis on the internal point of view, most of these problems are provided by the internal aspect of social rules. The first problem concerns the kind of internal point of view required. Many people may be concious of a rule and obey it for various reasons - prudence, fear, desire for conformity, tradition as well as a feeling of obligation. All these involve an internal awareness and use of that awareness as a sufficient reason for action. Hart quite clearly excludes all but the last from the required internal point of view. This is puzzling, for it makes social rules both rarer and more difficult to discover. It also seems to exclude a very important human phenomenon - the convergence of behaviour by persons having different reasons for behaving identically. In order to find many social rules the percentage of persons required to hold the internal view must be reduced. The social observer will be surprised that of two rules, one which 10% believe to be obligating and which 90% follow for other reasons and another which 50%

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13 <u>LLS</u> p. 52ff.

follow only by accident, the latter would be more likely to count as a social rule for Hart.[14]

The second problem concerns the enormous number of rules that could be felt internally which would forbid (or require as needs be) the action that is regularly avoided (or performed). This makes it highly unlikely that a majority will feel the same rule internally or that there will be correspondence in their internal beliefs. Suppose it is observed that most of a population abstain from killing one another and that the few who do are criticised and feel great social pressure (say in the form of a lynching party's noose). The whole population feels very strongly that it is obligated to refrain from such action. Here surely there is a classic social rule. But what the members of the population feel will vary greatly. Many will hold beliefs that enjoin a much wider range of behaviour than killing human beings. They may feel it wrong to harm any living creatures, others may feel it wrong to harm human beings physically (or even in any other way), or to kill any living creatures, or any living creatures capable of feeling pain. Other members may hold beliefs that enjoin a narrower range of behaviour, say killing members of their own race or social group. But they may have comparatively little contact with members of other social groups, and rarely in circumstances where they have any desire to kill. Thus the narrowness of the felt obligation does not have any significant impact on the general conformity. It might be said that, from the wider principles believed by some, the narrower principle of not killing human beings might be deduced, and that therefore all agreed to this narrower principle. However the members of the population may find such a deduction repugnant because it weakens, for them, the overall force of the principle. In any case it is not the deduced principle but the wider one that is felt and followed.

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14 All the more surprising because Hart acknowledges these kinds of rules when talking about the minimum conditions for the existence of a legal system. He also acknowledges them as law. But by this time he has had to drop the social rule concept and opt for a pure-norm one. Had he been more liberal in his conception of social rules he would have been able to persist with them longer.

A related problem occurs when people hold values prohibiting a wider range of behaviour than they actually abstain from. White Southerners might have believed that killing men was wrong, but, until recently, lynched more than the occasional black. Here again the internally felt rule does not correspond to the externally observable behaviour. Of equal importance are the cases where many hold general beliefs but would in certain cases not adhere to them. They might believe they would never kill, but would in some circumstances kill blacks or foreigners - though not white countrymen. Some would make the distinction if they really thought about it in advance. Others would vehemently deny that they would break their "principles" but would in fact change their minds about what the principle required if those circumstances actually arose. Most however do not make, and are never called upon to make, such fine distinctions about their beliefs, so their beliefs remain fairly general. The general prohibitions in their minds will not correspond to the more specific and precise rules, with all their inclusions and exceptions, found in the minds of those who made those distinctions.

The reasons why this variety of rules should be produced are far too numerous to discuss here (although some of the forces involved will be noted in §5.7). Nevertheless two that should be noted here are the indeterminacy of language, especially normative language, and the difficulties in its communication (§5.3). Even under the most favourable circumstances, where one person is prepared to be taught rules of social behaviour by another, the rules the teacher understands and attempts to communicate may not correspond with the rules understood and adopted by the taught - and circumstances are not often so favourable.

All the above cases deal with one kind of problem - the variety of internally felt rules that may be felt by those consciously conforming to the regularity of behaviour the social observer noted. Thus, there is unlikely to be a majority who internally feel <u>any</u> particular rule or a correspondence between the practice observed externally and the rule felt

internally.[15] Hart may exclude these cases (of people behaving similarly, but operating under rules of varying breadth and precision), from the concept of social rule. But in so doing so he would be ignoring a very important phenomenon in what most of us would call law. Most of the examples that spring to mind when reading about social rules in the Concept of Law would involve such variations in internally felt rules. Indeed, on most occasions where a population is observed to refrain from some designated action, the internally felt obligating rules under which the action is a delict will probably vary considerably.

The internal feelings of obligation, though very real to those who have them, may not even take the form of rules. They may merely take the form of standards[16] or of images of behaviour that have strong positive or negative moral connotations. Though a lawyer might turn these images into rules, most citizens do not bother. Even if they do, their inexperience in creating such rules (and in considering a variety of cases to provide qualifications and exceptions) will mean they are likely to produce rules which do not correspond to their likely behaviour and feelings should these cases arise.

These problems can easily be overlooked by a theorist postulating a social rule. If someone feels a rule internally he may ask himself if what he is conscious of is a social rule. He will look to the behaviour of others to see if it conforms to the rule. The similarity of behaviour will be investigated at the level of generality at which the researcher's own rule is pitched, thus missing the second problem. When he discovers that others have normative beliefs about this behaviour it is easy to assume they will be like his own. This assumption is aided by the difficulties in determining the internal views of others: (i) the difficulty in penetrating other minds and the difficulties of communication, previously cited as a cause of the variety of internally felt rules, also protect the observer from discovering it, (ii) the

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15 Dworkin makes a similar point TRS p. 58.

16 McCH p. 40ff.

variety of meanings normative language has for different persons means that a report of similar internal beliefs may conceal significant differences in normative feelings and in the actions they endorse or enjoin, and (iii) the unformed nature of many people's beliefs might mean that they will, when queried, endorse a rule suggested by the researcher that corresponds only roughly to their normative beliefs. Even asking the subject to think about these beliefs and express them in words may change the relevant beliefs and thus not express the beliefs the researcher was studying.[17]

But let us suppose that the required proportion of the relevant population did share internal feelings of obligation characterizable as rules and not only identical with one another but a fair match for the behaviour pattern that constitutes the external manifestation of the social rule. Even then, there would not be an internal rule. Instead there would be as many internal rules as there are people who hold these feelings. Individuals feel obligations that they have, they do not feel the obligations that others have. Of course, a social observer can state, as a single external fact, that there is this similarity or identity of these feelings. But this is achieved only when we move from the internal back to the external viewpoint.)

Thus, because of the variety and singularity of the internal beliefs involved, the social rule cannot be some thing which has internal and external aspects . At best it can be a social phenomenon defined as existing when certain kinds of external manifestations are present and the individual members of the population have certain kinds of normative beliefs about those external manifestations.

These many criticisms of Hart's concept of a social rule should not lead us to ignore the social phenomenon that it seeks to describe. This phenomenon can be said to exist where the first four external existence

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17 No solution is provided by a Wittgenstinian reply that ideas can only meaningfully exist through words. That would merely increase the error: from thinking that the prior belief was that which was expressed, to thinking there was a prior belief at all !

conditions are met (regularity of behaviour, demands for conformity, pressure on the non-conformists, including physical sanctions) and internal feelings of oughtness, be those feelings ever so variable and unrule-like, attach to the relevant behaviour.

Although Hart elaborates on the nature of social rules and the tests for their existence, they are not necessarily a part of his legal system. Social rules are the component elements of primitive law. But when secondary rules are introduced to create a legal system they do more than add to the primary rules. They also provide new existence criteria for primary rules - recognition by the rule of recognition or creation by those authorised to make new rules under rules of change. The rule of recognition will recognize rules that are not social rules, and rules of change will alter legal rules at different times and in different directions from the alterations of social rules. This is inevitable if the rule of recognition acknowledges sources other than popular custom, and if the rules of change give authority to determinate individuals or institutions who do not follow custom exactly. Thus we have a new existence test - one of validity according to secondary rules - rather than the dual requirements of general compliance and internally felt obligations.

The validity test is apparent only from the internal point of view - given the acceptance of the authorising rule, the obligatory nature of the rule authorised under it is accepted. But it is not like the internal test for social rules - it is not necessary that anyone feels obligated, merely that they would do so if they accepted the relevant secondary rule and were aware of the circumstances in which the relevant primary rule was created.

Hart could require that primary rules of a legal system must satisfy the social rule test, the validity test, both tests or only one test. He could justify the necessity of both on the basis that laws are to be seen as social rules but the only social rules that will be considered part of the legal system are those valid under the rule of recognition. He could

justifiy the sufficiency of one test on the basis that laws are created either by popular practice or by decree from above.[18] Hart, however, clearly chooses the validity test alone by counting as primary rules, those that are not enforced, not followed, not widely known or not widely accepted.[19] Neither externally observable consistencies of behaviour nor actual normative attitudes are necessary.

By setting the internally based validity test as the sole test for primary rules of a legal system Hart has made the dramatic shift[20] from a sociological view of law to what is fairly close to a "pure-norm" one. This shift explains why he says that law has both internal and external aspects but that it should "essentially" be seen from the internal point of view.[21]

This choice of validity test alone certainly makes law appear more systematic. There are clear links between the rules of recognition and the rules they recognize, links which can be built into a structure. Any other choice would make law appear less systematic. If both tests had to be satisfied then some rules that are valid under the secondary rules would not be part of law so that the "legal system" would include elements from outside law. If only one test had to be satisfied, then all the social rules that were not valid would be a part of law, but outside the legal system.

Although the choice is clearly convenient for a systems theorist, the price is high. It severely limits the applicability to modern law of Hart's valuable notion of a social rule. It is also very hard to justify. There are some rules invalid according to the rule of recognition, but nevertheless treated as valid by the courts. This is inevitable given the imperfect ability of human beings to apply their own rules, let alone the ability of different human beings to follow

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18 Like a mediaeval view of law or like Ehrlich's view that includes both "living law" and the "norms for decision". Fundamental Principles of the Sociology of Law.

19 CL p. 101.

20 Noted in §2.2.

21 CL p. 96.

consistently the rules set by others. This will be aggravated by the rule of recognition's lack of clarity and its varying degrees of acceptance (see infra). But sometimes rules are accepted and enforced despite their invalidity according to the rule of recognition. One example is provided by McKellar's Case[22] in which the Australian High Court ruled that the Electoral Act (1918) and the elections held under it had been unconstitutional for decades because the constitution required the numbers in the Lower House to correspond more exactly to the populations of the States. If one treats the Australian rule of recognition as establishing the constitution as the sole criterion of valid law, then the parliaments were not properly constituted and their enactments were invalid. Consequently, hundreds of Acts owed not their validity but their invalidity to the rule of recognition. Nevertheless, the court accepted the validity of laws passed by those parliaments.[23] Some might say that a new rule of recognition has emerged, and with it a new system. But most would probably accept that this indicates that validity according to secondary rules is neither necessary nor sufficient for the existence of primary legal rules. Clearly other potentially overriding factors are at work and Hart's test of validity needs to be supplemented[24] (and in this willingness so to override the rule of recognition we get the first inkling of limited judicial commitment, not only to the rule of recognition but to the whole project of systematising law).

Taking a purely internal point of view means that the rules felt internally need no longer be matched to any corresponding external conduct, thus avoiding the problems of social rules. But it does not make these rules felt internally any less individual, so that the validity that is claimed for a primary rule is a set of validities in the minds of those

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22 AG(NSW) en rel McKellar v Commonwealth (1975) CLR1.

23 Implying a merely prospective invalidation of the Electoral Act. This may be jurisprudential nonsense but the height of judicial common sense.

24 A modification to the Rule of Recognition could account for this, recognising as valid anything that a court recognises. This may be a useful rule of thumb for the observer. But, as Hart stresses, this is not a rule that will be accepted by the members of that ultimate court, and therefore is not a secondary rule at all according to Hart's test.

who accept the secondary rules and the justifications of the primary rule that flow from them. Furthermore, by making the existence of primary rules a matter of validity according to secondary rules, all the existence problems are shifted from individual primary rules to secondary rules, from the part of law with which we are all familiar, and whose existence we are at least inclined to doubt, on to unfamiliar things. Ultimately the existence of all law is made dependent on the rule of recognition that no-one had heard of until Hart "discovered" it.

The external point of view does return to relevance, to determine not the existence of single legal rules but that of the whole legal system. One of the "minimum conditions" for the existence of a legal system is that an (indeterminate) majority of people conform to an (again indeterminate) majority of valid primary rules.[25] This immediately makes the test a more difficult one to apply. A compliance test for a single law is simply a question of how many people in a position to disobey the law nevertheless do obey it. But for a system of laws account must be taken of laws which fall below that threshold of compliance - what weight are they to be given, and does more than sufficient compliance with one rule compensates for less than sufficient compliance with other rules? These are oft-noted problems for Austin's test of "habitual obedience" and Kelsen's requirement that a legal system be "by and large efficacious". They are no less pressing for Hart.

The compliance test is not only difficult to apply - there must be considerable doubt that it applies to our society. Socio-legal research indicates that much action by enforcement officials is *ultra vires* or in breach of apparently valid legal rules limiting their behaviour[26]; and any layman knows the extent to which tax, social security and traffic laws are violated by citizens. Indeed the proliferation of law seems to be matched by a proliferation of disobedience as the capacity of institutions

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25 *CL* p. 111. It is strange that as he puts so much emphasis on rules about wills and contracts etc., rules that *enable* action, rather than rules which *prescribe* action, yet the test for law is framed exclusively in terms of compliance with the latter rather than use of the former.

26 E.g. *LOP*.

to create paper rules far outruns the capacity of citizens to comprehend, or institutions to enforce, those rules.

Where the test does apply, most though not all of the primary rules would be complied with by the bulk of the population. This however does not make them social rules. Where the minimum conditions are satisfied, most primary rules will be of a different type - which might be called "hybrid rules". They have an external and an internal aspect. Externally, compliance can be observed. Internally they are thought to be valid, but only by the small number who both accept the relevant secondary rules and are aware that the criteria required by that rule for the creation of valid primary rules have been met. But in contrast to social rules, those who comply need not have any internal feeling of obligation, nor need they even be aware of the rule. Perhaps many such hybrid rules are also social rules. Certainly Hart thinks that this is usual and that this strengthens law. Furthermore, if a legal system is seen as the addition of secondary rules to a set of social rules, then many of the social rules will be validated by the secondary rules. But as law becomes more complex and new rules are created under the relevant secondary rules, many primary rules will not be social rules and many social rules will not be primary rules. We can summarize by saying that there are three tests for legal rules:

(i) validity test - necessary and sufficient for determining what is a primary rule. A minority of primary rules pass this test alone ("paper rules"), but are nonetheless legal rules.

(ii) compliance test - individual rules need pass this test but most must or there will be no legal system at all (hybrid rules pass both these tests).

(iii) social rule test - many pass this test too but it is neither necessary nor sufficient for the existence of a legal rule or the existence of a legal system.

Note that it is not sufficient to say that law is the union of social rules and secondary rules and that such a system exists when the two

minimum conditions are met. Meeting the two minimum conditions does not demonstrate the existence of social rules, merely that of hybrid rules. It is not possible to define an object as having two attributes and then to set the minimum conditions for its existence as the presence of only one attribute. If only one of the two is discernible then something certainly exists, but it is not the thing with two attributes.

2.4 SECONDARY RULES

Secondary rules are central to Hart's description of a legal system. Their presence is necessary both for the existence of a legal system at all and for the existence of primary rules. We know they are rules about rules that fall into three types. But what sort of thing are they and how do we know they exist?

Some[27] see secondary rules as social rules for officials. However secondary rules would appear to either fail the social rule test or to be untestable. Social rules require externally observable consistencies of behaviour and criticisms levelled at those who breach them. Hart says these things are required for secondary rules to exist.[28] But what behaviour do we expect to observe, and is there any behaviour that would count as a breach?[29] Most[30] secondary rules are power-conferring rules (conferring powers to legislate, change rules and adjudicate), and power-conferring rules cannot be breached.[31] Harris has tried to reformulate secondary rules as duty-imposing rules,[32] but, as Raz notes, such reformulations do not reflect the way in which they are used and held.[33] The last point is particularly damaging as it means that the

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27 E.g. Hacker LM&S p. 22.
28 CL p. 113.
29 Hart acknowledges this problem on p. 111 in asserting a difference between the way officials follow secondary rules and citizens obey primary rules but ignores it on p. 113. The only distinction he makes relates to the kind of internal point of view they hold.
30 Colvin 28 U Toronto LJ 198.
31 See McCH Ch. 9. Exceeding authority is not a breach of the norm conferring authority but of another norm requiring officials to limit themselves to that authority. Official adherence to the latter norm is made highly questionable by their constant attempts to expand their authority.
32 LLS p. 92ff.
33 CL p. 225.

reformulated rule fails the internal acceptance test. Finally, even if it were possible to breach these rules, could we point to any great social pressure, of which physical sanctions are a prominent and usual form, that is applied at their breach?[34] Even limited pressure is unlikely as judges tend to avoid criticising each other.[35]

Whether or not Hart thought secondary rules were normally social rules, he did not hang his theory on it.[36] The minimum conditions for the existence of a legal system included merely the internal acceptance of secondary rules by the officials. Thus if only the minimum conditions are met, secondary rules will be purely internal phenomena in the minds of officials. However, although no externally observable behaviour is required of officials the test of acceptance is much stronger than for social rules - acceptance by all officials as a common standard is required.[37]

Thus the addition to social rules which converts primitive law into a legal system is a consensus among officials about secondary rules. Although these are internal phenomena which exist for the individual official by virtue of his beliefs, the minimum claim Hart makes for their existence is a claim about official consensus, a psychological fact for the social observer to test. If, for any society, the test cannot be met, then there is no legal system in that society.

There are several types of secondary rules, but the one to which Hart devotes most attention and the one that serves as a lynchpin for the whole system is the rule of recognition. Yet the attempt to demonstrate its existence runs into many problems, including several that beset Kelsen's Basic Norm.

The first problem is to know among which officials this consensus is required. If the answer to this question is given in legal terms the

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34 LLS p. 60.

35 This avoidance of criticising other judges cannot itself count as a social rule, as general criticism of non-compliance would itself constitute general non-compliance.

36 Thus completing the excision from law of social rules begun by treating primary rules as hybrid ones.

37 CL p. 113.

argument becomes circular. This would not distinguish the legal system from systems of rules used by private organisations.[38] It would also become impossible to distinguish between a group of what we would all consider judges and a sociologically insignificant group who postulate a set of rules which happen to be congruent with what people actually do (indeed, by choosing rules carefully the latter could meet Hart's conditions for the existence of a legal system far better than any group more usually considered to be officials). Distinctions such as these will require a sociological definition of officials.

If "officials" are to be defined in sociological terms there are many simple and satisfactory definitions - one is offered in §5.11. But it will include the officials of many institutions - legislators, bureaucrats, judges, policemen, possibly even ticket inspectors. Finding a consensus about anything, let alone a rule of recognition in this group would be impossible and Hart would not claim one. Although he talks of officials in general terms, he concentrates almost exclusively on the central officials of courts - judges. To give a sociological answer to the question "who are the judges?" would require a sociological understanding of courts and their relations with other institutions. Before long a sociological description of law will have to be offered. Pace McCormick, who criticises sociological approaches to law for using and depending on positivist notions of law,[39] it is positivist notions that depend on sociological ones.

The next problem in alleging such a consensus is that although judges spend a great deal of time enunciating and elaborating most of the other rules virtually none ever say anything about the rule of recognition, indeed there is very little evidence that they even consider it. Hart acknowledges this: "for the most part the rule of recognition is not stated" but he claims that "its existence is shown by the way in which particular rules are identified either by courts or by private

38 Hughes 35 NYULR 1001, 1029.
39 N. McCormick 4 Br J of Law and Sociology 87, 88.

persons".[40] It is strange that something unstated and not directly considered from the internal point of view should nevertheless be "regarded from the internal point of view as a public common standard".[41] One writer has queried how a rule of recognition, in default of formulation, can be said to be a rule or exist at all.[42] It is also puzzling that one who emphasizes the importance of the internal point of view should be content to infer it from externally-observed action.

Even if officials can be said to accept, apparently unconsciously, a consensus about anything, let alone a rule of recognition in the seondary rules, the fact that they are unstated will make it very hard to compare them, and could hide many real differences between the rules which judges would state if called upon to do so. These likely differences are spotlighted by the problems involved in formulating a rule of recognition that really would pass the official consensus test. Lucas points out that most formulations are likely to be unclear and controversial.[43]

Lack of clarity and vagueness in formulation may lead to a rule of recognition with which most judges would agree[44] - possibly the only one with which a significant number of judges would agree. Hart seems to accept this, saying that rules of recognition will be "open textured" like other rules.[45] Most rules are like this without losing their character as rules. Lack of clarity in primary rules merely make some of their application uncertain. But it is a much more serious defect in a secondary rule, especially a rule of recognition. As a rule of recognition must act as a test for the existence of primary rules, any vagueness in it will lead to uncertainty as to what are the primary rules and it will fail to provide the rest. Such a vague rule cannot be a rule of recognition, although it may be something else.

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40 CL p. 98.
41 CL p. 112.
42 King 1963 Cambridge LJ 270, 298.
43 LM&S p. 92.
44 The precision that legal training gives to the judicial mind would hopefully mean that few would actually hold such a vague rule. Therefore vague rules would be even less likely to meet the full test required by Hart.
45 CL pp. 144-150.

Lack of clarity does not threaten the existence of the postulated rule merely that what exists is a rule of recognition. On the other hand, controversiality threatens the postulated rules' very existence according to Hart's judicial official consensus test.[46] One of the major sources of controversy and unclarity is that judges regard law as having several sources - at least one legislature, several courts, regulations and decisions made by the executive, and, in some cases, custom. A rule of recognition will need to specify and rank these sources so as to deny validity to rules emanating from inferior sources that conflict with higher ones. It will also need to specify to whom and to what degree the various sources can delegate power to subsidiary sources.[47] The ranking of sources and the powers of delegation may be controversial and subject to controversy between the institutions involved. There is no reason to assume that individual judges will all take the same side in such controversy and in any case judges will try to avoid pronouncing on such conflicts and risking politicising their role unless absolutely necessary. One example of such differences is that between Lord Denning and some others on the power of a court to invalidate laws passed by parliament because of their effect on human rights, and the extent of their power to invalidate subordinate legislation, both of which issues touch on the question of source ranking. Although Denning's views are extreme, it is more reasonable to suppose a continuum of views than complete agreement on a different view among his brother judges. Other examples can be found in (i) the controversy among Australian judges over the ranking of the Privy Council and Australian High Court as sources,[48] (ii) the uncertainty over the exact place of custom as a source of modern law, and (iii) the difference between some Scots lawyers and English ones as to whether the Act of Union of 1707 amounts to an original constitutional instrument with a special superior place among sources of

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46 Lack of clarity and controversiality are related in that the former may hide the latter.

47 Pace Harris, it is not an automatic concomitant of rule-making power that the rule-making power can be delegated.

48 Viro v R 141 CLR 88.

English law.[49] A final example is provided by subordinate legislatures. Many grow in prestige and power until they are treated as separate sources regardless of the terms of their original creation and the resolution of conflicts between their rules and rules made by the founding source becomes uncertain. Such cases are common in colonies in transition to full independence,[50] but a similar process can occur where a unitary state creates regional assemblies. This has not happened for local government in the United Kingdom, but where the units relate to an area with geographical, historical, cultural or ethnic identity and the delegation of power is more significant, this growth of prestige and power to become an independent source capable of contradicting its maker is possible (e.g. Hungary within the Austro-Hungarian Empire).

Even the presence of a written constitution does not usually solve this problem. Few constitutions specifically recognize the courts as a source of law and most throw up controversies over the relative weights of different sources. Consequently, a rule of recognition merely recognising the constitution will be inadequate for its task of the recognition and ranking of legal sources.

These several sources for law lead to another problem. In order to take them and their ranking into account the rule of recognition will become very complicated. In order to perform its task of identifying what are legal rules, it will have to incorporate all of Constitutional and Administrative Law. But long before you have got so far you will find the judges disagreeing. This should not surprise us for it reflects a general problem for all consensus theories - the postulated consensus is either too vague to be meaningful or too controversial to be consensual.

Some writers attempt to overcome these problems by saying that there are several rules of recognition, referring to the various sources.[51] Other secondary rules can then sort out the conflict. This destroy's

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49 McCH p. 111.
50 E.g. long before the final legal break, Canadian courts would almost certainly have backed Ottawa against Westminster.
51 E.g. AL pp. 68.

Hart's pyramidal structure but, provided an alternative structure can be established to reunite the several rules of recognition and the primary rules valid under them, this is not itself fatal to the postulation of a legal system. However, this merely shifts the controversy from parts of the rule of recognition to individual secondary rules. So the rules of recognition are saved but only at the expense of the existence of the legal system, one of whose minimum conditions of existence has been breached by the controversiality of these secondary rules. The rules of recognition are also changed because they no longer recognize legal rules, only rules which are contingently legal (depending on whether another source rule contradicts it and in whose favour the conflict resolving secondary rule works).

Another approach to these problems is to lower the requirement of acceptance to mere use of the secondary rules as a standard. Hughes cites the case of the enforcement of an invader's rules by the magistrates of the conquered nation[52] (e.g. occupied France). Harris and Kelsen both refer to the possibilities of an anarchist or communist judge who might deny the legitimacy of the regime yet still enforce its rules.[53] Although these acceptance requirements are intended to protect positivist theory, they point to other possible weaknesses in the consensus over the rule of recognition. Among the institutions that are seen as sources for rules some may be treated as legitimate and others merely acknowledged as "powers-that-be" which must be reluctantly followed. This dichotomy would be found in the French magistrates example - they would regard the laws of Parliament still in force as legitimately sourced and the decrees of the occupying power not (German lawyers would see the former as authorised by a decree "saving" existing laws, but the French lawyers would be more likely to consider them legitimate on their own and still legitimate in spite of the German decree saving them). But it may also be found in less extreme circumstances as when some Australian judges very reluctantly

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52 Hughes 35 NYULR 1001, 1013.

53 PT 218 n., LLS p. 108.

follow a Privy Council which they regard as an anachronism lacking legitimate authority. Even where there is full acceptance of all the sources, it is highly likely that different judges will value some more than others out of differential respect for the institutions or their personnel, thereby altering the effective rankings and what is the rule of recognition for that judge.

So even if, contrary to the doubts raised earlier, rules of recognition are used by, and exist for, individual judges, these rules will vary. Consequently, it is not possible for the social observer to say that even the minimum conditions of existence (internal acceptance by officials) have been met in societies like ours.[54] The key secondary rules have not been added to social rules and there is no legal system as outlined by Hart.

2.5 RELATIONS IN HART'S SYSTEM

Although Hart says little about the nature of the relations between the elements of his system, the following can be gleaned. The relations are incorporated in the secondary rules. Indeed, the whole point of those rules is to provide those relationships. A rule of recognition provides a relation between itself and the rules recognised, a rule of adjudication provides a relation between it and the rules whose application and interpretation are adjudged, a rule of change provides a relation between itself and the rules that can be changed under it. The relations are purely internal[55] - the acceptance of a secondary rule leads to the justification of another rule (e.g. the acceptance of the rule of recognition leads someone to regard a rule issued by one of the recognised sources as a primary rule valid from the internal point of view).

One major problem with these relations is their dependence on secondary rules. Just as the existence of secondary rules is doubtful, or

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54 The attempt to force law into a system has necessitated an unsatisfiable judicial-consensus test creating problems for the theory and the conversion of secondary rules from a useful point about the use of rules in some individual judicial minds into an untenable hypothesis about their use in all.

55 CL p. 99.

at best confined to existence as a personal rule for individual officials, so it is for Hart's postulated relations.

Another major problem which will become increasingly evident to the social observer is that the limited form in which the relations between rules is described has to be based on an extremely limited conception of the relations between persons. Just as Hart so rightly criticized Austin for seeing the relations between legislature and judiciary in terms of orders backed by threats so he can himself be criticized for conceiving them in terms of what might be called "rules backed by commitments". A good social observer should fall into neither trap. As we shall see in §5.2, social relations between persons, including legal officials, can be conceived as present where one person (A) regularly affects the actions of another (B), whether the effect is achieved intentionally (power relations) or not (relations of unintended effect and value-effect), and howsoever the effect is gained (by force, manipulation, persuasion etc.). But one of the most important kinds for law is authority in the very broad sense that a statement (or other form of communication) by A affects the action of B and the effect is gained not because of the content of the statement but because of the source of the statement. To be specific, the effect is gained because the person whose action is affected holds some belief about the person(s) who made the statement which for him counts as a reason for modifying his action. Authority relations can be broken down into different types on the basis of the considerable variety of beliefs that can achieve such effects.

(i) Inducement (based on B's belief that he will be rewarded for modifying his behaviour).

(ii) Coercion (B believes that he will be punished for not modifying his behaviour) - the kind of relations Austin had in mind.

(iii) Competent authority (B believes in A's superior knowledge or skill).

(iv) Personal authority (based on A's personal significance for B).

(v) Legitimate authority (B believes A has a right to make the

statement and that he ought to respond to it in a certain way) - the kind of relations envisaged by Hart.

The relations between real persons in law or out are rarely limited to any one kind of authority relation because the reasons for modifying actions created by the statements of others are usually several. This is just as true of judicial response to legislation by parliaments as to our response to a policeman's request. The mix may be different but a mix there will be, and to describe them in terms of one component will be to miss the important aspects of law represented by the others.

2.6 STRUCTURE AND WHOLENESS IN HART'S SYSTEM

Hart's greatest problems concern the structure of his system. He says little on the subject, but appears to give law a clear pyramidal form. His is a structure of authorising relations with the ultimate rule of recognition at the top descending *via* "a very familiar chain of legal reasoning" through a statute, a statutory order, to an Oxfordshire County Council By-Law.[56] This clearly links various rules of recognition with the primary rules but does not incorporate other key elements of Hart's "system" - rules of change and adjudication. Despite seeing the key to understanding law as the union of primary and secondary rules, his own structure does not provide that union; and his image of law lacks one of the four characteristics of a system.

Even this partial structure is endangered if, as argued in §2.4, there is more than one ultimate rule of recognition. That would produce not one but several structures descending pyramidally from those rules of recognition.

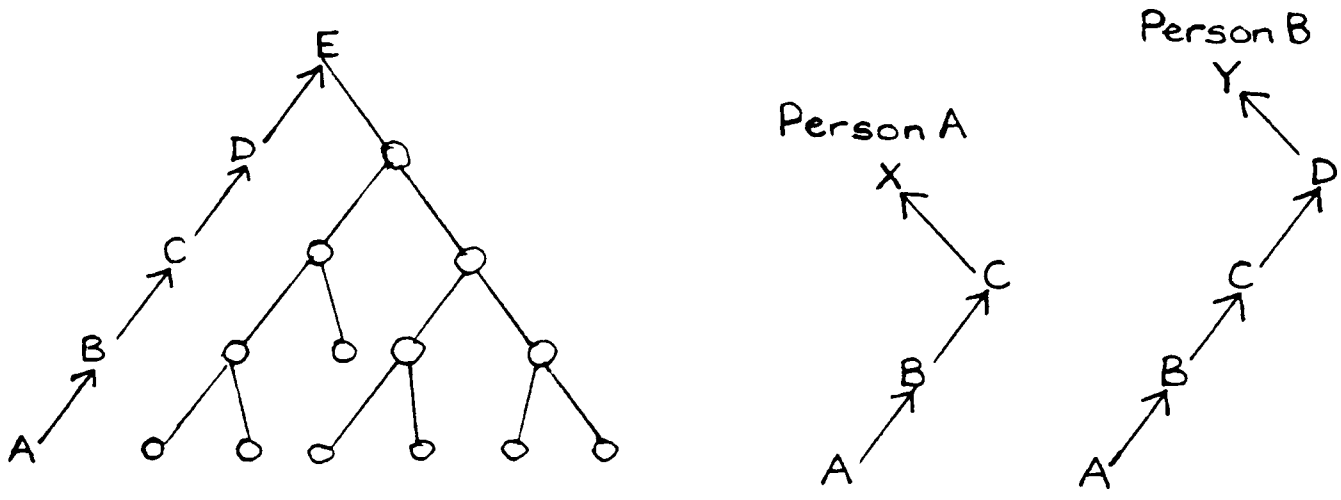
Another problem concerns the number of officials who do accept this *structure* of authority relations from an internal point of view. Few, if any, will actually, rather than hypothetically, accept the structure as a whole because few will have considered each step in the many chains of validity. The most that can be claimed is that those who accept the validity of the final legal rules (e.g. the Oxfordshire by-law) would, if

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56 *CL* pp. 101-2.

queried, trace that validity back through the chain described by Hart. But this is extremely doubtful. As different officials go back through the justifications for the by-law, many differences will be revealed. Some may stop at the very first rule, giving a Platonic justification based on comparative values of state institutions and the individual,[57] or more simply say "all 'laws' must be obeyed" and that that is sufficient justification. Many will keep going back through Hart's chain of authorising relations until they find a rule which they feel personally to be valid, and to which they can say: "I agree with that".[58] Others may break off Hart's path for idiosyncratic reasons (e.g. "It happens to suit me." "Because I was brought up to obey officials of this kind." "The judge/minister/official is a good chap/ is a member of my club/ gaols dope-pushers." "Because the content of the relevant rule is in accord with natural law/ Allah's will", etc.) Schematically, the two views might be put thus:

Figure 1: System of Validating Laws — Individual Justifications



Presumably Hart would limit this acceptance test to judicial officials just as he limits that for secondary rules. But, even the paths by which judges justify legal rules will diverge. Variations in the secondary rules used will lead to variations in the authority relations and in the rules which judges reach along the path. There will also be a

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57 See Crito quoted in Lloyd Idea of Law p. 53.

58 There is a similar phenomenon in chains of explanation: "Why did the kettle go black?" "Because it was burnt." "Why?" "Because the gas was left alight." "How?" "Because the paint particles oxidised" etc. (Russell's point, my example). When we reach the statement we are satisfied with, we stop. If we are incurable sceptics we never stop asking questions. (In chains of justifications authoritarians will stop early and anarchists never.)

tendency to stop when they reach a "subordinate" source which they regard as valid in its own right (e.g. when an Australian judge comes to the state legislature).

An even thornier problem is provided by the attitudes judges have to the content of laws. Few will accept, and fewer will enforce, absolutely any law valid under the secondary rules regardless of offence to moral sensibilities.[59] Of course, the degree of tolerance is very great - the legal profession tends to produce, and governments tend to choose, those who agree with the bulk of a government's action and the rules used to justify it. But this tolerance is not unlimited. So even if we only look at judicial attitudes, a second test for legal rules has appeared. It may be a test that is rarely invoked - most governments would face a revolution from the populace before sufficiently offending the moral sensibilities of most judges, and therefore rarely have the chance of suffering the latter. But it is a test nonetheless.

There is another way in which content affects validity in the eyes of judges. Where they find a postulated rule more attractive in substance, judges will be less concerned to hunt for defects in the chain of validity that authorizes it. Effectively, if not consciously, judges use:

(i) a prior substantive test - that the rule be not outrageous to the relevant judge. A rule failing this test fails outright.

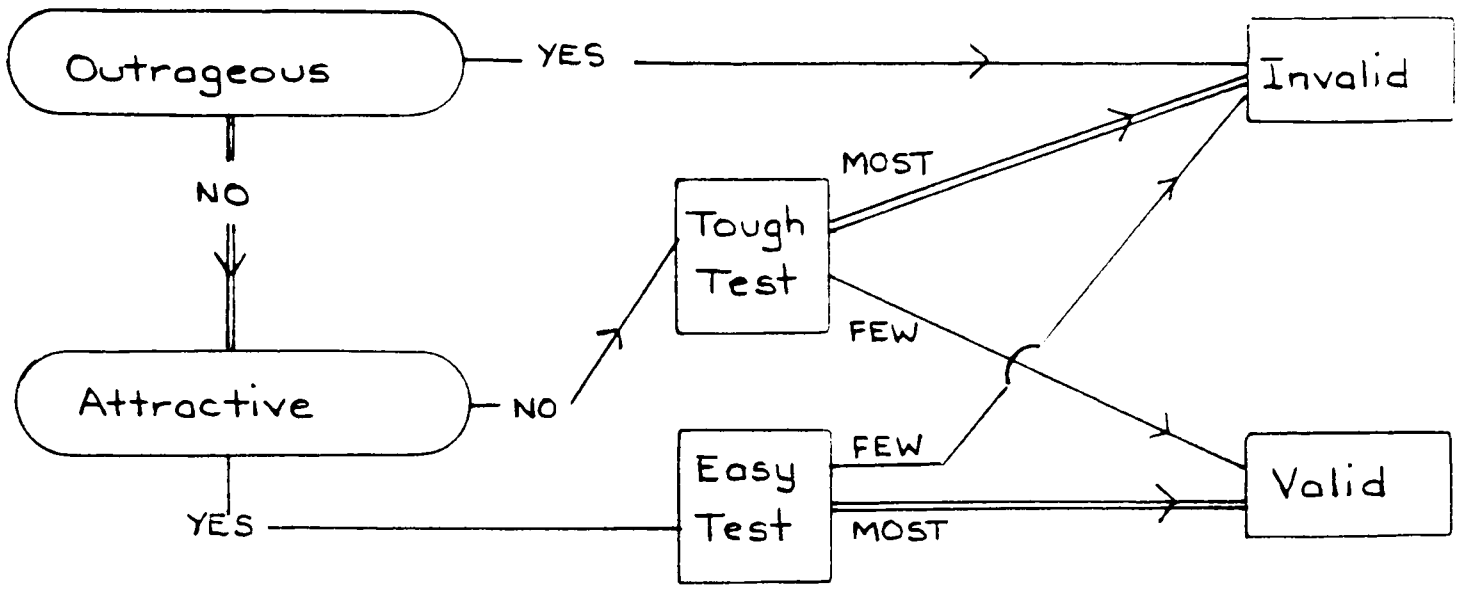
(ii) a second prior substantive test of attractiveness.

(iii) two authority tests - a stringent test (actively seeking out authorities to overrule it) applied where the rule fails the previous test and a more lenient test (defending the rule against attacks) where it passes.

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59 Lucas LM&S pp. 93-95.

Figure 2

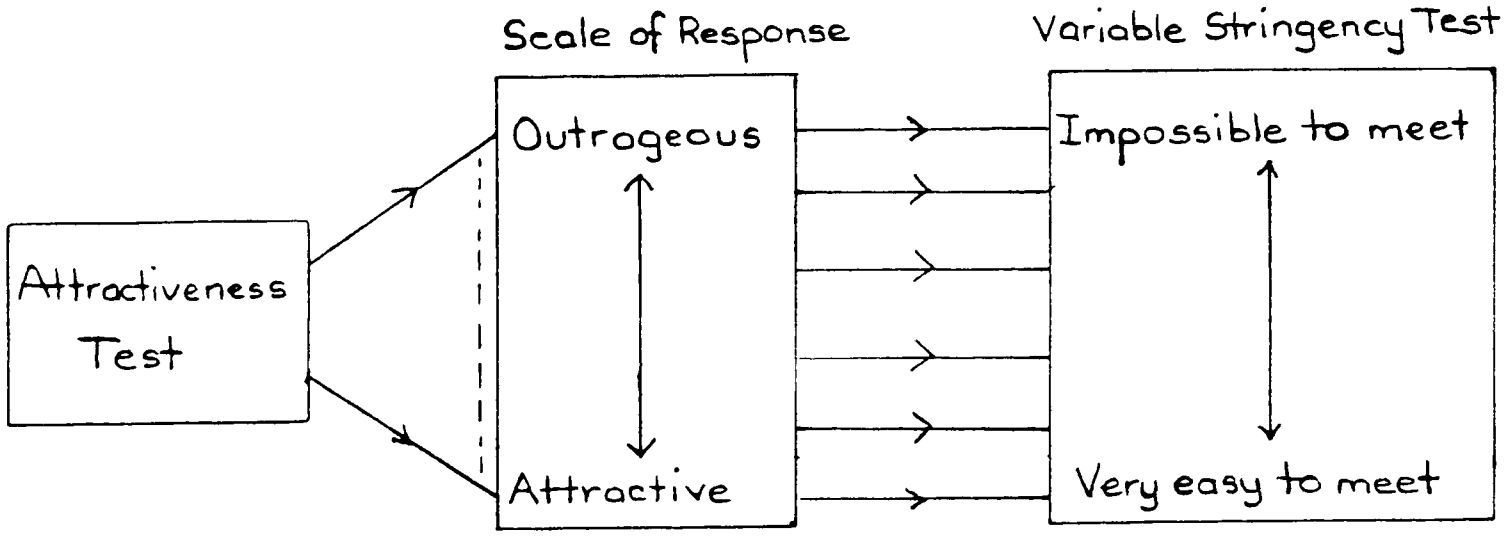


These tests could alternatively be seen as:

(i) a prior substantive test setting levels of attractiveness and outrage

(ii) a single authority test whose stringency is flexible, set by the substantive attraction of the rule itself, reaching impossible-to-meet levels where the rules go beyond the requisite level of outrage.

Figure 3



These content tests could not fit into Hart's structure of authorising relations that supposedly determine validity. In order to preserve Hart's system they must be ignored.

Wholeness

What gives Hart's system its wholeness, its unity, is clearly the supposed structure and the rule of recognition at its apex. Therefore, if the rule of recognition falls the "system" lacks not only structure but anything to unify it. Even if the existence of the rule of recognition is admitted it still cannot bear the burden of providing unity because legal systems are likely to have several rules of recognition and because no

rule of recognition will bring under its umbrella all that judges regard as law in any state.[60] Finally, even if a rule of recognition were formulated that did recognize all the sources of law in such a state, it would be because we knew what the laws and the sources of law were and formulated it accordingly. Thus the unity of law is a prerequisite for a rule of recognition rather than a consequence of it and the basis of that unity must be sought elsewhere.

2.7 PRACTICES, OFFICIALS, INSTITUTIONS

The failure to establish the existence of secondary rules may mean there is no legal system. But it does not mean there is no law.[61]

So what kind of law do we have without secondary rules? One possibility is Hart's description of primitive law (as modified by the earlier rejection of a common internal element in social rules). Perhaps we are closer to it than hitherto imagined - not least because it is obvious that our law suffers from many of the same defects! But we are not that close. One of Hart's most powerful contrasts is between modern law and his conception of primitive law. Clearly something has to be added to Hart's notion of primitive law to describe modern law adequately. But this addition takes the form not of these elusive secondary rules but of practices, officials and institutions.

In fact it is arguable that in real cases of "primitive law" there will always be some such added practices[62] and frequently, officials of a kind as well. Practices may involve the presentation of disputes to a certain person, group of persons or the whole group at certain times or in certain ways. In the simplest case a practice may involve the tendency to talk over alleged misbehaviour around the campfire before individuals take action, or an informalised practice of mockery or screamed abuse after dark in an attempt by an aggrieved person to shame his aggriever.[63] In the simplest case, an official is merely someone who plays a much

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60 TRS Ch. 2.
61 CL p. 119.
62 LAP, O&D, McCH p. 111.
63 O&D p. 61.

bigger part when questions about social rules are considered. He may merely be a good talker or one who can mediate between the parties.[64] Alternatively, his suggestions for solutions may carry weight because his counsel is considered wise (an "opinion leader") or thought to have access to a special "truth" (e.g. by sorcery), or other members are either dependent upon or used to receiving instructions from him, in the course of other social activities (especially production, without which there could be no community).[65]

The addition of officials and practices has very significant effects on primitive law. As well as the uncoordinated critical reaction and the haphazard violence inflicted by individuals against suspected offenders, there is now someone who is expected to respond (an official), or a method by which the response of ordinary people is made (a practice). At the same time the critical reactions of others will tend to decline, partly because the official reaction is seen as more effective or more appropriate, partly just to save effort, and partly because some private critical reactions will themselves stimulate an official reaction.

The addition increases the scope and detail of the subjects that are regulated. Even if the addition is simply the practice of discussing disputes around the campfire at night, many more matters can be dealt with than by haphazard private reaction. As the officials take on helpers and grow into institutions with ever expanding power, the growth is phenomenal.

The addition also makes the reaction more predictable. This is not necessarily because there is more reliance on rules - indeed the fact that there is now an official to deal with a dispute lessens the need for a

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64 O&D pp. 72-76.

65 Some might argue that such practices can only exist if there are social rules and would regard them as evidence for such social rules (Idea p. 57). The complete answer to this must include an alternative explanation of social practices (§5.7) but the practices so far described can easily be accounted for without rules. People with grievances are looking for a way to gain redress or satisfaction and pursue means previously used with success. This does not imply that they or others feel they ought to do it, that they ought not to do more or that the other party will regard these moves as deciding the issue.

rule.[66] The predictability is merely based on the fact that it is known how and by whom the dispute will be dealt with. It is easier to predict a single person's behaviour, or the behaviour of a group participating in a known activity, than haphazard individual reactions.

Calling these practices "additions" should not mask the fact that they fundamentally change the social rules themselves. Initially, these rules involve a regularity of behaviour, observable critical reactions by many members of the community against non-conformists and a variety of internally felt rules or other moral connotations that support conformity. The addition of dispute-settling "officials" means that the physically observable reactions of some members become more common and those of the rest become rarer and weaker. This naturally shifts the attention of the social observer from the citizens in general to the officials in particular. The members of the community, official and otherwise, continue to hold a variety of internal views about the behaviour. However, as they become more powerful, officials can afford to be more at variance with their fellow citizens in the nature of the internal views they hold and the behaviour to which they react. At some point it might be better to think of the internal feelings and critical reactions of non-official citizens separately - perhaps as social rules, residual "primitive" or "living" law - weaker than when there was no official reaction, but still there. However, most citizens will still think of official behaviour as enforcing community rules (even though the variety of internal views meant they were never truly communal). Consequently, there is always the possibility of shock and surprise when the gap between official and citizen views and reactions is realised,

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66 Some say that the official's decision will not be effective unless he follows rules: otherwise he will not receive public support, parties will not come to him and the losing party will not feel bound by his decision (O&D p. 179). However, what makes official decisions effective is extremely complex and the beliefs of the disputants and wider public about the extent to which the decision process is rule-guided is only a part of it (see Ch. 6). The public's and parties' attitudes to the decision are important, but are more likely to reflect its content than the way it was reached. Paradoxically, following a rule may undermine the perceived legitimacy of an official if he uses rules to decide against a strong or well-respected party.

providing a source of tension that is a permanent feature of non-primitive law.

Several writers criticise the absence of any account of legal institutions in Hart's account of law.[67] But the defect is not remedied by merely tacking on institutions to Hart's picture. Hart has not ignored the addition of institutions, practices or officials. His error is in attempting to encapsulate their effect by stating the rules by which these institutions are supposed to operate - the rules of recognition, change and adjudication that give various institutions authority to legislate, enforce and interpret. The institutions and practices have been reduced to rules. This is both impossible and severely distorting despite the long pedigree of such views of institutions. Weber presented the image of institutions running according to rules as the dominant type of government in the capitalist countries, fitting in well with the ideology and business needs of the bourgeoisie. But though the bourgeoisie may wish that the bureaucracy deal with them according to rules the desideratum is only partly realised. Chambliss and Siedman[68] offer a partial explanation. The same bourgeoisie did not wish legal institutions to deal with the working class according to rules. What they demand is action to protect threatened interests, whether this action is in conformity to existing rules or not (e.g. the demands that crime must be controlled, riots must be stopped, strikes must be broken). If Chambliss and Siedman were right in seeing the various legal institutions as controlled by the bourgeoisie and like-minded running dogs, then some institutions would operate by rules and others would not. But, despite an undeniable overall bias towards upper-middle class interests and values among legal officials, there is great individual variation. Some officials avoid rules in pursuing middle class offenders and some operate by rules in pursuing working class ones. Institutions, legal and otherwise, are not mechanisms by which specified ends are pursued according to particular

67 Incl. Arnold 51 Mod LR 667.
68 LOP.

rules, but filled with individual human beings who pursue different ends by different means according to different justifications (if any). These divisions have more important effects in that even where officials do operate according to rules those rules differ so making the rules individual rather than institutional ones. Furthermore, there are distinct advantages in avoiding even such individual rules. Leaving them unstated avoids controversy; and leaving them vague or unused provides and adjudication that give various institutions valuable flexibility, whether in pursuing those officials' ideals and interests, or merely in avoiding the conflict into which rigid applications of what they believed the rule to be could lead.

Institutions are not made up of rules so much as comparatively ill-defined "practices". These involve actions that are frequently performed in certain situations and form a typical response of an official to that situation. Frequently the situation to which an official responds is itself the response of another official as when a prosecutor's practices are the regular responses to police reports which are themselves police responses to complaints by the public. In complex institutions or sets of institutions the series of official responses can grow quite long. Where a regular path is followed through a maze of officials the series of practices are what some call a "process".[69]

The practices of legal officials all concern talk about rules that apply to the community (i.e. primary), but they are not governed by rules (i.e. secondary). The situations they respond to usually involve talk of rules - demands for new rules, and interpretation and enforcement of old ones (although the response of legal institutions is more likely to be a process so that what legal officials are dealing with is part of a chain of official response to that demand).

In making these responses, the officials and others involved develop "skills" in the sense that they have experience in handling that situation and dealing with it in accordance with practice. Their actions take on a

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69 E.g. LAP p.4. See Chapters 5 & 6 for accounts of the place within my own theory of: legal institutions (6.6, 6.7) and chains of official response arising from chains of relations in law (6.4, 6.8).

familiar form, both in the ultimate response they make, and in the way they lead up to it. Thereby they cause fewer surprises, arouse less hostility, and are more likely to induce intended responses in others. The skill is threefold: (i) knowledge of the usual forms of behaviour of someone in their position, (ii) ability to use those forms of behaviour to induce the desired response of another in the form of an action or decision, and (iii) within those forms of behaviour, the ability to pursue the ends they set themselves (these are not necessarily selfish ends - they may be the ends of the client, improvements of efficiency, furtherance of an ideal, or performance of what he considers his official duties to be).

This skill element in law is touched on in different ways by many writers. Llewelyn emphasises law as a "craft".[70] Finnis refers to law as "stylized and manageable drama".[71] The latter provides an image of law involving a play in which there are fairly recognisable characters, each with fairly recognisable patterns of behaviour (i.e. practices).[72] This play is repeated over and over again with different performers playing the parts. Their interpretations of their roles may vary enormously as do their reasons for playing them - their skill lies in achieving their ends while still behaving in the broad way expected of that character. Hart himself starts with the fact that we know that we can find out what the law is on a point - we have the skill - it is just that we are not sure exactly what sort of thing it is that we discover, and whether there are any basic principles that govern the discovery. We are like children[73] who can do mathematics but are ignorant of its principles (or whether there are any principles at all !).

The most important skills involve the ability to formulate, use and argue about rules. It is a skill involving verbal rather than physical

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70 JP p. 364.
71 NLNR p. 283.
72 It is like an "experimental" play where there is no script as such and the actors are given roles and told to respond as the person they are playing would do.
73 Or merely pre-Russellian mathematicians.

manipulation - more like debating than carpentry.[74] The particular skills will vary considerably from solicitor to advocate, to judge, to legislator to bureaucrat to policeman. Legislators will need to argue the virtues of rules, policemen spot nonconforming actions by citizens, bureaucrats determine what personal action does conform etc. But for many, the most crucial skill is the ability to generate rules applicable to the case in hand. Sometimes these are generated from the individual's own values as in the case of legislators framing a law or bureaucrats exercising of discretion (and perhaps in rare cases, judges, where they realise there are no significant precedents to cover the case). More often a rule is derived from the action of another ("superior"[75]) legal official or set of officials - as when parliament votes on a bill or an appellate court writes a judgement at the same time it disposes of a case. This is not a matter of taking on board a rule stated by the superior official - often the superior's action is not in the form of language, or is expressed in the indicative mood.[76] Where the superior's action does take the form of normative language the rule may not, as originally stated, be in a form that can be applied to the case in hand and even if it is, there remain all the difficulties of communicating rules and knowing whether the internal rules match (§2.3). In any case the rule that is generated by the subordinate official is, even if the wording be the same, a new rule, a personal rule, for that official. (Not only is the rule personal but it is transient. In the case of judges, or barristers especially, it is created from the material for the purpose of deciding or arguing <u>that particular case</u>. They do not carry them from case to case as they do not know when another case will require it,

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74 But skills of verbal and physical manipulation are similar in an important respect. There are many different ways of building a chair, producing things which look very different and which can be put to a variety of uses. There is no single "correct" chair even though there is skill and craft in making chairs. Some are better at their craft just as some lawyers are at theirs. But it is still a chair if it can support a human posterior and it is still a rule if it can support a legal argument.

75 Nothing should hinge on this choice of term. The person whose action is used to derive the rule could be of lower status.

76 Honoré in <u>LM&S</u>.

because they expect to have to look at the materials again when they argue or decide the new case and because they quite rightly regard their skill as involving the generation of such rules rather than their memorisation.)

This way of viewing legal skills owes much to Kelsen. He depicted lawyers observing the action of officials and finding a norm which is the legal meaning of the act.[77] This chapter does not deny that the skill of lawyers lies in interpreting action so as to produce a rule to argue or decide the case in hand. It merely denies that the skill involves use of a system of higher norms, and that the skill is exercised in a sufficiently similar way by lawyers for the meaning to be called the legal meaning or the legal scientist's meaning, rather than the meaning that that particular lawyer draws from it.

When the social observer views these practices in which officials in generating rules for personal guidance out of the actions of other officials, he sees this as a power relationship at work (in the sociological sense used in this thesis of a situation where one person's actions intentionally and regularly affect the actions of another - §2.5). Among the officials and institutions in law, some are more powerful and affect the activities of the others whether through possession of resources of greater physical strength, greater prestige or greater persuasiveness. They may possess all three to varying degrees and different power subjects may respond to different resources. Those who respond will see the actions of the power holder as a reason for their own action. If their own action involves the generation of primary rules, the power-holder is regarded as a source of these rules. This does not imply a secondary rule recognising, as valid, rules that emanate from that source. It implies that there is a practice among the lower officials to generate these rules by finding justifications for them in the actions of the power holder. They may create secondary rules for themselves to encapsulate their own practice. On the other hand they may not think

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77 PT Ch 1.

about it, merely exercising their skill in generating primary rules from the source.[78]

But in all cases it is the source which predates the rule rather than vice versa. A new subordinate official takes up his post noting the fact that predecessors and others like him were and are affected by the actions of the relevant superior official(s). He may consider it right, prudent or unavoidable to follow suit in which case he has a reason to consider the superior(s) as a source. If he does formalise this into a personal secondary rule, it will post-date not only the existence of the superior official(s) who are the source, but also the existence of the power relationship, the practice of others of treating the official(s) as a source, and his practice of treating them as a source. At the very best the rule of recognition becomes a part of the subordinate official's skill of generation of rules from sources. That skill may include other rules, but like so many skills it is likely to be only partly based on, or expressible in, rules.

The sources recognised and hence any (personal) rules of recognition[79] will vary depending on the officials to which the subordinate responds. Some will respond to a wide range of sources, some only to their immediate superiors. Even among a single nation's courts there is a variation in the sources recognised. Different state courts[80] or "federal" courts[81] in federations, in specialist courts which administer particular acts[82] and in the old courts of equity which ignored so many of the sources common to courts of common law (where there are two such types of courts, however much the rule of recognition listing equity sources is shared by equity judges and that listing common law sources by common law judges, judicial officials as a group share no rule of

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78 A task whose difficulty varies enormously depending on the obtuseness of the superior officials and the extent to which they had considered such cases when framing their original action.

79 This variation, although on an institutional level, is acknowledged by Raz CLS Ch 8.

80 Who respond to different legislatures and give different weights to decisions of their own and other state supreme courts.

81 U.S. state and federal law are dealt with in different courts.

82 Australian examples include the Arbitration and Family Courts.

recognition and a rule of recognition that incorporates both equitable and common law sources is held by none).

This is not to say that Hart's theory of rules of recognition is unimportant. It has probably had a significant effect on the practices of legal officials. Where a practice is frequently and readily performed but not well understood, any putative explanation will be influential. Where the theory emphasizes a part of a complex craft, as any simple theory will, those who examine their practices will find that part. Seeing the theory apparently confirmed, they may either adopt it in full or, clearly conscious of and understanding only that part of their craft, they may use that part more. This was undoubtedly so with explanations of law in terms of sovereignty. By putting a sovereign legislature at the centre of law it concentrated on that part of legal craft that looked to parliament and legislation rather than the courts and common law. For Bentham, the turning of lawyers' heads towards parliament[83] and setting them in search of a sovereign was deliberate - he wanted nothing of common law with its reliance on judicial precedent, and passionately preferred legislated codes. Kelsen and Hart were less evangelical, but nevertheless set lawyers on the trail of Basic norms and Ultimate Rules of Recognition, again influencing lawyers' practices.

If all or most judges had taken Hart's concepts on board, found the same rule of recognition, and made it the centre point of their legal practice, then Hart might paradoxically have been wrong about the practice of judges when he wrote the book but right about it after it had been read ![84] But for several reasons this has not happened. First, the compartmentalisation of "theoretical" jurisprudence and "practical" law subjects partly immunised the latter from the influences of the former: so practices are affected only marginally even by jurisprudential theories

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83 See McCH p 119. The growing power of parliament (which Bentham merely converted into ideological terms) sometimes exerted a more direct influence.

84 Conversely, to the extent that legal theorists improve on their predecessors' theories, they will be wrong about the theories of judges who have learnt from those predecessors.

with which the practitioner wholeheartedly agrees. Second, it was clear to many that only a part of the practice of law was represented by this search for authorising relationships. Third, the difficulties in finding the rule of recognition and applying it noted above would be quickly discovered by any judge attempting to use Hart's theory in practice. Fourth, the content of the rule of recognition would be controversial.

Finally, some did not like the changes that would be wrought in judicial practice if the theory were adopted by future judges. Fuller and Dworkin disliked the concentration on social sources that would result from the use of a rule of recognition. Thus they emphasised other parts of judicial craft, especially the use of moral principles.[85] This produced a division in jurisprudence and in jurisprudence teaching. Unless a significant majority of students fully adopted one theory and rejected the other, the legal craft they practised as lawyers and judges would not conform to the theories of either.

2.8 WHAT ABOUT THE REST OF "LAW"?

Criticism so far has been largely directed to the proposition that from the point of view of the social observer, there is no legal system as outlined by Hart. But even if all that Hart said was true and all judges did see, from their internal points of view, a set of primary and secondary rules united into a structure by the rule of recognition, the social observer would still be disinclined to see law as systematic.

The first problem is the exclusive emphasis placed on judges. Why should we be so concerned about these officials? Should we not enquire about other court officials, and whether they accept secondary rules, and whether a legal system could be said to exist from their internal points of view?[86] JPs are unlikely to know enough constitutional and

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85 Even if the positivist distinction is accepted and the discovery of what is law is regarded as a separate exercise from its justification, they know that once a purely socially-sourced law is established it would be difficult to persuade judges or citizens that it should not be followed. Accepting the positivist view of law shifts moral principles from a role in determining what is law to a role in justifying civil disobedience - in the latter role they have to work a lot harder.

86 Lasswell & McDougall 37 U Pitt LR 465, 473.

administrative law to construct rules of recognition for themselves. Even if they had the time and the requisite skills they would be highly unlikely to come up with the same ones as judges[87] (for this reason I have assumed that they were not included among the relevant officials for the official consensus test; if they were, the test would be quite impossible to meet). Yet their place is pivotal, dealing with far more cases than judges, and, in some jurisdictions, dealing with those cases on their own. Another body with a key role to play in law is the jury, yet no-one would suggest they would find system in law. For them the law is a set of bewildering propositions set before them by judges. If they did have a rule of recognition it would refer to a single source - the judge in their case.

But why not look at non-court officials and how law appears through the eyes of legislators, the executive and the police? Why confine these questions to officials ? What about the views of the majority of the legal profession who do not have official posts and whose activities lead them to view the law in a different light (§1.4) - and what about the citizenry ?[88] It may or may not be, as Raz claims, that courts are the one institution always found in law and only found in law.[89] But there is no doubt that in Western countries they are not the only institutions that must be added to primary rules to provide an understanding of law - a law that would look very different without legislatures, police forces and ministries. In Western countries legislators come from different parties and the extent to which they share a "unified and shared acceptance" of anything, let alone the niceties of rules of recognition. Loyalty to party (or sometimes a philosophy and set of social values behind it) comes before loyalty to shared values and rules about conduct. Such rules may be claimed, not as a guide or limitation on the behaviour of both parties, but to be used as a weapon against the other. The quest for personal

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87 One could say that their rule of recognition is "what the stipendiary or clerk of court says is law".
88 Not a specifically "legal" point of view but relevant to the social observer's understanding of law.
89 AL p. 111.

power or ideological realisation always comes first.[90]

Members of the bureaucracy are concerned with the legislation they administer. The law for them partly comprises rules they glean from an Act of Parliament and orders received from their superiors. The law for most policemen consists of criminal statutes (which generate duty-imposing rules for citizens, and a duty imposed upon policemen to restrain those who seek to, and apprehend those who do, break them) plus court procedures and a set of rules for police behaviour that make the above-mentioned duty more difficult to perform. To describe law as a policeman sees it would not be to picture a system of rules like Hart's, but <u>two</u> sets of rules in constant tension (though one set may be stronger). Whatever view of law the police <u>should</u> hold there is no doubt that the <u>actual</u> views held of it vary among them and are very different from that of judges.

Finally, there is the view of the citizen who will witness a selective set of actions of various officials of the legal institutions. He too will generate rules for himself out of the actions of officials. These he may accept because of the value he places on the relevant institution, because he accepts the substantive content of the law, or because he sees that it will be enforced despite his disapproval. But many of the actions will be seen as merely actions of the powerful which have effects on himself, and of which he must take account in making his plans (when he chooses his driving speed he does not so much see a <u>rule</u> to be followed because magistrates who believe in it have the power to impose sanctions, but an intermittently relevant set of actions by policemen and magistrates that will be set in motion by speeding in the presence of a policeman).

The second problem concerns how much of law is included within Hart's system. If the other parts of law are sufficiently significant, the social observer would have to say that although there may be a legal system <u>within</u> law, <u>law</u> as a whole is not systematic. Some of these other parts of law have been noted by positivists (though not their consequences

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90 See §5.11.

for positivist theory). Raz thinks a theory of adjudication has to be added to a theory of legal system to provide "a conceptual foundation of our understanding of the law as a social institution of great importance to society."[91] Harris finds, in addition to his own system of legal rules, a "dynamic congerie of principles, maxims, doctrines, morals, policies, delineations, classifications and so on, found as part of the tradition of a group of officials."[92] Even Hart admits there is more when he says that the union of primary and secondary rules is at the centre of but is not the whole of law.[93]

Other theorists would want to add even more to Hart's system in order to describe law. Honoré considers customary and conventional rules to be law but not part of Raz's (or presumably Hart's) legal system.[94] Dworkin claimed his "principles" are unlikely to be captured by the rule of recognition because they are not derived from a source.[95] Various realists and their jurimetric descendents have pointed to the personal characteristics of judges (their political socialization[96]; their individual psychology;[97] their values[98]), the group dynamics of courts[99] and the ability of regular litigants to control the agenda of decision by settling cases that might involve unfortunate precedents[100] that affect judicial decisions. Sociological theorists point to a variety of social forces that have a vital role in the generation and shaping of law. Pound[101] and Stone[102] have emphasised the part that major interest groups play in shaping the content of the law through their ability to organise

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91 CLS p 209.
92 LLS p 65.
93 CL p 96. Hart says that the union of primary and secondary rules is not the whole of the "legal system". However he must here be using the term "legal system" loosely as a synonym for "law". The legal system he has described is the primary and secondary rules as allegedly unified and systematised by the role of recognition and other secondary rules.
94 WG p. 163.
95 TRS p. 39 ff.
96 Nagel 63 Mich LR 1411.
97 Frank Law and the Modern Mind.
98 Schubert 57 Am Pol Sci R 433.
99 Ulmer 27 J of Pol 133, Schubert in 8 IESS 310.
100 Galanter 9 Law & Soc R 95, 101.
101 The Philosophy of Law pp. 42-47.
102 SD chs. 6, 7.

themselves and exercise power over the appointment and actions of legislative and judicial officials. This affects not only the "discretion" of legislative and judicial officials but also what decisions are in practice enforcable (judges know they just cannot successfully gaol a unionist for union activities even though the relevant power-conferring rule says he can). Criminologists point to the importance of various "sub-cultures" in affecting the administration of and reaction to law.[103] Finally, the profound effect that the institutional nature of law has on its operation has led many sociological theorists to include facts about the workings of institutions in their descriptions of law. The extent and nature of these other phenomena will be unravelled in later chapters. For the moment all that is noted is their existence and that they involve far more personnel, and a greater variety of social relations between them, than Hart envisaged.

Faced with all these phenomena which, though not fitting into the system of primary and secondary rules, are familiar even to the casual observer of the institutions we call legal, there are three possible defences: (i) to include these phenomena in law but to see them as minor parts of it, (ii) an attempt to include them in Hart's system (or an amended version of it) and (iii) to exclude them from what the theory considers to be law. The first is hardly plausible. The second tends to turn the phenomena into Trojan horses able to destroy the structure and unity of the legal systems from within. Dworkin's principles as originally stated;[104] were not so very different from legal rules[105] but as further explicated in "Hard cases",[106] their links with the judges' own moral judgements make them ineligible for membership in a system deriving its criteria of validity, its structure and its unity from a rule listing institutional sources of rules.

More often the attempt is made to exclude these phenomena from a

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103 Podgorecki Law and Society.
104 TRS p. 14.
105 Tapper 34 Mod LR 628.
106 TRS p. 81.

narrowly defined "law" that is the focus of "jurisprudence" (or "legal science" or judicial preoccupation[107]). Social forces are acknowledged, but they are seen as having effects on law rather than being a part of law. Even these are confined to (i) very strong social forces that affect the existence of the system or, more exactly, which ultimate rule of recognition will be accepted by officials, and (ii) lesser social forces that may affect the content of laws created by those who are empowered to do so by the secondary rules of adjudication and change. This does not do sufficient justice to the role of outside forces in law. More than being mere matters affecting official discretion, these forces impose limitations and requirements far more stringent and exacting than any contained in the secondary rules of the system. Further, these limitations and requirements apply at all levels of the legal system, not just on the apex norms at revolution time. As a consequence, law cannot really be understood without them. How well, for instance, can law be understood without appreciating the phenomena which are among the principal operative forces affecting what positivists themselves regard as the key officials of law ?[108]

As already noted, even Raz and Harris consider it necessary to have theories of adjudication to understand law. Some explanation of what is involved in judicial decision is necessary. How can the place of statutes in law be comprehended without some appreciation of the dynamics of legislatures, how can the rules of evidence be understood without an appreciation of the nature of juries (or at least judicial conceptions of their nature) ?

The exclusion of social forces from law has two further effects. First, it reduces law from something central to the functioning of society to something merely peripheral[109] to it, to be found in the minds of judges rather than the actions and thoughts of the bulk of the population and their officials. Second, it can lead to a divorce from reality

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107 See Harris and Raz infra.
108 Hubbard 36 Mod LR 39, 81.
109 Cf. Unger LIMS p. 44.

approaching that of natural law. Just as natural lawyers would say that despite legislation and enforcement of a rule it is nonetheless not law because it contravenes a higher law, so a Hartian judge may look at some of the practices of police officials in stopping, searching, "taking to the station," holding, fingerprinting, etc. (which are consistently in contravention of the laws against assault, kidnapping and so on[110]) and say they are illegal because they are in contravention of primary rules valid under the relevant secondary rules.[111] The statement that the practice is illegal may have political value in denying legitimacy to certain officials, just as it did for advocates of natural law. But it does little else.

A Hartian may say that most of the other laws must be followed for the secondary rules to exist (and hence for the primary rules to be valid under them to be law). But most natural lawyers could easily modify their theories to provide the same defence - most laws in any nation are not in contravention to the sorts of moral requirements set out by natural lawyers. Both Hartians and natural lawyers use a procedure sufficiently removed from the reality of legal institutions that they can not only see entrenched practices as not part of law, but as contrary to it.

Hart has provided a bold conception of law as a system which he hoped would be useful not only for lawyers but for sociologists as well. However, as the theory is developed, it becomes more and more a theory from the internal viewpoint of a judge, losing most of its value for the social observer. Unfortunately it does not even adequately cover or describe law from the more restricted point of view. The other two positivists considered start with more limited ambitions, clearly stating that they are describing law from an extremely limited viewpoint. This strengthens the apparent systemness of law from that point of view but, as we shall see, not sufficiently to prevent the return of all the same

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110 See the Phillips Report (Cmnd 8092 (1981)), for UK examples and LOP for US ones.

111 Despite the facts that (i) the rules of evidence make these contraventions dangerous to assert, and (ii) the nature of juries make them impossible to prove.

problems. Of course, from the social observer's viewpoint, the case is further weakened.

2.9 HARRIS

Harris offers a "pure norm" picture of a legal system. He claims that this is the way law appears to "legal science" ("the activity attempting the systematic exposition of some corpus of legal materials as found in textbooks and treatises, in solicitor's advice, in counsels' opinion and commonly in the reported decisions of courts"[112]). That he is writing from this limited point of view is stated categorically and prominently[113] and is underlined by his criticism of other theories[114] of law that they do not accord with the way legal science sees law.

At first sight, Harris's theory appears to have no relevance to the question at hand, i.e. whether or not law appears systematic to the social observer. Harris however, clearly sees the contents of his book as highly relevant to "sociopolitical enquiries" about law, because this view of law is part of the "shared understandings" of legal institutions and more specifically of the officials who man them.[115] He does not deny the relevance of other phenomena to those enquiries, not least those highlighted by the various theories of law discarded by him in the context of legal science. Although he does not necessarily say that law would appear systematic to the social observer, he does claim that it appears systematic to key actors in the drama observed.

The next two sections will examine Harris's picture of law to determine the extent to which it can rightly be called a system by a legal scientist. In §2.12, the consequences for the social observer's view of law will be considered.

2.10 TWO SYSTEMS

Although Harris is concerned to elucidate a pure norm conception of legal system, this is only one of two systems his legal scientist sees in

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112 LLS p 2.
113 LLS pp. 2, 34, 35.
114 Realism (LLS p. 48) Hart (p 63) and Dworkin (p 69).
115 LLS pp. 14, 23.

law. The momentary legal system comprising current valid legal rules and the rules which authorise them in a fairly definite structure, is outlined in the next section. The non-momentary legal system comprises the "congerie of rules, principles, maxims" etc. that are used for the creation of new rules by the judiciary. This is not the same distinction used by Kelsen and Raz. They saw the momentary legal system as the current rules and the non-momentary as the structural rules that authorised them. Harris's momentary system roughly includes both their momentary and non-momentary systems from Kelsen and Raz. Behind this terminological difference lies, no doubt, a substantive disagreement on what is more permanent in law.

Harris says the "non-momentary system consists merely of a collectivity of verbal formulations."[116] It is hard to see this as a system at all. No method of determining what <u>are</u> the parts is offered and their nature is both varying and unclear. There would appear to be very few relations between them - not even any to deal with contradictions between competing principles. Neither does there appear to be any structure or anything to unify the set of principles etc. into a whole.[117] This "system" acts as a dumping ground for all those things which other writers, especially Dworkin, have claimed to find in law, which Harris concedes are there,[118] but which do not fit into his neo-Kelsenian system.

Because of the above weaknesses in the non-momentary "system" discussion will be concentrated on Harris' "momentary" legal system of pure norms. But the claims for it do show that even for Harris' legal scientist, law is at best two systems that are not consolidated into an overall system for law. If the non-momentary "congeries" are not regarded as forming a system, then law is at best only partly a system with the rest a jumble. In either case, law <u>as a whole</u> is not systematic.

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116 <u>LLS</u> p 121.

117 The shared characteristic that they are used by judges to determine hard cases from time to time operates as a very loose definition but not as something which provides unity.

118 Even when seen from the limited viewpoint of legal science.

2.11 HARRIS'S MOMENTARY SYSTEM

The elements of Harris's system are legal rules. They take the form of "pure norms" - abstract entities with an "ought" or "may" meaning content.[119] He denies that they either regularly are, or can legitimately be, converted into anything else. They are imperatival in form and are either duty-imposing or duty-excepting.[120] He differs from Kelsen in that they are not seen as acts of will but rather have the same form and logical force as acts of will.[121] This force is not provided by the compulsion of the issuer of a command or the feeling of duty of the commanded, but by a "legal" ought which legal science practice ascribes to the rules which are valid according to that same legal science practice.

For Harris the practices of legal science used for determining the validity of legal rules (with which come not only this legal ought but also membership of the set of elements of the legal system) are, unlike those conceived in §2.7, sufficiently rigorous to be formalised into four principles. The principle of exclusion "presupposes a determinate number of independent legislative sources in any legal system".[122] The principle of subsumption provides hierarchical connections between sources with delegated authority and the sources which delegated that authority. The principle of non-contradiction eliminates rules that conflict with other rules emanating from the same source.[123] The principle of derogation does much the same for rules emanating from different sources, rejecting any rule or any part of a rule that conflicts with a rule from a higher source. These principles are not empirical statements about what legal scientists do but rather definitions of the activity of legal science (supposedly derived from the goals of the activities of legal science[124]). When examining the law of any social grouping, legal scientists will follow the principle of exclusion, will look for and state

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119 LLS p 34.
120 LLS p 93 ff.
121 LLS p 38.
122 LLS p 28.
123 LLS p 11. Conflict exists where one rule prescribes a duty and the other a non-duty in respect of the same person and same action.
124 LLS pp 1,2.

the list of sources and, following the principle of derogation, will look for a ranking of sources. If they do not, they are not legal scientists.

These principles, along with the ranked sources for any group, can be synthesised and stated in a standard form known as the "basic legal science fiat":

> "Legal duties exist only if imposed (and not excepted) by rules originating in the following sources: ....or by rules subsumable under such rules. Provided that any contradiction between rules originating in different sources shall be resolved according to the following ranking amongst the sources...and provided that no other contradiction shall be admitted to exist."[125]

This fiat is not a positive legal rule. It cannot be one for the same reason as Kelsen's Basic Norm could not. Positive legal rules only exist because they are valid according to the principles of legal science, so unless those principles can be self-validating, they cannot be positive legal rules. Nor is the fiat something which exists by virtue of the actions or beliefs of any person or persons as in Hart. It merely exists because legal science presupposes it.

The fiat is something of an optional extra. Because of the complexity of the task, few, if any, legal scientists[126] would actually make the synthesis and it is quite possible to operate the principles without it.[127] Nevertheless, Harris regards it as a useful way of highlighting and summarising the central features of legal science. It also provides a single test for determining the validity of norms performing a similar function to Kelsen's Basic Norm.[128]

Harris explicitly acknowledges[129] that for legal rules to form a system there must be relations that link them in a structure. These, he claims, are provided by the four above-mentioned principles. However, these principles are not so much concerned with relations between legal rules, but with what are the legal rules, eliminating those that are not.

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125 LLS p 70.
126 I.e. those who use legal science principles.
127 LLS p 79.
128 The function is only similar because it does not itself confer validity. That is done by the "source rules" which validate rules from each source.
129 LLS p. 71.

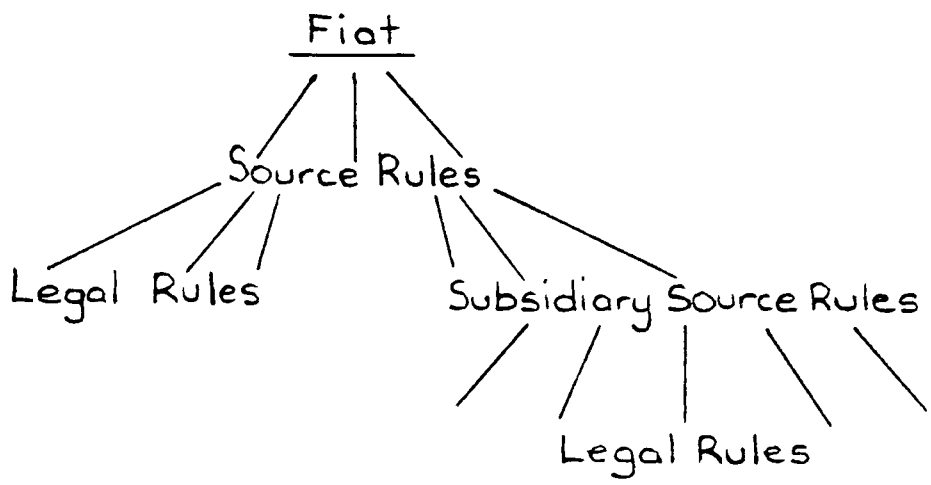
They are directed towards creating a set of imperatival rules which do not contradict[130] - what he calls a "normative field of meaning"[131] - rather than creating a structure into which those rules can fit. The first principle excludes all norms not originating in listed sources. The principles of derogation and non-contradiction eliminate some of the apparent rules originating in listed sources. (The former eliminates contradictory rules from inferior sources. The latter principle is not so helpful - it merely tells us that one of two contradictory rules from equal sources is not law, but not which one. Indeed, only the principle of derogation removes contradictory rules in a systematic way.) Even if the existence of the contradiction is seen as a relationship between the two rules, it is not a relation between two elements of the one legal system but between an element of the legal system and something outside it.

The only relations between rules are provided by the inclusive aspects of the principle of exclusion and the principle of subsumption. These provide the familiar positivist pyramidal structure. The principle of exclusion creates the first part of the legal science fiat which lists the sources. It also relates the rules originating in a source to the source rule[132] for that source. The principle of subsumption permits some of the legal rules originating in legal sources to be source rules themselves, specifying other institutions as sources. These in turn are related to the legal rules they validate. Depending on the rules of subsumption that are followed, the pyramid so formed may have several steps and we could trace a path from fiat to Oxfordshire County Council by-law similar to the path traced by Hart.

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130 When reduced to pure duty-imposing or duty-excepting form.
131 LLS p. 34.
132 These should be more familiar than the fiat and are part of the consciousness of judges - LLS p 79.

Figure 4: Harris's System



The last step in each path relates the lowest legal sources to the legal rules directly emanating from them.[133]

Harris's system faces several difficulties that confronted Hart's. The first is where the legal scientist finds that a statute or by-law has been passed or a court's ruling made that is, according to the other rules enumerated, ultra vires (and hence cannot be subsumed under the appropriate source-rules) but is accepted by the courts, acted on, etc. Harris acknowledges such cases, but says that the rule is nevertheless a legal rule because the courts have authority other than by subsumption and dubs them cases of "forced subsumption". But surely this highlights the fact that what makes it a legal rule is this "other" authority of institutions rather than the subsumptive system of authorising relations which the legal scientist has built.

Another problem is that any full rendering of the legal science fiat is (conceptually and verbally) nothing short of constitutional and administrative law. The beguiling simplicity of the fiat is only because the gaps have not been filled in - there would have to be an awful lot of dots to accommodate in the details ! Hart's system suffers the same problem, leaving the gaps merely makes the problem more obvious. The list of sources recognised by an Australian legal scientist would be manageable though still running into dozens. But the rankings would be positively horrendous, taking into account Federal, State and English

133 Unlike Kelsen, Harris does not include rules about specific persons or cases in the legal system LLS p. 89.

courts. Furthermore, the complexities of exactly what powers may be delegated mean that including the "rules subsumable under such rules" is no simple matter. Needless to say, by the time the fiat had been finally read out there would be much controversy - a controversy whose importance to the social observer is considered in the next section.

In what sense can these rules and the legal system into which they are arranged be said to exist ? According to Harris, they are abstract entities and consequently "we are free to choose the conditions of existence, since the quality of 'being' as applied to an abstract entity is as much a symbol in use as the entity itself."[134] Hence the existence criteria for the legal rules are those set by the legal scientist which he states in the form of principles. These "customised" criteria make it easy for a legal scientist to say that these norms exist, but only at the cost that they may exist only for him.

The legal system exists for the legal scientist if these rules appear to him to be related into a structure which has a unity. But the whole edifice is not built on thin air. Legal scientists, like Hart's officials, are looking at social institutions and the actions of various officials within them. From those actions they have drawn meanings in the form of imperatival rules which are formed into a kind of system by using legal science principles. Thus the legal system's existence depends on the ability of a legal scientist to find systematic meaning in the actions of many officials.

2.12 HARRIS'S SYSTEM AND THE SOCIAL OBSERVER

Harris has set out to prove that when a legal scientist looks at law, he sees a momentary legal system and is satisfied it exists. Whether the social observer considers law to be systematic depends on who practices legal science, what importance it has for how they act and how important their action is in law. Although Harris does not address this question

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134 LLS p 127.

himself, he does state that legal science is part of the shared understandings of judges[135] and lawyers.

But do judges practice legal science, do they follow those four principles, and does the basic legal science fiat highlight their practices or distort them ?

The first problem for Harris's claim is that the legal science described is so clearly seen as an improvement on what judges really do. Consequently, it tends to distort, rather than encapsulate, judicial practice. Judges do not reduce legal rules into duty-imposing and duty-excepting terms so that their contradictions can be exposed and eliminated. Judges not only leave rules in a variety of forms, conversion from which is difficult and controversial, they also embed them in long tracts of prose from which extrication in any form is difficult. Neither do judges have a ranking of sources that could be incorporated into a legal science fiat. Certainly some sources are regarded as higher than others, but there will often be several at the same level (e.g. supreme courts of Australian states). Furthermore, there are several criteria for adjudging one rule superior to another including not only the seniority of its source, but also how recently the rule was stated, whether it was ratio/obiter in that statement, and how directly it bears on the current one. These cut across and partly negate any ranking on the basis of authority that judges may use.

As finding system in law is not what legal scientists actually do, it can at best be a goal of legal science rather than an achievement. System is not to be found in what judges do see in law but what they would like to see, and believe could be seen, if enough effort were put into it. Given the nature of the material sought to be systematised, that goal is rather quixotic. Although Harris's book clearly assumes it is possible, no-one actually has filled in those blanks of a legal science fiat for the law of any nation. This is perhaps because to do so is to seek system in

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135 Though at times he uses "officials" and "members of legal institutions," it is doubtful if these include any non-judges.

the legal meaning of an unsystematic set of actions within the institutions of law, to make systematic sense out of that which was done by a multitude of persons for a multitude of reasons, with the consequent myriad of varying and conflicting effects.

It is submitted that the goal of judges is not so wide (in fact, closer to their achievements). If they seek to create some system in law it is not in law as a whole but in some part of law. Indeed it is this more limited goal that Harris states is legal science's: "attempting the systematic exposition of a corpus of legal materials".[136] Judges seek to tidy up small portions of law and tend to keep those portions small for reasons considered in §3.5. The systemisation attempted is also more in terms of content than of the structure of authorising relations.[137] In any case the latter would tend to reduce their flexibility in achieving the former. This suggests that judicial failure to create such legal systems is due to more than judicial recognition of the time and difficulty involved. It is useful for a judge to have rules which give more authority to some sources than others, thereby justifying choice between rules. But a rigid ranking of sources would reduce a judge's flexibility and his ability to choose the sources from which rules of more appealing content can be found to originate. A set of overlapping and potentially contradictory methods of choosing between sources allows them to retain this flexibility, so it is hardly surprising that judges do not engage in the tidying up operations necessary for the creation of a legal science fiat.

Yet this failure throws doubt on the judges' commitment to one of the four principles of legal science. The principle of derogation is supposed to resolve contradictions between pairs of norms, systematically and

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136 LLS p. 2.

137 Even where such small bodies of legal rules are systemised, the uncoordinated nature of the effort means that it is unlikely that they could be formed into a larger system - especially as judges, in seeking not only to rationalise various rules from different sources but also to pick the substantively best will tend to give slightly different weightings and rankings to the various sources in each of the areas they try to tidy up.

automatically, by invalidating the one from the inferior source. This is not possible without a ranking of sources.

With a weak principle of derogation the job of excising contradictions is left to the rather more haphazard principle of non-contradiction (which tells us that one - but not which one - of a pair of contradicting norms from the same or equal sources is not law). Yet judicial commitment to this principle seems even more shaky. Judges undoubtedly see ensuring consistency as part of their role - but only a part.[138] Their first concern is with settling the dispute in front of them. In fact they are functus officio when they have given their order though they will frequently give reasons, providing a guide for settling and/or prevention of similar disputes.[139] They will frequently shy away from settling potential conflicts with other rules and the relatively inchoate structure[140] of many of their pronouncements aids them in this: (i) they virtually never use language that is sufficiently formal to properly contradict anything; (ii) where rules do appear to conflict they will normally attempt minor modifications to avoid the contradiction; (iii) sometimes they ignore apparent contradictions and refuse to overrule either, thereby failing to use "their" supposedly vital principle of non-contradiction. (Confining an old rule "to its facts" does not remove contradictions between it and new rules; it merely indicates that the court does not think it is necessary to overrule the old decision as those particular facts are unlikely to recur.)

Even where judges do try to tackle contradictions they do not do it as believers in the principle of non-contradiction. Rather than saying that one of the contradictory "rules" is not a rule of law, judges see both as rules because they have originated in legal sources and have a set of ways (themselves contradictory) of dealing with contradictions brought to their attention. This is borne out by:

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138 Exactly what proportion and what other parts make up the judge's role will vary from individual to individual. LL p. 199.
139 Although whom they are trying to guide is uncertain LL p. 10.
140 While not completely unstructured they are certainly far less so than the lists of rules the legal scientist derives from them.

(i) Where a judge does find two rules in contradiction, prior to that ruling, both rules had apparently had force, operating simultaneously.[141] A legal scientist would have to say that all the time only one had been really law. But without a principle of non-contradiction, he could say that two contradictory rules co-existed until a judge used one of the ways of resolving contradictions to remove one.

(ii) A rule from an inferior source is revived when a contradictory rule emanating from a superior source is abolished. For example, a Victorian statute would derogate from a Tasmanian precedent in Victorian courts, but if the statute were repealed the Tasmanian precedent would become effective. For Harris's legal scientist the principle of non-contradiction eliminated the Tasmanian precedent from Victorian law and there is no explanation of how it suddenly re-emerged. But without a principle of non-contradiction, this could be explained by saying that formerly the Tasmanian precedent had been a part of Victorian law, but the practices for finding and resolving conflicts meant it had not been effective during the Victorian Statute's currency.

Judicial adherence to the other two principles of legal science is equally weak. Rather than operating a principle of exclusion, judges tend to have a rule of inclusion, a fairly definite but non-exhaustive list of sources. They do not wish to have specific limits placed on what they regard as a relevant source. They want to be able to cite something like morality, "policy", or "judicial notice", without having to decide whether they are treating it as a source or something far more vague. Subsumption is undermined because courts do not automatically accept delegated legislation. They impose limits on it via a large number of (reasonably flexible) rules: so what passes that set of rules is set up, at least

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141 Naturally enough they had never both operated in the same case but they had both made effective and final distributions of property, determinations of freedom in criminal matters, etc. This highlights the way in which legal rules are operative if at all - they will occupy the minds of some judges and affect the future of some citizens. It is this limited operation that makes contradictions in those rules so easy. One rule occupies the mind of one judge, the other the mind of the other: one rule affects one citizen's fortunes, the other another's.

temporarily, as another source. Thus the four principles do not encapsulate judicial practice but represent a formalised, over-consensualised distortion of them. But just such a distortion is necessary in order to found Harris's system.

Even if, contrary to all of the above, judges really did have a legal scientist's view of law, the social observer would ask how important this is in understanding the activities of judging. "Finding" the law is only a part of those activities - filling gaps, deciding trouble-cases and, at lower levels, discovering facts and applying laws to them are also very important. The first two are explicitly acknowledged by Harris, but are compartmentalised into another, non-momentary legal system. But this separation of the parts of judging is very difficult, if not impossible, and very few judges attempt to make it.

Even if the judges could and did create legal systems, there would be significant variations between them (mirroring a problem with variations in secondary rules). Their legal science fiats would vary (reflecting the controversiality of source-rankings and the variable commitment to the various principles). Thus the perception of law as systematic by various legal scientists would not make law appear systematic to a social observer who records the differences in the legal systems perceived.

Finally, judges are only one of the examples of legal scientists Harris gives.[142] The others[143] are even less concerned with systematising law. Although textbook writers may seek to systematise areas of the law, sometimes as great as whole subjects, they as often seek to expose its internal contradictions and tensions. Solicitors and counsel are as often trying to muddy the areas of law they deal with in order to protect their clients as they are to tidying it up.

2.13 RAZ

In overall appearance, Raz's system is very similar to those of Hart and Harris. Norms are related by authority and other relations into a

142 LLS p. 2.
143 Who still do not include the range of officials involved in law (§2.8).

system supposedly used by judicial officials to understand law. The details will be provided in concentrating on the similarities to the other theories (which tend to throw up the same problems) and the differences (which fail to resolve them). Many of the differences from Hart's theory are deliberate changes that attempt to overcome Hart's problems. Many of the differences from Harris's theory are on account of different approaches to the same problems.

In dealing with the problems inherent in Hart's mixed internal/external rules, Raz, like Harris, retreats into a much more internal view of law, seeing it as consisting essentially of norms. However Raz's response to criticisms of Hart's and Kelsen's pyramidal structures topped by apex norms is very different from Harris's. Instead of redrawing the theory in more rigid terms from an even more restricted point of view and excluding all doubtful rules, he accepts some criticisms, rejecting hierarchical structure and a single rule of recognition. Consequently, his system is more open, flexible, and, dare we say, less systematic.

But he still calls it a system. Indeed, Raz is quite dogmatic about law's systematic quality. He regards it as a "fact that every law necessarily belongs to a legal system" and that law cannot be understood except through a theory of legal system.[144] As is indicated by the use of the word necessarily some of the argument is definitional. He only finds law where the process of social decision-making has been split into "deliberative" and "executive" stages and where those involved in the latter stage regard themselves bound to apply the decisions reached in the former (they regard the institutions of the deliberative stage as sources).[145] Consequently, even when there is all the institutional paraphernalia of what we call "law", if certain officials do not see themselves bound by sources there is no law.[146]

Despite the predominantly internal point of view and the occasional a priori argument, Raz does claim to be studying a social organisation. He

144 CLS pp. 1-2.
145 CLS p. 214.
146 PRN p 137.

believes that the institutions we call "legal" are split into ones with deliberative and executive functions, and that the view of one by the other is the key to understanding both. This view is clearly of relevance to the question posed by this chapter. As it is the most detailed of the three with the most to say about the nature of the elements and the relations of a legal system, it is clearly a theory whose challenge must be met. However, as with the other two theories considered, it is maintained that the social observer would not be led to call law systematic partly through: (i) its lacking of some qualities of a system and (ii) the limited number and significance of those who view law in this systematic way.

2.14 THE ELEMENTS OF RAZ'S SYSTEM

The elements of Raz's system include norms and non-normative rules which are internally related to legal norms. Sometimes, but not always, he includes institutions as well[147] - namely courts which he calls "executive" or "norm-applying" institutions. There are two reasons for the apparent discrepancy, both of them based on Raz's description of law as something seen by members of executive institutions. Because law is something seen from them, these institutions may not be included in the scenery. Even if institutions are included it will be these institutions' view of themselves which Raz claims will be in terms of norms which constitute the institutions and establish their power.

Though norms are central in several positivist systems, few give as detailed an account of them as Raz. This is ironic considering Raz's emphasis on law's systemness and his insistence that many of the attributes traditionally regarded as properties of individual legal rules should be seen as properties of the system - including sanctions, normativity and even existence. Presumption of a sanction was an indispensable element of any legal rule for Bentham and Kelsen as was normativity for Kelsen and Harris. Yet Raz finds it essential only that each legal rule is a part of a system in which some rules impose sanctions

147 AL p 112, CLS pp. 44, 187.

and some rules are norms - for Raz a law exists if it is valid and it is only valid if it is part of a system.

Raz's account of norms is of a type of reason, that employed in the process of "practical reasoning" (the reasoning used to choose what action to perform). A practical reason is a relationship between a fact or belief and a person. Evidence of that fact, or adherence to that belief, is seen as a reason for or against performing an action. This is so because the reasoner holds a value that the action may help directly or indirectly to fulfil. Thus ultimately the relation is between facts, beliefs and values.

Among the host of reasons used in practical reasoning Raz distinguishes two "orders" of reason. "First-order" reasons are direct reasons for action - facts or beliefs which affect the value placed on the act or the probability and value of the expected consequences. Such reasons may conflict but in that conflict some reasons are stronger than others - they are said to have greater "weight". The conflict is resolved by a balancing of their respective weights. "Second-order" reasons are reasons for acting on or ignoring certain first-order reasons - dubbed respectively "positive" and "negative" second-order reasons. Particularly important are the latter which he calls "exclusionary reasons".[148] They do not have weight vis-à-vis first-order reasons but override first-order reasons within specified categories, regardless of the latter's weight. He notes two types of exclusionary reasons: "rules of thumb" (including time saving and error-reducing rules[149]) and rules made by those the actor regards as being in authority. The key elements of the legal system are exclusionary reasons of the second type. They exclude all the other first-order reasons we may have for doing or avoiding an action (preferences, advice, values, fear etc.) leaving only the dictates of authority as reasons.

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148 PRN p. 40.
149 PRN p. 59.

Among these norms are "duty-imposing rules"[150] or "mandatory norms"[151] which specify an act that a certain group of "norm subjects" should perform or refrain from, and a set of conditions under which the norm applies. These offer both a first-order reason for doing the action set out and a second-order reason for ignoring any reason for not doing it. Raz calls them "protected reasons,"[152] and, because the exclusion of other reasons is total, "complete reasons".[153]

Other norms are non-mandatory and include power-conferring rules and permissions.[154] The former confer "normative power" - the ability to alter norms, i.e. to change protected reasons.[155] The power-conferring norm states that the performance of an act by the person named has certain effects on those reasons. Thus they are clearly second-order reasons but, unlike mandatory norms, they are not simultaneously first-order reasons. They merely point to the acts of the normatively powerful that are to act as first-order reasons. Although Raz talks only of exclusionary (negative) second-order reasons, these are also important <u>positive</u> second-order reasons which give us a reason to regard something else, a person's action, as a reason for our own.

Permissions are also exclusionary reasons, excluding reasons against the action contained in mandatory norms prohibiting it (eg. a permission to kill in self-defence excludes the reasons against doing so provided by the norms proscribing murder.). As such there can only be permissions if there <u>are</u> such other reasons - if there are not, a permission could only be said to exist in a weak and, he claims, unnecessary sense.[156]

The other parts of the legal system are not considered to be norms because they are neither exclusionary reasons nor in a general sense "guides" to action, but they are still reasons. The only examples he has

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150 <u>CLS</u> p 224.
151 <u>PRN</u> p 49.
152 <u>AL</u> p 78.
153 <u>PRN</u> p 79.
154 <u>PRN</u> p 85.
155 <u>AL</u> p 18.
156 <u>PRN</u> p 96.

offered are rights[157] which he sees as reasons for courts to allow people to perform acts, reasons to stop others from hindering them,[158] and perhaps reasons for providing assistance to the right-holders in performing these acts.[159] He does say that there may well be others, probably including some or all of Honoré's list of non-normative rules which Raz cites without demurral.[160]

In describing the parts of a legal system as reasons, Raz has opted for an extremely internal view of law. Although reasons are described as relations between facts and persons, they are relations drawn by a practical reasoner between facts as perceived by him and the decision he is to make. They are part of the internal processes of his mind.

The internality of the parts is matched only by their individuality. Something is a reason because of the part it plays in a person's reasoning process. My reason is my reason, your reason is yours: however similar their content, they are separate phenomena. This isolation of the parts of legal systems as individual phenomena and the consequence that systems built from them must also be individual phenomena is common in positivist systems. This was argued to be the case for the feeling of obligation that formed a part of social rules and the structure of validating rules in Hart, as well as for Harris's norms whose existence conditions for legal rules and legal systems were highly personalised. This should be unsurprising - norms, and "oughtness" in general, are irreducibly individual phenomena because, however general their application, their locus is in the individual. This is first because each individual possesses what might be called "moral sovereignty" - the sole right to determine what is morally valid for him (even if everybody but individual A thinks A should not Φ, but A still thinks he ought to Φ, it is perfectly intelligible, indeed inescapable, that, for A, he ought to Φ). Second, even if ought-ideas are communicated and are held in identical terms by

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157 CLS p 175. Permissions, his other example, were later reclassified as norms (PRN p 85).
158 CLS p 227.
159 If the right is a "positive" one.
160 CLS p 225.

different people, they have to pass through an "inter-personal barrier" which splits them into seperate individual phenomena. An ought-idea has to be formed into words, then speech acts, sensed by the second person and understood. Even if the communication is perfect ie. (i) the words used completely and accurately cover the first persons's ought idea (ii) the second person understands those words perfectly and (iii) the ought idea he forms corresponds exactly to the first person's ought-idea, it will not be one idea that is shared but two identical ones that are held each in one man's mind separated by that gulf. Of course, in the world of inter-personal communications those "ifs" are very potent: failure of expression is common, words have many shades of meaning and "contested concepts" abound in normative discourse. Even if someone says in response to a suggested "norm" that he agrees with it, this is merely a matter of finding a form of words that seems to approximate his own ideas. The difference in "meaning" may only become apparent to us (and perhaps to him) when he comes to act upon it.[161]

Because of this individuality of reasons, is very important to know exactly whose reasons they are supposed to be. On this Raz leaves us in no doubt. They are reasons regularly used by members of the executive institutions,[162] i.e. by judges. These reasons are used in choosing what action (ie. decision) to perform. But not all the reasons they use in coming to decisions count as legal reasons. Because the "essential"[163] nature of law involves the binding of executive institutions by deliberative ones, legal rules are rules which originate in social sources and by which members of courts customarily regard themselves to be bound.[164] Converting this into terms of reasons means that judges draw reasons for action from social facts about deliberative institutions (and

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161 "May" is used because the multiplicity of norms that can justify an action means that action cannot clearly indicate the norms behind it.

162 PRN p 142.

163 CLS p 212. Hubbard's criticism that Hart resorts to vague essence statements at critical points (36 Mod LR 39, 85) can be directed at Raz too.

164 CLS p 214.

other social sources, if any). These social facts may be about actions that were performed (e.g. the Queen signed an Act), or events that occurred (e.g. a majority vote was cast in a certain forum). Reasons were defined in general terms as relations between facts and persons, drawn by those persons. Legal reasons become relations between social facts and judges, drawn by judges. Just as in Hart, Raz's judges are looking at the social institutions of law. The only difference is that what they generate is described in terms of reasons for action rather than rules. This would not be an important difference if the method by which judges generate reasons is to generate rules first which are then treated as reasons - it would merely clarify the mechanism. But if, as argued earlier, judges reason only partially in terms of rules, the difference is an important one.

This view of law as reasons provides both existence and identity criteria for the parts of Raz's legal system. As reasons they exist if they are used, i.e. they are somebody's reason. They are identified as legal if they are practiced by the courts and are seen by them as originating in social sources. It also avoids some of the problems that had confounded other positivist theories of law. Command and will theories had difficulty in finding an intention or will in such complex sources as legislatures, let alone custom, but this is side-stepped neatly. There is no need to determine the actual intentions of the members of the legislature or to construct artificial ones - judges look at what has been done and draw reasons from it. Normative theories like Kelsen's and Harris's, faced two more problems: (i) much of law is stated in non-normative terms especially power-conferring rules which did not seem to tell the power-holder to do any thing at all; and (ii) even when the law is put in normative terms, it is not directed at judges. But for Raz it does not matter what form of expression is used. If a legislature endorses a statement in the indicative mood such as the example given by Honoré that "a young person is one between fourteen and seventeen", then

that is a reason for judges to treat people of that age differently.[165] Power-conferring rules may not tell the power-holder what to do, but whatever is done provides a reason for judges in deciding what they should do. Finally, even if legislation is directed at others (eg. speeding motorists) rather than judges, judges find reasons for their own actions in these directions (e.g. reasons for imposing sentences on motorists who have been speeding).

Raz's account of the elements of his legal system is constructed to meet some of the problems of positivist theory. Nevertheless other problems remain which will be considered in §2.17.

2.15 RELATIONS AND STRUCTURE IN RAZ

Raz sees the elements of law as a set of norms practised by a distinct set of persons. He acknowleges that this does not entail that these rules are related to each other, and that such relations are necessary for the presence of a legal system.[166]

Like Harris, Raz sees these relations linking the parts into two structures. Like Harris, Raz calls them momentary and non-momentary systems. But there are few other similarities. Raz's non-momentary system is a system of authorising relations that link source rules, power-conferring rules and substantive rules into a "genetic structure" similar to the pyramidal structures of Hart and Harris. Raz's momentary system relates all the substantive norms that are in operation (i.e. used as reasons by the courts) at any one time into what Raz calls an "operative structure".[167]

As these structures differ greatly, so do the relations that form them. Genetic relations link elements of the non-momentary system. These were initially described as relations between one law and another law authorising its existence. Put into terms of reasons it is the relationship between a reason and a reason for holding it as a reason. This can be illustrated with Hart's Oxfordshire by-law (§2.6). The judge

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165 LM&S p. 114.
166 PRN p 197.
167 CLS p. 185.

will regard certain facts about the behaviour of members of the County Council, resolutions voted on in meetings etc., as a reason for fining parking offenders. This is because he believes that such facts constitute a reason for action - i.e. he adheres to a power-conferring norm. The genetic relation links those two reasons.[168] The same sort of relation links the norm conferring power on the minister to give ministerial orders to the norm conferring power on the council to make by-laws. Hart's chain of valid rules becomes a chain of reasons that ends with a source. The chain of reasons constitutes the answers to the chain of questions "why ?" that might be asked of a judge to justify his official behaviour. As we go further up these chains they begin to converge, forming a pattern that constitutes the genetic structure of the non-momentary legal system.

The relations of the momentary system link norms on the basis of content. They relate the potential effects of various rules. Thus a permission for A to Φ is related to a mandatory norm prohibiting a class of persons that includes A from Φing. These are related in that the reasons contained in the permission exclude the reasons contained in the mandatory norm for A. Other important content relations can be found: (i) between the mandatory norm prohibiting the behaviour and the (permissory or mandatory) norm imposing a sanction, and (ii) where the act involved in the exercise of the power is usually prohibited, between a power-conferring norm and a permissory norm.[169] In all these, the relations are between different reasons that the judge draws from law to decide what action he should himself take. Such relations are extremely numerous and range across the whole of law (e.g. details of property law affect the operation of the laws of theft). They do not fit into a regular pattern, let alone a pyramid. They are part of an "interconnected web", the operative structure.

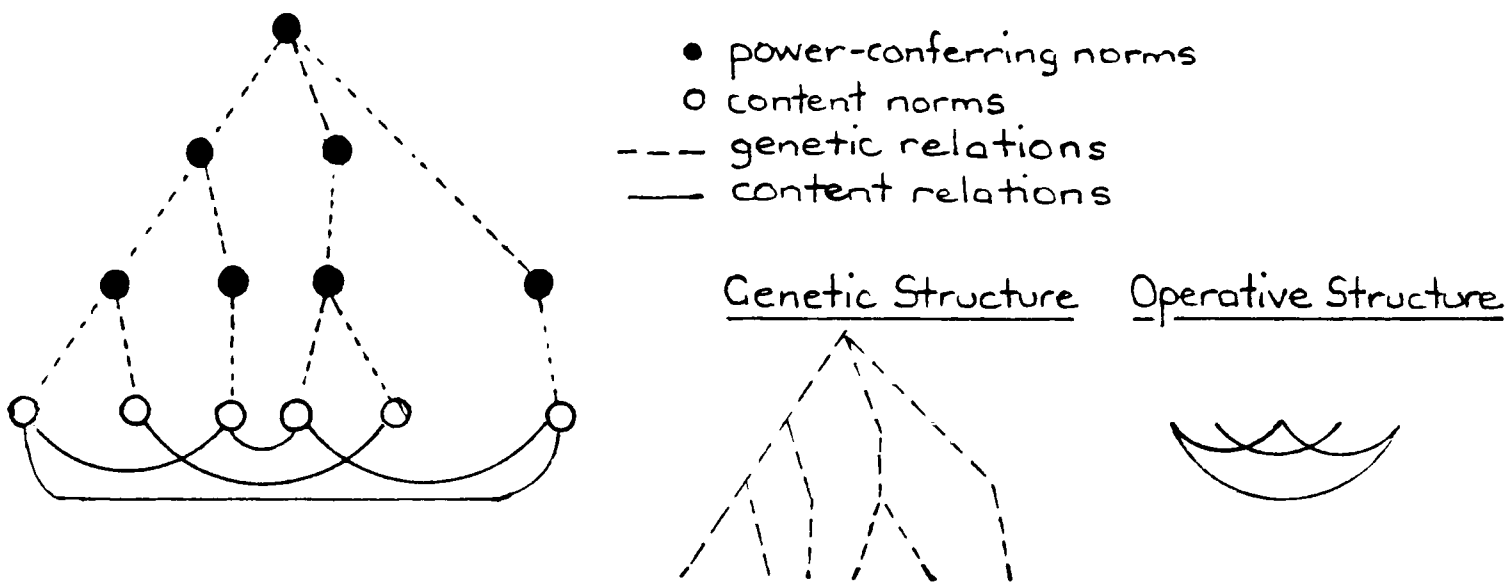
Raz's depiction of law in terms of two systems does not split law in the way Harris's theory does. Unlike Harris, Raz includes all the

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168 The several types of genetic relations need not concern us here CLS p. 184.
169 CLS Ch 6.

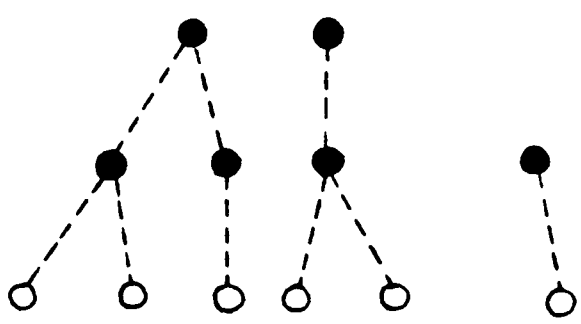
elements in one of the systems. Because all legal reasons must have social sources they will all be linked, by genetic relations, to a power-conferring norm which makes facts about a source reasons for the judge's own action. Thus all legal norms will find a place in the non-momentary system. The momentary system relates some of the legal norms (the final, "content" ones) in a quite different way - but this cannot detract from any degree of systemness in law established by the non-momentary system. The legal system would appear like an infinitely complicated version of Fig. 5:

Figure 5



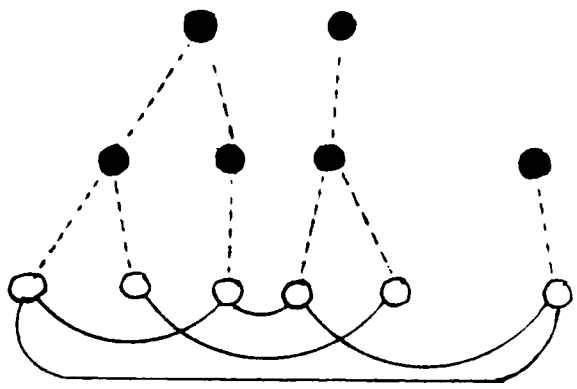
Although the presence of the two systems is not fatal to the over all systematic quality of law, the reason why they are needed is. The operative structure is necessary because of a weakness in the genetic structure. Raz recognises not only the possibility of several rules of recognition for law in one state, but that this will be usual in complex "systems" like ours. Once there are several "rules of recognition" the various chains of reasons will not join up, and there will not be one genetic structure but several.

Figure 6



The operative structure is necessary to provide extra links between these partial systems. It could not by itself provide an overall structure for law because the operative structure will not include power-conferring norms. No doubt Raz hopes that there would be sufficient operative relations to link the various isolated bits of the genetic structure - so that every legal norm will be ultimately, if tortuously, linked to every other in a grand interconnected web of both genetic and operative relations:

Figure 7



The key question is whether this interconnected web of relations can be usefully said to amount to a "structure". All Raz has given us is a completely unpatterned web of relations. It is a bit like saying that a pile of bricks is structured in that all the bricks are related to others (by being in contact), and that these relationships fall into categories (frictional, gravitational, and being stuck together with old mortar). You can even find identity and membership criteria by having a primary brick-discerning organ - the subcontractor who has dumped the bricks on to the pile ! Perhaps nothing can be ruled out on definitional grounds but this is certainly a very different kind of structure from those of other theorists and from the kinds of structures that spring to mind when the word "structure" is used. The reader must consider whether such "interconnected webs" fall within the borderline of what he considers a structure to be. Even if it does, the question still remains as to whether, with such a different kind of structure to that from other systems, describing it as a "system" is helpful or not.

2.16 WHOLENESS IN RAZ

Without a sovereign, ultimate rule of recognition, basic norm or legal science *fiat* to place at the apex of his system, Raz has denied himself the traditional positivist's answer to the system's unity and wholeness. Raz offers three others. The first is the "pattern of relations" between the norms[170] - but as seen in, the structure is too weak to bear that burden. The second would seem to be provided by the courts who practise law.[171] Yet courts practice much else besides law (including the rules of grammar and occasionally mathematics), but frequently do not practice all of law because they are confined to applying only a part of it (§2.6). The practices of the court may provide an imperfect criterion of *identity* for law by determining which norms are legal ones, but it does not turn them into a whole unless courts *practice* them *as a whole*. In fact, as seen in §2.4, the very opposite is the case. Judges tend to draw on only a part of the law, using only a very few norms at any one time, leaving the rest undisturbed. This allows judges to avoid potential conflicts between various reasons for their decisions, and to pick and choose, from the myriad of legal reasons available, a manageable set that can be applied to the case in front of them.

The third way in which Raz's legal system may be seen as a whole is provided by the position he claims these rules have within the overall social system.[172] He describes the legal system as a sub-system of the political system which is in turn a sub-system of the social system. This view of law, common in sociological jurisprudence, will be criticised in Chapter 4.

2.17 RAZ'S SYSTEM AND THE SOCIAL OBSERVER

Raz has set out a system which has clearly defined elements and relations, yet with a rather indefinite structure and no clear wholeness factor. Thus it is not a system in the sense used in this thesis. But

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170 *PRN* p 9.
171 *PRN* p 124.
172 *AL* pp 99-100.

can the social observer be persuaded that even this slightly deviant "system" exists in a society such as ours?

The first problem for our social observer is the extremely internal and individual nature of the elements and relations comprising Raz's system. For the social observer the trite statement that law is a social phenomenon is more than usually true. His problem is to convert such an internal phenomenon into a social one. (This is a traditional problem for positivism - command theory found it very hard to convert the model of one person willing another to do something into an analogous willing by society or an institution within it. Kelsen, Hart and Harris had difficulty with existence tests for systems based on internally followed "grundnorms", secondary rules and principled practices). The most that can be done is to assert that a group of persons uses a system of reasons with the same form and content in reaching decisions, that that use is central to their decision-making and that their decision-making is of social importance. This forms one of the two existence criteria that Raz sets for law, but it is a difficult one to apply because of the problems involved in comparing internal phenomena noted in §2.4.

There is another problem in converting Raz's model into a social phenomenon. The crucial division of the social decision-making process into deliberative and executive stages is based on an analogy with the way individuals sometimes make decisions.[173] At worst, this amounts to an anthropomorphic view of society with hints of a group mind. At best, the analogy is a very strained one, as the quality of a "decision" taken by society is very different from that of one taken by an individual. This is doubly so when the two stages involve different persons with different views of what the decision was once it was made. It could be answered that although no social observer could see this as a two-stage decision process, the members of the courts see it as such and see themselves as the executors of social decisions already made. But this merely turns the allegedly social phenomenon back into an individual one.

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173 CLS p. 213.

Raz adds to the social observer's problems by providing him with two sets of existence tests to apply. One set involves two tests to be applied in sequence.[174] The first test is the familiar one of efficacy - "how many of the duty-imposing laws are obeyed ?" - which he has expanded by asking, "how many power conferring rules are used ?" as well. This is used despite all the classic problems he admits it faces. This test determines if any legal system exists in society. If only one system passes the test then that is the legal system.[175] The second test only comes into operation if more than one system has passed this test. Although called a "test of exclusion" it in fact comes in two parts, the first part of which is a compatibility test and is not exclusionary at all. If two legal systems do not contradict each other then both exist; law is split into two different entities and hence is not systematic as a whole. But if the legal systems do contradict each other, the exclusion test proper comes into operation. It examines the attitudes of the population to the legal systems, especially where the norms of the two systems conflict. If the population does not regard law as systematic then this test cannot be met because the population cannot have an attitude to something they do not know exists. But perhaps attitudes to the various institutions might be substituted. Even then the test is difficult to apply (do you look to the so-called "deliberative" or "executive" institutions ?) and quite possibly unreliable. Considering the contempt so many hold for both legislators and the legal profession from whose ranks judges are drawn, the system whose institutions are held most in contempt might nonetheless be the system most theorists would want to call law.

At first sight both these tests seem to depend only on the behaviour and attitudes of the general population. While making life a little easier for the social observer, this does seem to contradict Raz's emphasis on law-applying institutions and the internal reasoning of its

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174 CLS p. 205ff.
175 CLS p 206.

members. But Raz's description of the elements of a legal system mean that legal norms are by their very nature reasons for action applied by executive institutions. Thus a judicial-acceptance test is built into the description of the system itself. Raz acknowledges this and presents his second set of existence criteria,[176] as a restatement of Hart's dual test. Members of the norm-applying institutions must practise, and the population must conform to, the norms of the system.

However, this test by itself is only sufficient to establish the existence of a _set of norms_ rather than a _system_. At the very least, the relations and structure would have to exist in some sense or for someone - presumably the members of the norm-applying institutions. Not only would judges have to share reasons with the same form and content, but they would have to see them linked by the same relations into the same structure.

The earlier discussion of similar claims about the commonality of judges' practices and perceptions should make us just as wary of these. The content of the reasons may be _similar_ but is likely to vary in significant ways, just as did the content of Hart's primary and secondary rules. The structures of judicial reasons are likely to vary enormously, as the chains of reasons justifying an action deviate in Raz just as the chain of rules justifying a decision does in Hart.

Even more fundamentally it is doubtful that judges' reasons and the relations they find between reasons even take the _exclusionary_ form suggested by Raz. Raz makes some very important points in noting several techniques that all of us have for sorting out which of the many available reasons to follow, and how we regard some rules and actions by others as reasons for ignoring some (or all) of the other reasons for an action. Yet the first-order reasons are not completely _excluded_ from the calculation regardless of weight, but are rather _suppressed_.[177] One of Raz's examples was the error-reducing rule that investment decisions

176 _PRN_ p 131.

177 These are not "repressed" in the Freudian sense. They remain in the conscious mind but are merely ignored under most circumstances.

should not be made when tired - but there may be an opportunity which presents itself that seems so clearly profitable and so urgent that the practical reasoner ignores that rule. The weight of the first-order reasons was so great that the second-order rule failed to suppress it. The same is true for authority. For various reasons we may obey the dictates of a particular authority, regardless of the values served by the prescribed action itself, and in most cases we do not consider the weight of the reasons against it. But it is in the nature of authority that we sometimes regard that which it prescribes as so senseless or so ethically wrong that we do not comply.[178] The second-order reasons are suppressory rather than exclusionary. Weight is relevant in that first-order reasons of a certain weight will fail to be suppressed by certain second-order reasons. Indeed, such suppressory reasons may be considered to have three weights: (i) one which corresponds to the weight of first-order reasons it can suppress; (ii) one which corresponds to the weight the suppressory reason will have in the final balance of reasons made necessary because of its inability to suppress other reasons,[179] and (iii) its weight vis-à-vis other second-order reasons where all first order reasons have been suppressed.[180]

The nature of the structure of relations between judicial reasons as depicted by Raz is also subject to challenge. Raz pictures them integrated into a complex structure by genetic and operative relations. This suggests something more permanent and all encompassing than the practical reasoning in which judges are involved. Reasons are not so much in existence and interrelated as judges are skilled in generating reasons and avoiding or resolving any conflicts which appear between them (§§2.7 & 2.12). Rather than judges holding a power-conferring norm which is genetically related to the reasons which are provided by the institution upon which power is conferred, judges are skilled in drawing reasons for

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178 Another function of "moral sovereignty" (supra).

179 Not all suppressory reasons will have this weight - a few may have no weight if they fail to suppress the other reasons.

180 This raises in a different form the part content plays in the determination of law and the problems it creates for positivists.

their actions from facts about, and actions of, other social institutions. Rather than judges holding as reasons a mandatory norm and a permissory norm which are operatively related by the latter reason excluding the reasons for conformity contained in the former, judges possess the skill of removing conflict between rules they have derived by making such interrelations. Rather than delving into a structure of reasons to find a set that are appropriate for the case in hand, judges make a partial, temporary structure out of the reasons they bring to bear on the case. This chapter maintains that the positivist image of a system of rules, norms or reasons should be replaced by a set of skills that allow judges to create individual and differing internal phenomena to help them decide how to act.

Raz's theory also faces the same two fundamental obstacles Hart's and Harris's had in persuading the social observer to see law as systematic. The first is that, even from Raz's point of view, there is much more to law - a theory of adjudication is also required in order to provide even "a conceptual foundation of an understanding of law as a social institution of great importance to society."[181] No doubt this would include a great deal of material that was not source-based, and would include all Dworkin's principles and Harris's "congerie" which did not fit into other positivist systems either. The second criticism is Raz's concentration on courts and judges rather than the other institutions of law. Although this criticism applies to the other two theories it is one to which Raz draws particular attention by referring to the judicial institutions as "norm-applying" and executive institutions. The first term is as appropriate to the bureaucracy as to judges, for it is on it that the principal task of applying legislation falls. The second term is in fact more often used to refer to the bureaucracy than the courts. Raz also draws attention to other institutions in law by specifically referring to them - he even gives them a special name, "deliberative" institutions. Why should law be the acts of deliberative institutions as

181 CLS p. 209.

seen through the eyes of members of executive ones rather than vice versa ? Raz says that to understand authority it is necessary to look at how it appears to the person who regards himself bound by it. But to prefer the view of law from one institution is to acknowledge that there is a difference, and to raise even more forcefully the question of why we should look from one rather than the other. Surely the study of social organisations should note the views of both and study the way in which the interaction of the two institutions produces different views rather than to examine the view of one to the exclusion of the other ?

2.18 CONCLUSIONS

Thus none of the three positivists considered here has produced a theory of legal system which would lead a social observer to see law as systematic. Although adopting a more limited point of view, all made claims of interest to the social observer - that those in pivotal places within the phenomenon of law held this point of view and saw the institutions of law in terms of a system of rules, norms or reasons.

When these claims were examined more closely they foundered. The systems as described sometimes turned out to be quite weak. Although professing to have elements, relations, structure and wholeness, they did not possess all of these, even from the restricted point of view adopted. But far worse, those who really do occupy those pivotal places in law tend not to see law in the terms described. Their practices lead them to a far less formalised view of those institutions. They certainly derive reasons for their own action from the actions of those involved in the relevant institutions - and in this lies the positivist's major contribution to the understanding of law. But the reasons are only partly in terms of rules, and where they are, these are only loosely related and largely unstructured because the priorities of their activities lead judges to do things other than build legal systems in the air. Furthermore, to the extent that they do derive rules and link them together, they derive different rules, reasons and norms, and make different linkages between them. So even if a strong system could be found in the mind of a single

judge, legislator or bureaucrat, it would not be a system of courts, legislatures or bureaucracies. Finally, when we opened our eyes to the viewpoint of the social observer we saw that: (i) those it was claimed shared this point of view were but one of several important classes of official who were unlikely to share the positivist's point of view, and (ii) there was much more to law than had been seen from that point of view, especially the complex social interactions and power relationships which influenced the generation of rules by individual legal officials. Of this the positivist theorists have only given us a tiny, partial, misleading glimpse.

Although positivist theories of legal system are the most developed, that development has forced them into taking more and more artificial positions and excluding many phenomena that other research has shown to be important in understanding law. As suggested in §1.1, their adherence to their belief in law's systemness has led them to reject more and more of the insights of others, isolating positivist theory from the rest. The next two chapters will examine attempts to develop theories of legal system from those other insights.

CHAPTER 3

DWORKIN'S CONTENT SYSTEM

3.1 INTRODUCTION

In the last chapter we saw that the content of the rules of law has no significant role to play in positivist systems. Harris's only reference to the content of legal norms was his insistence on their non-contradiction. This did not relate legal norms to each other by their content but excluded one of a contradictory pair of potential norms (§2.11). Raz's "operative' relations link rules by their content but only in a very technical way (§2.15).

Indeed positivist systems cannot stand a more significant role for content in law. Where the content of legal rules may lead judges or other officials to disregard them or interpret them out of existence, there is an informal content test which cuts across the positivists' validity test (§2.6). For these officials, rules which form part of the positivist system because of the rules of recognition are nonetheless not part of the law. In their stead are rules which do not owe their place to any relationship to a rule of recognition but to the judges' approval of their content. If that approval is based on the holding of some other general rule or principle, then there is a relation between the two rules, but of a quite different kind from those found in positivist systems. Rather than a relation in which one rule authorises the creation of another it is a relation in which the content of one rule implies or justifies the content of another.

Several theorists have regarded these relations between the content of legal rules as vitally important in understanding law and reject positivist theories of legal system for missing what is for them the key

insight into law. Others go further and attempt to use this insight to build a different type of legal system - a content one. Legal rules are related to general principles and the principles to each other by a network of content relations which are integrated into a whole much in the manner of a moral code, or even into a

> "closed system of definitions, rules of operation and substantive major premises such that any specific legal problem can be solved by deductive reasoning from the propositional system so established."[1]

There have been many such content theories[2] but space limits discussion to one and fame dictates that that one be Dworkin's.

3.2 DWORKIN'S SYSTEM

The systematic theory of law that Dworkin offers[3] is of a set of principles that a hypothetical judge called "Hercules" would create to provide the "best justification" of his society's legal institutions and the decisions made within them. It must justify a sufficient[4] number of decisions of the courts and probably the constitutional arrangements and legislative output[5] as well. It must also justify Hercules' future decisions, providing a single right answer in all cases. This system of principles links the content of new decisions to that of old by justifying both. Recently Dworkin has redescribed the enterprise as the provision of an interpretation of those same institutions and decisions analogous to the interpretation that a critic makes of a work of art or literature in order to show it in the best possible light.[6]

Dworkin's theory claims for law all four characteristics of a system - elements, relations, structure and wholeness.

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1 Sawer, Law in Society p. 17, referring to formalism.
2 Especially among "Formalists" and Natural Lawyers.
3 Unlike others considered in this thesis, Dworkin does not sprinkle the word "system" liberally through his writings. However he implicitly and at times explicitly, regards law as such (e.g. LM&S p. 82). Some readings of Dworkin's theory might play down its systematic quality. To the extent that such interpretations are available and adopted they do not detract from this thesis's rejection of systematic theories. They merely mean that Dworkin's theory is not threat to such a rejection.
4 I.e. the justification must pass a threshold of "fit". It is this that makes it a justification of the decisions rather than just a "good" political theory.
5 TRS pp.108, 9.
6 TRS p. 331 ff.; LM&S p. 75 ff.

Elements

The elements of Dworkin's system are not as well defined as those in other theories. He does not seek to enunciate any precise tests for inclusion or exclusion. He denies that there can be any such fundamental test.[7] It is important to his theory that there is no distinction between legal and moral standards and that law merges with political morality. Furthermore he does not offer principles of individuation - presumably because, in such a personal system, individuation is reduced to a strategem in the description of the content of law.

"The Model of Rules" introduced us to two kinds of elements in law - rules and principles. However, the distinction was much criticized and since then he has rarely mentioned rules,[8] and talked almost exclusively of principles. These are now to be distinguished from policy[9] on the basis that they are about individual rights rather than general welfare. Only the former are part of law. Principles are "moral judgements about what is right and what is wrong"[10] made by Hercules to justify elements of his "best theory" of law. Perhaps rules should be seen as similar, but narrower and more closely defined, justifications of either a few decisions or a part of an institution.

Principles can be subdivided on the basis of what they must justify.

(i) Principles of political morality and political organisation justifying the constitutional arrangements.[11]

(ii) Principles that justify judicial methods of statutory interpretation[12] - i.e. the way in which the output of other institutions in those constitutional arrangements is interpreted.

(iii) Principles about substantive human rights to justify the content of (most of) the decisions of the courts.[13]

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7 TRS p. 46.
8 Though still including them in law. DNB p. 29.
9 After the "Model of Rules" one could be forgiven for thinking that these were a part of law too.
10 TRS Ch. 5.
11 TRS p. 106.
12 TRS p. 108.
13 TRS p. 112 ff.

The place of the actual statutes and decisions of the courts as opposed to the place of the principles that justify them is problematical. These might be regarded as parts of the system, linked into it by the rules which justify them. Alternatively they could be seen as non-legal substrata used to derive the legal system of rules and principles, part of the environment of the legal system with which it interacts but not part of the system itself.

Relations

One of Dworkin's most important claims is that these principles are related to each other by "intense intersections and interdependencies" into a systematic whole[14], for it is their alleged ability as a whole to justify the past decisions of the courts that makes it law. The exact nature of these relations and the structure into which they fit is not spelled out but it is possible to infer something about them.

Some kind of consistency relation between the principles is indicated by the various claims of consistency and coherence that Dworkin makes for the system as a whole.[15] This systematic consistency is called "articulate consistency" in "Hard Cases".[16] It is supposed to be a strong requirement which binds the principles tightly together. One example he gives[17], that a judge should not allow one couple to use contraceptives on the basis of sexual liberty then deny their use to the next couple coming before him, merely requires treating identical cases in the same manner. This links a few cases and one rule to a single principle rather than linking principles to each other, see fig. 1.

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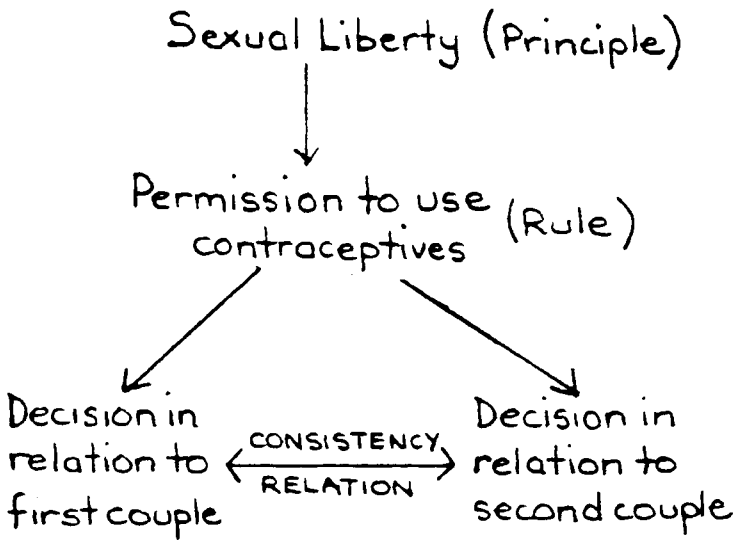
14 DNB p. 44; LM&S p. 81.

15 This represents a considerable departure from the "Model of Rules". In that essay principles were not seen as consistent but liable to clash. This is the reason why principles had "weight" so that these conflicts could be resolved. The image of law implicit in that was not a harmonizing system of consistent and coherent principles but a cacophony of principles pointing in different directions.

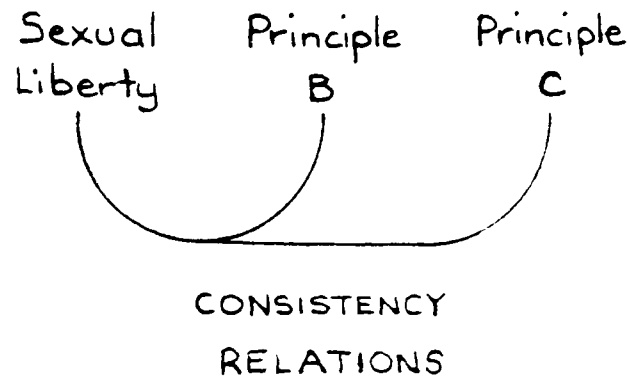
16 TRS p.88.

17 He also mentions the Spartan Steel Case ([1973] 1 Q.B. 27) but only to insist on consistency without exactly saying what inconsistency would be (TRS p.88.).

Figure 1:
Dworkin's Example

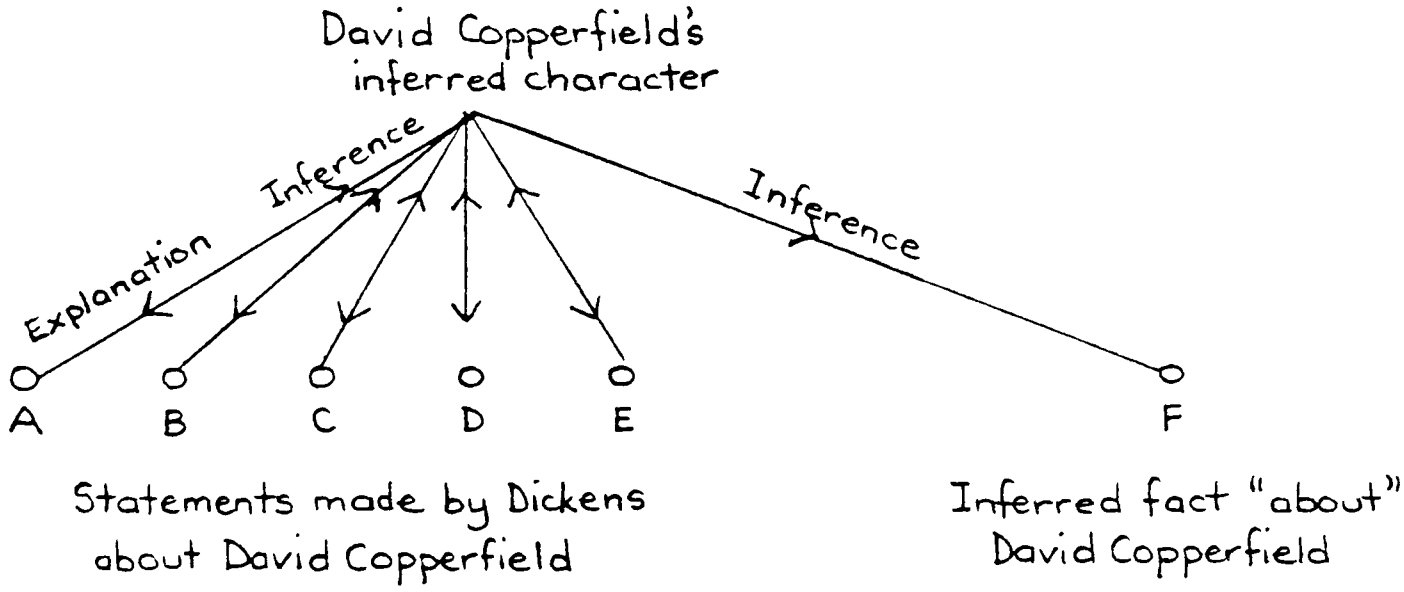


Consistency Relation
that links principles



In a later essay this systematic requirement is relabelled "normative consistency". This is likened to "narrative consistency", in which a proposition about a character in a novel or play that is not stated by the author is inferred because it fits the picture of that character built up from what the author does say. Thus the consistency relation is an indirect one (Fig. 2).

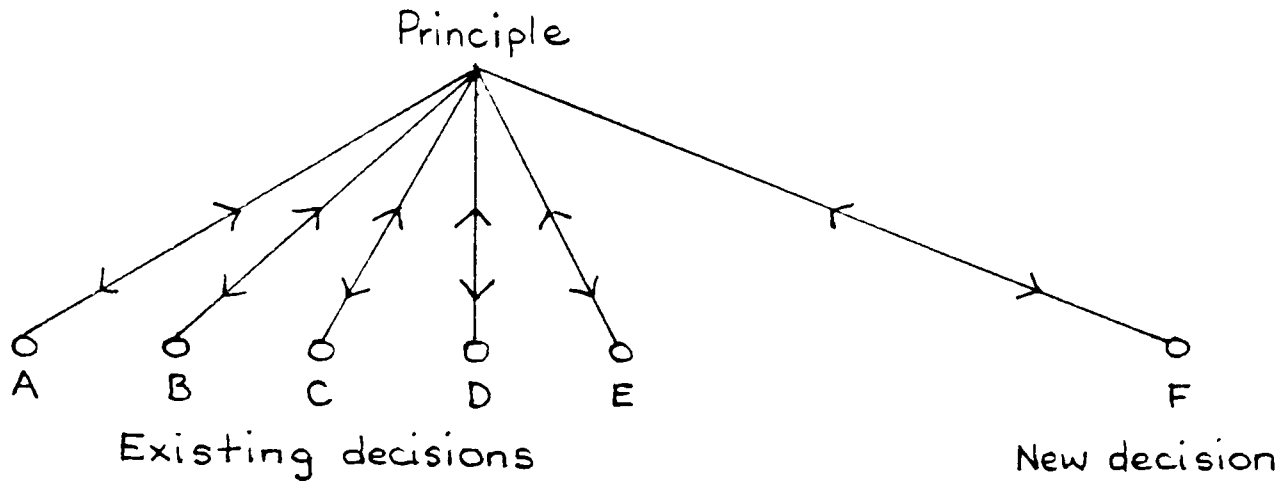
Figure 2: Narrative Consistency



The nature of the relationships involved is reasonably simple using causal inference, probability theory and psychology. It is only difficult in practice because of the controversiality of the last. The theoretical problem is to translate the analogy into a model of relations between legal principles. Dworkin tells us little about narrative consistency and explicitly acknowledges that normative and narrative consistency differ - but without enlightening us how. Nevertheless something like the

following is clearly in mind: several existing decisions can be justified by a moral principle, and that moral principle will also justify the new decision.

Figure 3: Normative Consistency



Thus the horizontal relation of consistency is based on a vertical relationship of "justification". This latter relation is the key one in Dworkin's system. It not only makes the horizontal consistency relation possible, but also links rules to principles, principles to higher principles, and finally provides the single right answer to legal questions that Dworkin so controversially claims for it. Although operating under a different name, this is essentially similar to the "logical" relations of "deduction" or "entailment" which joined the general and specific rules in earlier common law content theories. Where deduction looks down from the general to the specific, justification looks upward from the specific to the general. But Dworkin's relation must look down as well - when the general principle is used by the judge to justify the new decision in the case before him. Furthermore, although the notion of justification might seem to denote a much weaker relationship than "entailment" or "deduction", it must be just as strong if it is to furnish a single right answer for legal questions. Indeed if the principles cannot justify one rule only (Rx) out of the several possible (R1, R2, R3, R4...) then it cannot be said to justify following Rx.

Structure

The structure of Dworkin's system is that of a truncated pyramid[18] with a few principles at the top and the many individual rules at the bottom. But it will not have the tree-like simplicity of some positivist systems because many lower principles and rules will be justified by several higher principles (the pyramid will get wider at the bottom because principles will justify more rules than rules need principles to justify them). The structure is a combination of Figs. 4 and 5 resulting in Fig. 6.

Figure 4: One rule justified by several principles

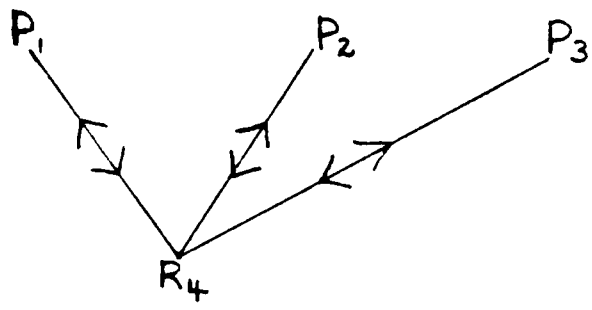


Figure 5: One principle playing a part in justifying many rules

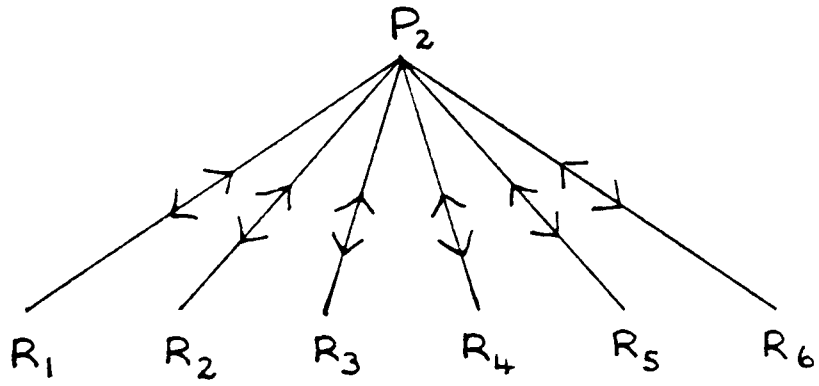
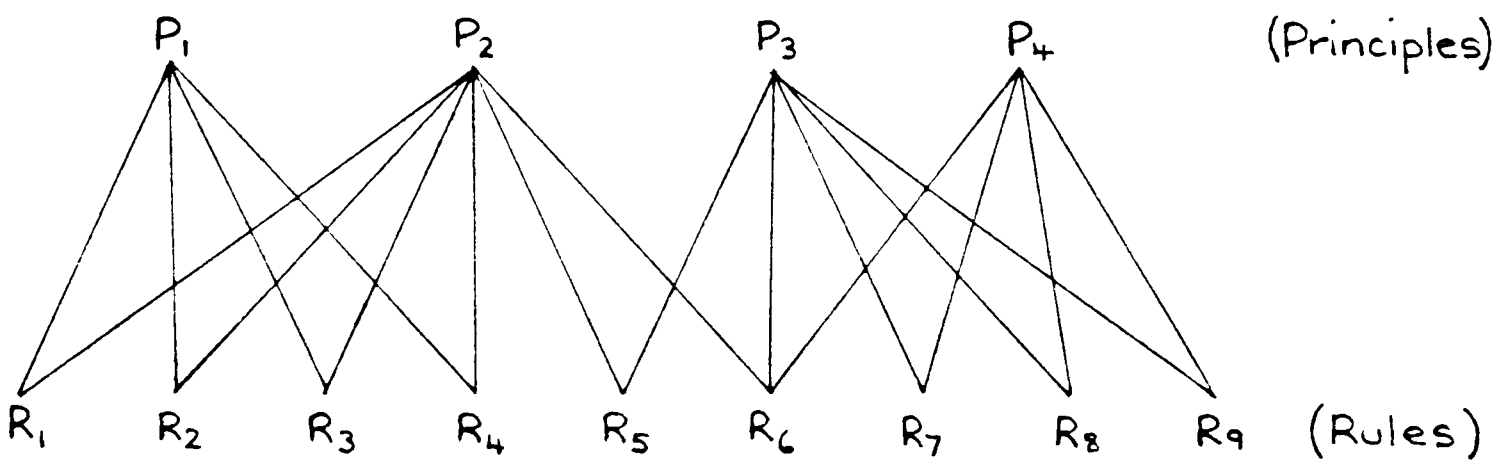


Figure 6: Truncated pyramid lattice



18 At times Dworkin refers to his legal system as a "seamless web" (LM&S p. 84). But elsewhere he says it is not, but that the litigant is entitled to have it treated as such (TRS p. 116).

This structure is complicated by the various "layers of authority"[19] found in the law of modern states. Dworkin refers to four levels in the USA - the constitution, constitutional decisions of the Supreme Court, statutes and common law decisions. Hercules must create a theory to justify the rules to be found at each level. Furthermore the theories he creates at lower levels must be consistent with the theories he has created at higher ones.[20] Thus Hercules must first choose a "background theory" comprising substantive principles of political philosophy to justify the "constitutional structure". He must then choose the best theory he can which incorporates the first theory that also justifies the decisions of the Supreme Court. The next theory must incorporate the previous ones and justify the various statutes as means of interpreting them. The final, grandest theory of all, is the best theory which incorporates the above three theories but also justifies a certain percentage of decisions the courts have made in the development of the common law. Hercules need not justify all earlier decisions because Dworkin allows him to dismiss some of them as "mistakes". (Note that the decisions so dismissed are not part of the legal system because the higher principles do not bind them into its structure).

This indulgence cannot be extended to Hercules in respect of constitutional arrangements, statutes nor, unless he is a Supreme Court Justice[21], decisions of that court. That which a judge has no power to overrule he cannot call a mistake and he must tailor his theory to "fit" it completely.

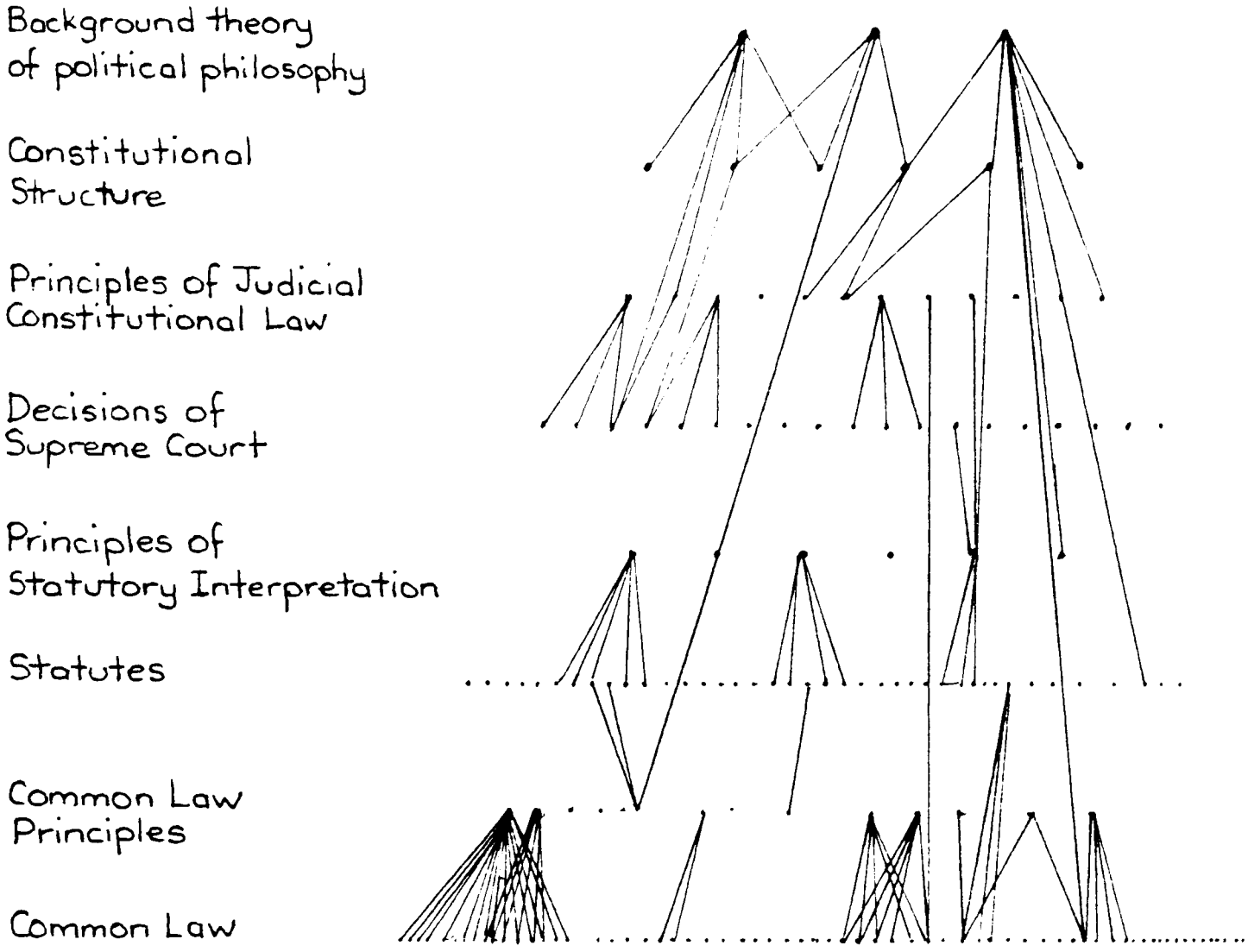
Thus there are a series of theories to justify the "institutional history" of law at progressively lower levels of authority, each incorporating theories used to justify the higher levels. The first of these theories looked like fig. 6 above but the whole structure of the legal system would resemble fig. 7.

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19 TRS p.117.
20 E.g a judge finding a privacy principle in the constitution must also find one in Torts. TRS p.117.
21 What country would waste such talent in the lower courts?

Figure 7: Hercules' entire theory of law, his legal system

(Only a few symbolic lines have been drawn to represent the many intersecting lines linking levels with each other and with higher ones.)



Note: although the pyramid on the whole expands from top to bottom the number of principles in the judge's theory for that level may well be fewer than the number of decisions justified at the level preceding it.

Wholeness

The fourth feature of a system, possession of some feature which makes it an identiable whole, does not have to be inferred from Dworkin's writing - he insists upon it. Hercules must create a single theory of law which as a whole justifies all of the decisions, statutes etc. As a consequence of this holistic mode of creation, Dworkin's theory is holistic in three further ways.

(i) The system is created by the single mind of a judge to justify his official actions.

(ii) Because the system can be used to answer all legal questions it operates like a complete code of behaviour for the judge in his official capacity.

(iii) Hercules' individual decisions are justified by the whole system

rather than a part of it, and it is the whole system that provides the one right answer to legal questions.

3.3 CRITICISMS

Confronted by this theory, our ubiquitous social observer must consider whether law can usefully be seen as systematic in this way. Initially it might seem of little use to him. The need for such a theory, and the duty judges and other officials have for creating it, is seen in terms of their duty to offer a public theory to justify the powers they hold and the decisions they take underneath them. With this emphasis on justifying decisions made, we would expect the result to be a theory of adjudication rather than a general theory about what law is. In the introduction to his book Dworkin seems to so confine it by splitting his new "liberal" theory of law into three parts, applicable to the point of view of legislators, judges and ordinary citizens - theories of legislation, adjudication and compliance.[22] But elsewhere he clearly indicates that the adjudication theory contains a full theory of law[23] that is offered as an alternative to other such theories. He claims that full theories of adjudication require a judge to respect the decisions of earlier judges so that any such theory must include a description of what that institutional history is.[24] However this is a special kind of description, an "interpretative" one - part empirical and part evaluative. It is empirical in a sense that it must "fit" the "brute facts" of the institution being interpreted.[25] It is evaluative in that, within these weak confines, the interpreter chooses the interpretation that shows the institution in its "best light" or as the "politically most successful institution possible".[26] Dworkin then proceeds to argue that the judges ought to choose his theory as part of their theory of

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22 TRS p. vii.
23 DNB p. 65.
24 DNB p. 5.
25 A positivist might ask exactly how we know what are the brute facts to which the system must conform and humbly offer his own theory. But whatever theory is used it means that a theory of law is a prerequisite for rather than a consequence of the theory of adjudication.
26 DNB p. 65.

adjudication. Here unfortunately his criteria of what constitutes an interpretative description and his own description become entangled. The standards of "fit", and the requirements that the judge see law as a whole and in its best possible light, have been transferred from his theory of law into the criteria of theories of law.[27] Consequently an attack on the adequacy of this description of law would involve not only an attack on his theory of law but on his notion of what counts as an adequate description.

Furthermore, Dworkin claims that his theory conforms to the actual practice of judges.[28] Although Dworkin no longer stresses this so heavily and admits that it is not "decisive"[29], for the social observer the claim is of great importance. If most judges do use Dworkin's system then it can be said that Dworkin's legal system exists within law - in the practice of judges. Furthermore if the rest of law can either be incorporated into Dworkin's system or dismissed as peripheral, the social observer will accept that law is best seen as a system of Dworkin's type. Consequently the criticism will begin by countering Dworkin's claim that his theory represents judicial practice. However, Dworkin's main argument for his theory will be confronted four-square because it will be argued that one of the reasons for this divergence is the theory's unsuitability to judges as part of a theory of adjudication. As the reasons given apply to the suitability of any such interpretation, the attack will apply as much to the kind of description used as to the particular description advocated. Finally it will be argued that even if the interpretative description given by Dworkin were suited to judges this would not make a good description of law for the social observer.

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27 Putting other theorists at a disadvantage when he starts to criticize them !

28 Since "Hard Cases" TRS.

29 DNB p. 73.

3.4 DWORKIN'S SYSTEM AND JUDICIAL PRACTICE

To what extent then does judicial practice involve the use of a system like Dworkin's ?

Elements

A common criticism levelled at Dworkin is that judges not only use principles but a great deal of policy as well.[30] Thus, reflecting his own argument against the model of rules, law cannot be a system of principles because it contains so much policy.

Dworkin's answer is to deny the judicial use of policy and, where counter-examples are produced, to translate them into principles. But such an approach cuts both ways - once such translations are permitted there is nothing to stop an opponent not only retranslating those principles into policies, but also doing the same translation job on the rest of Dworkin's principles. It is even worse for Dworkin for it is he that is insisting on the distinction in the first place. But it is not a problem for Dworkin's goal of systematizing law. If law is to be systematized its elements will have to be related to each other. But if Dworkin is right, and those elements can be translated into principles, then whatever they are called, they should be sufficiently similar to principles to fit into the same kinds of relations and structures.

Relations

If principles are to be related by consistency relations, then there must be some meaningful way in which legal rules and principles can be inconsistent and contradict each other. Caracciolo[31] has illustrated the difficulty using Deontic logic. There is no contradiction saying that someone is permitted to do something and permitted not to do something (Pp & P-p)[32] or that he has an obligation Op and an obligation O-q when q is a subset of (this constitutes an "exception"). In the most common form of legal norms, conditionals, there can be no contradiction at all (e.g. "if

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30 Greenawalt 11 Ga LR 991; Harris L Phil p. 173 ff.

31 65 ARSP 457.

32 This need not make either statement useless because X may be a member of two groups one of which is covered by Pp and the other by P-p.

A then Op and if A then O-p" is not contradictory - it merely means that anyone getting or finding himself in the position A will have an obligation to do p and an obligation to do -p.[33] He cannot in fact do both. It would of course be grossly unfair if breach of either obligation were greeted with punishment. The pair of norms might be regarded as implying official disapproval of getting into circumstances A; but there would be no contradiction.[34]

However, as noted in §2.12, judges virtually never use language of a sufficiently formal nature to set up such logical relations in the first place. Furthermore, so much of law refers to meanings, definitions, etc.,[35] and is not of a form that could conceivably be transformed into such propositional terms. Worst of all the alternative rules between which judges have to choose are virtually never expressible in terms of opposites (the decisions may be opposites - that is the nature of a court case, but the rules that base them usually vary very little).[36] Finally when it is possible to set up principles or rules in terms of opposites, judges frequently avoid doing so. Although they sometimes set up a rule to knock it down, they normally attempt minor modifications to avoid the contradiction or merely ignore the contradiction altogether. Instead of relating consistent rules to each other or rejecting one of a pair of rules that contradict each other, judges tend to reformulate the rules to effect a compromise or just distinguish the facts of the case on which an inconvenient rule stands. This does not so much relate the two rules, but

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33 E.g. Herbert's amusing suggestion that on a public footpath you may have both an obligation to move along and an obligation to stay put. (Uncommon Law, p. 91). The rule -(Op + O-p) is a principle of justice not of logic although a better one would be: If (Op + O-p) then -Op + -O-p (i.e. neither obligation would be enforced).

34 If this is expressed as a factual statement the lack of contradiction is even clearer:
Rule 1 - If Circumstances A and action B the sanction S is imposed. i.e. If A + B then S.
Rule 2 - If circumstances A and action -B the sanction S is imposed. i.e. If A + -B then S.
These two do not contradict but they jointly produce the conclusion: If A then S.

35 Honoré LM&S.

36 Thus his test for what legal propositions are "true", whether a principle fits into the legal system better than its opposite is quite useless. See Dworkin LM&S p. 75.

confine each in such a way that they do not interact at all.

The informality of judicial formulation of legal rules also affects the strength of the vertical relations by which lesser rules, and ultimately the "right answer", are supposedly derived from higher principles.[37] Certainly judges often talk as if one rule followed inexorably from another in order to give their decision finality, authority, and apparent certainty (despite the fact that as stated, and possibly even if restated, they do not in logic do so). But they also recognise the variety of answers which could reasonably be expected both explicitly[38] and in practice (e.g. by limiting the retro-active effect of their decision[39]). The practice of other lawyers also indicates the legal acceptance of more than one right answer to legal questions. There are many legal statements that most barristers and solicitors would call "arguable" or "unsettled". If lawyers <u>did</u> believe there were a single right answer, and they agreed with Dworkin that such right answers had moral force, would it not be immoral for them to argue against it if that were the side his client happened to be on, could they so easily fraternize with those who accepted the brief from sides that did not deserve to win ?

But even if the central principles were more formally stated would it be possible to derive the right answer from them? It is difficult enough to derive a concrete practical conclusion from a technical rule drafted with great care and skill - but to derive such answers from general <u>moral</u> principles ? The difficulty of producing such answers is perhaps an even older and thornier problem in ethics than the content of the central principles themselves. If it were possible to do this, one wonders why parliament and draughtsmen go to so much trouble. Why not merely legislate the central principles and then go home ? Of course some haved hoped to do this - it is the great dream of the code-maker. But the principles and rules the latter set out were quite insufficient to provide

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37 See Farago 14 <u>Val ULR</u> 371, 409.
38 <u>LL</u> pp. 191-5.
39 Brilmayer 11 <u>Ga LR</u> 1173, 1190.

the host of required answers without massive additions of commentaries and court rulings. The same fate lies in wait for Hercules' system of principles.

Structure

However judges and other lawyers may regard the relations between rules and principles, they certainly do not treat them as systematically arranged into a content-structured whole. In "Hard Cases" the judge who creates such a system is a mythical creature and is clearly labelled as such. Dworkin's Hercules "improves" on real judicial practice even more than Harris's legal scientists. The best Dworkin claims for mortal judges is that they seek to go as far as they can towards systematising law. Even for them the law is not a system but split into many chunks by their unfortunate shortage of super-hero powers. But few judges go anywhere near so far as they could. Most look for a single overriding authority, or for several authorities that appear to say the same thing. They seek a single rule under which a case can unambiguously be stated to fall. It is usually only when the rule based on the most directly relevant and/or authoritative cases does not appeal to the judge that he starts looking more widely. He will seek some other case in a related area of law which will support a principle that can be used to contradict the offending rule. He will have indulged in a very small exercise in something like Dworkinian system building, but he will only have gone so far as is necessary to get the desired result. The most that is systematised is a tiny part of the law several orders of magnitude less than the Herculean dream,[40] and even such limited efforts are rare.

As argued in chapter 2, judges do not tend to build systems of any kind. Rather they to see themselves using conveniently ill-defined judicial "skills" to deal with the material presented to them during the arguing of cases.

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40 As only a small part of the law is ever up for decision at any one time, any attempt to suggest a grand system would be treated as the most eccentric of obiter. This may be an unjust reward for one of the labours of Hercules, but any judge with the wisdom of Hercules would undoubtedly realise this and abandon the effort.

3.5 HERCULES AS MYTH

There are many reasons for this reticence to systematise. These reasons are offered primarily as part of the explanation of why judges do not practice Dworkinian system building. However, to the extent that these reasons appeal to the reader, they count against Dworkin's claim (central to his thesis though peripheral to this one) that judges should practice it.

Although Dworkin advocates this system building as part of his theory of adjudication, one of the major reasons for judges to shun it is how far it takes them from the task of adjudication. This task, especially in the face of large case back-logs, can be very onerous, leaving little time for chasing even the worthiest of impossible dreams. But even given more time, it forgets that judges are adjudicators rather than justifiers. Their primary task is to settle the case in hand. The judge is functus officio when he has given his order whether or not he has given any justification for it. (Indeed if the parties settle prior to judgement, neither the case nor any comment he may have made on it will appear in the law reports). He will usually seek to do more, to settle the point of law involved, but he is usually reluctant to state a rule which goes much beyond it. He may offer a justification, but it will usually be extremely limited in scope and he is under no obligation to "sell" his decision. Indeed there is a very good reason for avoiding the full blooded moral justifications of law that Dworkin urges on judges. As we saw in §§2.5 & 2.7, law is a reasonably successful exercise of power and like most such exercises it is a mixture of force, sanctions, manipulation, persuasion etc. because of the different reasons citizens have for obeying it. Only some are persuaded to obey, so that an emphasis on justification may lead others to forget the other resources that legal institutions have to compel obedience. Furthermore there are many justifications that might be given for obeying laws. Many of them will be incompatible - by tying law to one it loses the support of the others. Thus judges have an interest

in laying down rules and leaving it to others to invent reasons for following them.

A second reason for judges to reject Dworkin's system building is his major claim for it - that it provides a single right answer in hard cases. This would destroy the flexibility that so many judges like to retain[41] and possibly even promote.[42] It would also make legal change extraordinarily difficult because if the whole system produced a single right answer P, to change the law to not-P would require changing the entire system. This is not the way judges change law and it is completely contrary to common law traditions of change by accretion and piecemeal modification rather than root and branch systematic change. Indeed all law exhibits this quality - new ideas are not introduced simultaneously throughout the law but percolate gradually.

The main reason against judicial attempts at Dworkinian systems building is that the nature of the material sought to be systematised makes it impossible not only to complete the project but to make any real headway at all. The further the judge goes, the more difficult the task becomes - there are more cases to reconcile, more rules and principles to incorporate. Having organised one chunk of law around a set of principles the attempt to relate it to another set of principles means further adjustments to each set. Hard cases are "hard" precisely because they involve integration of differing cases and the rules, principles or ideas behind them. The more integration involved, the harder it becomes. Anything like the integration required by Dworkin is impossible.

The problem is that the material sought to be systematised has been created in attempts to realise a multitude of values. This is because the creators were different people (with consequent variation in personality, point of view, etc.), at different times (with consequent variation in the then current ideas and concerns), in different cases

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41 Just as they avoid the inflexibility a positivist system would impose.
42 See Munzer 11 Ga LR 1055.

(where the peculiarities of the case or disputants sway the judges[43]), relying on different information and with different paradigms in mind (e.g. in commercial law one judge may be thinking in terms of massive conglomerates and poor consumers, and the other of harrassed small businessmen with pernickerty customers). Many of these values will be contradictory to each other so that many values will be inimical to the values contained in any system of principles a judge might create.

This problem will be aggravated by any attempts at systematisation by earlier judges. These will have created blocks of rules, decisions and statutes, representing attempts to institutionalise different values. Thus the more people who embrace Dworkin's theory, the more problems it creates for each of them and the weaker is Dworkin's normative claim.[44] Of course if no-one has attempted such systematisation this aggravation disappears. But in that case the descriptive claim would have to be abandoned too.

Dworkin has two lines of defence against the diversity of material created by judges and legislators operating under their different values. The first is that the judge can characterise a certain proportion of the judicial decisions as "mistakes". However, the further the judge goes in attempting to systematise law, the more mistakes he will have to declare, whereas judges are usually at pains to minimise the number of their peers they say are wrong. Furthermore it is a very limited device. A judge cannot exclude statutes, "embedded" (long-standing) mistakes, mistakes of superior courts or rules within their "enactment force" from the decisions to be justified. Statutes are particularly troublesome. They are very numerous and their impact is multiplied in the areas of law they affect because judicial decisions in those areas must be tailored to fit in with them. Furthermore they are passed by a succession of governments, often

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43 As the rule in each case was created for that case only it will bear the marks of that case. This is inevitable as the judge will always be aware not only of his reasoning but of the practical consequences of where his reasoning is taking him and Dworkin himself says elsewhere (TRS Ch. 6) that by a process of reflective equilibrium this can affect the reasoning used. This may be deliberately exploited by the parties.

44 Cf. Hart's theory whose strength grows as more judges embrace it.

attempting to implement very clear[45] but conflicting values. Statutes passed by successive conservative and labour governments may be very easily justifiable in terms of principles - but not compatible ones. Where the statutes are not passed with clear principles in mind the contradictions are not so much between the statutes as built into them.

Dworkin's second defence is to argue by analogy from a form of criticism that it is quite possible to interpret legal materials while largely ignoring the values, principles, concerns and especially intentions of those who created them. This form of criticism attempts to build an interpretation of the play, book, painting etc. which would make it the very best work which it could possibly be. His initial examples were taken from David Copperfield and Hamlet. He used interpretations of these to answer questions such as whether Hamlet and Ophelia were having an affair before the start of the play which, like answers to questions in law, are not directly answerable by examination of the text. The problem with this approach is that it analogises law to material of a completely different order of complexity and variation of origin. A closer parallel would not be a single play by a single author but the combined works of many playwrights written over a considerable period of time.[46] Possibly in recognition of criticisms along these lines,[47] Dworkin has modified his analogy to the interpretation of a "chain novel", in which chapter one is written by one author who sends it on to the next author. The second author writes chapter two as if it followed from the first, and so on. Dworkin argues that it is possible at any time to interpret the whole of what has been written so far, and that each successive author must so interpret it in order to relate his own chapter to those which have already been written.

Much depends on the compatibility of the writers. Suppose D.H.

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45 The "intention" of Congress may be unfathomable but in UK legislation may very clearly bear the imprint of the values of the small numbers in cabinet.

46 Even if intention and purpose are ignored the comparative unity and coherence of a single work would make any kind of theorizing about it easier.

47 Eg. Farago 14 Val ULR 371, 415.

Lawrence wrote the first chapter and introduces two women who take two men as lovers. Gore Vidal's Chapter Two changes their sexual orientation and Waugh's Chapter Three their religion. In Chapter Four Agatha Christie has one of them murdered but, with all the other three having motives by now, leaves us guessing who did it because in Chapter Five Tolstoy asks what all these shifting relationships in the midst of bloodshed could mean. How can we appreciate or interpret such a novel which seems to be a combination of love story, satire, mystery thriller and philosophical novel - by attempting to impose some thematic unity on the whole either by seeing one genre as dominant or by inventing a new hybrid genre; or by appreciating singly each chapter with its own style, point and purpose? Dworkin ridicules the idea of interpreting a mystery thriller as a philosophical novel, but it would be exactly the same mistake to interpret a mystery thriller <u>chapter</u> as either philosophical or hybrid - and for the same reasons. Even if there were some apparent, or even deliberate philosophical aspects of the chapter resembling novels from the philosophical or hybrid genres, to regard it as part of either kind of novel is to give such an incomplete and unsatisfactory account of the chapter as not to fit the facts. The price of seeking an interpretation that fits the <u>whole</u> of the novel is that it does not really fit any <u>part</u> of it. Even if some hybrid genre could be concocted which <u>did</u> meet Dworkin's standard of fit (or if Dworkin dropped the standard of fit sufficiently to pass the concoction), the price must still be paid because the interpretation that fits the whole does not fit nearly as well as separate interpretations of the parts. Furthermore although Dworkin wants to find the interpretation which renders the whole enterprise the "best and most successful it could be", he rules out the most complimentary thing that could in fact have been said about it. It may be a very bad <u>novel</u> but a series of great little essays.[48] One could summarise by saying that holistic interpretation will involve a worse fit and, at any

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48 Some of the writers may realise this and only try to write good essays - as judges may well try to give the best judgement they can without systematising law.

level of fit, a less attractive interpretation than interpretation of the separate parts.

At this point it might be argued that law is not analogous to this kind of chain novel because the variations among judges' purposes are not so great as between these different writers. But Dworkin specifically accepts that judges do operate under at least three theories of judicial role based on the "rights-sceptic", "conventionalist", and "non-conventionalist" (his own) theory of rights. He clearly regards the differences between these to be of sufficient significance to argue vigorously for the superiority of his own. Even among non-conventionalist judges, there will be very significant differences between the principles they use in making their decisions and writing their judgements (not to mention the differences between the principles behind the statutes noted earlier). Although Dworkin accepts, even propounds, some of the variation in judicial purpose and approach, he still dismisses their importance in the interpretation adopted, saying that "no participant can accept as a test of the correct interpretation of the chain so far what any predecessor thinks correct".[49] But however much we may dismiss the earlier authors' or judges' interpretation we cannot ignore their chapter/decision which is the _product_ of their interpretation. Indeed much of the interpretation will appear in the product as when Agatha Christie dredges up events and characters from the earlier chapters and interprets them for clues. However much we may disagree with and dismiss her interpretation of the first three chapters as part of a mystery thriller novel, the chapter _she_ writes is stamped indelibly by it. Statutes and judicial decisions are likewise stamped by the intentions of their creators, however disagreeable to the interpreter. They may be found in preambles and _dicta_ but it is more usual to attempt to incorporate them in the sections of the statute and the _ratio_. In fact Dworkin should not be surprised. He tells us that interpretation and creation are mixed, so we cannot ignore the fact that what is created is

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49 _DNB_ p. 51.

bound to include some interpretation.

Far from overstating the complexity and variation of legal material the analogy understates it by not taking into account five facts about judicial decisions.

(i) The authors read all the previous chapters by other authors but judges do not read all the previous judgements by other judges.

(ii) Judicial decision follows an adversarial argument and in general only addresses the issues and cases raised in that argument. This is like the new chapter in the chain novel being written by an author who had not read the previous chapters but only criticisms of the earlier chapters written by two critics with violently opposed prejudices.

(iii) There is nothing in law comparable to the sequential development of the plot in this chain novel. Questions in law are less analogous to "what happens next" than to questions about what has already been written in the novel, what has not been written and how these two relate.

(iv) More than one judge writes about the same part of law. Thus its interpretation is not like the best theory of Hamlet's character but the best theory of Faustus' character taken from the plays of both Marlow and Goethe. We would need to alter our chain novel analogy by having two Chapter Fives - one written by Tolstoy and one by Vidal !

(v) The time span for writing the law is so much greater than that for the chain novel.

Perhaps a truer parallel to law would be an attempt to create theory of "art", or "literature", or all the plays currently showing in the West End. Such exercises would be considered at best worthless and eccentric but more often simply misleading. Dworkin gives only one example of this level of complexity - that the meaning of modern painting is "negation".[50] But so much of the meaning of modern paintings would be missed in the attempt to encompass it under that one umbrella that such an interpretation would be a serious encumbrance to its understanding. Even more than the chain novel, the incredible variety of artists' approaches

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50 DNB p. 36.

and purposes require separate treatments of their work rather than an attempt to bundle them all into "modern painting".

And so it is with law. It may be quite possible to interpret various segments of the law (e.g. legislation on a topic during a party's term of office or a series of decisions on an area of tort law) by providing one or more related principles to justify it. Let us imagine that a judge has picked three areas of law involving some conservative legislation, some labour legislation and some House of Lords decisions and he has chosen the best principles (according to his own values) that fit each. If, as is likely, these principles are not compatible then the Dworkinian judge would have to look for other principles that are. Given the remarkably different purposes of those who created these areas of law it would be a remarkable achievement, but let us assume that he can find these principles. Unfortunately they will either fit each area less well, or be a less attractive justification of them - possibly both. The judge will have to make the same sacrifice as a chain novel critic - to give up a better interpretation of the parts in order to furnish some kind of interpretation of the whole. Consequently any decision he makes in areas in which he had to choose less attractive or less well-fitting principles will itself will be less attractive and more loosely aligned to its neighbours. Furthermore in adding such a decision to the body of decisions in that area that decision shifts it slightly in the direction of unacceptability or incoherence.

Some judges may not find this too great a price to pay - they may not be too concerned about fit or they may have fairly catholic tastes in what they consider acceptable. But what about those judges who can find justification for many parts of the law but for whom the best set of principles that fits the whole of law is just not acceptable Dworkin considers such cases confined to completely intolerable regimes like Nazi Germany[51], but more radical lawyers would see it as true for their own countries. Dworkin offers them little consolation. He suggests they

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51 TRS pp. 326-7.

either lie about the principles embedded in the law (ie. use principles that do not "fit") or resign in protest. He offers the judge the choice of pretending to judge or not judging at all.[52] But Dworkin not only denies judgeship to radicals - he even makes it impossible for them to be good lawyers. This is because providing the answer to a legal question requires the same theory-building as judging does, since the correct answer to a question of law is what a judge would provide using the "correct" Dworkinian theory of adjudication.

Yet the piecemeal treatment outlined above offers an alternative way out. Law is seen as part good, part bad, part justifiable, part not, but in which the good parts justify the judges in continuing to judge and the lawyers in continuing to practice. Furthermore such piecemeal treatment becomes a valuable critical tool. The good justifications that can be given for one area of law can be compared with the poor justifications that can be given for another. Note that in interpreting law as part good and part bad, and in subjecting the bad to criticism, lawyers will probably not only abandon Dworkin's holism but also his insistence that law be interpreted in the "best light". This abandonment allows the judge to interpret decisions he regards as mistakes as well as those he includes in his description of law (as such it is useful to conservative as well as radical judges - they just don't need to use it so much). It also leads us to a new insight into the way in which judges respect the institutional history of law. They do this by avoiding wholesale changes in the bulk of the decisions and by their already noted reluctance to declare mistakes, rather than by attempting to justify them. Their respect is much more neutral than Dworkin implies. Conservative judges and lawyers would probably approve most of those decisions but would like to retain their flexibility and do not want law to have to live up to any extravagant claims about how good an institution it is. Reformist judges and lawyers know that they just cannot achieve wholesale change so they are silent about the many decisions of which they disapprove, nibbling away at them

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52 Cf. Kelsen PT p. 218 n.

case by case. Their "best theory" of law would be that it has great potential as a civilised and democratic way in which men may collectively control their individual behaviour - a potential that is rarely achieved but which is worth striving for, and an ideal to be contrasted with the failures of existing practice.

3.6 DWORKIN'S SYSTEM AND THE SOCIAL OBSERVER

Even if all judges overcame the many difficulties and objections to Dworkin's legal system, thus validating Dworkin's claim to describe judicial practice, the social observer would still not view law as systematic. First, as already argued, law is far more than mere judicial practice, so that any systematisation of that alone will systematise only a small part of law. But from the social observer's point of view even the judicial institutions would not be made more systematic by such a practice because if Dworkin's system exists it exists only for individual judges. Dworkin's system must necessarily be individual because its creation requires the injection of someone's personal moral values. Dworkin acknowledges that several systems would probably surpass the threshold of fit and says that the individual judge should choose which he considers best[53] - indeed Dworkin uses this claim to distinguish himself from positivists who attempt to exclude moral judgement from the determination of what the law is.[54] At lower levels the principles used to justify groups of decisions or areas of law are also chosen by the judge from his own values. From top to bottom values do not creep in because of accident or diminished vigilance but are deliberately inserted, introducing what many writers have seen as an ineradicably subjective element in law.

In fact Dworkin's theory is more subjective still - because the standard of fit a successful theory has to pass will itself be determined by the judges' values. Dworkin sees the question of fit as being a moral one[56] - related to the principles of fairness, that require like cases to

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53 TRS p. 117.
54 TRS p. 350.
56 DNB p. 45.

be treated alike, and principles of political morality, that require a judge to respect institutional history. In either case these principles would have to be integrated with the judge's other moral values and modified if they did not fit. To hold otherwise would be to have the level of fit determined by convention which Dworkin would never permit for a moral principle.

This necessity for individual value choices to be made by the system-creator in determining both the principles to be used and the level of fit required means that there can be no system until those choices have been made. Because Hercules is mythical he cannot have made those value-choices, so it is not possible to assert that Hercules' system exists and that it is only our lack of superhuman powers that prevents us discovering it. Likewise, we cannot say that any real judge's system exists because he has not yet made all the necessary value-choices (including the crucial final one of the "best" theory of law out of those that fit). We cannot even say that elements of such systems exist. Even if the judge has chosen the principles he regards as best justifying one or more areas of law, he might later reject them in favour of a justifying principle intrinsically less appealing but which fits in with principles he later uses to justify other areas of law. Finally, the requirement of individual value choice makes it impossible to piece together a composite system by linking partial attempts at systematisation made by different judges, because these are based on value-preferences of the creators that are not necessarily reconcilable and because the crucial final holistic choice of a system of principles has not been made by anyone.

Nevertheless, let us suppose that several judges overcame or ignored all these problems and reached the stage of finding more than one theory of law that fitted the institutional facts and chose one of these as their best theory. Dworkin accepts that in such a situation different judges would most probably make different choices. Naturally law will appear perfectly systematic to each of them. The social observer could observe any of these judges and conclude that there existed a system within the

mind of that judge. But for the social observer law involves more than the contents of a single mind. He will look at the other judges and see that there are several systems to be found within law - to be precise, within the mind of its officials. He could not conclude that law as a whole was systematic because he could not but notice that there were different systems, incompatible not only in his eyes but in the eyes of the individual judges who chose one system above the others. Ironically the alleged strength of the system for each individual judge would be the undoing of the system for law as a whole. On the other hand, if the actual weaknesses of the individual judge's systems are acknowledged, this does not make law as a whole any more systematic. It rather acknowledges the failure of this attempt to find system in law at all. When the social observer takes into account the impossibility of actually achieving such systems in <u>any</u> minds and the fact that many judges could not,[57] and many judges do not,[58] approach law in a Dworkinian manner, Dworkin's system is reduced to an unobtainable and rarely sought goal in the minds of some judges and lawyers, rather than a model for the social observer's systematic description of law.

Much of this problem lies in attempting to turn a theory of adjudication into a theory of law.[59] A theory of adjudication tells an individual how to act rather than describing the institution in which he and others act. Of course Dworkin's theory <u>refers</u> to the acts of others, but merely to tell the adjudicator what <u>obligations</u> those actions impose on him because of his duty to respect institutional history. What is included in the system is not so much the acts of others, as the adjudicator's moral reactions to those events. This turns law into a curiously <u>asocial</u> activity - a moral response in an individual mind, rather than some kind of <u>social</u> interaction between the members of a

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57 The reformers considered in §3.4.

58 Acknowledged by Dworkin <u>DNB</u> p. 2.

59 Offering a theory of adjudication and calling it a theory of law does solve one of the problems of positivist theories - that the lack of a theory of adjudication meant that their theory of law left something out. But this is only done at the cost of an inadequate theory of law.

society or officials of an institution.

The social observer will also have problems with the way Dworkin's system ignores the intentions, theories, interpretations of all participants other than the systematiser's. If the social observer accepts the sociological cliché that human action is purposive, he will consider this a major hindrance to understanding those actions. Dworkin defends himself by saying that intention is no use in deciding the point of several decisions taken as a whole.[60] However this does not count as an argument against using intention, it merely points to a stark choice. The choice is between treating as purposive either the whole activity or institution or the individual acts that make it up. In order to treat an activity or institution involving several participants as purposive it is necessary to ignore the purposes of each individual participant. What actually happens is that the point of the activity or institution is supplied by the observer himself.[61] This is a mistake we shall see in the next chapter repeated again and again by sociological theorists under the guise of ascribing the activity or institution a "function". Surely most social observers, and lawyers too, when faced with this choice betwen treating individual and institutional action as purposive, would choose the former,[62] and in doing so reject the attempt to analyse law as a whole rather than in much smaller pieces.

3.7 CONCLUSION

Although the social observer cannot accept that law forms a system resembling that outlined by Dworkin, the theory highlights certain very important features of law. First it notes (and in so doing backs up a major argument of the last chapter) the highly individual way in which officials derive reasons for action from the actions of others. Judges do not take the rules from cases and statutes and merely plug them into their

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60 DNB p. 49.

61 Or in Dworkin's case by the participant/observer for he acknowledges no role for the observer himself.

62 In fact, this is especially true of lawyers. They regard intention and purpose as quintessentially individual, as in their approach to guilt in crimes involving several persons.

practical reasoning, but note the actions of others and construct their own reasons for action from them. In doing so they are affected by factors quite external to the statute or decision under consideration - factors which vary from individual to individual and help to explain the individuality of the reaction. Among these factors Dworkin emphasizes the judge's reaction to the content of the rule he gleans from the statute or decision, and the part the judge's own values play in this.

However his claim that there is system in the way judges react to statutes and decisions (because they integrate them into a system of principles) cannot be supported. Even if it could, the very individual and varying nature of that reaction would lead us to see the institutions of law not as systematic, but the very opposite. Thus Dworkin's system suffers from precisely the same problem as positivist systems, despite the different kinds of elements and relations it contains. Indeed he highlights the individuality of judicial reaction. Finally even Dworkin's systems only includes some of the external factors affecting the nature of the individual judicial reactions - the others discussed in the previous chapter would certainly not fit into his system.

Dworkin is instrumental in wrecking one theory of legal system but fails to establish his alternative. The principles he first introduced in "Model of Rules" to attack the positivist system did not prove as amenable to systematising as he later claimed in "Hard Cases" they could be. Instead they added to the complexity and heterogeneity of what even Dworkin refers to as a "chaos of legal materials".[63] This is perhaps the classic case of a theorist rejecting another theory because its artificial system does not incorporate his insights into law, then failing in his attempts to build those insights into a system. It also provides a classic case of how those insights are so distorted by attempts to force them into a system as to all but lose their original value.

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63 DNB p. 57.

CHAPTER 4

SOCIOLOGICAL THEORIES OF LEGAL SYSTEM

4.1 INTRODUCTION

This chapter will deal with those sociological and realist theories which see law in systematic terms. Such theories usually contain trenchant criticisms of positivist and content theories of legal system - some of which were noted in the previous two chapters. Yet they still see law as systematic in a different way.

The next section will deal with the general character of sociological theories of legal system. The following two sections will indicate the two main forms of such theories - normative content (4.3) and functional interrelation (4.4). The next four sections will detail their elements (4.5), relations (4.6), structure (4.7) and some variations (4.8). The kinds of relations used will be criticised in §4.9. But the major criticism, and the reason why these systems fail as descriptions of law, is the reliance these theories place on notions of function and especially institutional function. This is discussed in §§4.10 & 4.11. Finally, §4.12 will consider one of the reasons so many have sought to find system of law: the so-called "Problem of Order".

4.2 INTERACTIVE SYSTEMS

Where positivists seek to describe the legal system independently of the outside forces that mould it, sociological and realist writers embrace those forces. They try to understand law by its relationship to, and interaction with, the rest of society. (Consequently their principal criticism of positivist systems is the very independence the positivists sought to achieve for them). In general, sociological theorists look for interaction between law and social values or interests, or between legal

and social institutions. Realists concentrated on interaction involving judges, discussing various non-legal inputs to judicial decision making (the judges' attitudes and values, class background etc.) and various non-legal outputs (the effect of judicial decisions on society).

The sort of legal system they constructed was interactive, it was conceived and described not on the basis of its independence from but rather its interdependence with, the outside world. Its systematic quality was to be found in its characterisation as a sub-system within a social system.[1] What makes it a sub-system within a social system provides two more features that are characteristic of sociological jurisprudence.

(i) It is a sub-system of the social system because it performs some function necessary to the successful operation of the whole system.[2] This core idea constantly reappears in sociological jurisprudence - though in various verbal guises. Stone talks of "law's tasks"[3] Llewellyn, with characteristically descriptive awkwardness, calls them "law-jobs".[4] The more teleological call them "ends" or "purposes". Whatever the name, the idea is that some thing or things that law does within the social system makes it law. It is a notion as important to the system builders in sociological jurisprudence as the concept of source-derived rules is to those in positivist jurisprudence. The function of law operates as a defining characteristic of what is law and provides both the wholeness factor that gives law its unity and the key to law's internal structure.

(ii) That which makes it possible for law to fulfill its function constitutes the second characteristic of sociological jurisprudence - the institutionalisation of law. Law is seen to include courts, and usually legislatures, firms of solicitors, and some executive institutions (police, prisons, etc.) as well. These institutions provide the middle range structure of law that is said to coordinate the activity of the

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1 Braybrooke Ignorance is No Excuse Ch. 1, Schiff 39 Mod LR 287, 293, LOP p. 9, LSS p. 52.
2 Braybrooke loc.cit.
3 LSLR p. 24.
4 JP p. 358.

multitude of legal officials to achieve the functions of law.

One of the consequences of treating law's interaction with the rest of society as central to its comprehension is that the viewpoint adopted is clearly that of the social observer. It is only from his vantage point that the interactions can be seen. To adopt a legal point of view would be to see those interactions from the point of view of one of the interacting parties and not to see their place in society as a whole - which for sociological theorists would be the greatest sin !

Sociological theories of legal system are not nearly as developed as positivist ones.[5] This is partly due to the outward-looking nature of sociological and realist jurisprudence which means that most theorists are more concerned with elaborating law's external connections than its internal nature. But it is compounded by the fact that those who have written about the internal working of law have tended to propound theories at quite different levels of generality with few attempting theories to cover all such levels. Those who are usually dubbed "sociological" tend to study social influences on law as a whole, while American realists and their descendents tend to look at the influences on single officials, notably judges. The problem is to synthesise a sociological theory of legal system that spans this range of social and legal phenomena. A theorist might build up from the individual phenomena to law as a functioning whole: or he might work down from the postulated social structures inferring similar lower level structures in law until he finally reaches those same individual phenomena. The danger is that the two theoretical extrapolations will not meet. The construction of a general theory based on extrapolation of observation of the behaviour and interactions of individuals may not reveal a systematic whole but a disordered mass (as argued in the chapter 5); and the lower the general theory is taken, the more may its lack of foundations be revealed. Nevertheless, this chapter attempts to incorporate several sociological theorists' claims about the "legal system" at its various levels.

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5 Freely admitted by Evan (SLSS p. 31).

Although this synthesises claims made by different theorists, most of the theorists involved would endorse the claims to which their own are linked. Within the general framework outlined there is room for several variations (see §4.8) which it is claimed would encompass most of the differences between sociological system theories.

Of course, not every sociological or realist writer would agree with the systematic description of law or the stated variations. Some would agree only with a part, would go only so far. Other theorists simply do not address themselves to the task of constructing systems at all and do not talk of law in systematic terms. This would be true of many realists,[6] conflict theorists, symbolic interactionists[7] and ethnomethodogists.[8] A few sociological and realist theorists clearly do not see law as systematic and more or less explicitly say so[9] - often for the same reasons as the writer - because society is unsystematic and disordered, law, as an integral part of that society, cannot escape being unsystematic and disordered too. But that is the subject of the next chapter, this one discusses those sociological and realist writers who do see law as systematatic.

4.3 SOCIOLOGICAL CONTENT SYSTEMS

All sociological writers emphasise the external links between the law and society. This leads most to describe the internal elements, relations and structure in radically different ways from those seen in the first two chapters. However, some writers retain more traditional views of law. They see it as a content system whose norms embody and reflect a coherent

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6 Many realists were primarily engaged in using social and psychological facts as wedges to be driven into other peoples' theories of legal system. (American Realists attempted to split formalist content systems: Scandanavian Realists attacked Natural law and Will Theories.) When realists do talk in systematic terms most of their ideas are imported from mainstream sociological jurisprudence.

7 Brittan sees the approach as "inherently microsociological" SAL p. 198.

8 Which is even more engrossed by the minutiae of interpersonal communication e.g. Atkinson SAL pp. 201-221.

9 Eg. Turk SLSS p. 107.
Some "process theorists" describe law in the most non-systematic terms (e.g. "a big blooming ongoing confusion"), yet persist in calling it a "legal system". Apparently, they merely regard the term as a synonym for law (see Hasswell and McDougal 37 U Pitt LR 465, J.N. Moore 54 Va LR 662, 667.

set of values. Their sociological credentials are based on their claim that there is a link between these values and wider social values or interests.

One such theory is provided by Pound.[10] He believed that any society embodies certain values which are implicitly accepted by the community and are reflected in the social structure. These values (or "jural postulates") are also the key values of law, thus providing the central principles of a content system for law as well as the external links required by any form of sociological jurisprudence.

Pound believed that as well as holding these values, people felt wants which constituted their interests. It was the function of law to fulfil these interests as far as possible. Where they conflicted, it was the function of law to reconcile them and fit them into law's consistent system of values.[11] Although Pound thought they could be aided in this task by a Ministry of Justice, he considered that legal institutions had been doing it remarkably well. Consequently, law was a content system, externally related to the jural postulates of society and the interests of its people.

Parsons[12] and his followers like Evan[13] are far bolder. They believe that no society can continue to exist unless it is vertically structured into an internalised hierarchy of consistent values (normative beliefs, at a very high level of generality, about what is desirable), norms (more specific formulations of what is acceptable behaviour in given circumstances) and roles (which specify the duties of individuals in particular positions or circumstances). At the same time it is horizontally structured into several sub-systems - political, economic, legal and educational. Each of these sub-systems is itself vertically structured into values, norms and roles which are incorporated into the larger vertical structure of society by being related to ultimate values

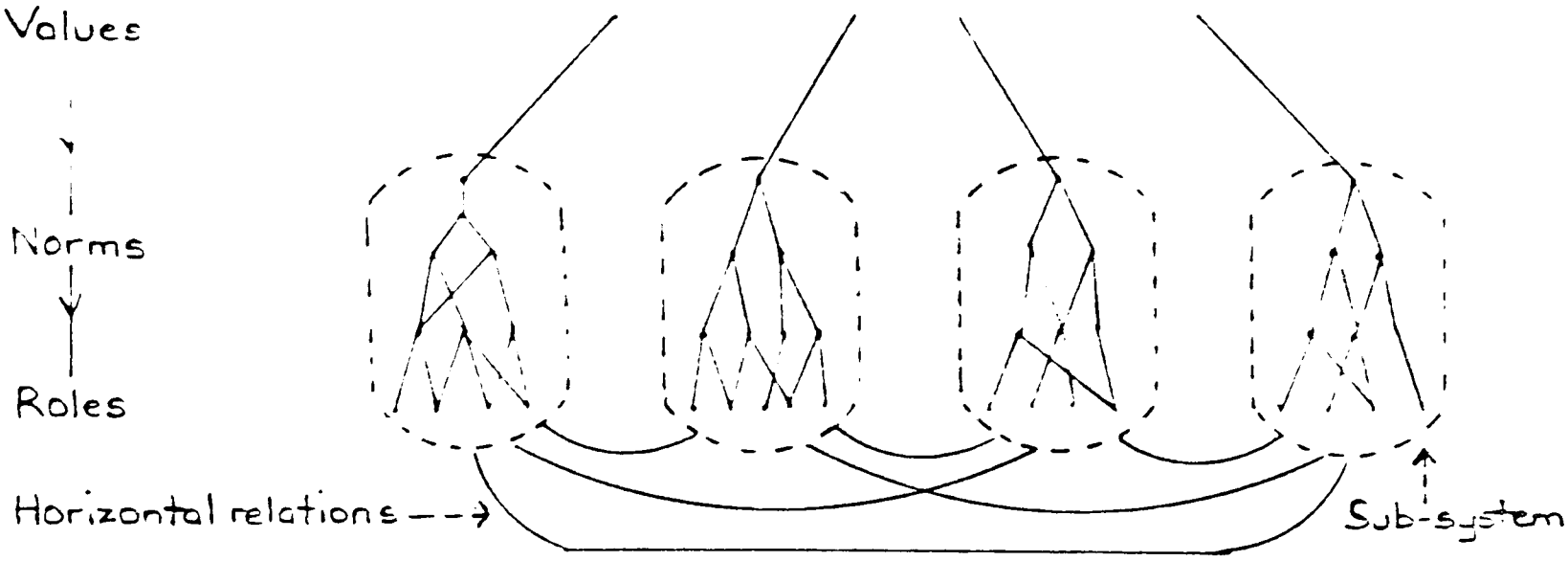
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10 Pound Philosophy of Law (1954). See also Ross On Law and Justice and Vago Law and Society.
11 SLSS p. 80.
12 The Structure of Social Action.
13 SLSS p. 139.

and the values of other sub-systems.[14] But what distinguishes one sub-system from another is the "function" it performs within society by meeting one of the four 'needs' society has for continued existence - "goal-pursuance", "adaptation", "integration" and "pattern-maintenance" (socialisation) respectively. Each sub-system's function both meets a social need and supports the functioning of the other sub-systems, thereby maintaining the system as a whole and helping to preserve and enforce the vertical structure of values, norms and roles.

Parsons' social system could be represented pictorially as follows. The vertical structure is represented by the pyramid (or more precisely a "truncated pyramid lattice" - see §3.3) of values, norms and roles. At some level, the bundles of values, norms and roles are seen as sub-systems which are horizontally interrelated by their interdependent functioning.

Figure 1: Parsons' Social Structure



The first problem such theories face is to find these fundamental values of society and its sub-systems.[15] The problems of knowing the content of other minds, even when they have been verbalised, have already been noted (§2.3). Yet if there were these consensually held values shaping all our social actions, we should surely be aware of them. We could collect evidence for the consensus by asking those with different backgrounds, jobs and political affiliations if they agreed with us. Unfortunately the evidence points the other way. Abercrombie and

14 SLSS p. 140.
15 Evan euphemistically calls it a "challenge", SLSS p. 141.

Turner[16] argue that workers on the whole do not share the values of their employers and that even among the latter there is a considerable and growing degree of dissensus. Mann's study[17] of opinion research reached the same conclusion. Finally, when Evan compiled a book of extracts to illustrate the hierarchy of legal values, norms and roles and their linkages with social values and norms, all the articles revealed a considerable degree of dissensus, even among the participants in legal activity.[18] This should not surprise us. We have seen the difficulties another content theorist (Dworkin) had in deriving a uniform and consistent set of principles out of the activity and beliefs of judges. But his problems are multiplied for sociological content theorists attempting to derive social values from the activities and beliefs of the population at large (who lack the similarities of background and comparative intimacy of the judiciary). Indeed much of sociology has concentrated on the differences between variously defined groups of men that lead them to hold different values.[19] It may, of course, be possible to formulate propositions with which a sufficient number and variety of people could agree - just as international conferences can produce final resolutions. But just as such resolutions usually had not been held before the conference, are given different meanings after the conference, and avoid rather than express the key motivating values of the participants, so such formulations will not express the content of men's social values. Here we encounter the second problem for content theorists. Any formulations of values that could be subject to a consensus are, like conference resolutions, likely to be so vague, or subject to such conflicting interpretations, that they are no guide to action and cannot be usefully related to any specific norms or role expectations. Prothro and Grigg[20] found more than 90% agreement in the U.S. for statements like "Public officials should be chosen by majority

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16 29 Br.J. of Sociology pp. 149-70.
17 35 Am Soc R 423.
18 SLSS Ch.s 13, 14, 21, 22.
19 I.e. the work on different "subcultures", espec. in criminology.
20 22 J of Politics.

vote" and "minorities should be free to criticise majority decisions and try to win support for their opinions". Yet 79% thought only taxpayers should vote and 44% thought a communist should be allowed to speak in public.[21] It is not enough for Evan to say that such formulations as "justice", "love and nurturance" and "the production and distribution of wealth" (the basic values that he claims underlie and guide the norms and roles of, respectively, the social sub-systems of the family, the economy and law) are "complex concepts". They are just plain vague and cannot provide the vertical relations of consistency/justification/derivation needed to create a content system (see §3.3). Any values formulated precisely enough to provide those relations would be controversial and hence non consensual. Sometimes even the vague notions that Evan uses are controversial - Evan sees "justice" as the central value of law, but Fuller, Unger and Selznick insist on "legality" instead!

Hence any societal values or "postulates" the theorists claim to find will inevitably either be too controversial to be the values of <u>society</u> (rather than a part of it) or too vague to relate to any specific norms or roles. Some will even manage to be both !

Consequently, there is no <u>system</u> of societal values, norms and roles which law could either mirror (Pound) or of which it could form a part (Parsons). Yet these theorists are surely right to insist on the linkage between the content of values to be found in society and those to be found in legal rules. But in so insisting, they provide a very good reason why the content of law should not be systematic, and help explain the failure of other theorists to find content systems when they looked at law alone.[22]

Values and other normative beliefs remain important. Full theories of law and society need to explain the nature, place and source of these

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21 Lest it be thought that there was a consensus for illiberal non-democratic specifics, the range was from 19.4% to 79%, most being in the 50s.

22 The relation between social interests and the law poses similar problems. Stone showed how conflicts of interests were not resolved but merely incorporated into law, <u>SD</u>.

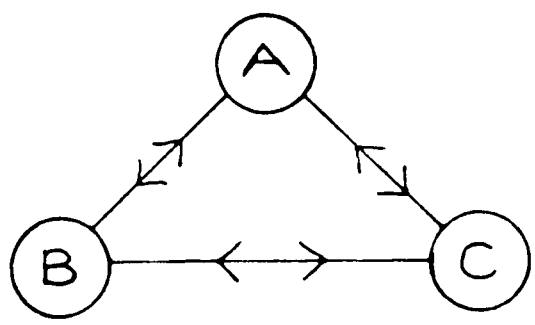
values. Fortunately there is no shortage of such theories, many of which do not lend themselves to systematisation and give an inkling of why such systematisation would be impossible. Such "micro-sociological"[23] approaches as symbolic interactionism and the various exchange and organisation theories see norms and roles emerging from day to day interactions of individuals and responding to their needs, interests and desires. Norms and roles produced by such diffuse and decentralised processes are unlikely to fit well into a society-wide system. On the other hand, conflict theories emphasise the factors which produce clashes of values, even between those with close contact with each other. Thus values, far from being the great unifiers that turn society into a social system, are its potential destroyers.

4.4 LAW AS A FUNCTIONAL SUB-SYSTEM OF THE SOCIAL SYSTEM

Whereas Parsons' vertical structure is widely disparaged for the reasons outlined in the last section, his horizontal structure is much more widely followed. Indeed, Parsons himself shifted his emphasis towards it in his later years.[24] It certainly reflects a much stronger functionalist tradition stemming from Durkheim's notion of organic solidarity in which a social division of labour achieved a common end by complementary effort.

There are two aspects to Parsons horizontal structure: the joint achievement of certain functions like system-maintenance, and the effects that the sub-systems have on each other. The latter aspect could be represented diagrammatically by figure 2 which shows how three theoretical sub-systems might interact with each other.

Figure 2:

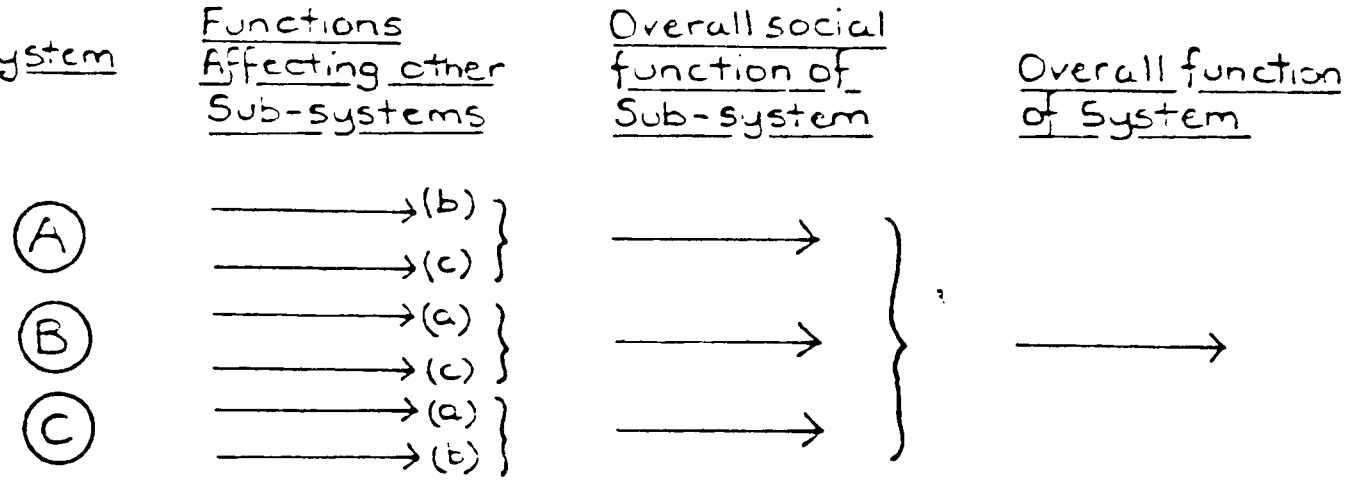


23 Supra n. 7.

24 Wilkinson claims he abandoned the vertical structure, SAL p. 78.

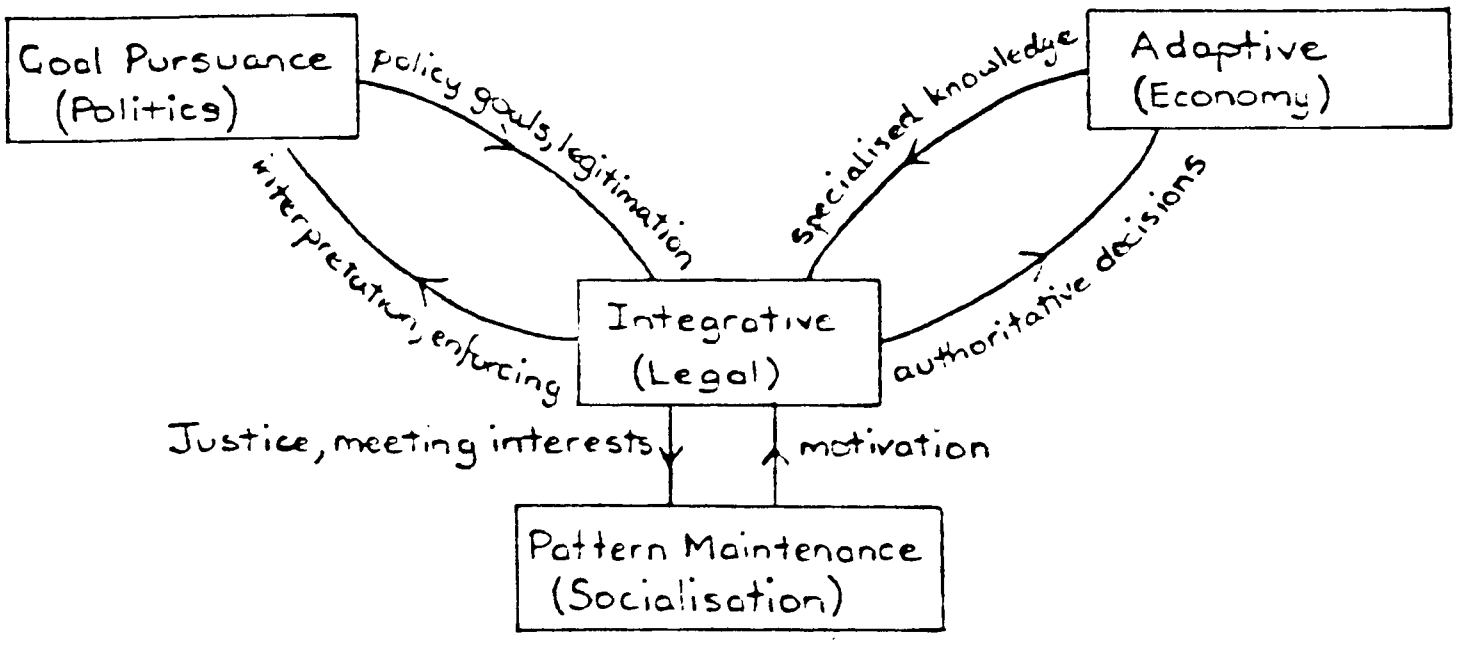
The other aspect of horizontal structure could be pictorially represented diagrammatically by Fig. 3, indicating how the various functions each sub-system has in relation to the other sub-systems combine to provide the overall function of that sub-system, and these in turn combine to provide the overall effect or function of the system.

Figure 3:



Parsons' horizontal social structure has been represented in both ways. Bredemeier's representation,[25] given below, follows the pattern of Fig. 2 (although being concerned with law's place in society, it does not include the interrelationship of non-legal systems with each other - e.g. the effect that the institution of socialisation has on the economy emphasised by Weber, and the effect the economy has on socialisation emphasised by Marx).

Figure 4:

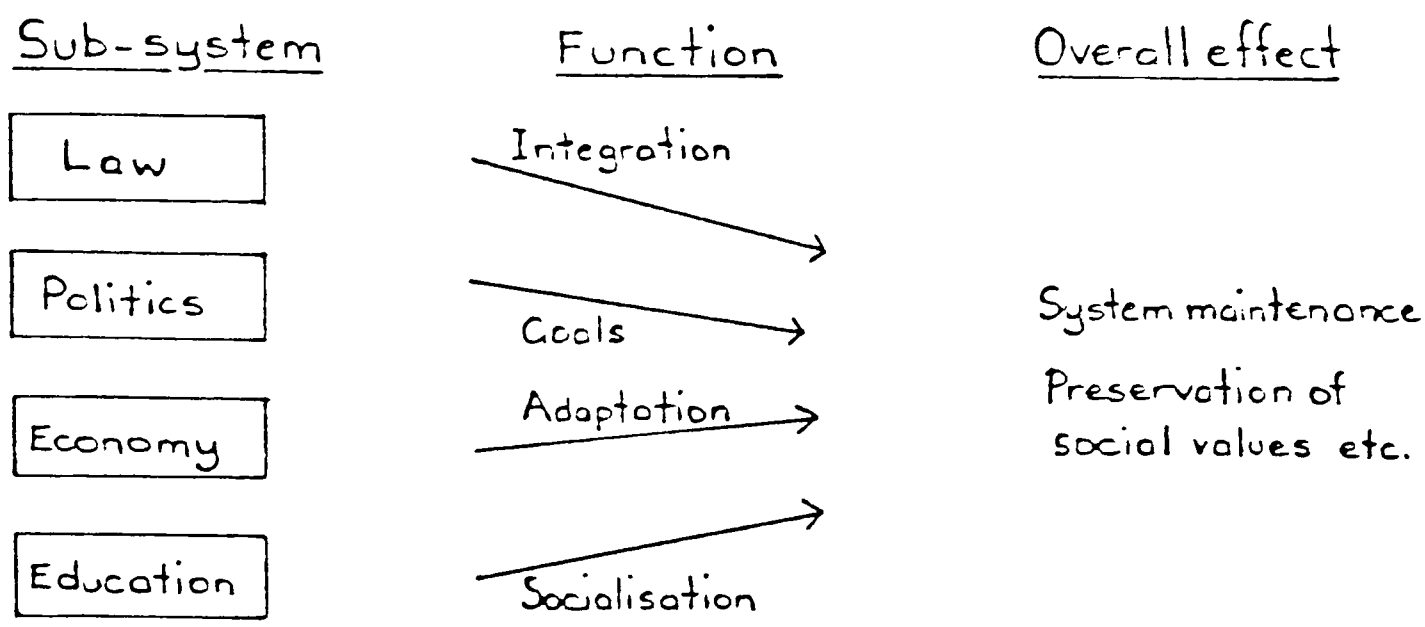


The social function of each social sub-system is the summation of its functions in relation to the other sub-systems. Law's social function of "integration" comprises and is achieved by the fulfillment of the

25 LSS pp. 52-65.

functions of enforcement, authoritative decision-making, interpretation, and provision of a sense of justice. This can lead us to a diagrammatic representation along the lines of fig. 3 which is shown in fig. 5 and is close to Roach and Gross's image.[26]

Figure 5:

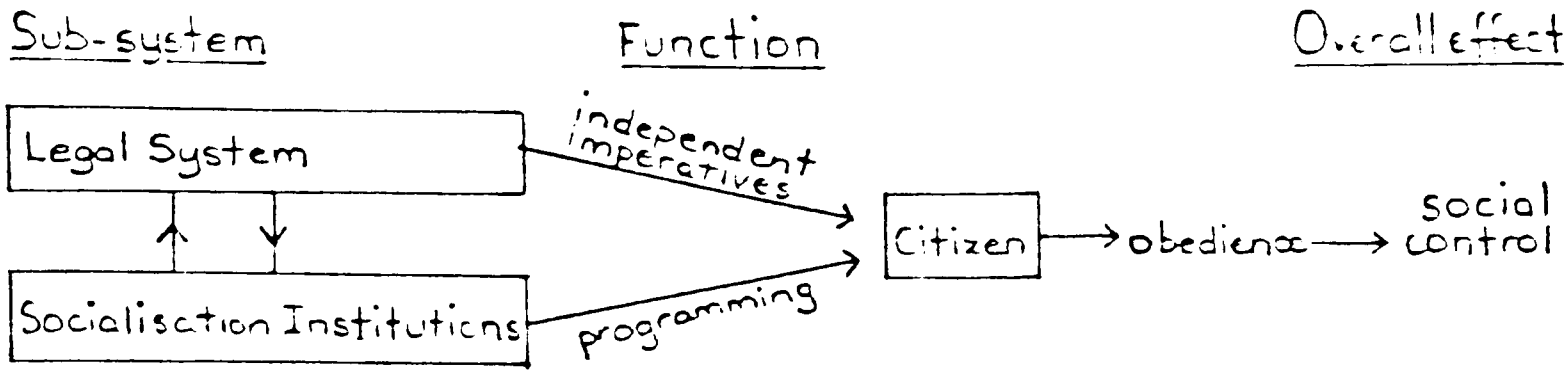


Several writers adopt Parsons' horizontal system fairly directly: especially Evan.[27] and Bredemeier.[28] Other theorists find different sub-systems, assign them different functions and see the result of this joint functioning in terms other than "system-maintenance" or the preservation of the vertical structure of consensual values. Some theorists emphasise the enforcement aspects of the social system or that part of the social system to which law belongs - dubbing this a system of "social control". Roberts sees the legal system as "one of a set of existing and interacting mechanisms of social control".[29] Laszlo takes a similar view - economic, legal, political and moral constraints add up to a system of sanctions that tend to channel social behaviour into pre-existing channels, reducing deviation by corresponding measures.[30] Likewise, Olivecrona sees the legal system and its institutions of socialisation jointly affecting social control: the latter teaching us to respond psychologically to certain cues, and the law providing those cues.[31]

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26 58 ARSP 53.
27 SLSS p. 139.
28 LSS p. 52.
29 39 ModLR 663, 677.
30 ISP p. 104.
31 Law as Fact p. 252 ff.

Figure 6: Olivecrona's System



But the basic structure of complementary and interdependent functioning sub-systems is constant, providing the structure of society at the very highest level. It will be designated Structure I. It places law as a legal sub-system within the social system. The place it gives the legal system also provides it with a wholeness factor - the function law has in maintaining the social system. Furthermore, it also provides a sociological model for the internal structure of the legal system at lower levels, a structure that will be elaborated in §4.7 after more carefully considering the elements and interrelationships from which it is constructed.

4.5: ELEMENTS

Positivists usually see law in terms of words to be found in, or extracted from, statutes and judgements. The sociological and realist opposition sees law in terms of facts. Holmes emphasised that the law is the action of judges rather than the words they use to justify it.[32] Frank added the actions of juries[33] and Llewelyn the actions of many other officials (e.g. tax officials[34]). Among the American realists' closest descendents, Lasswell and McDougal insist on talking about law in terms of events rather than rules,[35] and Nagel[36] attempts to construct a system from he behaviour of officials. The Scandinavian realists followed their American namesakes in this. The "facts", which Olivecrona used to describe law, concerned the actions of various officials.[37] Even though

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32 10 Harv.L.R.
33 Law and the Modern Mind.
34 The Bramble Bush pp. 13, 89.
35 44 S Cal L R 362, 364.
36 TLP.
37 Law as Fact.

Ross said law involved a combination of rules and judicial action, the rules were conceived in terms of facts about the norms actually operative in the minds of judges.[38] Many sociologists see law and society composed of actions or at least actions that are "social" because they are either oriented towards[39], or meaningful to, other actors.[40] As in theory, so in research: in examining law and its relationship to non-legal factors, legal sociologists have studied the actions of judges, lawyers, police and prison officials rather than legal principles (§2.8).

However most realist and sociological writers who construct theories of legal system do not build them out of actions simpliciter. The basic elements of their systems are termed "roles". These are to be found in both the vertical and horizontal structures of society. In the former they constitute the lowest and most specific normative unit. Yet they are also the basic units of the horizontal structure for as we shall see it is only by officials performing their roles that sub-systems are able to perform their functions. In the horizontal structure, roles could be called the "micro-functions" of individuals within the functional system of law.

This ability of roles to fit into two different kinds of system alerts us to different concepts of role used in each case. The elements of the vertical system are more illuminatingly seen as "role-orientations" (what the role-occupant thinks he should do) or "role-expectations" (what others think he should do). The elements of the horizontal system are "role-performances" (or "role-behaviour").[41] These three will not necessarily coincide (providing a fascinating echo of the problems with Hart's social rules). But it is Parsons' controversial claim that they do. Role-orientation coincides with role-expectation because they are part of a consensually shared vertical socialisation sub-system to teach us and the function of other sub-systems to protect. Role-behaviour

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38 On Law and Justice p. 34.
39 Weber STh p. 54.
40 Idea ch. 2.
41 Evan SLSS p. 242, LOP p. 11.

coincides with role-orientation/expectation, principally because people act on their value beliefs, but also because it is the function of certain institutions to ensure compliance with role-expectations. Yet even if Parsons' vertical system did exist, these claims could not be accepted. Role-orientation will not coincide with role-expectation because, in contrast to Parsons' "oversocialised" view of them,[42] people frequently resist the imposition of such role-expectations on them.[43] Role-orientation will not necessarily produce role-behaviour, because there are many other pressures to which the role-occupant is subject, and because men act and interact as "wholes" not merely as the occupants of specific roles.[44]

With the rejection of Parsons' vertical structure and its consensus on roles, it becomes doubly important to distinguish expectation, orientation and behaviour. People often differ on the behaviour expected of role-occupants. Thus role-orientation cannot mirror communal expectations but must be chosen from them. Just as frequently role-expectations are too vague to indicate what behaviour is required,[45] so that if role-orientation is to have any influence on a person's role-behaviour he will have to invent a new one for himself. With conflicting or vague role-expectations we would not expect the pressures placed on the role-occupant to be solely in the direction of one kind of role-behaviour. Yet in this there is some hope that despite the conflicting role-expectations and orientations a relatively consistent and uniform role-behaviour may yet be possible. If the mixture of role-orientations and external pressures on behaviour is 'right' the majority of role-occupants may yet conform to some kind of role-behaviour.

Thus divergence of role-expectation, orientation and behaviour is a

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42 Wrong 26 Am Soc R 183.
43 Brittan SAL p. 175.
44 Selznick ST (1) p. 302.
45 Paterson offers an example - the expectation that "judges will not usurp the functions of the legislature" (LL p. 188). But the examples he gives of role-beliefs held by judges and their "reference groups" that he claims do have content and provide guidance suffer the same problem: e.g. the "obligation to produce a just and fair decision".

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B's action. The effect that A's action has on B will depend on the content and structure of these beliefs and thought processes which the social observer comprehends by "Verstehen".[50] But this does not make it any less causal. Even the mechanistic physical interaction par excellence, the causal effect of one billiard ball striking another, depends upon the nature and structure of the billiard balls - if one were a large profiterole the effect would be quite different !

Neither should causal relations in law be seen in terms of necessity and sufficiency.[51] In law as elsewhere there are multiple and varied causes of any action, all of different weights, which may be singly neither necessary nor sufficient, though collectively both.

Such a view of causal relations can easily accommodate the kinds of relations regularly described in law. Many relations involve the action of stating a rule which causes others, because of their beliefs about the rule-stater, to act in conformity to what they perceive the stated rule to be. This is an exercise of authority which in general involves in the sense used in §2.5 - a (verbal) action by the power-holder indicates the behaviour desired of the power-subject; this leads to the desired behaviour because of beliefs the power-subject holds about the power-holder. Indeed it is just such relations from which most sociological theorists create their systems, though most of the relations they find are of pure legitimate authority (sanctions are mentioned, but merely as a backstop when legitimate authority relations break down).[52]

Those who talk in terms not of action but of role have a similar notion of relations in the legal system. (Indeed, roles and functions are more often stated in terms of the effects to be achieved, than in terms of the mere physical actions that are required to be performed.) Roles are linked when the performance of a role by A leads to the action of B, and B's role specifies that he act in that way in response to such actions of A's. Two kinds of linkage are common, (i) where B's role is to do A's

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50 Weber Economy and Society p. 8.
51 Pace Angyal ST(1) p. 35.
52 E.g. LOP p. 11ff.

bidding or follow a rule laid out by A (e.g. the appeal judge's role is to lay down rules and the magistrate's role is to follow them). It may be the role of B to handle a person or a matter after another has dealt with it (e.g. the arresting officer's role is to take an arrested person to the station where the desk sergeant's role is to charge him). In an ideal Parsonian world this means that the role-expectations are linked in that A is expected to perform the relevant action and B is expected to make the designated response, that the role-orientations are linked because each shares these communal role-expectations and those role-orientations are sufficient to produce role-behaviour in conformity with them. But in the real events from which the sociological theorist must construct his system, what are linked are the role-behaviours of A and B - with the role-performance of B frequently influenced by B's role-orientation, A's and others' role-expectations and usually other pressures as well. But this merely restates the causal description offered above.

In either case there can be chains of relations, either causal relations or interrelated roles. The form these chains take and the way they converge, split and complement each other is the structure of the legal system.

Many, perhaps most, relations between individual actors are intra-institutional. However, many relations are extra-institutional either with members of the public or with members of other institutions. The external relations of the institution amount to no more than the sum of such individual extra-institutional relations (though they may amount to less - see §5.7). These external relations achieve certain effects. The principal effect those institutions are thought to have are frequently called their "function".

Some theorists talk not of causal relations or role-linkages but of the flow of information.[53] The relation between appeal judge and magistrate or detective and desk sergeant involves one passing information to the other. This concept is taken from computer technology but its

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53 E.g. Vanyo SLSS p. 136.

transplantation into social relationships between actors and actions is fraught with difficulty. In computer systems, the sub-systems are programmed to react in a certain way to certain kinds of information. In society there is no such centralised programmer (unless you accept that the Parsonian socialisation sub-system performs such a function). The minds of the individual actors are formed by the constellation of forces that mould human values, and the reaction of the information recipient will depend on his internalised beliefs and attitudes, as well as pressures from outside. Once again this merely restates the causul description of social relations.

4.7: THE STRUCTURE OF THE LEGAL SYSTEM

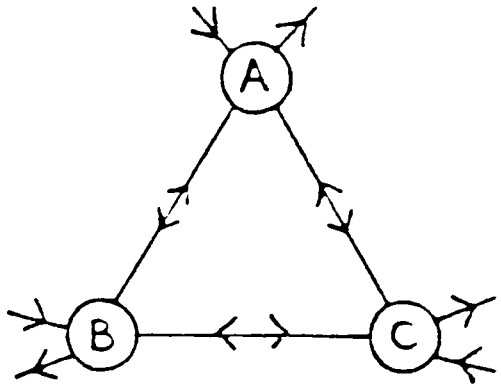
True to the external orientation of most sociological writing on law, the internal structure is rarely explained. Most writers do, however, go so far as to say that the structure of law involves "institutions" including courts and usually one or more out of the following: legislature, police, cabinet, magistracy, bar and some government bureaucracies. Sometimes, several such institutions are grouped into sub-systems of the legal system (e.g. the 'criminal justice system' - police, criminal courts, criminal bar, prisons and parole officers). The institutions included vary, but this is rarely important. Most of the writers see law as a sub-system of the social system. Thus, if an institution is excluded from law, its relations to legal institutions are merely converted from internal relations of the legal sub-system (i.e. part of the structure of the legal sub-system) into external relations of the legal sub-system (i.e. part of the structure of the social system). Nevertheless, most writers tend to include many more institutions in law than the positivists, and emphasise this in their criticism of positivism.

Neither the internal structure of these institutions nor the structure into which they are interrelated is frequently or extensively discussed. Nevertheless those who see the legal sub-system as part of a continuous social system would expect the structure of both to be of the same form so that the model of the social system can be applied to the

legal sub-system - i.e. the institutions have sub-functions which they each fulfil to jointly fulfil law's social functions. This is specifically stated by some[54] and can be inferred from the writings of many others. Most see the institutions of law having their particular functions and many refer to the way legal institutions function interdependently (or "cog together" as Llewelyn's excruciating prose decscribes it[55]).

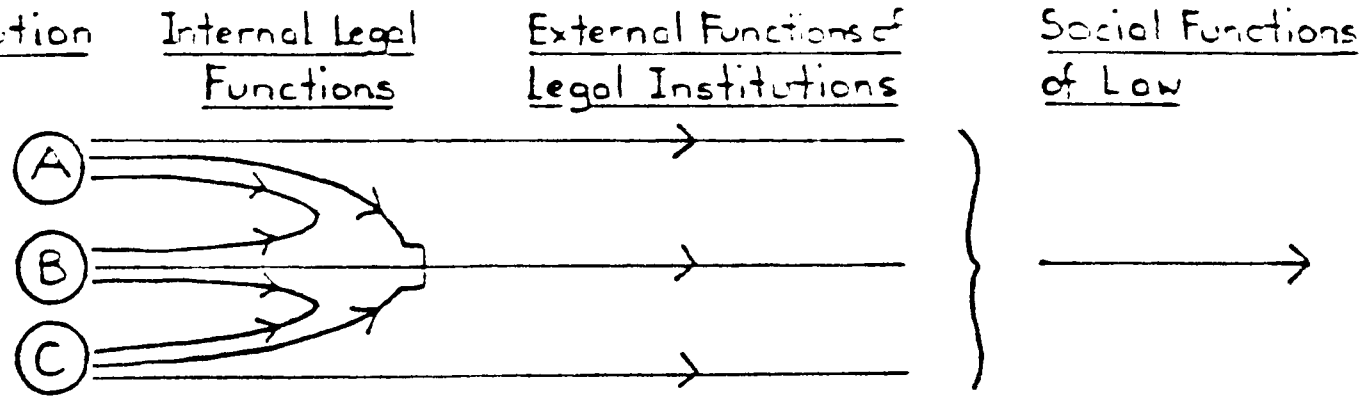
Several possibilities for the legal structure based on the interdependent functioning of legal institutions are suggested by the model of the social structure outlined in the last section. Because the legal system is a social sub-system performing functions for the social system, legal institutions must not only relate to each other, but to outside entities as well. The general model of social systems (fig. 2) needs to be modified to show these external relations:

Figure 7: General structure of a social sub-system



Their joint achievement of the social functions of law could be represented as follows:

Figure 8:



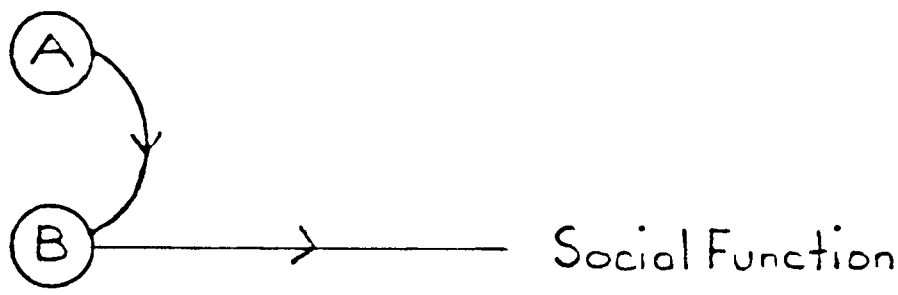
The manner in which several institutions can jointly achieve such

54 ISP Ch. 2. Braybrooke Ignorance is No Excuse Ch. 1. Bohannen 9 IESS 73.

55 JP p. 234.

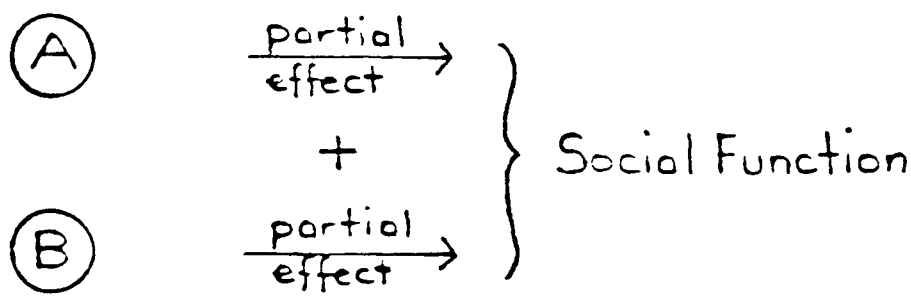
functions fall into three broad categories: functional chains, functional convergence and functional complementation. Functional chains involve the performance of one institution's function leading to the performance of the second institution's function (e.g. punishment by incarceration is provided by a court determining guilt and sentencing then a prison locking up the individual so sentenced).

Figure 9:



Functional complementation[56] occurs when the social function is fulfilled by two or more institutions performing their functions, yet not even partially fulfilled if one of ther does not (e.g. in bicameral parliaments legislation is only effected when both houses pass the same Act).

Figure 10:

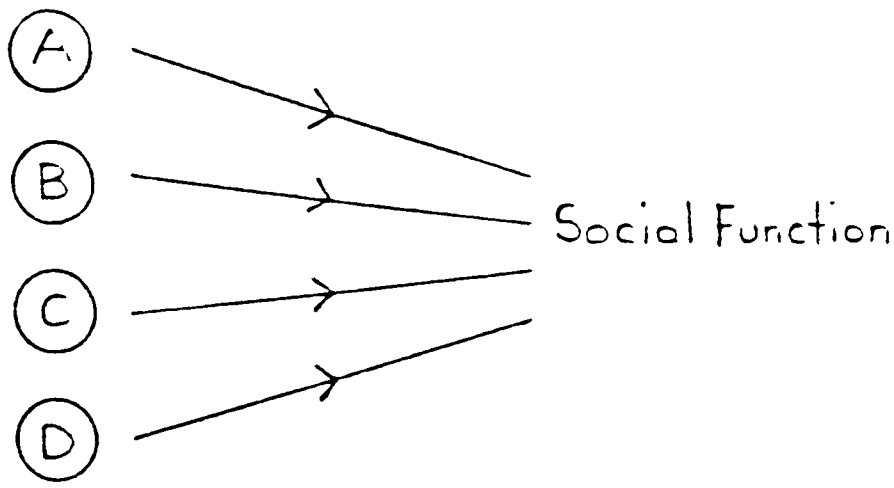


Functional convergence[57] occurs when several institutions have the same effect on the same subject - each institution would individually have some effect but that effect is reinforced by the effect of other institutions. This is particularly important in the many cases where the effects of the institutions are individually less than sufficient to fulfill the requisite function, but collectively more than sufficient to do so (e.g. economic stimulation by central bank and treasury).

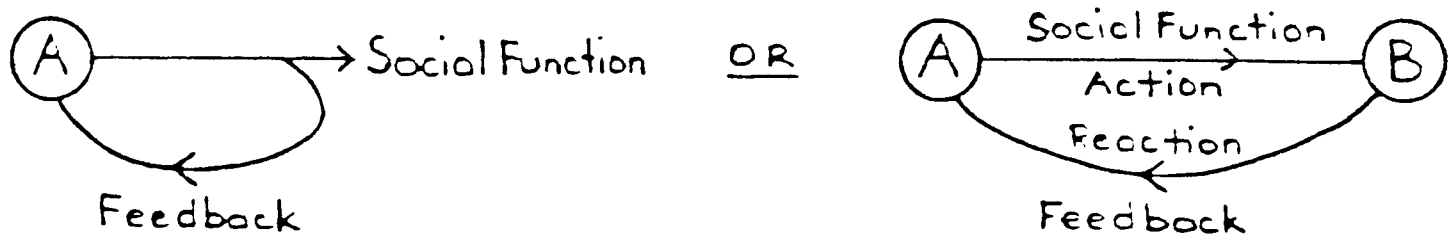
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56 Also called "joint causation" TLP p. 50.
57 Or "cocausation" TLP p. 50.

Figure 11:



One feature which crops up in the structure of virtually every systems theory is feedback.[58] If one institution acts in the performance of its social function it will frequently in turn be affected by its own action, either because it takes notice of its own actions (e.g. the bench remembers how he decided a similar case the week before), or because those affected by the institution's action react to it (e.g. those affected by new legislation put pressure on MPs to have it repealed or modified). Either type of feedback is likely to affect future performance of that institution.

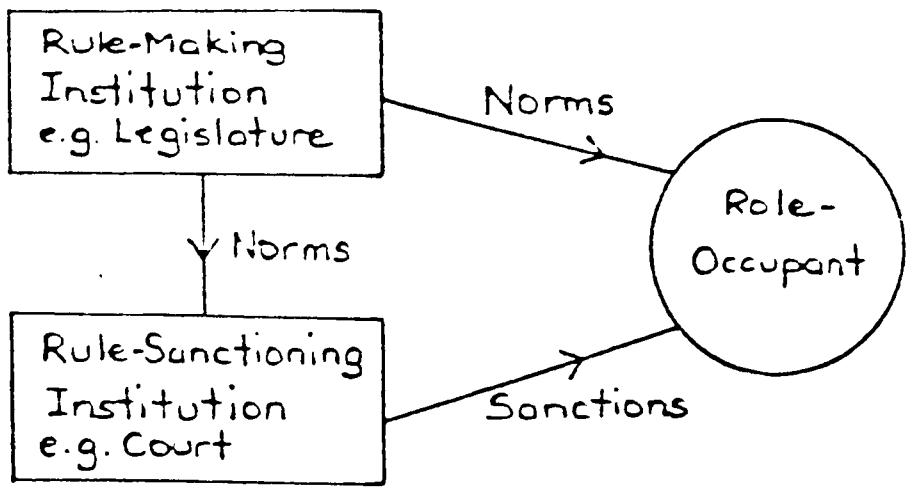


Most theories considered here have converging functional structures with elements of complementary functions, functional chains and feedback. Chambliss and Siedman offer a partial model of legal system structure in such terms.[59] They see rule-making and rule-sanctioning institutions jointly affecting the behaviour of various role-occupants (including both officials in other institutions and private citizens). Rule-making institutions create norms which appeal to role-occupants and which rule-sanctioning institutions enforce.

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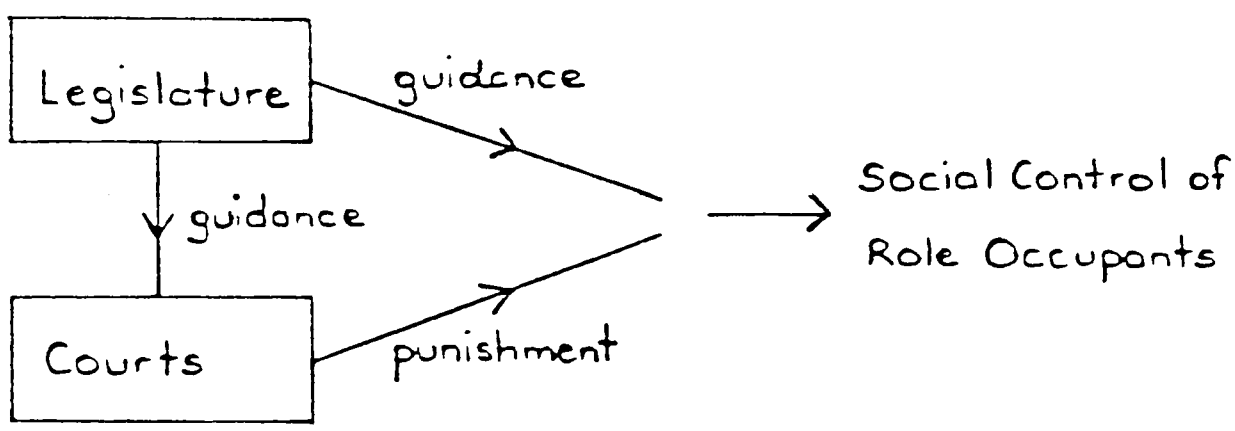
58 E.g. LSS, TLP p. 42.
59 LOP p. 11.

Figure 13:



The function of the former is to provide guidance and that of the latter is to provide deterrence to potential deviants and punishment for actual deviant-role occupants. Thus a functional representation of the legal structure, following the form of Fig. 8, would be as follows:

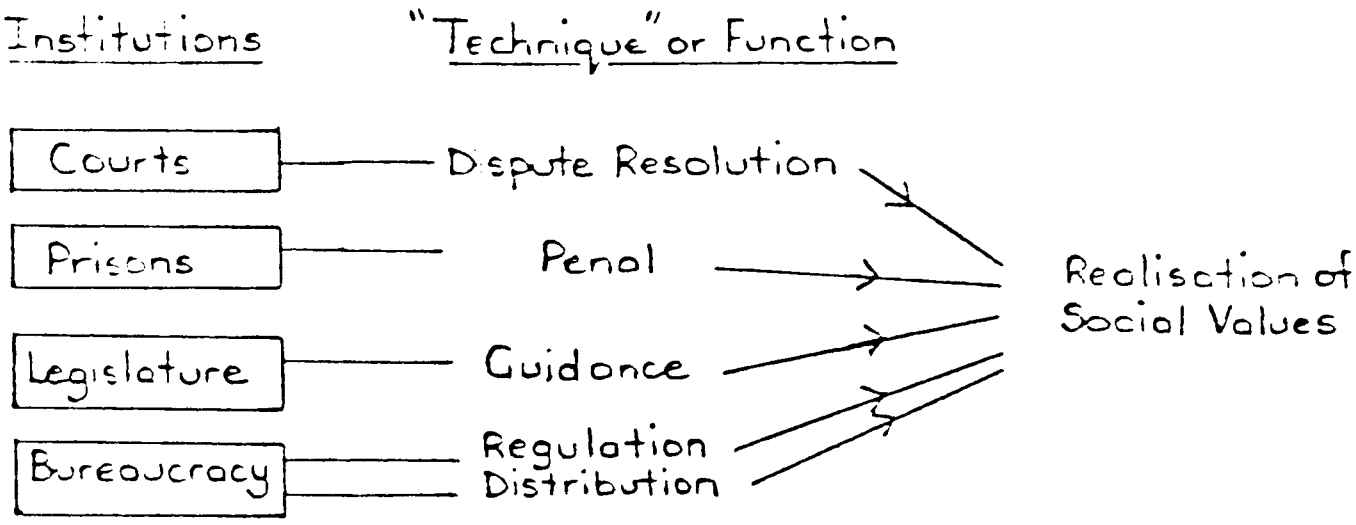
Figure 14



This structure is based on converging functions but incorporates a chain (legislature - court - role-occupant). It could be expanded to include other institutions which sociological theorists see as legal by ascribing to them some of the other supposed sub-functions of law. For instance, the five "legal techniques", which Summers finds law using in conjunction to achieve various goals, could be ascribed to various institutions (although Summers himself would not do so[60]).

60 LM&S p. 127.

Figure 15



This structure can ultimately be extended to include most of the functions that have been suggested for law. These functions can be reduced to nine and can each be attached to one or two legal institutions.[61] (Although there may be variations from one social system to another as to which institution performs which functions).

(i) "Dispute resolution"[62] - dealing with disputes both by imposing settlements on parties who bring them to the courts, and by the effect this preparedness has on others who may settle for fear of the costs involved in this process. This is usually seen as a court function although most disputes are settled by the parties themselves or by their law firms.

(ii) "Reinforcement"[63] of existing practices within the community by framing rules that equate to those practices and by providing the means for their "facilitation"[64]. This approximates to Bohannen's notion of "reinstitutionalisation" of practices from other institutions.[65] This is also largely a court function too.

(iii) "Change in existing practices".[66] This is largely a legislative function.

(iv) "Guidance" or "education"[67] - providing standards for people to

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61 Some even hope to establish one-to-one correspondence between institutions and functions O&D Ch. 2.
62 LM&S p. 127.
63 LSS p. 55.
64 Summers LM&S p. 127.
65 9 IESS p. 73.
66 Schur Law and Society p. 75ff.
67 LOP p. 9.

follow by making statements of desirable conduct. These standards also provide guidance for the other institutions in the performance of their own functions. This is largely a function of the legislature.

(v) "Regulation".[68] This involves more detailed administrative control of various private institutions and is performed by various parts of the bureaucracy.

(vi) Participation by the state in social and economic affairs. This is achieved by the bureaucracy and statutory bodies.

(vii) Punishment. This provides vengeance against perceived wrongdoers and through that reinforcement of existing social values [69] (presumably also helping to provide a "sense of justice"[70]). This is achieved by penal institutions, although it is one of the functions of courts to specify on whom and on how much such vengeance shall be enacted.

(viii) Maintaining social peace[71] and preventing outbreaks of violence. This incorporates some of the more restricted meanings of "social control".[72] It is achieved by the police preventing deviations from the social norms and penal institutions removing some potential offenders from social interaction and deterring others.

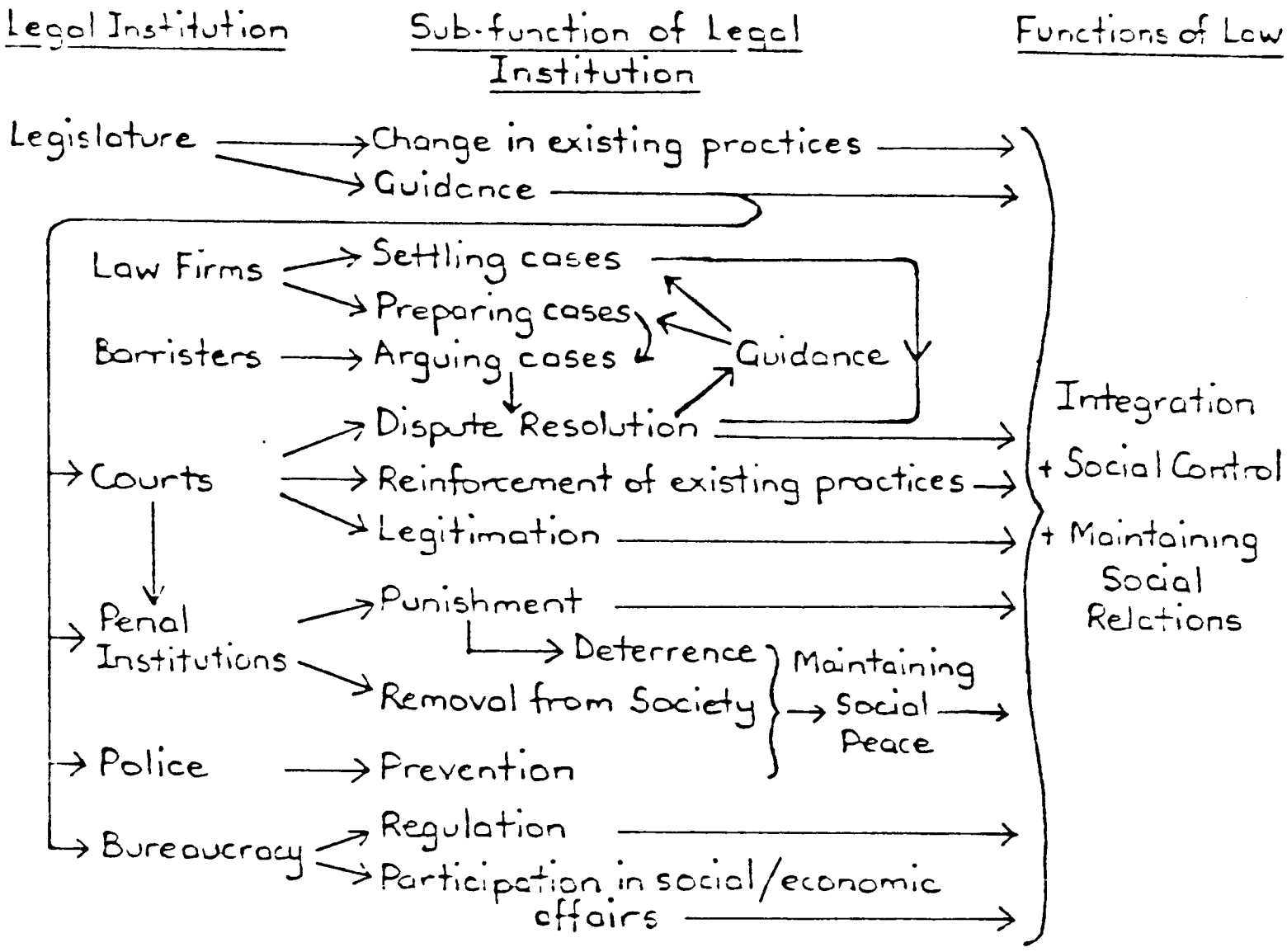
(ix) Legitimation of existing social institutions - supposedly achieved by courts.[73]

The way these sub-functions of legal institutions jointly act to provide law's overall social function and also relate to each other could be partially represented by Fig. 16. This is the closest to an internal structure of law that sociological theory can provide - it may be conveniently labelled structure II.

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68 Summers LM&S p. 127.
69 Durkheim The Division of Labour in Society p. 108.
70 LSS p. 60.
71 Used in preference to the more common phrase "social order" which is rejected for its overtones of social system, §4.12.
72 E.g. OLI p. 96.
73 LSS p. 58.

Figure 16: Structure of the Legal Sub-System



Some say that in addition to performing its social functions of integration and helping other institutions to perform their functions, the legal system "needs" to maintain itself just as the social system does.[74] Somebody, something, or some institution must perform the same functions for law (pattern-maintenance, goal-pursuance, adaptation and integration), as the four social sub-systems perform for society as a whole. This provides a secondary set of sub-functions to fulfil. Law schools and law firms may be seen as socialising legal officials; law reform commissions, legislatures and courts may provide new goals, and so on. However several of these functions may be provided by institutions outside law[75] as part of the mutually supportive interdependent functioning of social sub-systems. A structure built from these sub-functions would not be the structure _of_ the legal sub-system and would include non-legal institutions. Where these secondary sub-functions _were_ provided by legal institutions, extra lines could be added to the structure. But they would

74 Parsons in Evan (ed.) _Law and Sociology_ p. 58, Evan _SLSS_ p. 32, Selznick _ST (1)_ p. 309.
75 See Fig. 4.

not substantially alter the systematic structure illustrated and the success or failure of that structure as a description of law will depend on the actual performance of the above-mentioned institutional sub-functions and legal functions. So, for diagrammatic simplicity, secondary sub-functions will not be added.

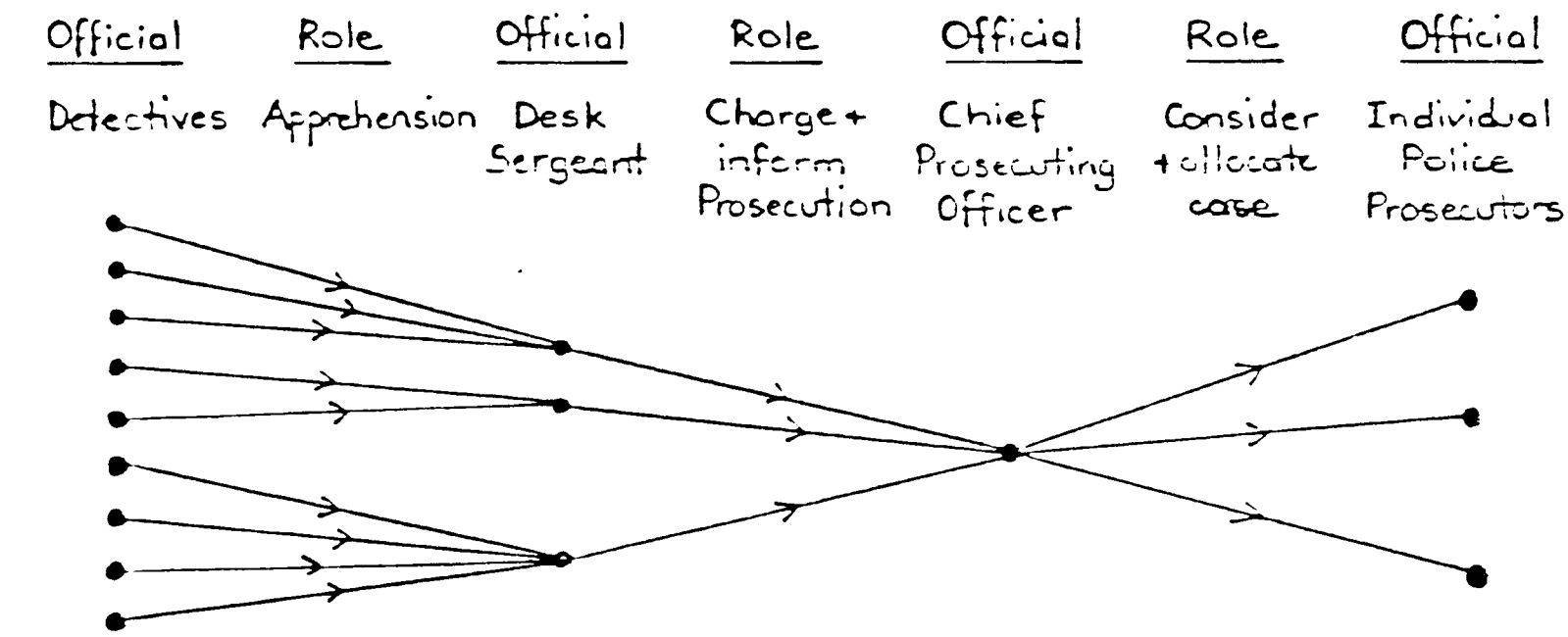
The third level of social structure for the social theorist to map is the intra-institutional structure[76] of legal institutions. This may be called structure III. Sociological theorists tend to see legal institutions as sub-systems of the legal system, as "system of roles"[77] which attach to various positions in the institution. These roles are micro-functions for individuals just as legal institutions had sub-functions and the legal system as a whole had macro-level social functions. The structures of these systems of roles are fairly similar to the structure of higher level systems - the roles are so related that their performance by the role-occupants fulfils the functions of the legal institution within the legal system (as well as the sub-functions of adaptation, integration, etc. that every system, sub-system or, in this case, sub-sub-system "needs" to fulfil to preserve itself). This is partly achieved by structures of converging and complementary functions - the joint performance of similar roles by those in contact with other institutions or the public (e.g. the resolution of hundreds of individual disputes by individual judges means that the courts perform their function of dispute resolution.) But it is also achieved by the arrangement of roles into chains of responsibility so that the role of one official is to respond to the role-performance of another official. These chains of roles will often be arranged hierarchically into superior roles which involve the issuing of orders or guidelines and inferior roles which require the role occupants to follow them. For instance, it is the role of superior court judges to decide cases before them and it is the role of lower court judges to use such decisions in deciding their own cases. But

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76 Or, as Evan optimistically calls it, "design" SLSS p. 297.
77 Twining 58 Cornell LR 275, 291. See also Salaman CIO p. 129, EvanSLSS p. 241.

the chain will not necessarily pass from superior to inferior or vice versa. Sometimes it will pass between equals with different functions - as when a detective sergeant having arrested a man hands responsibility for him to the desk sergeant who decides whether and with what to charge him. Similarly the structure will not necessarily be pyramidal in form. The chains of roles may at one point connect one official to many and then from many to one. A prosecutor's role may involve receiving cases from many different policemen and farming them out to many different police prosecutors. This could lead us to depict part of a system of roles within the police force as follows:

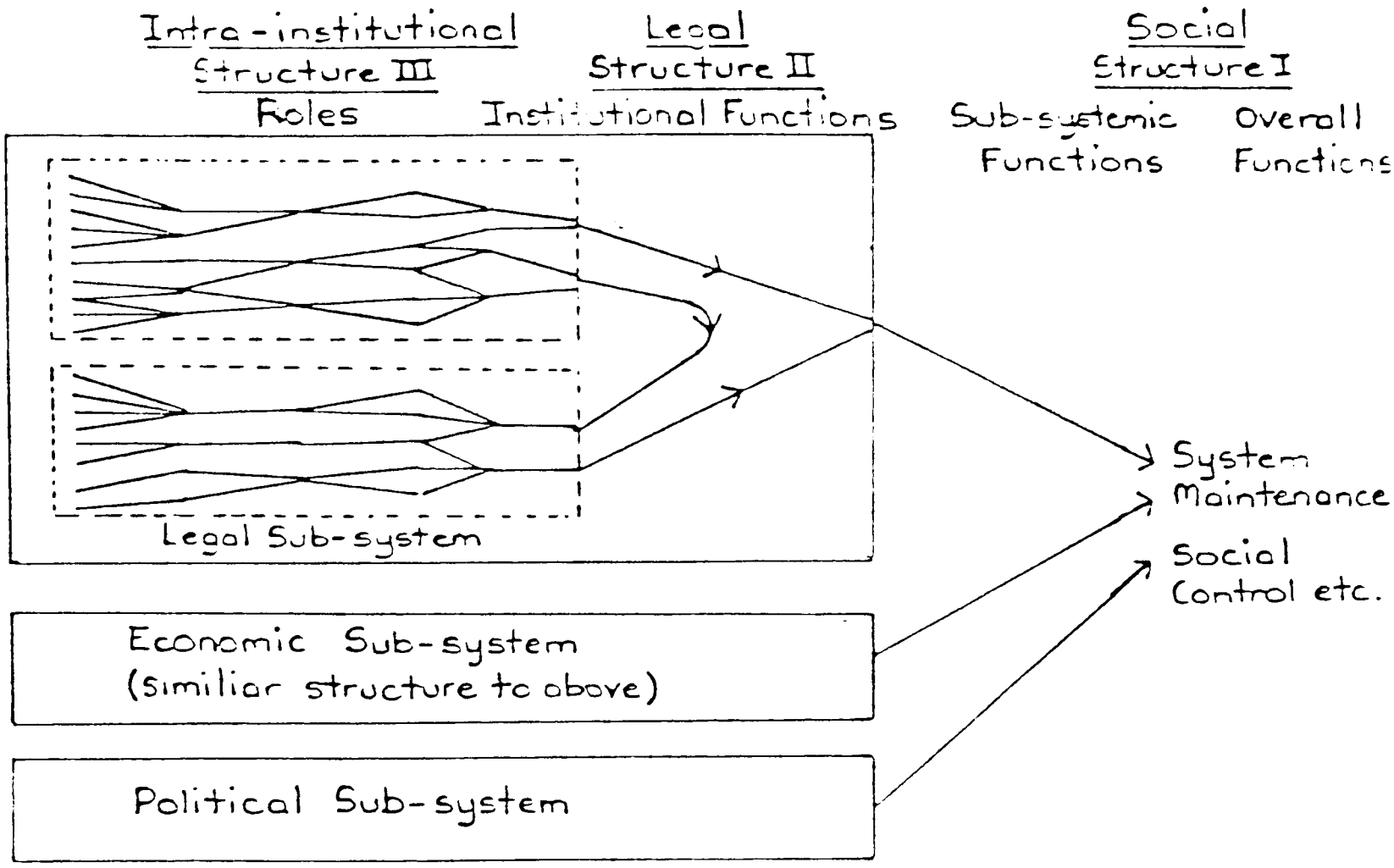
Figure 17



Whatever pattern structure III forms, it involves the interrelation of individual roles that jointly achieve the sub-functions of the relevant institution.

Putting these three levels of structure together, we see an overall system. At each level several sub-functions are jointly performed so as to fulfil the appropriate function achieved at the next level.

Figure 18



4.8: SOME VARIATIONS

The functions that law is supposed to fulfil and hence what gives it its unity will depend on the system to which it is supposed to belong. Three types of interactive social systems can be identified, each of which flavour the functions perceived for law.

Homeostatic Social Systems

In "homeostatic"[78] or self-regulatory systems like Parsons', all the sub-systems function together to resist externally induced change and keep the system as it is. As D'Amato puts it:

> "the system is so organised that each person working within it - legislators, judges, clerks, lawyers, litigants, policemen, bureaucrats - does of his own accord what is necessary for the success of the system."[79]

Such a model is sometimes called an "equilibrium" model but this is a confusion of analogies;[80] equilibrium is a state to which something returns naturally because in that state there is maximum disorder (entropy) and minimum potential energy. Homeostasis is where a high energy, ordered state is maintained by negative feedback, changes are

78 ISP Ch. 4.
79 14 W Ont LR 172, 202.
80 Buckley Sociology and Modern Systems Theory p. 14.

actively resisted by providing a countervailing force, as in mammalian temperature control.

The analogy is usually carried further. Negative feedback only works to maintain mammalian temperatures within a certain range of fluctuation. If a mammal is in an extremely hot or cold environment, the negative feedback organs (sub-systems) of skin, blood supply etc. cannot cope, the body temperature rises or falls below that range. Negative feedback then ceases and the temperature spirals to either a hot or cold "thermal death". This is called "positive feedback". After changes are experienced which are too great for it to handle, the organism actually aids in its own destruction by adding to, rather than subtracting from the effects, of the external stimulus. Parsons and Chalmers-Johnson[81] analogised to social systems. They cope with change to a certain point and then rapidly disintegrate into social disorder and revolution.

Such a view of the social system affects the functions of law. Law becomes a system to prevent change, and reflects and reinforces existing values, power relations and interests, resisting changes to them until law goes under with the rest of the social system.

Minimally Adaptive Social Systems

Others see the social system changing itself in response to external stimulus, but only to the minimum degree necessary.[82] In most circumstances, it resists change just as strongly as homeostatic systems. But in the face of an environment changing too much for it to deal with, adapts itself by changing its values, norms, roles and the structure of the relations of sub-systems within it if need be. The system is better protected and more permanent because of this flexibility - it enjoys "ultra-stability".[83]

The functions of law in such a system are threefold - the defence of pre-existing values (involving all the functions claimed for homeostatic systems), change of existing practices where necessary, and making these

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81 Revolutionary Change.
82 ISP p. 107, LOP p. 157, Vago Law and Society p. 1.
83 Cadwaller 65 Am J of Soc 154.

as consistent as possible with the values with which they had previously conflicted.

Developmental Social Systems

A third image of the social system involves a more vigorous kind of adaptation. It sees society constantly developing, with all the sub-systems changing together.[84] The system serves to keep them in step. Law's function is especially important in this, matching the actions of the law to the current social balance of power, e.g. Stone's view that changes in business and trade union law reflected changes in the economy and the growing power of unions.[85]

These variations alter the overall effect of the social system - from system maintenance, to system adaptation, to system development. They change the social functions of law and thereby alter the wholeness factor for the legal system. Consequentially they change the structure of law from the micro-functions of legal roles to the sub-functions of legal institutions so that they can jointly fulfil law's variously conceived social functions. But the structure of these variant systems still follows the same form outlined in the last two sections - role-performances jointly fulfil institutional sub-functions which jointly fulfil social functions.

4.9: CRITICISMS - RELATIONS

The time now comes to pose the same question as was posed for positivist and content theories in the last two chapters: from the social observer's point of view can law usefully be seen as systematically ordered in the way outlined above (i.e. do the elements exist, are they related into a structure to form a whole and does this whole include most of what the social observer regards as law) ? Unlike some positivist and content theorists there is rarely any doubt that sociological theorists adopt a social observer's point of view (§4.2). There are also far fewer conceptual problems posed by the claimed existence of the sociological

84 LOP p. 158.
85 SD ch. 7.

elements and relations than by positivist notions of norm/rule and validity. If the elements are actions and the relations are causal, then the theorists are merely including in their system statements about what people do and the effect their doings have on each other. Even roles and role-linkages are merely combinations of alleged facts about the attitudes and actions of individuals.

The relative lack of conceptual problems is more than compensated by an avalanche of practical ones. Officials have beliefs, they act, and those acts have effects - the difficulty is in finding a system in them. It is even harder to find a system in the actions and beliefs of institutions full of people than in the verbal creations of their officials.

We have seen the problems in finding consensually held values, norms and role-expectations which were supposed to be the elements of Parsons' vertical structure. The elements of the horizontal system, the behaviour of role-occupants, cause no such problems but the postulated relations between them do. Two types of relations are usually relied on - pure authority relations and information flows. There is no doubt that the actions of legal actors affect other legal actors and that they are linked to each other by a mass of power relations and social relations of other kinds. But relations of pure legitimate authority are rare and most power relations involve a mixture, of which legitimate authority is only a part (§§2.5 & 5.2).

The alternative treatment of relations as information flows is especially dubious. When we consider claimed legal systems it is often the very lack of information exchange that strikes us. Of the Australian Criminal Justice system, presumably a part of any postulated Australian legal system, Biles has said:

> "decisions by the management of law enforcement, courts and corrections, are made independently of each other and communication between the three elements takes place infrequently or is non-existent."[86]

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86 Crime and Justice in Australia p. 10.

This is especially damaging to one of the most popular structural features in systems theory - "feedback". Sometimes this indicates little more than an acknowledgement that all interactions are two-way and few relations are such that an actor can completely disregard the reactions of those toward whom his actions are directed. But having realised that the action of one person produces a reaction of which the initial actor takes note and having called it "feedback", many convince themselves that this is the negative feedback built into mammalian temperature control mechanisms and some computer systems. It is assumed that this feedback moderates fluctuations in each actor's output. There are certainly many such examples, as when unpopular or ineffective legislation is passed and then modified after observation of its operation, or when a non-conformist is pounced upon by the police. But there are many cases where a legislator is blind to the unpopularity or ineffectiveness of his legislation (i.e. the feedback loop is not completed) or a non-conformist is not noticed (i.e. the feedback loop does not even begin) so that the actor, having enjoyed his perceived self-importance and deviant pleasure respectively, continues to do so more frequently. Evan goes so far as to say that the inability to develop feedback loops is one of the great failures of law.[87]

Even where the feedback loops are complete, people are selective about the information they use. They may disregard, or even take comfort from, unfavourable reaction from those they dislike (e.g. if militant students complain about education cuts it may strengthen the conviction of Tory ministers that they are on the right course). They may also completely misread the effects (e.g. a judge who sentences more severely to deter a rising crime rate may exacerbate it by sending convicts to prison where they will be socialised into a criminal sub-culture. The judge then sees the crime rate rising and is convinced that even tougher sentencing is required).

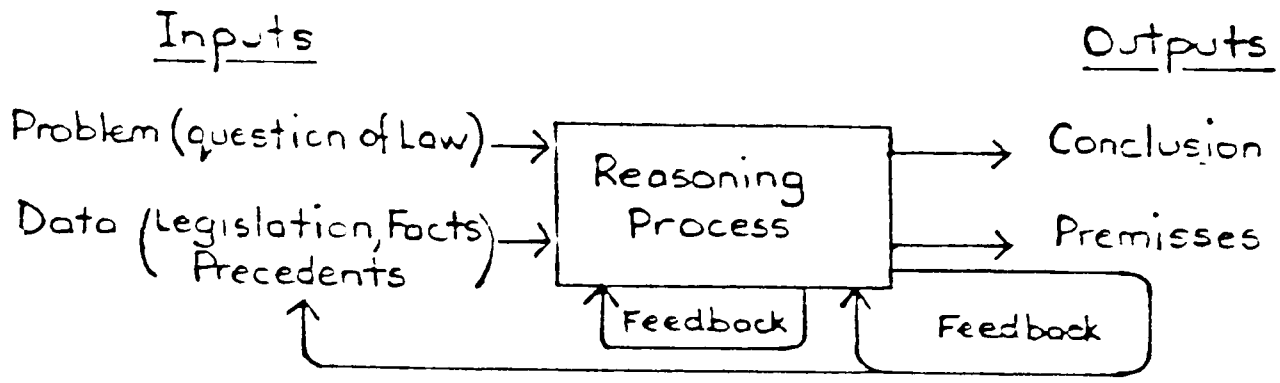
Sometimes the feedback observed resembles that which occurs in those

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87 SLSS p. 140.

other man-made inventions - audio systems. Eckhoff has a neat diagram of the relations involved in judicial decision-making.[88]

Figure 19:



A judge's previous decisions are fed back into his decision-making inputs as reasons. This is the classic case of positive feedback[89] - the same message is fed back and is amplified until it is loud, meaningless and incomprehensible. Or possibly it resembles a short circuit: the judge says it; the next time the question arises he says it again because he has said it before, irrespective of the actual consequences of the original decision. In fact the judge possibly will get some inkling of the consequences at the same time as he has his previous decision quoted at himself - this may well amount to conflicting feedback if the consequences were not as he had imagined.

The real lesson to be learned that actors are dimly or otherwise aware of previous decisions, their effects and the reactions to them, and that this awareness leads some to modify and others to amplify their previous behaviour. By highlighting the notion of feedback, systems theorists have not demonstrated the self-regulatory nature of a legal system, but the massive and contradictory inter-connected web of effects in a complex society.

Despite the problems in finding the claimed relations between the elements of sociological legal systems, the greatest difficulties are provided by the kind of structures and wholeness factors they claim to find. These depend on those central features of sociological

88 22 Scandanavian Studies in Law 39, 44.
89 Which Evan admits is endemic in law, SLSS p. 141.

jurisprudence - its notions of function and institution, and it is to these that we now turn.

4.10: FUNCTION

As already seen, function is central to legal sociology's systematic description of law. The social function of law serves to unify law into a whole and the interdependent functions of legal officials and institutions serve to form its structure. At each level of structure the various elements are doubly linked by functions. The functions combine to produce an overall function for the social system, the legal sub-system or the legal institution. These functions are also frequently directed toward other sub-systems. To accept that the legal system as described exists, the social observer must satisfy himself that the legal system and legal institutions really do fulfil their allocated functions, i.e. at each level the institutions, sub-systems and individuals really do indulge in the relevant activity and have the claimed effects. To see law as systematic the social observer must accept that most of the phenomena of law can be incorporated within this system.

Our social observer will quickly discover the enormous range of activities performed by those individuals and institutions and the various effects that they have both singly and in combination. His attention will be drawn to this fact by the variety of functions claimed for legal institutions, the legal system and society as a whole. At the structure I level, the social system is seen variously as providing change, stability and survival (§4.8). At the structure II level, courts are given the functions of creating rules, resolving disputes, providing a sense of justice, promoting economic efficiency, reinforcing existing social relations and encouraging new ones. Penal institutions are seen as serving the functions of punishment, rehabilitation, deterrence and isolation of deviants (§4.7). At the structure III level, lawyers are alternatively given the roles of advising their clients as to the nature of the law and advising their clients how to get around it. All these claims are partially substantiated. Legal institutions have a perplexing

variety of effects. So even if a system can be made by linking some of the effects into a functionalist system, many will be left out, and it would be a mistake for the social observer to try to understand law in terms of such a system.

The multiplicity of functions does more than testify to the diversity of legal phenomena. Many of these functions are partially or wholely contradictory.[90] Of course, some of the theorists postulating contradictory functions may be wrong But when roles, institutions and groups of institutions like law are observed, they do appear to achieve opposite effects in many cases. Indeed for every function listed in §4.7 either that or another legal institution seems to fulfil the opposite. Even where there is agreement by theorists and participants on the function of an institution (and hence on the sort of action to be performed and the effects to be achieved by the personnel of that institution), it may be the opposite that is actually achieved. This is due largely to the nature of legal institutions (see next section), the role of outside forces in law[91] and an ignorance of, and the mistakes we make about, the likely effects of our intended actions.[92]

At the very highest level there is the controversy over whether the social system should be seen as maintaining itself in the face of environmental changes or adapting to them. This fundamentally affects the role of the legal system as an instrument (or at least a reflector) of change or an implacable opponent of it. There are problems for both sides of the argument. Homeostatic theories find it hard to argue that changes occur only when the system disintegrates in runaway revolutionary positive feedback. But adaptive systems face their own problems. If the theory is one of minimal adaptation to avoid disaster, we are inclined to ask how did the officials know that the eleventh hour had come ? May not some

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90 I.e. both functions cannot be fulfilled simultaneously.

91 These impinge at every point in the "legal system". But they act with different strengths and in varying directions on different officials - pushing them into actions that produce contradictory effects.

92 Due to inadequate or misinterpreted feedback (§4.9) and the prevalence of unintended effects in law and society as complicated as ours (§5.4).

think that change is necessary and others think that it is not, producing conflicting actions that point in opposite directions ? If the theory is one of adaptation to keep pace with social change - then how do the officials pick the trends ? May not different judges simultaneously think society is moving in different directions and thereby be making contradictory adjustments ? And even when legislators or judges act in concert, they are not always successful. Law and society are characterised by simultaneous moves to initiate and bolster change on the one hand and resist change and reinforce existing practices on the other. This spreads throughout law, producing conflicting effects and partial functioning, even nonfunctioning, of legal institutions and officials.

At the level of legal institutions the same theoretical and practical discrepancies in their claimed functions are found. Most writers emphasise the function of dispute and conflict resolution for courts: yet there is tension between this and the function of "rule creation".[93] Out-of-court settlement of disputes is encouraged: yet this makes guidance in the form of definitive legal pronouncements rarer. Furthermore, far from reducing conflict, some laws express and exacerbate the conflict in the community. Conflicting parties come to law not to resolve their disputes but to win them. If the law produces a clear solution by legislative or judicial determination, and if the losing side accepts it, then the dispute has been resolved and conflict has been reduced. But if the losing party feels unfairly dealt with, its resentment may lead to other, possibly more severe, conflicts. This is a danger especially inherent in litigation which makes complete victory possible for one party, discouraging the compromises he might otherwise have made in order to reach a settlement. Where the losing side does not accept the legislation or judicial decision, then the original conflict continues - with the stakes raised significantly by the potential use of legal sanctions[94] - and another of law's functions, legitimation, is

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93 Galanter 9 Law & Soc R 95.
94 Schur op.cit. p. 68.

compromised. Where the law does not provide a clear solution, it may settle only the immediate conflict and stimulate many more. Finally, where an attempt is made to fulfil law's "rechannelling of conduct" function by changing the law, many serious disputes may be created where previously there had been few - arousing the indignation of the interests prejudiced by the decision and a flurry of litigation to sort out the details.[95]

The Economic School of Law[96] sees the function of courts as the promotion of economic efficiency rather than the promotion of welfare goals that conflict with such efficiency. Other theorists list participation of the state in social and economic affairs as a function of law. And, for Dworkin, judicial functions exclude promotion of any goals. In fact, judicial decisions have had the intention and the effect (though not necessarily in tandem) of furthering many goals so achieving many, contradictory, effects.[97]

The police are generally ascribed the functions of catching law breakers and maintaining social peace (in the sense of preventing outbreaks of violence). Yet at times these two functions may conflict, as in the 1981 Bristol. Even when there is no such apparent conflict police actions may frustrate rather than aid the fulfilment of each function. Sometimes the violence is initiated and performed by the police and peace only returns when the police stop using their truncheons. Sometimes such violence prevents greater violence, so that they have at least partially fulfilled their function. But at other times, the violence used is greater than that averted. This could be ascribed to a miscalculation.

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95 Brown v Board of Education (1954) 347 U.S. 483 and Donoghue v Stevenson (1932) A.C. 562 provide classic examples of this (as they seem to of everything else).

96 Esp. Posner Economic Analysis of Law.

97 In the Economic School's view of law, the legislature is portrayed as constantly interfering with the economically sound judicial decisions and pursuing welfare goals. Even though we are told that these goals are never achieved their pursuit is criticised because their ultimate effect is to produce economic inefficiency. Thus the image presented of the "legal system" by the Economic School is of two institutions whose actions have directly conflicting effects - something close to the antithesis of a sociological legal system.

Less charitably, it could be ascribed to a conflicting function, of crushing protest, or intimidating oppressed classes, which is pursued even at the cost of increasing the level of violence in the community.[98] Whatever the explanation, the function of maintaining social peace is prejudiced rather than fulfilled. Similarly, in attempting to catch law-breakers police frequently become law-breakers themselves; and because they do not "catch" themselves fail to pursue that social function.

One defence for those who point out that the actual effects of law contradict its claimed functions is to say that ascribing a function to law implies that it has more effects in that direction than in the opposite one, e.g. that courts resolve more disputes than they create, or that policemen reduce the levels of violence and the numbers of law-breakers more than they add to them. However, the positive effects do not cancel out the negative effects; it cannot be ignored that law is producing <u>both</u> positive and negative effects, especially as these effects fall on different people. Legal institutions resolve disputes between some and aggravate conflict between others, reduce the amount of violence suffered by some and increase that suffered by others, reinforce and facilitate the practices of some while attempting to change the practices of others, and regulate the disapproved practices of some while punishing the disapproved practices of others.

If law as a whole, or a legal institution in particular, achieves both a set of effects and a contrary set of effects, it is very hard to describe the production of <u>either</u> as its function. In such circumstances the ascription of a function implies a choice in which some of the actions and effects of law are singled out and others are ignored.

This puts at risk the <u>wholeness</u> factor sociological systems theory gives to the legal system (and to legal institutions). That which supposedly gives it its unity is the fact that it performs a certain function. Yet it also does the opposite. This is aggravated by the fact that most of the actions and effects that are ascribed to law and legal

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98 Turk <u>SLSS</u> p. 113.

institutions as functions are also performed and produced by other social institutions. Not only do the institutions and "sub-systems" have effects other than those assigned, but other institutions and sub-systems have those same effects. The value of seeing institutions and sub-systems as wholes on the basis of what they are supposed to achieve is rendered highly dubious because of the poor fit between institution and effect found in practice.

The choice of effects necessary to see legal institutions in terms of functions is even more disastrous for the structure of legal systems. The structure relates only some of the effects of those institutions into a system. Other theorists can single out other effects of those institutions and form them into a system. Thus Parsons builds a system from the legitimate authority relations within society, and Quinney[99] builds a system from the coercive relations. Parsons makes the function of law the integration of currently held common values, thus ignoring the new values that law promotes and conflict over those values. Quinney makes the function of law the securing of ruling-class interests by the forceful control of the working class, so he highlights those parts of law which discriminate against the working class and poorer sections of the community and especially those which involve the use of force against them. To do so he must ignore or play down crimes against the person which seem to have no class basis, and which are as strictly enforced in countries whose leaders profess Marxist beliefs.[100]

Dahrendorf noted how such selectivity allowed consensus theorists and conflict theorists to paint quite different pictures of society. Each of them drew on observed social fact about the society. He concluded that society was "Janus-faced"[101] presenting different faces to different theorists. But rather than concluding that both are true, surely the social observer will conclude that both are inadequate. He will observe

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99 Critique of Legal Order.

100 Their Marxism may be questioned but Marxists rarely criticise them for having such laws.

101 1958 J of Conflict Resolution 170.

that institutions achieve both the effects listed and their opposite, as well as others beside.

Even if there were to be a choice between conflicting images of social system on what basis would it be made ? Is it to be a choice based on a point of view - but if so whose ? It is certainly not the social observer's for he observes all the effects of law and legal institutions. It is certainly not the point of view of those involved because it was the controversiality and limited range of observation of such positions that led us to seek a description of law from the social observer's viewpoint in the first place. In the end such a choice can only be a value one. The function of society, or law, or a legal institution, becomes not a description of what it does and the effects it has, but what the writer wants it to do and achieve. Desired effects become functions, undesired effects become malfunctions. Braybrooke poses the question of when malfunctioning becomes non-functioning.[102] But long before that, it becomes important for the social observer to note that the so called system is producing both the effects labelled "functions" and the other effects labelled "malfunctions", and that this tendency lies in the very "structural" inter-relationships which are claimed by sociological systems theory to be producing the functions.

A system built up of the interlocking of such ideal or desired functions is not a system in existence in the real world, but an ideal or desired system. It is a blueprint for society rather than a drawing of it. As such it is much simpler and more systematic. No doubt if Parsons, or[103] Bredemeier had the job of designing a society, if he could sweep away the products of two thousand generations of communal living, this is just the sort of society he would create, with everyone having his proper place, performing his proper role with sub-systems performing their proper functions. It would be the product of one man, just as a computer system may be to the design of one man and as such the parts can all be made to

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102 Braybrooke in Law Under Stress p. 56.

103 Despite their apparent theoretical agreements it is doubtful that in committee they could agree on a single design.

work towards his own ends. But societies and legal systems are not the product of one man at one time. They are the products of many men at different times with often quite conflicting values and ends. Social and legal systems such as those found in Parsons and Bredemeier look good on paper. That is just as well, because it is only on paper and not among the tumult of social life that they may be found.

4.11 INSTITUTIONS

Legal institutions are central to the structure of sociological legal systems (§4.7). Their internal structure of roles is supposed to enable the institution to perform its allotted functions and it is the simultaneous performance of these functions that jointly produces the functions of law. However when we examined the actual effects achieved by various institutions we found them almost as varied as those of law, and just as contradictory. This section argues that much of the reason for this is to be found in the very nature of institutions and their interaction. This makes them unlikely to have well defined functions, and unlikely to produce jointly the effects expected of the legal sub-system.

Institutions are very important in understanding society, they interact with each other and with the public and have very significant effects on them. The number of persons and resources involved in them usually make the effects of institutions much stronger than those of individuals. Functionalists tend to think that these effects are coordinated and directed towards the achievement of institutional goals or functions. Those who are also sociological content theorists would claim that the consensus over the values to be achieved by that institution is shared by its members. Those who are not sociological content theorists could claim a tendency to greater convergence of values among members of institutions because of the constant and intensive contact they have with each other,[104] and because they can choose which institutions to

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104 Parsons and Schils STh p.71.

join.[105] Where the convergence of values is insufficient to produce actions in conformity to the functional requirements of the institution, the power of senior officials to control and coordinate the actions of subordinates supposedly is.

There is certainly a tendency for values to converge within institutions (as well as several contrary tendencies). However, one of the factors tending towards such convergence makes the institution less likely to achieve <u>any</u> allotted social function: the existence of "institutional interests" - the interest individuals have in the strength of the institution which enhances their current or hoped for position within it. These interests are formed as soon as the institution comes into existence, whether it is deliberately created or merely emerges.

In cases of deliberate creation, institutions are planned and often given specific functions. Indeed, at times of Federation or Independence, <u>all</u> the institutions of a legal system may be so created - offering a chance to build from a blueprint and achieve the elusive interdependently functioning system (although the blueprint will rarely be by one man and will be full of the political compromises engendered by constitutional conventions; so even if it is a deliberate product, it is the product of different minds at cross-purposes). But once the institutions are created and the positions are filled, the individuals who fill them perceive their own interests in their positions and act, at least in part, to enhance them. This helps explain the enormous growth in power of the federal institutions that were created by agreement among the states in both USA and Australia - they were given resources by the states to fulfil the functions allotted to them but they sought more even, or perhaps especially, at the expense of their creators. This is not to say that an institution set up for a particular purpose immediately goes off on its own self-seeking tangent. But institutional interests are a factor in decisions of the institution's officials, so that many actions may primarily further institutional interests while doing little to fulfil the

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105 Cf. the lack of choice in which society they are to live.

institutional function, and may indeed contradict it. Chambliss and Siedman provide an example by citing as a "function" of legal institutions, "providing work for lawyers".[106] Even while fulfilling their "functions" they do so in as complicated a manner as possible, in a language so far removed from ordinary discourse that lawyers' work is increased. Procedures are insisted upon that do nothing to fulfil the originally envisaged fuctions of law but do significantly enhance the scope for legal work. Finally some of the actions which create work for lawyers actually derogate from the functions of legal institutions. The complexities of legal language serve to weaken the effect law can have in guiding the public; the expense of engaging lawyers in all this work minimises the use of legal solutions in dispute-resolution and breeds a sense of grievance which offends the sense of justice and legitimacy which it is law's supposed function to foster.

Many institutions are not founded with a specific or uncontested purpose in mind. These will not slot easily into any functionalist system. Many are not founded at all. They just grow up from practices that become entrenched, expanded and then institutionalised. As we saw in §2.7, primitive law may involve nothing more than the practice of taking disputes to the rest of the tribe at a particular time. But even then, embryonic institutional interests are emerging. The individuals who are most influential in the campfire discussions enjoy having their opinion so highly regarded and wish to have disputes settled in this way on a continuing basis. As specialisation and formalisation takes place, these individuals and their successors spend more of their time and effort in these embryonic legal activities and their interest in the respect and rewards conceded to them because of their involvement grows accordingly.

Such observations are not limited to left-wing critics. They are implicit in the theory of functionalism itself. Parsons sees every system as having four "needs" that must be fulfilled in order for it to preserve itself - pattern maintenance, integration, goal pursuance and adaptation.

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106 LOP p. 9.

It is the function of various sub-systems to meet these needs. Yet these sub-systems and the institutions within them are themselves systems with the same "needs" for preservation. It is not difficult to imagine conflicts between the function of institutional self-preservation and performance of the institution's social function in the sense that pursuing the latter would - because of resultant controversy, vested interests or a clash with other social institutions - endanger the former. It is hardly a startling suggestion that the social function might miss out ! Indeed, the fortunes of many institutions may be enhanced if they do very little because the less that is done the fewer outside interests that are threatened. This challenges the claim by many organisational theorists that institutions are inherently goal-directed.[107] As Crozier has acknowledged, institutions need not fulfil their goals in order to remain in existence.[108] It might be added that they might not remain in existence if they tried too hard to fulfil their social function.

Institutions generate more than institutional interests. The prime interest of their members is in enhancing the prestige and rewards that go with their current or hoped-for position. This is generally served if the institution is strong, but it is also served by the enhancement of their position vis-à-vis other positions within the institution. For some this will be achieved if the institution is actually weakened leading to a loss of confidence in (and by) the institution's "top" personnel, giving more scope for subordinates. In general, the interests of the top personnel lie in being able to direct the institution's personnel and resources to the achievement of their own goals; and the interests of lower officials lie in maintaining their autonomy from central control and in "empire-building" - expanding the area in which they have control or, at least, discretion.[109] Thus the institution will generate conflicting

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107 Gouldner Modern Sociology p. 484, BP p. 6, Blau ASS p. 240.
108 Which happens when they become "bureaucratised" BP p. 187
109 BP p. 156.

interests which make the smooth interdependent functioning of complementary roles highly problematic.

Of course, members of institutions pursue goals other than purely selfish ones. In the case of a deliberately founded institution, the founder (or key personnel of the founding institution) may hope to recruit those whose principal desire is to serve the institution's set sociological function. Institutions that just grow up may owe their start to the public respect felt for the values held by the persons around whom those institutions grow - their advice may be sought or listened to because of the values the adviser lives by.

But once the institution is founded or the position arises, successors to the initial occupants must be "recruited". Newcomers will not necessarily share the founder's goals or a desire to use their positions to fulfil the socio-legal function of the law, or even to further the institutional and role-interests pursued by their predecessors. In some organisations there may be recruiting officers who seek to ensure that they do. But recruiting practices often become comparatively formalised and seek to find those with qualities that are not specific to those with appropriate value commitments (such as formal qualifications or success at a previous job). Choosing someone who seeks to pursue the socio-legal functions of the institution may be put in the "too hard" basket - too hard to determine what the person's goals are, too hard to guess whether they will remain constant, too hard to determine what the functions of the institutions really are and too hard to determine what the occupant of the vacant position should strive for in order to further that function.[110] Newcomers will join because joining fits their own purposes.[111] Those purposes will vary from a desire to fulfil the institution's social function (as seen by the systems theorist), through hopes of pure self-aggrandisement, to a desire to "take over" the institution and redirect its activities. Although any extreme

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110 Pace Blau and Schoenheur who see the power of appointment as one of the bases of a new form of "organisational power". PAO pp. 12-19.
111 WG p. 169.

is possible, most will join for a mixture of (mainly) self-advancement and a vague desire to help fulfil even vaguer personal notions of the institution's functions. These functions may be those assigned to the institution by a different theoretical legal system or they may be those that are set in isolation from any such theory. In fact the non-selfish goals that members pursue will reflect the ebb and flow of ideas both inside and outside the institution about what that institution's functions are.[112] Just as there is debate in the community about those functions so there will be contradictory goals pursued,[113] and some or all of these will contradict the socio-legal function set by the theorists. Once the individual joins the institution his ideas may be modified by contact with other members. But to the extent that the views of existing members vary from one sub-group to another,[114] the conflicting views of those who see law as a legal system leads to law being non-systematic (this parallels the problems caused to positivist and content systems by the different systems of rules and principles which different judges would create if they tried). At best, the differences will muffle and dilute the fulfilment of that function but more often they render the institution incapable of achieving it.

Thus it is not in the nature of institutions in general, or legal institutions in particular, to produce a convergence of values or interests among its members that will promote the performance of the institutions allotted function. What then of the other hope of the functionalists - the ability of senior officials to control the role-behaviour of subordinates ? "Compliance" and "Organisation" theory have devoted considerable speculation and research to this question. Baum[115] summarises the conditions under which the activities of lower officials will further the goals set by their superiors. The goals need to be clearly stated and communicated, and either the subordinates must

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112 As it is sometimes suggested the goals of corporations have come to include more "social" ones. Elliott CIO p. 90.
113 Gross 20 Br J of Sociology 278.
114 Roy PAO p. 205.
115 SLSS p. 302.

want to comply (because it accords with their interests, values or beliefs - including beliefs in the authority of the person setting the goals), or superior officials must be able to monitor deviations and either coerce or persuade the subordinates to comply. On most of these counts legal institutions are weak. The functions of law are highly controversial (supra) and the goals to be achieved by individual laws are frequently (though not always) obscure - legislation is frequently the result of compromise and judicial decision-making tends to eschew the setting and pursuit of goals. The language in which they are communicated is, though usually intelligible to lawyers, impenetrable for the many non-legally-trained officials through whom many of the effects law has on citizens must be achieved. These officials do not read Acts and judgements. If they hear of them at all, they must rely on the often distorted interpretations provided by others. The values of subordinates frequently differ from their superiors, and from each other. The interests of subordinate officials lie in maximising their autonomy and resisting control by their superiors. Monitoring of subordinates' actions is a form of feedback that is notoriously weak. Where deviations can be monitored, superior officials in legal institutions do have several persuasive and even coercive resources with which to encourage compliance (§6.3). Nevertheless in such conflicts not all the resources are held by superior officials. Indeed one of the characteristics of all institutions is that resources have to be placed in the hands of subordinates so that they may achieve their allotted goals, but that those resources will often be just as useful in conflict with superior officials who set these goals. These resources (and others that the subordinate officials bring to the job, such as skill and knowledge for which they may have been appointed in the first place)[116] are used in an effort to acquire other resources to further strengthen positions against superiors, subordinates and equals. The strength of subordinate officials vis-à-vis their superiors is considerable in law. Many minor officials, like police,

116 Froman SLSS p. 326.

magistrates and prison officials, through whom the ultimate functions of legal institutions must be fulfilled, have a considerable degree of autonomy and considerable resources of knowledge and skill so as to carve out a large area of discretionary control. Where subordinates have this kind of independence and power, many theorists have come to see the role they are set and the role they play as the result of "negotiation"[117] or "bargaining".[118] Where this is the case, the roles played are those that reflect the interests, values and resources of the bargainers rather than the "functions" of the institution which can so easily be the first to be ditched in the compromises that result.

Some acknowledge these sorts of factors, but either try to play down their importance,[119] or to incorporate them within their organisational theory as an "informal" rather than the "formal" structure. But the institution is not made of two separate structures; it is an amalgam of both[120] in which the informal element may well compromise the achievement of institutional functions by the formal structure.

Even where members of institutions do attempt faithfully to perform their role within it, institutional functions may still not be fulfilled. Where institutions set both goals for subordinate officials and means by which they are supposed to achieve them then, unless the institution is well-designed, it is quite possible that the set means are inadequate for achieving the goal. In such cases an official dedicated to fulfilling his role has to choose between rejecting the goals, the means, or both - between ritualism, innovation and withdrawal.[121] Where an official chooses the first (not unknown in legal institutions !), he fails to achieve the effects required of his role and to that extent diminishes his institution's fulfilment of its function.

Even in well-designed systems, in which goals are faithfully followed

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117 Brittan SAL p. 170.
118 BP p. 163.
119 BP p. 167.
120 Selznick (ST (1) p. 307). But, his description of the amalgam as a "structure" is highly dubious.
121 Merton 18 Social Forces 560, BP p. 179.

and limits on means are either conveniently absent or congruent with the goals set for subordinates, the system's ultimate goal may not be achieved. Consider the example of a corporation whose overall "function" is to make profits, to which end interlocking sub-functions are delegated to personnel, production and marketing managers. Each zealously pursues his sub-function so that industrial harmony is achieved although the cost in wages and conditions is high, production is maximised (not least because of the former achievement) even though costs are high, and sales are maximised even though margins are low. Despite the successful achievement of all the sub-functions, the overall function may not be fulfilled at all. Such situations are not only possible but common in modern business, helping to explain the tendency for it apparently to seek goals other than profits once these have reached a level sufficient to placate shareholders.[122] Given the nature of their origins and growth, it is doubtful that legal institutions are sufficiently well-designed to even suffer this problem. The ultimate goals are too vague and controversial, and roles are set by processes other than the furtherance of goals. But it is a salutary lesson that even the most vigorous and conscientious performance of institutional roles will not necessarily help the fulfilment of an institution's function.

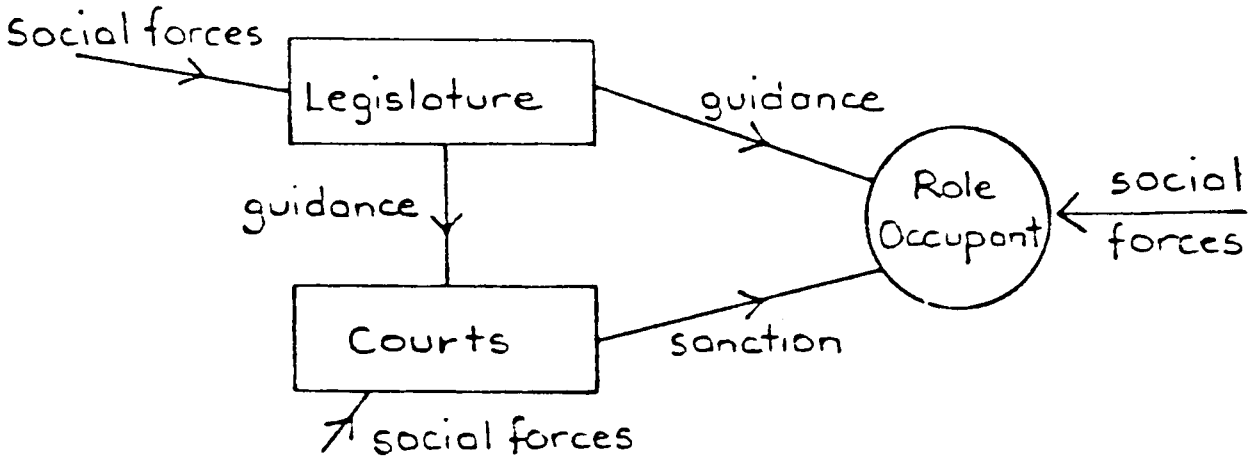
The strength of an institution is also the source of its weakness as a medium for the fulfilment of functions. The action of one person can, through chains of intra-institutional relations, affect the actions of many other members (the basis of the functionalists claimed hierarchical structure of roles). This means that the institution can have effects far beyond those that any individual could achieve - that is its strength. But these chains of relations must go through several people whose interests, perceptions and values vary and conflict. Institutions must act through the human material of which they are made, rather than through any abstract set of goals or functions which may not be agreed, and roles that may be actively resisted. Furthermore, each actor along the chain is

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122 Elliot CIO p. 90.

subject to other forces affecting his own action leading to action that is different from that expected by the initiator of the chain of effects. This reflects the fact that the influence of social forces is not confined to law or legal institutions as a whole, but acts on each individual actor within them.[123] The existence of these social forces is studied by many legal sociologists and is sometimes noted by system theorists, e.g. Chambliss and Siedman.

Figure 20:[124]



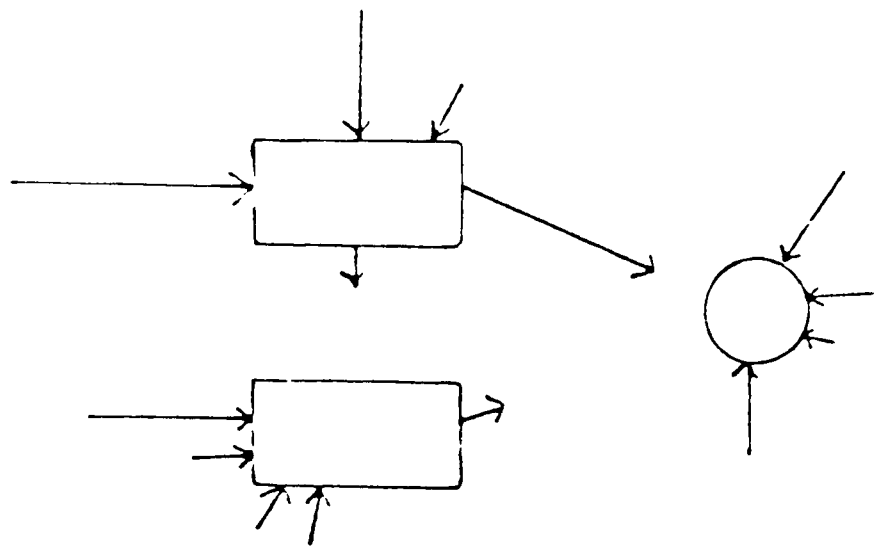
There is a chain of actions passing from legislature to court to role-occupant (albeit one that passes through several institutions, but the fact that these chains have to pass through different institutions makes it even more difficult to be effective). This pictures the sociological functions as the predominant ones and the "other social forces" as little pinpricks that may affect them. But there is no guarantee that intra-legal forces will be the strongest ones. If the length of arrows are adjusted to reflect their strength (rather than demonstrating the supposed institutional system of interdependent parts) the diagram might look like this:

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123 It is the whole individual upon whom these forces act, not merely the individual in his role (Selznick ST (1) p. 302). Thus forces which affect the individual outside the institution may also affect his behaviour within it.

124 LOP p. 11.

Figure 21:



Where is the system now ? Who is to say that the sanction will be imposed along the lines the legislature supplies ? Who is to say that the sanction will be applied to the same role-occupant or indeed to anyone ? The structure may look more like Fig. 22 or Fig. 23.

Figure 22: Normative guidance and sanction applied to different role occupants

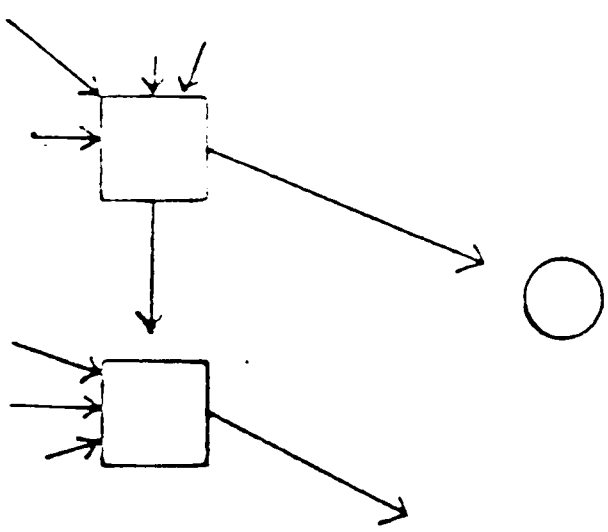
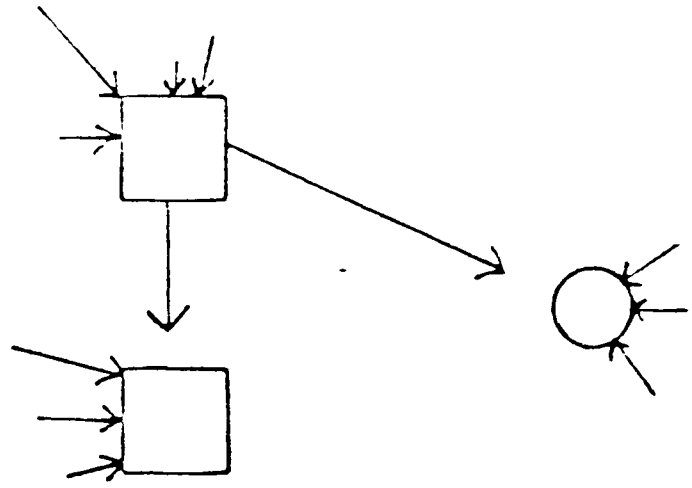


Figure 23: No sanctions applied



However, these diagrams are far too simple. The number of persons involved in the chains through which the effects of law are ultimately achieved are far longer. Some inkling is given by considering how many members of legal institutions would be involved between the passing of a law and the gaoling of a convict (or in Hart's example of the chain of relations between the constiution and a by-law). Over such a long chain even mere pinpricks would have a dulling, distorting, perhaps even nullifying effect.[125] This helps explain the traditionally-noted discrepancy between "law in the books" and "law in action" which Trubek

125 Thus S.F. Moore regards the output of law as the result of institutional processes rather than institutional purpose. LAP p. 6.

has called "a fact of modern societies".[126] The law in the books is, in effect, the action of high officials like judges and legislators, the law in action involves the action of lower officials who bring the effect of law to the people. The discrepancy is caused by conflict between higher and lower officials, and by the chain of relations that are involved before the former can affect the latter.

We can now see why legal institutions do not appear to perform the functions allotted to them.

(i) the different functions allotted to institutions by members and non-members alike and the difficulties in recruiting only those who agree on function;

(ii) the conflicting nature of those functions;

(iii) the unintended consequences that frustrate intentional action in pursuit of functions;

(iv) the institutional interests common to all members;

(v) the role-interests of individual members;

(vi) the existence of subgroups within institutions;

(vii) the role of outside forces on members' individual actions; and

(viii) the resultant difficulties for superiors to set and control the role-behaviour of subordinates.

Thus are rejected both structure III and the claimed consequences of its existence, the sub-functions which legal institutions fulfil in Structure II.

When we consider the nature of institutions and the nature of their interrelationship with other institutions we see that even if insititutions did perform a single function they would be unlikely to "cog together"[127] with other institutions to fulfil the social functions of law - i.e. their inter-relations would be unlikely to conform to Structure II.

The interaction of institutions with which we are most familiar is of

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126 11 Law & Soc R 529, 543.

127 JP p. 234.

institutions in conflict. Yet the various theoretical structures all require institutions to follow the lead of others, respond in certain ways to the actions of other institutions, cooperate in the achievement of a joint effect, or reinforce the activity of other institutions. All of these require a limitation of institutional autonomy and a restriction of their field of operation. Yet institutional interests require the very opposite. The maximisation of autonomy and an extension of the area in which the institution may autonomously operate lead institutions to, at best, avoid contact and, at worst, conflict.[128] It is ironic that the list of institutions made by most functionalists is a slightly expanded version of Montesquieu's. But Montesquieu would be horrified. He did not suggest giving different resources and jobs to various legal institutions, so that they could immediately leap into bed in joyous union for a common purpose. In proposing the separation Montesquieu was relying on the conflict and lack of cooperation between institutions whose institutional interests and goals (if any) conflict rather than cog together. It is strange that the most prominent English-speaking functionalist, Parsons, should propose his system in, and applying to, the United States. That country was most influenced by Montesquieu in its constitutional formation, and is the most perfect realisation of his ideals with each institution so perfectly and complementarily frustrating each other.

The examples of such conflict are legion: courts and prosecutors over plea bargaining, courts and the executive over judicial control of ministerial discretion, courts and police over interviewing practices, treasury and other departments over anything to do with money, and local and central government over everything the former tries to do.

Llewelyn imagined legal institutions "cogging together". A more apt metaphor would be the grating of gears. The appearance of cooperation and interdependent functioning arises only when most of the teeth have been stripped from the gears. At this point the wheels of the various

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128 This leads to competition between institutions to cover the same area of social life: Gouldner Modern Sociology p. 497.

institutions can whir happily, and without friction, because they do not touch. They are either totally ineffective or achieve their effects on society independent of the rest. Only when one of the remaining teeth touch, providing momentary, partial and largely ineffective contact between institutions, does the automobile of law[129] as a whole lurch unpredictably in one direction or another. But this is never for long enough to gain any social momentum.

The various ways legal institutions are supposed to cog together are all seriously damaged by the tendencies of institutions to go their own way so that they either provide no mutual support in achieving their functions or openly conflict.

This destroys convergent structures (i.e. where several institutions are supposed to produce the same effect on the same person or institution). The first problem is that the effects represented by the various functions are not confined to the institutions to which those functions are allotted. This is partly because officials of various institutions pursuing their own conception of their institution's goals will attempt to "take on" the functions of other institutions and try to have the same kinds of effects on others, and partly because of the many effects that any entity as complex as an institution will have. Indeed the whole exercise of characterising institutions on the basis of function has been widely criticised.[130] Even where different institutions perform single functions they will not necessarily influence the same citizen in the same direction. The legislature may guide him into activity that the police do not tolerate; punishment may not accord closely with the behaviour the legislature was trying to discourage; and the courts' dispute-resolution procedure may indicate opportunities to the citizen for acting contrary to the guidance of the legislature. Sometimes the

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129 A change from the tired "Ship of State" analogies.

130 E.g. Hirst (OLI p. 44) and Verdun-Jones (1 Dalhousie LJ 441, 452) who describe the allotment of functions as a priori which is borne out by the origins of Bredemeier's system (Parsons said some sub-system had to perform the integrative function and Bredemeier suggested that it must be law).

relevant institution may affect different people or influence none at all. Consequently the incidence of converging effects by different institutions will be rare.

Where convergence structures suffer a diminution of effect by the failure of one of the institutions to perform its function, "complementary" structures require the performance of both functions before any effect can be achieved. The conflicting and non-cooperative nature of institutional interaction will be completely fatal here.

Finally, where the structure lies in the chains of functions involving a sequence of institutions it suffers the same problems as intra-institutional chains - aggravated by the greater strength of institutional interests and extent of institutional autonomy.

Consequently the social observer would have to reject the image of law as a structure of legal institutions having complementary and converging effects. He would see it incorporating several institutions having a large number of discrete, sometimes conflicting, largely unrelated, and largely uncoordinated effects on individuals and institutions.

The last three sections have shown that from the social observer's point of view there is no legal system as outlined by mainstream legal sociologists. This is mainly due to the failure to establish either a satisfactory structure of relations or a wholeness factor. This is in turn largely because of their reliance on a highly dubious view of institutions as constructed in such a way that they can, and do, perform allotted functions and can cooperate to perform allotted joint functions.

4.12: ORDER

Some theorists propose systematic models of law and society, not just as a means of understanding the society in which we live, but as a means of explaining how social life can exist at all. The spectre that haunts them is a Hobbesian "state of nature" - a war of all against all; where life would be "solitary, poor, nasty, brutish and short".[131] The

131 Leviathan Ch. 13.

question they ask is how have we been spared this living hell,[132] why are we sitting talking philosophy rather than beating each other around the head with clubs. This is the "problem of order".

Such a question refers to order in a sense quite different from that used so far. Although there can be an almost infinite number of meanings the different writers find in words, their uses of "order" cluster around two basic notions. "Order" in one sense refers to systems where "everything is in its proper place and performs its proper function",[133] where there is "orderliness". In another sense "order" is merely "an absence of insurrection, riot, turbulence, unruliness or crimes of violence",[134] what I shall call "social peace".

Thus the "problem of order" involves questioning how it is that there is order in the second sense (social peace). Most of the solutions consist of claims that society is at least partly characterised by order in the first sense (orderliness). Indeed it would seem that many think that this is the only solution. This provides the impetus for a search for order - a search for some orderly feature of society that explains its relative peacefulness.

Such a search is specifically undertaken by Parsons who was the first to put the Hobbesian problem of order in this empirical form (Hobbes posed a normative question - why should men obey the commands of a sovereign ?). He offers his vertically and horizontally structured social system as the answer. Many social control theorists have a similar solution. They see social control as a function, perhaps the function of a "social control system" (which includes law and usually most of society). That system is put forward as the kind of social orderliness that provides social control, limiting violence and thus maintaining order in the sense of social peace.

Curiously, Marxists seem to be asking the same kind of question and

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132 Although the "sparing" is relative; Friedenberg in Wolff (ed.) The Rule of Law (1971).
133 OED defn 13b.
134 OED defn 19.

giving the same kind of answer - they just get less joy from it! Why is it that capitalist society has survived the challenges of war, depression and The Communist Manifesto ? The answers given by Marxist systems theorists are that, through an ordered system of repressive and/or ideological institutions, the dominant class has had defence in depth against the challenges Marx foresaw.[135]

Despite the popularity of offering social order in the sense of system as an answer to the problem of social order in the sense of social peace, there is no necessity in the relation. Such necessity will occur only where the two concepts of social order have been so confused as to reduce the question to a tautology.[136] There could be many answers to the question of why we do not beat each other's brains out. Only some of them involve social systems. However it is strange that we should be so concerned to ask ourselves why we do not have a state of affairs that never occurred. Hobbes calls his eternal war the "state of nature" yet man in his "natural" state was a tribal animal, having descended from tribal primates. Indeed the very image of "war" is provided by an activity characteristic of socialised man and intensified with greater degrees of social organisation, for it is because of group loyalties that men kill and are killed by those whom he has no interest in fighting.

Nevertheless, the only way of assuring the doubters is to provide a non-systematic explanation of social peace - this will be done in §5.12 as part of the outline of a non-systematic theory of society.

4.13 CONCLUSION

The last three chapters have examined many writers who claimed to find system in law and sometimes the whole of society as well. But all of them failed to provide a systematic description of law that a social observer could accept. Many of the reasons for this were peculiar to the individual theories. But there was one reason common to all. Each involved a system created in one mind to tie together the achievements of

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135 E.g. Althuser ISAs.
136 As Wilkinson suggests Parsons does SAL p. 78.

many minds into a system, whether for the derivation of rules, the content of principles or the functions of institutions. Creating such a system may be a considerable intellectual feat. It may also be of great value to the individual - allowing a judge to derive his judgments in the same way or relate their contents, or providing an ideal society to which a politically-minded sociologist might strive. But this occurs only in one individual's mind and the minds of those he can convert and educate to use or pursue his system. Most of those involved in the activities or institutions sought to be systematised are untouched by this system. Most are not trying to build or enforce any system at all[137] and are just pursuing their normal day-to-day goals. It would be quite extraordinary if those actions conformed to the system by either good luck or good design (which, as there is no designer, is indeed the very height of good fortune). But, ironically, there is an even greater problem where they do attempt to realise systems, because those systems will tend to be different ones. Thus positivist systems theorists who see law in terms of a single system of authorising relations have the greatest difficulty with those who are using different sets of authorising relations. Dworkin has greatest difficulty with the variety in the systems of consistent principles that judges would use if they could and did create them. Finally sociological theories have to face the difficulty of those who see different functions and systems of functions for the institutions of law and society. Although each theorist creates or attempts to create a system of sorts in his mind this could not represent the range of activity produced by other minds. That activity could not be represented as systematic despite the fact that many were attempting to realise a system - indeed the attempts by so many to realise their own different systems is instrumental in making the overall result of their activity, law as we know it, unsystematic.

All systems are created initially in the mind of a man, an idea about

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137 Perhaps they have less time than legal theorists - perhaps they have more sense !

how the world is arranged - the problem with all these legal systems is that they have remained there. They are not, as Dewey put it, "worked over into the facts",[138] either by fitting them in the first place or by forcing them into the mould by purposive action of those in a position to do so. Consequently, the facts themselves cannot be regarded as systematically organised.[139]

Nevertheless, many insights can be salvaged from these theories and used in the construction of a non-systematic image of law and society. From the positivists can be taken the importance of sources - the fact that most, if not all, personnel involved in legal institutions take the actions of others as reasons for their own. From Dworkin can be taken the importance of the individuality of such official reaction to legal sources and the importance of their values in determining their content. From the content theorists in general we realise the importance of content so that we should not look merely at relationships between people (authoritative or otherwise) but relationships that involve specific directives and specific actions. Finally, from the legal sociologists we can take: (i) their insight into the importance of relations between officials rather than rules, (ii) their realisation that law must be seen as part of an overall social reality, and (iii) the use of individual actions and the relations between them as the basic constituents of social description.

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138 Entry on "System", Baddwin's Dictionary of Philosophy and Psychology.
139 Dewey notes the unacceptable alternative of ignoring the facts and "imposing system on them" (loc.cit.). Unfortunately many theorists do this, including Dworkin who uses exactly those words (DNB p. 57).

CHAPTER 5

SOCIETY WITHOUT ORDER

5.1 INTRODUCTION

In the preceding three chapters, several positivist content and sociological theories that attempt to picture law in systematic terms were examined and rejected. Criticisms of various systems theories are common enough. They are normally mounted as "clearing operations" to make room for the theorist to propound his own theory of legal system. It is not intended to follow this convention. This thesis does not maintain that the above theories have looked for the wrong kind of legal or social system but that they were wrong to look for system at all. It sees society as essentially disordered and unsystematic (in the sense that it cannot be satisfactorily understood from the social observer's point of view if seen in systematic or orderly terms, but that it can be comprehended only if the disorder within it is highlighted). Law, which consists of several institutions within society, is infected by this. In this chapter a sketch of society in non-systematic terms will be provided. It will start with the basic building blocks of society - the human elements and the social relations between them - rather than starting with a view of a legal or social system and distorting the elements and relations to fit into it. In the following chapter law will be pictured as a part of that sketch, constructed from the same building blocks, suffering the same centripetal and disorganising influences as society. Yet within that sketch will be recognised many of the insights of positivist, content and sociological theories of law which, stripped of the distortions involved in incorporating them into a theory of legal

system, will be singly more acceptable and collectively more compatible than in their original form.

This chapter spans the critical and constructive parts of this thesis. In arguing that society is disordered it provides one of the most important reasons why we should not expect law, a part of that society, to be systematic. Yet in arguing that despite this, society can still be comprehended and, in broad terms, described, we find a model for the non-systematic theory of law to replace the rejected systematic ones.

Naturally enough, a single chapter of a doctoral dissertation cannot amount to a treatise on social theory. It will sketch the key tenets of the theory appropriate to a non-systematic picture of law and society. In so doing it will draw on the views and insights of many writers, especially Marx, Weber and the lesser known Wrong, with small touches of many others. But as it varies from, and takes issue with, so much in each of these theories, it would be less of a help than a hindrance to link it to any of those names.

5.2 SOCIAL RELATIONS - POWER

Whatever else society comprises, whatever concepts, structures and entities with which the social theorist wishes to furnish his social world, it contains members of the species homo sapiens. But for a set of persons to be a society they must, in some way and at least to some extent, interact and be related. All social theories include some description of these "social" interactions and relations, although there is considerable diversity in categorisations and typologies. This diversity is related to descriptive convenience and the relations that the theorist regards as most important. The two most discussed are power and authority, so a precise conceptualisation of them provides a good starting point. I shall adopt, with some variations, Wrong's categorisation in which an overall concept of power encompasses authority and provides a set of ideal types that are very fruitful for the generation of descriptive hypotheses.

Wrong defines power as the "capacity of some person or persons to

produce intended and foreseen effects on others".[1] Power involves the capacity to produce, or probability of producing, effects rather than the actual production of effects. The latter amounts to an instance of the exercise of power. The distinction is important rather than the side to which the word "power" is allocated. The distinction could be put in the following terms. An exercise of power involves a social interaction in which effects are actually produced. Power, the capacity to produce these effects, is a social relation referring to the possibility or probability, pregnant within the positions of the power-holder and power-subject in society, that such interactions will occur.[2]

Wrong sees power as the capacity to produce effects intentionally (including the production of anticipated though undesired effects among exercises of power).[3] It is a social relation of which at least the power-holder is conscious. Wider definitions of power have been suggested, usually to take account of the fact that the powerful often affect others[4] in unconscious ways and may benefit from collective forces, social arrangements and norms.[5] There is definitely a place for concepts to describe such effects. But it is preferred to use separate concepts for them which can be usefully compared with and related to power, rather than encompassing them in an all-embracing concept of power which strays too far from its paradigm.

Wrong distinguishes various types of power on the basis of the manner in which the power-holder affects the power-subject.

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1 PFBU p. 2. Power is sometimes seen to include the ability to affect physical objects. These are not social relations unless they have effects on others (Arthur's ability to pull the sword from the stone was only social in that others took this as a sign of personal or legitimate authority).

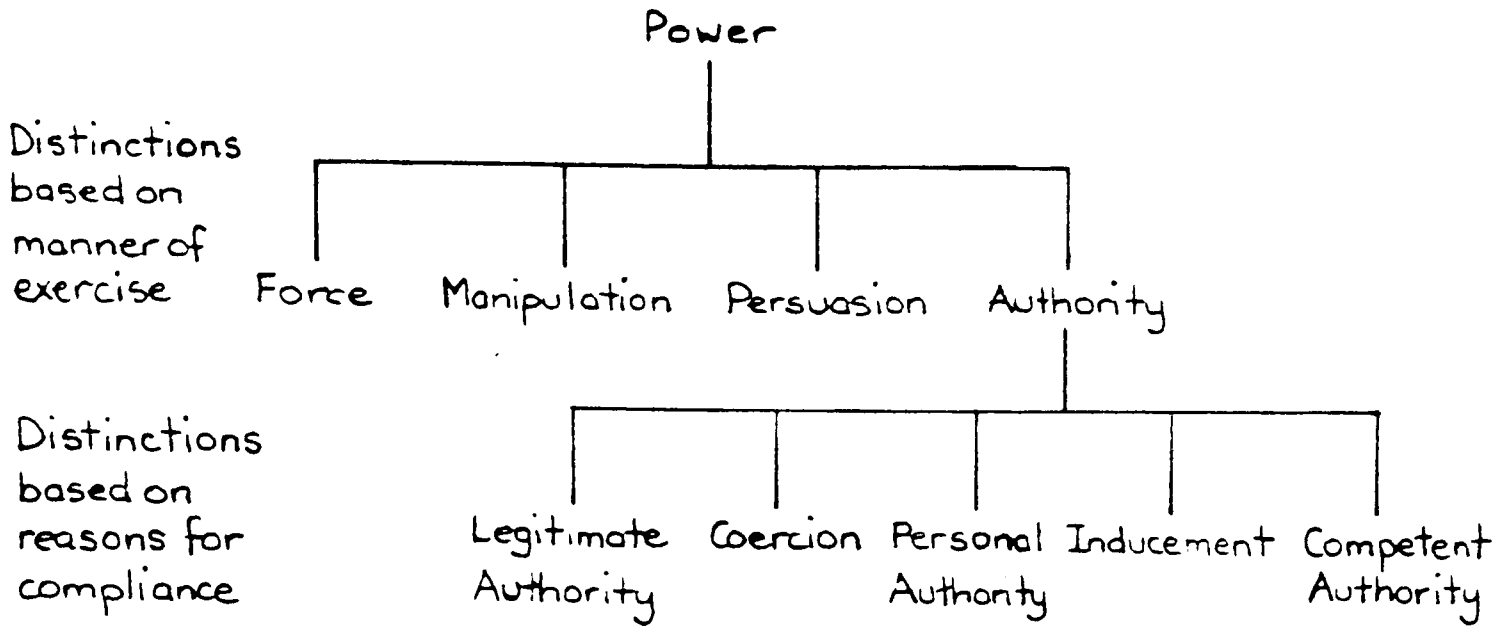
2 Weber in STh p. 56.

3 Effectively including reckless production of effects, cf. Lukes who effectively includes negligent production of effects, Power p. 56.

4 Oppenheim Dimensions of Freedom.

5 Lukes Power p. 22

Figure 1



Force is found where the power-subject's behaviour is changed by making it physically impossible for him to do something that he otherwise would have done. This may involve forcing him to do something, but force usually has a negative rather than positive impact on behaviour. This may be done by physical restraint (e.g. by physical confinement), by direct interference with the subject's thought processes (hypnosis, brain-washing and subliminal advertising), or by acting upon someone's environment (e.g. "sitting-in" to prevent an office functioning or confiscation of a printing press). Force is to be distinguished from the threat of force which operates in a psychological rather than a physical manner (through the choice of the power-subject to avoid unpleasant consequences).

In Manipulation a similar response is induced because the power-holder deliberately restricts or falsifies the information reaching the power-subject.

In Persuasion the power-subject chooses to act as the power-holder wishes because the latter's arguments appeal to the power-subject's own values.

Authority is found where the power-holder issues commands and the power-subject complies because of the source of the command (cf. persuasion in which the power-subject acts because of the content of the communication). Authority operates via the power-subject's beliefs about the power-holder (and the power-holder's likely actions) which the power-subject treats as reasons for action. Five types of authority are

distinguished on the basis of various beliefs that provide reasons for compliance:

(i) Inducement (the offer of rewards - both material and social).

(ii) Coercion (The issue of threats. If coercion is unsuccessful and the threat has to be carried out then force is exercised.)

(iii) Competent authority (the belief by the power-subject in the superior knowledge or skill of the power-holder).

(iv) Personal authority (the power-holder's personal significance to the power subject e.g. love, charisma).

(v) Legitimate authority (the power-subject acknowledges the power-holder's right to issue commands which he has an obligation to obey because of his normative beliefs). Wrong requires that these normative beliefs be shared by power-holder and power-subject. But it is not necessary that the power-holder and power-subject adhere to the same norm - indeed the problem with inter-personal variation in the meaning of norms would make that difficult. All that is necessary is that the power-subject holds a belief that makes compliance for him a matter of obligation rather than self-interest. It is not even necessary (though it is usually the case) that the power-holder believes his power to be legitimate.

Wrong makes the issuing of and obedience to commands the paradigmatic case of authority. However this treatment restricts the usefulness of the concept. Wrong has sketched one of the most significant kinds of social relations - where power-holders and power-subjects react in the manner desired by the power-holder because of beliefs they hold about him. Yet the actions of such power-holders do not usually, or perhaps even frequently, resemble commands. They may involve the intimation of a desire or belief that is held, the statement of a rule to be followed or merely the statement of a definition. They will not necessarily involve speech (there are many kinds of communication), or even an overt action (in the case of anticipatory reactions by the power-subject noted above). The response of the power-subject will also vary. Compliance with the

wishes of the power-holder may not only involve actions performed, but also factual and value-beliefs adopted.

Consequently, the conception of authority adopted in this thesis is the broader one cited in §2.5 - where the action of a person (or persons) intentionally affects the actions of others and the effect is achieved because of the beliefs the latter has about the former and his actions.

Resources. One of the consequences of the intentionality of power is that it distinguishes power, the probability that one person will affect the action of another from the "resources"[6] which make it possible.[7] (The actuality requires knowledge that the resources can be used and a willingness to so use them.[8])

Some resources are attributes of the power-holder - physical strength, intelligence, and knowledge. The first makes coercion possible, the last two persuasion. Other resources include the money and goods he controls which can serve as the basis for inducement. The power-subject's beliefs and perceptions of him can constitute other important resources. Reputation, social standing, charisma, popularity, belief in his legitimacy allow him to exercise personal, competent and legitimate authority. Beliefs that the power-holder possesses other categories of resources can themselves constitute resources e.g. the belief that someone can carry out a threat is as effective a basis for coercion as the actual ability.

Some of the most important resources involve the ability to exercise other forms of power - e.g. the ability to induce a third party (be he bully-boy or policeman) to harm the power-subject. Indeed, to be effective, some resources, like the control of money or goods, require power or other social relations.

Power-mixes. Power relations involve the ability to affect intentionally the actions of others. But the scale of those effects is

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6 Dahl Who Governs? p. 226.
7 PFBU p. 127.
8 Cf. Turk SLSS p. 108.

usually limited along one of three "dimensions":[9] extensiveness (the number of power-subjects), comprehensiveness (the areas of the power-subjects' activity that can be affected), intensiveness (how far the power-holder can affect the power-subject's behaviour). In addition, most forms of power entail costs.[10] Force is limited in all three dimensions, few persons can be affected at the one time and although very effective in preventing people from doing things, is of little use in securing positive action. Personal authority can be highly comprehensive and intensive, but except for some charismatic personalities is rarely very extensive. Coercion in large populations cannot be very comprehensive because of difficulties in detecting non-compliance. Legitimate authority is limited in all three dimensions by the necessity for the power-subject to hold congruent values but is not costly and has no detection problem.

However, the exercise of one form of power can be used to acquire other forms of power. An individual may induce another to act as his bully boy, someone who frequently persuades another may soon become regarded by the latter as a competent authority; and skilful use of propaganda (i.e. manipulation) may lead a population to think a government legitimate. Régimes which initially govern by force and coercion commonly come to be widely regarded as legitimate authorities. The extent and nature of this last transformation are subject to much dispute - some explanations involve claims that: the oppressed identify with their oppressors; the powerless rationalize that they want to do what they have to do and the power-holders exercise their power for popular ends or in a popular manner. The transformation may operate through other forms of power too - they may claim (or even possess!) competent authority as governors, they may use manipulation, they may induce support from some who feel the need to justify their loyalty.

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9 PFBU p. 14

10 If a power-holder is acting in rational self-interest then the benefits will presumably exceed the costs, and the power-holder's overall stock of resources will increase. But the resources expended and received will often be of different kinds so the exercise of power involves cashing-in one resource in order to acquire another (more desired) one.

Some combinations of power are particularly effective (e.g. manipulation and inducement: if the power-subject's expectations are lowered by propaganda, he can be readily induced to act according to the power-holder's wishes for a relatively low reward).

Where someone exercises a combination of power relations, different power-subjects will be affected for different reasons. Some might obey a command out of fear, others out of respect for the competence or personal qualities of the leader, others out of a belief that such a person's commands ought to be obeyed. Thus the greater the number, and especially heterogeneity, of people sought to be affected, the greater the difficulty encountered by a power-holder possessing only one form of power.

All this is reasonably obvious, so we should expect power-holders to regularly avail themselves of the opportunities for acquiring other forms of power. Self-interest would lead them to diversify, either as a deliberate policy to make their own positions more secure, or to achieve particular ends that they realise cannot be attained using the initial form of power.[11] As the exercise of power involves, by definition, the intentional affecting of another, it is unsurprising that extra forms of power are sought to make the effect more certain. There is also undoubtedly a psychological need felt by the powerful to legitimate this power, a need fulfilled by any tendency among the relatively powerless[12] to accord legitimacy to the powerful mentioned above.

So power-holders will tend to possess several forms of power, i.e. a range of means by which they can produce intended effects in others. Nowhere is this clearer than the personal wielder of state-power who will have, over large numbers of people, coercive, legitimate (over those holding relevant norms), competent (as a military leader or economic manager) and personal authority (for some of those who deal with him). He has control over goods to offer inducement and the means to manipulate the people's information supply and physically to prevent some acts of

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11 Wealth may not be able to buy votes directly but it may be used to build charisma to get them.

12 Virtually everyone has some "power" as defined here.

non-compliance. Yet nowhere is this range of power more necessary than in the case of the state where the population of power subjects is large, varied and variable.

The extra forms of power gained will usually not merely cover new power-subjects but extend to power-subjects of the original power relation e.g. power-subjects may be threatened with sanctions for disobedience to orders they regard as legitimate. To the power-subject, these multiple exercises of power appear as multiple reasons for compliance. If the power-subject finds these reasons sufficient then the resulting compliance will be for a mixture of reasons (not always clearly distinguished in his own mind) and the power relation will be neither coercive nor legitimate but a mixture of both. The capacity to deal with such mixtures is a major virtue of Wrong's categorisation.

Exercises of power may be mixed in a further important way. They may be indirect, affecting the power-subject <u>via</u> the actions of other persons. A whole chain of different power relations could be involved: A induces B to coerce C to restrain D by force. However pure the relations of inducement, coercion and force may be, the chain as a whole is not any one but a mixture.

Even more important than the mixture of reasons within any one power-subject is the <u>variety</u> of mixes that will be found in different subjects of the one power-holder.[13] The strength of the reasons provided by the original power relation varies from subject to subject as do the additional reasons provided by the additional power relations. Herein lies another advantage of possessing several forms of power, they can "top up" the reasons for compliance felt by power-subjects until they are sufficient to provide compliance with the power-holder's wishes. Of course, single power relations will not always be insufficient for all power-subjects. In these cases the exercise of multiple power relations will lead to what the social observer sees as "<u>overdetermination</u>"[14] of

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13 <u>PFBU</u> p. 114
14 Lukes <u>Power</u> p. 39.

the power-subject's response, or what the power-subject sees as an oversufficiency of reasons for compliance.

5.3 ASYMMETRY

All this makes it highly possible that the two persons involved in a power relations may have quite different perceptions of that relation. Such power relations may be described as asymmetrical.[15] This is implicit in the nature of manipulation where the ignorance of the power-subject is part of the very nature of the power relationship. But the phenomenon of differing perceptions does not stop there. The holder of authority may make his wishes known but be ignorant of the reason for compliance. If he holds different forms of authority over the one power-subject he may be unaware of how strong the various forms are and the actual mix of reasons that lead the power-subject to comply. Indeed, there may be very strong psychological forces which lead him into error. The above-mentioned desire of the powerful to feel their power to be legitimate may lead to the self-delusion that the dominant reason for compliance is the shared belief of their power-subjects in norms legitimating their commands, exaggerating both the strength of these norms for individual power-subjects and to the number of power-subjects who hold them at all.[16] Thus, the same power relationship may be seen as essentially one of legitimate authority from one end, yet essentially one of coercion from the other.

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15 Weber makes this point about the rather less specific "relations" of love, friendship, contracts and patriotism (STh p. 56), but this is rarely noted and never emphasised by other sociologists. Although it is acknowledged in the literary device of writing about the same relationship from the point of view of both parties (e.g. Fowles The Collector). Symbolic Interactionists recognise many of the features of social life which lead to asymmetric perceptions of social relationships. They believe, however, that the parties to these relations "negotiate" a shared meaning. They seem to share with Parsonians the belief that such common meanings are necessary for continued interaction. Yet if the interaction could occur once without it, perhaps it could occur again. And if the parties must, for one reason or another, continue to interact, it might be better for them to keep their differences to themselves. If they are going to "negotiate" about anything, surely they are more likely to negotiate about what is actually done than the meaning given to it (N.B. Wrong uses the term for another purpose, PFBU p. 10).

16 The opposite delusion is often held by power-holders' opponents, e.g. revolutionaries may under-estimate the extent of a government's legitimate authority.

A further example is provided by coercion and inducement. The difference between them is often a matter of expectations. The offer of a pay increase in return for changes in working practices would be seen as a threat if the pay increase were expected or an inducement if it were not. Thus differences in expectations of power-holder and power-subject may lead the relation to be seen as inducement from one end and coercion from the other.

In another example, someone with coercive power attempts to control others by propaganda (manipulation). The power-subjects "see through" the latter, yet comply with the power-holder's wishes from fear of the former.

The sources of this asymmetry are worth examining. First, one action may produce a large number of intentional social interactions (e.g. an order may be addressed to several persons, an "offer" to several employees, and propaganda to whole populations). The mix of power relations activated may vary from power-subject to power-subject, yet the power-holder will not examine each relation but rather make general assumptions about the operation of his power relations. These generalisations will undoubtedly be wrong in respect of his relations with some power-subjects. Second, there are the tendencies to self-delusion mentioned above. Third, many social interactions do not involve face-to-face contact, making differing perception easier. Fourth, even in the most visible case of social interaction, where the two parties come face-to-face and the action of one leads the other to act, the two parties may have quite different perceptions of those actions. It may be described differently by the power-holder and power-subject and these different descriptions may read quite different meanings into the act.[17] Where these actions involve words these different meanings are even more likely. For all these reasons, asymmetry should be regarded as a normal part of regular social relations.

This asymmetric view of power relations runs headlong into the idea

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17 See White Philosophy of Action pp. 8-12

that human interactions have "common", "shared" or "cultural" meaning. The idea may be an old one but much of its current popularity among social philosophers can be credited to Winch.[18] He analogized from Wittgenstein's views on language (although where social interaction is purely verbal those views are directly relevant). Wittgenstein saw people learning rules about the use of language through participation in "language-games" in which words were used and actions performed. The latter helped the learning process by indicating what actions were associated with the use of the words and what actions counted as "mistakes". Winch's extension of this to the understanding of interactions through learning shared rules about its "meaning" is highly dubious considering Wittgenstein's strenuous attempts to avoid the concept. But the central idea that share rules could emerge from such language-games is too optimistic anyway. It suffers a problem similar to one already noted for Hart's notion of a social rule:[19] the same action may be a mistake under several rules between which Wittgenstein's "mistake test" does not distinguish. So the rule learnt may not be the same as the rule taught and nor rule is shared. No solution is provided by suggesting that the shared rule can be directly communicated. It must first pass the "interpersonal barrier" (§2.14). The mental events we call ideas must be formed in one mind and processed by its into words, the words formed into speech, and speech must be heard and then processed by the listener's mind. Thus an idea in one mind affects the production of an idea in a second mind; but because it does not pass directly from one to the other, and must pass through the interpersonal barrier by means of speech, those ideas will frequently vary. That a degree of communication occurs is due to the fact that language is not used in isolation but in the context of action - in language-games. The other verbal and physical stimuli these language games provide aid to this process of communication and the repeated use in slightly different circumstances results in the original

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18 Idea.

19 A notion strongly influenced by Winch and Wittgenstein.

and received ideas being drawn closer together. The similarity between the ideas is a mark that communication has occurred; but the frequent variation between them indicates the crudity of the process.[20]

This may not have been the kind of language-game that Wittgenstein had in mind, but it does help to explain how communication occurs. The action context in which speech acts are made helps the communication that the speech acts are at least partially intended[21] to achieve. Much of the success is due to the fact that despite the vagaries of communication, people know what is going to happen next.

As it is for language so it is for social interaction, not least that within law. The word "theft" is used by a draughtsman to a politician. Later a judge uses it in front of a barrister, twleve jurymen and the accused. It conjures up quite different images and meanings for each. Yet such regular interactions recur because they know, if not the meaning of the word for each, the actions that accompany it.[22]

Cultural meanings do not determine and shape actions. It is rather

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20 Someone with stone-kicking comonsense might reply: "But I can communicate esily enough. I think a sentence. I speak a sentence. You can hear the sentence and think it." Unfortunately rules are rarely learnt by such straightforward word duplication. There are usually several concurrent associated activities, demonstrations and other non-verbal actions subject to the already mentioned variety of perceptions. Even when words are the only form of action, their effect will be determined by the circumstances in which they are performed. In attempts to persuade, an idea will often be put in various ways. The listener will usually only adopt one of them or create a new amalgam in his own mind. People may even modify what they say only to approximate what they think in order to make it more acceptable to the listener! Even if the idea did successfully pass the interpersonal barrier and were implanted in the recipient's mind in the same verbal form it would have to lie in a new intellectual environment. Whether it is accepted, modified or rejected, will depend on his other ideas and values, and the other rules that will be brought to bear to make decisions using the rule.

21 Language has many uses other than mere communication.

22 The same problems and the same salvation are to be found in other kinds of language-games where the use of language has different effects. Consider language-games involving performatives in the special sense that use of the word indicates a change of state of something which involves changes in the future behaviour of at least some persons (McCH p. 14). This would seem to necessitate common agreement on what change that performative achieved. Yet consider these performatives: by Captain Cook, "I claim this land in the name of King George III" and by a policeman to a suspect, "You are under arrest". Those words may have different meanings to the speakers and listeners. But the words have achieved an important effect which is due less to commonly held meanings than to an awareness of some of the differences in people's actions surrounding, and at least partially resulting from, the making of the statement.

that the actions enable some communication of meaning - though not successfully enough for the meanings to be shared by the two parties involved in the communication (let alone all those who are part of the "culture"). But most importantly of all, the action-contexts of language mean that we can still interact <u>despite</u> this imperfection of communication because, though the interacting parties give the words different meanings, they have some idea of the sorts of actions that accompany or follow the use of various words. Where the above concept of a language game indicates how this is <u>possible</u>, asymmetric power relations provide specific examples - both of how such different meanings of words can be generated and sustained, and how interaction is nevertheless a continuing possibility. Furthermore, to the extent that such power relations do not involve language we can see how the same asymmetric appreciation of the meaning of an interaction can be generated and sustained without prejudicing the continuity of such interaction within a stable social relationship.

But power relations are more than just examples of a quirky type of social relationship. They are central to the understanding of society and are, along with other social relations that are equally prone to asymmetric perception, constitutive of it. Thus Winch and others who saw language as a model for social interaction were quite right to do so - it is just that the most appropriate model is one based not on shared rules and perceptions but on interaction between people whose perceptions of the interaction run from complete congruence, through diametric opposition, to the complete ignorance by one or both parties that any interaction has occurred at all.

Power relations cannot be understood solely from the view-point of either power-holder or power-subject. If they are viewed solely from the former (a) the power-holder cannot know the mix of reasons for the power-subject's compliance with his wishes, (b) where he tries to affect the action of an unseen person he will not know whether the effect has been achieved and thus whether this is even a case of power at all, and

(c) he cannot even be sure which form of power is being exercised. If power relations are viewed solely from the power-subject's viewpoint[23] some forms of power disappear completely (e.g. manipulation and some forms of force).

The model of a social interaction offered here is one in which some thought, action, inaction or attribute by A (being a person) affects the thoughts, actions or position of B (being another person).[24] Put most simply, something about what A is or does affects what B is or does.[25] A social relation between two people is the tendency or probability that such interactions will occur. A power relation occurs if A intends the effect. Other types of relation will be discussed below.

This model is a "causal" one. As noted in §4.5, sociological causes are rarely either necessary or sufficient, so that most social relations are by themselves insufficient to cause a change in B's action, and only effective in combination with several other social relations. The interaction is rarely purely physical - in all cases involving a thought or an action and most involving inaction, A's action has to be observed by B and processed by his brain before B changes his thoughts or actions. Thus B's perception,[26] of the interaction is an essential part of the social relationship. This is so even when the perception is not of a social relationship but of something else (as in manipulation where B does not see the action of the other person upon him but sees only the "facts" he is intended to see). A's perception is equally important, for without it, one may be unable to comprehend his action and distinguish between quite different social relationships.

This is the nature of social causality in which most causes are

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23 As some conflict and compliance theorists would have use do e.g.Krislov in Clark et al (eds.) Compliance and the Law.

24 Social interaction need not be limited, as Gouldner wishes, to those cases where B's reaction affects A: Modern Sociology p. 63. Such cases are important, but other important regular social interactions include very little - especially law (§4.9).

25 Social relations are deliberately limited to this dyadic form. Pace Simmel, it is preferred to analyse triadic relations into dyadic components.

26 Including non-perception and "misinterpretation", howsoever defined.

instigated, and effects realised, by the processes of the human mind. For this reason, the description of a social interaction or relation requires a statement of (i) causes, (ii) the actions that are affected and (iii) the mechanism by which the causal effects are achieved (including, as part of that mechanism, the parties' perceptions of all three[27]).

5.4 SOCIAL RELATIONS OF UNINTENDED EFFECT

That power relations are not the only social relations is indicated by the variety of situations described by other theorists of power who adopt broader definitions (supra §5.2). These are excluded as instances of power not in order to deny their importance, but in order to provide a better understanding of them and to enable comparisons with other categories of social relation.

The first type of non-power relation may simply be called "unintended effects". That we affect others in ways we do not realise is an inevitable consequence of living in a complex community.[28] Environmentalists will provide any number of fearsome anecdotes, but such evidence is available in all spheres of life. Companies may seek greater profit by competition but merely ruin themselves and others. Road accidents are, by definition, unintended and have the most widespread and devastating effects.[29] Wrong regards "unintended influence" to be a larger category than the "intended influence" (power) his book covered,[30] and Merton regarded its study as one of the major tasks of the social sciences.[31] There are good reasons for assigning them such importance. Human behaviour is not completely calculative so we inevitably produce more effects than intended. Indeed, it might be added, many actions are

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27 It is an oft-noted complication of social life that the mechanism of social causation includes the actor's pereption of the mechanism. But though such perceptions may lead to a change in mechanism and the effect that is achieved, they do not prevent there being a mechanism and an effect each time a social interaction occurs.

28 Weber would not include these among "social" actions because they are not oriented to the behaviour of others (STh p. 53). But the result of this is merely to say that society is made up of non-social as well as social action both of which the sociologist must consider.

29 An updated version of two cyclists colliding - Weber's example of non-social interaction STh p. 54.

30 PFBU p. 4

31 Social Theory and Social Structure p. 68

performed without any thought for their consequences because they are routine, instinctive, reflexive or amount to small ill-considered choices in response to low-level environmental stimuli (e.g. "choosing" a toothpaste from a supermarket shelf). Even when we consider the effects of an action we may not calculate its effects on others (the action may be entirely self-centred) or on those outside our immediate circle. Even when we do attempt to calculate the broad effects of our actions or else calculate what actions will produce desired effects, we may be quite wrong. Such calculations will involve little more than a guess - theories of social prediction tend to be very weak. Indeed, considering the past difficulties with social theory and that it is probably not advancing in sophistication as quickly as society is developing in complexity, it might be a good rule of thumb to ignore the remote consequences of our actions, removing them from our calculations and intentions altogether.[32] Even when we do anticipate effects we are often completely wrong about their extent. It may be said that ignorance about the nature and extent of the effect of our actions is a key part of social interaction.

Unintended effects have the same form as other social relations, i.e. a causal relation between one person's attitudes, ideas, actions or inaction and the ideas, actions or position of another. But in contrast to power relations there is no awareness of this relation by the person who is the cause of those effects. There are two important categories. The first is the category of anticipatory reactions[33] where one person (B) modifies his action because of an anticipated reaction by another person (A) but that A is ignorant of the fact. Something about A has led B to assume that A possesses resources and a willingness to react in certain circumstances, B is anticipating a power-act by A.[34] A could be dubbed the reactor and B the anticipator. Depending on whether the

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32 A position some would take on moral grounds.

33 See Friedrich Men and Government pp. 199-215

34 These power acts would presumably include force, inducement, coercion and the exercise of legitimate or personal authority, but not manipulation and only very rarely persuasion and competent authority.

reaction is desired[35] or not, this will either be a reason for or against the anticipator's performance of the relevant action.

Within this category of anticipatory reactions it is useful to distinguish several sub-categories on the basis of the accuracy of the anticipator's perceptions/predictions:

(a) the "reactor" has neither capacity nor willingness to react,

(b) the "reactor" has the capacity but not the willingness,

(c) the "reactor" has both,

The first two might be thought relatively unimportant. In the long term this may be so. If over time there are several people in the position of the anticipator their perceptions will vary and some may not anticipate a reaction or, for various reasons, welcome it. Consequently they will act and the reaction will not occur. Knowledge of this might initially be known only to that actor but one would expect word to spread to others so that they no longer anticipate a reaction and cease to modify their behaviour accordingly. But all this will take time. During the interval the circumstances may change and the capacity and/or willingness may develop. This is quite possible: although it may be wrongly assumed that the reactor has the specific resources, for the anticipated reaction the assumption is normally based on the possession of other resources.[36] Willingness to act may be assumed because it appears to the anticipator that the self-interest of the reactor is served in doing so. In fact the reactor might feel that reaction is not in his best interests or feel morally constrained from so reacting. The misperception of a reactor's willingness or resources to react may cover a period when that willingness or resources are absent, effectively protecting the reactor

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35 E.g the approval of his "reference group". This is not normally intentionally offered as an inducement to act in the approved manner but is more likely to be given or withheld after the action is completed (making this a relation of anticipatory reaction rather than power).

36 E.g. it may be assumed that a wealthy corporation has the ear of government. This assumption may be quite wrong but is based on the possession of resources that are often found with, and may over time lead to, the relevant power relation.

against the actions of the anticipator until the willingness emerges or the resources are acquired.

Even if the willingness or resources do not emerge, the effect is still important. Many factors affect our estimations of the willingness and resources of others to act. There is a tendency to overestimate the power and capacity of others vis-à-vis oneself. One is more likely to know the costs and difficulties of exercising power over others than of the same costs and difficulties of one's opponents exercising power over oneself. This would explain how it is possible for two opposing groups to simultaneously wring their hands at their own powerlessness (like business and unions). But even if overestimates of opponent's strength are no more likely than underestimates, wrongly assumed weakness is soon disproved but wrongly assumed strength never, for the latter is not challenged.

The second important category of unintended effects could be called "unforeseen" effects. In this, one person (the affector) expects some effects for his actions but not those that result. The person affected in this way might be called the "affectee". The cause of the effects is not some perceived attribute of a reactor, but the action of the affector. Such effects may vary in nature, extent or target, but the division of these relations into sub-categories is based on how the error occurs:

(i) The affector may just not consider the remote effects of his action or he may be unable to calculate them.

(ii) The effects may be contingent on whether others do the same and he may be quite unaware of whether they will or not. Selling sterling will only lead to a sterling crisis if many others do the same. (This assumes that there is no conspiracy, a case of power, involved.)

(iii) The affector may exercise power, but with effects that are much greater than expected because of the (again, non-conspiratorial) action of others. This would cover cases like the above where the affector was deliberately sells sterling to affect the exchange rate but was unaware that others were doing the same. In some cases the effectiveness of the power exercise is increased significantly by the exercise of another's

power, but of a different type (e.g. inducement/manipulation: a company may induce strikers to return to work with a pay offer that the strikers think is good because of government propaganda about other low pay settlements).

Even more than power relations, these social relations are asymmetrical. In relations of anticipated reactions, the reactor is ignorant of the relation. In relations of unforeseen effect, the affector will at best find out afterwards. In some cases, the relationship will not be discernible to either party although its effect may be.

5.5 VALUE-EFFECT RELATIONS

The earlier criticisms of various normative theories of legal system should not lead us to ignore the fact that the values held by individuals significantly influence their actions and the effects they have on others. These are particularly significant where a large number of people hold identical or similar values. Many writers tend to concentrate on values that lead people to refrain from certain actions and hence the effects on those who benefit from such restraint.[37] But in other societies, norms of conduct have included the persecution and ostracism of non-believers and outsiders; and in our own society the values of hard work and wealth accumulation have been widely held and have had significant effects on the physical and social environment.[38]

This points to a different kind of social relation - a *value-effect relation*. In this relation, the attitude of one person, (the *value-holder*) tends to lead him to act in a manner different to the way he would act if he did not hold the value, and another person (the *value-beneficiary* or the *value-sufferer*) is affected in some way by this difference. For example, if the value-holder believes that certain desirable material things should be regarded as another's and should not be removed from his proximity, then, to the extent that the value-holder could have removed them, the latter person's enjoyment of those material

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37 Lukes *Power* p. 22
38 Merton *Social Theory and Social Structure*.

things is more secure. This raises an important feature of such value-effect relations. They frequently operate to neutralise power.[39] In other examples, values lead their holders to act rather than refrain from acting - in which cases the values direct the exercise of power. Finally, some value-effect relations create power for others. If the value-holder believes he ought to obey commands or follow the rules laid down by another, then, provided the latter is aware of this, the latter has the power of legitimate authority.

Several people may hold similar values. Indeed their social significance will not be great unless the value-holders are either numerous or very powerful. The word "norm" itself may be used to announce the fact that many people do hold such similar values, and so the social relation that results (the sum of the value-effect relations to which the holders of these similar values are a party) may be called a "normative relation".

It should be stressed that this notion of norms involves similar values. As argued in §2.14, values are entirely internal mental phenomena. Even if their content is identical, values in different minds remain separate phenomena. But the vagaries of interpersonal communication and the variety of meanings given to words in normative discourse make that identity unlikely and approximation the best possible result.

Yet this variation in norms does not destroy their effectiveness. As noted in discussing Hart's social rules, different ideas may lead to the "same" actions and hence to the same effects. Consequently, insistence that people share the same normative beliefs (or "internal aspects") leads us to miss what is socially relevant - those cases where they are sufficiently similar to produce the same effects (see §2.3).

Like other social relations, value-effect relations are frequently asymmetrical. Indeed, they rarely appear as a relation from either end.

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39 E.g., in Whigs and Hunters, Thompson argues that the ruling classes' adherence to the value of the rule of law limited the use they made of their repressive power in eighteenth century England.

To the value-holder the relation does not appear so much as a relation, but as an obligation, something quite outside himself (§1.4). It is a nice irony that, seen from the external point of view, values are phenomena internal to the mind, but from the internal point of view they seem to be external ones. Where power is neutralised, the value-beneficiary may also be quite unaware of the relationship, viewing only the effects (in the first example, the objects that he continues to enjoy). Where value-effect relations create legitimate authority, this complete asymmetry of mutual ignorance is impossible. But the value under which the power-subject considers he has an obligation to obey may be different from the value (if any) under which the power-holder considers he has a right to be obeyed (§5.2). This asymmetry will be particularly likely if several people consider the power-holder to have legitimate authority. Where there are several values under which the value-holders/power-subjects consider themselves obligated, the value-beneficiary/power-holder can hardly share them all. To do so would be inconvenient and, to the extent that the power-subjects' values contradict each other, morally inconsistent. If he holds any value legitimising this authority for himself, then it will at best correspond to that of some of the value-holders/power-subjects with the rest of those value-effect relations being asymmetrical.

5.6 SOME INTERRELATIONSHIPS AND COMBINATIONS

Just as different forms of power relation are inter-related, combined and shade into one another, so do social relations in general.

Power relations tend to produce relations of unintended effect because (i) not all the effects of their exercise can be foreseen, and (ii) power-holders are likely to have the capacity to react and power-subjects are likely to anticipate such reaction.

Power relations also produce norms. A classic example is the parent/child relationship where coercion is used to prompt adherence to values. Another is where legitimate authority commands obedience to a rule of conduct which is then internalised.

Individuals may be subject to a combination of social relations each of which is insufficient to cause his final behaviour but which together are more than sufficient. He may be subject to the power of one, the unintended effects from a second and hold certain values that retard his willingness to act against a third. It is the combination of social relations that determines his actions rather than any single one.

Just as power relations may be mixed and the mix perceived differently from each end, so may social relations. A manager may tell employees that the company cannot continue to pay current wages and that a wage-cut would be best for all. Even if he does not imply a threat, the employees may anticipate that he would sack them if they refused. If so, there is a mix of persuasion and anticipated reaction. But there may not even be any mix. The employees may find him totally unpersuasive yet still fear that the anticipated sacking will follow a refusal to accept. Here the social interaction is totally effective - but from one end it appears to be through the activation of a relation that is, in fact, totally ineffective, and from the other end it is seen as a relation of which the other party is, in fact, totally unaware.

Different social relations shade into each other. Where power is exercised, the power-holders often have a clear idea of some of the desired effects, and hazier ideas of the remoter effects. The actual dividing line between intended and unintended effects is blurred, a problem not unknown to lawyers! A power-holder may realise that some others will act partly on the basis of anticipated reactions by themselves, but they will not know how many will take their anticipated reactions into account and to what extent. Power and norms will tend to merge when an authority that a power-subject accepts as legitimate restates a jointly-held norm. However, the typology is useful in all these boundary situations analysing the extent to which the relation is one of power, norms, or unintended effect.

Role

One concept that can be usefully analysed as a combination of social

relations is the problematic one of "role". The differences between role-expectation, role-orientation and role-behaviour have already been noted and any unitary conception that lumps the three into one rejected (§4.5). Naturally enough, the three are inter-related and the social relations listed above can be used to indicate how. Role-orientations (what the role-occupant thinks he should do) affect role-behaviour in the same ways as any other personal normative beliefs affect action. Role-expectations (what others think the role-occupant should do) affect role-behaviour (i) indirectly through role-orientations if the person with a role-expectation is power-holder in a relation of persuasion, manipulation or legitimate authority[40] or (ii) directly on role-behaviour sometimes through the conscious exercise of power rleations but more usually through anticipatory reactions where the role-occupant takes into account the likely reaction if his behaviour[41] does not meet the outsider's expectation.[42]

Note that these power relations and anticipatory reactions must be expressed in the plural. Conflicting role-expectations about the same role-occupant will be held by different people (indeed, conflicting expectations are often held by the same person). Thus the same action may receive a critical reaction from some and a positive reaction from others, and in many cases he can anticipate that any action will receive some critical reaction. The individual role-occupant need not so much consider a uniform communal reaction to his role-performance or role-deviance but the variety of pressures on, and reactions to, any action he takes.

5.7 MIND AND ENVIRONMENT

That a man's social environment is crucial in the moulding of his perceptions, ideas, values and action is accepted by all social

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40 And also through the other ways that social relations influence values - see §5.8.

41 Or rather the external appearance of it.

42 The reactions may take the form of force, coercion or disapproval or the withholding of approval or other rewards that the outsider would usually bestow without thinking about the effect those have on the role-occupant's behaviour. Note however that the reaction will usually be to the external appearance of the act so that this is what the role-occupant will have to take into account.

theorists. Their disagreements are about the extent of the effect, the part(s) of the environment that have the greatest effect on consciousness, and the manner in which they produce these effects.

The theory outlined here treats the environment of any individual as all that surrounds him - persons, objects and interactions. His social environment is that part of society that surrounds him and interacts with him. The social observer will see these in terms of the social interactions and relations he has with others, and the objects and ideas with which those relations bring him into contact. (Objects are applied to him in force, threatened in coercion, offered as inducement or left in his possession by value-effect relations. Ideas are thrust at him in manipulation, persuasion, competent authority and legitimate authority.) His own actions are not a part of his environment, but the effects are and his actions are part of the environment of those whose actions he affects.

Point of View

The individual's view of his environment will not be the same as the social observer's - it may not even be similar. He may be ignorant of the nature of the social relations that affect him (e.g. seeing manipulation as persuasion) or that there is a social relation at all (e.g. many value-effect relations). Moreover, his past interactions with other people will have set the terms in which he can describe the world. The meanings of the words he uses to describe his environment may be different to the social observer's because of the different contexts, language-games, in which they were learnt. These words, and the meanings, images and ideas of the world they create in the mind, are used to analyse the environment. They are a part of the mind/brain's methods of processing the incoming signals from it. Furthermore, this mechanism is selectively focussing on that part of his environment to which his attention is directed. For an individual the environment does not contain all the physical objects and movements within sensory range, but some of those things as processed by his brain using the mechanisms at his disposal.

Of course, these word-meanings/ideas are not static. Experiences of the environment, though filtered and selected, are continually coming in, and some of them do not sit easily with the resident ideas and beliefs. This is a Quinian "recalcitrant experience" (§1.1). Such experiences lead us to modify or reject one or more of our ideas or word-meanings (including, in drastic cases, the memory of the experience).[43] Consequently a man's ideas of the world are the result of a constant interaction between his ideas and his experience as interpreted by these ideas.

It should be noted that what is being discussed is a person's view of his environment or at best his view of the world. The term "world view" is deliberately avoided because it has connotations of something that few, if any, possess: a unified, coherent, consistent and systematic set of concepts, values, ideas or perceptions.

One reason for this could be the disorder in the social world itself (asserted below). But this is neither necessary nor sufficient to produce a disordered view of it in the mind of one of its inhabitants. The lack of consistency and system in an individual's ideas and perceptions lies in the fact that they are generated in and for different situations and activities in which the individual participates. The words learnt vary, as do the people from whom and the contexts in which, they are learnt. In quieter moments he may try to take out the key ideas and order them into a consistent whole. But few, if any, would have the ability or the time. Even if it were possible to systematise a man' ideas, how would he deal with changes in his ideas generated by different experiences? Would an entirely new system need to be devised? Would the systematisation mean that each belief was so strongly supported by other beliefs as to unchallengeable by experience? Or would the new experiences lead to

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43 These processes occur at various levels of consciousness. Where strong beliefs are weakened by a series of experiences, the believer is unlikely to be aware of a series of doubts commencing with the first recalcitrant experience. He will see them as doubts only when enough experiences have been had, and the belief is sufficiently weak, to be the subject of a doubt.

rejection or modification of ideas so that the set of ideas quickly become as disordered as this thesis claims it always was?

An individual's ideas are not seen as systematic or unified, but part of a Quinian "web of belief". Some ideas are connected, and this provides a source of strength for each because rejecting one would usually mean doubting the other. There are contradictions, but these may not emerge because we are not called upon to consider both ideas in one context. When this happens through experience (or, sometimes, reflection), the contradiction becomes apparent and is dealt with by taking on new ideas or modifying or rejecting old ones.

A man's views of the world differ not only from that of the social observer but from each other as well. It will differ from that of his fellows because of variations in (i) his physical position in relation to other persons (and objects), (ii) his social relations with them, (iii) the words/meanings/ideas/concepts with which he interprets what he senses, (iv) what his sensory interpretative mechanisms are directed at, (v) his practices and (vi) his values (for v & vi see infra). All these are inter-related and are themselves the results of previous interactions with his environment through his social relations with others. People who are similar on any one of those variables tend to have similar perceptions of their environments. Accordingly many writers have written of the "point of view" of persons who share such a similarity. Jurisprudence has especially concentrated on the hoped-for similarity between the points of view of those engaged in the same "legal" activity (based on v and, sometimes, controversially vi). This hope has been confounded not only by the many activities within law, but by these other factors which affect the point of view of those engaged in legal activities.

Practical Reason

Of course, an individual's social environment does not merely affect his view of it. It affects his actions, which in turn affect the environment. Both sorts of effects are mapped out in the social relations of which he is a part. But to understand how these effects are achieved

requires an understanding of the way the mind processes the sensory information about the environment into actions that affect it. This constitutes the most dynamic aspect of the interaction between mind and the environment. The interaction operates at several levels.

Conscious choice of action is based upon reasons[44] - practical reasons. Values held (themselves the result of a complex interaction between mind, practice and environment - see infra) provide reasons. Beliefs about how the world works (which are perceptions about the environment) provide reasons because they give an indication of the consequences that will flow from considered actions and hence what values will be realised by performing them. But environment also provides reasons more directly. From the point of view of the power-subject, the social relations of which he is a part provide him with reasons for and against action. Force, where he is physically prevented from doing something, provides him with a reason to give up any hope of doing it,[45] (pace Raz, this is one of the few "complete reasons"). Persuasion provides him with reasons in which the persuader points to certain of the power-subject's values that provide him with reasons to do as the persuader suggests; in manipulation, the same appears to be so. Authority relations provide various reasons for conforming to the dictates of the power-holder. These reasons may be because of the respect in which the subject holds the power-holder (personal authority) or the power-holder's expertise (competent authority) or the power-holder's capacity to provide or deprive him of objects or feelings he values (inducement and coercion). Further reasons are provided by desired or undesired reactions of others that the reasoner anticipates will follow certain actions. Yet more reasons are provided by the norms or values that appear to put him under an obligation to act in certain ways (although located in the reasoner's mind these appear to him as part of the environment).

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44 Or rather, "reasons" are how brain-processes that produce action appear from the internal point of view.

45 If the reasoner is unaware of its existence and attempts the action, the environment will have a more direct effect.

Finally, there are the resources at the disposal of the practical reasoner. These will take the form of physical objects within his environment,[46] or power relations in which he is the power-holder, that he can direct to the achievement of his purposes. These resources provide him with opportunities, but the lack of such opportunities provides the strongest of all reasons for not acting - impossibility! Even where the action is possible and the desired effect achievable, the cost involved and the alternative uses to which those resources could be put constitute reasons against the action.

This long list shows both the large number and disparate nature of the reasons that may be provided by the physical objects and social relations as seen from the actor's point of view. Frequently several such reasons combine and reinforce each other - the over-determination of action seen by the social observer becomes an over-abundance of reasons from the point of view of the actor. All too often, the power and other social relations to which he is subject, effectively reduce an individual to a single course of action: practical reason merely identifies this fact.

Where the issue is not so clear cut, the individual has a range of choice in the action he takes, his practical reason can be used to choose his action from alternatives. Frequently several reasons will point towards one action and several away from it. If he chooses an action to which several reasons pointed, he may pick one reason as the reason that he acted on. This may be because he consciously considered only one of the reasons. But there are degrees of consideration, and Freudians are not the only ones to believe that reasons can exert weight even from the unconscious mind. As likely an explanation is our tendency to seek simple explanations, the search for a single reason in our mind mirroring our search for necessary and sufficient causes in the world. We are usually asked for the reason so we will usually give only one. Yet if

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46 They are "his" in that his ability to turn them to his purposes implies that he is not subject to the power of others to deprive him of their use.

we were asked for twenty we could probably do that too. The number of reasons actually used will probably fall somewhere in between.

How is this profusion of reasons processed by the mind ? Raz's model, as qualified in §2.17, provides an excellent starting point. First-order reasons are direct reasons for action provided by the values it is likely to realise. Their weight is determined by the probability and value we place on the expected outcome. Conflicts between first-order reasons are resolved by balancing their weights. Second-order reasons are reasons for acting on, or ignoring, certain first-order reasons - positive and negative second-order reasons respectively. The latter are suppressory reasons because they suppress consideration of first-order reasons - only first-order reasons of sufficient weight to overcome the suppression will be considered. They are protected reasons if they are, at the same time, a reason for acting themselves.

Raz saw the statements made by those the actor regarded as having "authority" over him as protected reasons. Raz's discussion seemed to cover only legitimate authority, but the concept is far more useful that that. Naturally enough, the same can be said for personal and competent authority as well. But other kinds of authority can also provide such reasons. Although a single interaction of inducement or coercion will provide a first-order reason for doing as the power-holder requires, the regular or probable interactions within power relations of those kinds may lead us to create a "rule of thumb" that those requirements be adhered to. In the many cases of mixed authority relations these reasons will usually not be considered separately but compounded into a more powerful composite reason for following the dictates of the power-holder.

The mixture of reasons for according someone or something authority has a further consequence. The reasons people have for obeying the law are classically a mixture of the possibility of sanction, inducement (the reward is social approval), belief in its legitimacy and its correctness. These may be jointly sufficient to create a suppressory reason of great strength. But if one or more of those reasons is not perceived the

effectiveness of the overall reason may drop enormously. Take Raz's example of someone passing through a red light on a deserted road with a clear view in all directions.[47] It is not that the value placed on breaking the law is so great that the authority of law is not regarded as a sufficient reason for disregarding it. Rather it is that the loss of coercive and inducement- related reasons for according the law authority has reduced its suppressory capacity. Consequently it is not sufficient to suppress the first-order reason that the convenience of crossing the road provides.

Other social relations also provide reasons. Relations of anticipatory reaction produce the same kinds of suppressory reasons as authority relations and value-effect relations may produce either first or second-order reasons depending on how formalised the value-beliefs are. Persuasion and manipulation provide only first-order reasons. No secondary reasons could be provided by manipulation because it operates through the ignorance of the power-subject. Nor could they be provided by persuasion - which operates via the content of the advice not its source. If a power-subject does make rules about following the persuader's advice he has created a power relation of competent authority. These reasons take their place in an individual's practical reasoning alongside those provided by the authority relations that Raz considers. All the second-order reasons will complement and conflict on the basis of their weight vis-à-vis other second-order reasons. Because even legitimate authority relations provide merely suppressory reasons, first-order reasons have new importance. Strong ones can overcome the suppressory effect of other relations, others may come into play if other reasons have done so.

The above image of practical reasoning does not permit the construction of elaborate systems of practical reasoning and structures of authority relations that Raz is so good at. Indeed it should be emphasised that for most individuals, practical reasoning will not be a unified or structured affair. In the different areas of their life they

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47 AL ch. 1

will have different procedures for dealing with decisions over actions. These procedures[48] will have emerged in response to situations calling for action on the spot and reflection afterwards on how they might have handled the decision better. In any case, they would be hampered in the construction of any elaborate system of reasoning by the very factors that prevented their having a unified world view - lack of time, lack of ability, the need to deal with changing and unforeseen circumstances and the lack of a consistent world-view itself.

These reasoning processes will vary from person to person. Mixes within the authority relations vary. Consequently the reasons for acting, and perceptions of the act itself, vary too. Power-subjects in similar situations may well act in what appear to be identical ways - both physical actions and the effects are similar - yet be doing it for quite dissimilar reasons and perceive it in quite dissimilar ways. Indeed, if they are subject to the same power-holder, who will not detect the difference in internal perception, the same physical actions will produce the same response and are just as suitable for each. Thus it is quite unnecessary to postulate common perception (Unger's "common meaning") or common reasons (norms) for action in order to explain and understand how behaviour is regular and hence predictable. As has been maintained throughout, we should delve inside the minds of the social actors, but we should not presume to find the same ideas and processes just because the same movements are being performed.

Practices

Not all action is preceded by the above kind of practical reason. At a much lower level of consciousness, much action and many ideas result from fairly low-level interactions with the environment. We are constantly making decisions about what action to perform next, crossing the road, watching television, buying goods. These mobilise little of our conscious brain or bring into play few of our attitudes, ideas and values. If the behaviour has an "internal" aspect, it is a very muted

48 They might be called "skills".

one. In making choices about such mundane matters, it is common to note how others around us choose and do as they do to save mental effort.

If the action that results from either conscious or unconscious choice does not produce known consequences undesirable to the actor, and if the conditions of the earlier choice (the same social relations and the practices of others) are repeated, then the action is likely to be repeated as well. In fact, the likelihood of a repetition is enhanced because our earlier action will be a more impressive example than the actions of others. Indeed, however conscious the initial action, later ones are likely to become less a matter of conscious choice and more a matter of unconscious "habit".

Not all our practices emerge from such processes. Sometimes our practical reasoning is used to decide not merely single actions but practices to be followed deliberately because, given our values and knowledge of the world, we consider them to be the best. Within that process of practical reasoning, rules laid down by others play a role through the relations of persuasion, manipulation and personal, competent and legitimate authority and the reasons they provide. Sometimes individuals model themselves on others - placing a value on being like them. This effectively gives the other person personal, competent or legitimate authority to affect the individual's behaviour by example (although to the individual it will appear as a reason to do something "because so-and-so does it"). But just as in the choice of single actions, the choice of practices involves all the other reasons arising from other social relations and lack of resources that narrow choice and impose heavy costs on any but a very limited range of actions.

The common practices of groups show the same diversity of origin. In unconscious or semi-conscious reasoning, the examples set by one can be adopted by many others. This may result from similar values or from any other social relations providing reasons to indulge in practices that are at least externally similar. In many cases the members of the group are subject to a mixture of social relations linking them to the same

person(s). The mix will vary from subject to subject and with them the reasons. But each has sufficient reason for adopting the same practice.[49] Thus those who adopt common practices may, for different reasons, have little choice or find the costs of some actions out of the question.

At other times we adopt practices because there is something we would like to do and there is only one way to do it. An example was the success of "Bankcard" (an Australian equivalent to "Access"). Many swore not to use it or to use it only in an emergency because of the temptation to overspend and because of the manner of its introduction (it was sent unsolicited to everyone with a cheque account). Although usage started slowly, it rose steadily and many of its detractors became regular users. MacKay[50] has suggested that this was a classic case of practices being formed by simple environmental conditions. Some situation would arise where a fairly simple desire to buy a particular object could not be fulfilled by the familiar means (no chequebook or cash in the pocket) but could be bought by Bankcard. Once this happened a few times it became a practice and the users justified their use on the basis of convenience, ready credit etc. and declared Bankcard a "good thing".

Values

The last example tells us something about the relationship between attitudes and practices. The practice changed the attitude rather than vice versa. Many of our practices are the result of low-level choices in which we do not invoke any of the values we regard as important. When it comes to justifying our practices, we select from the ideas known to us (most of which would have been presented to us as arguments and were therefore themselves part of our environment) one that fits our practice.

Of course, we may decide after such reflection to reject the practice

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49 Where the set of people among whom the practice develops (e.g. A, B and C) are subject to similar power relations but with separate power-holders (e.g. A is subject to P, B to Q, C to R), and the latter have a practice about the way they exercise power, then this will often produce a practice among the power-subjects.

50 Centre for Communication Studies, Bathurst.

- but we do not come to such personal value questions as neutrals.[51] More often than not we choose those values congruent with our actions. In more major matters we are likely to bring into consideration more of our values before taking action. But, because we tend to have less time to consider action beforehand than justify it afterwards, we usually mobilise fewer beliefs and values in choosing than in justifying it. Thus, although values and practices interact, key values will tend to be determined by practice rather than vice versa. Even where there is time for value-choice to precede action, the environment plays a key role, because such choices are usually thrown up by concrete situations people encounter in their social environment. Thus the value-choice is defined and delimited by the experiences that led to the need for a choice, and by the environment in which the actor will have to live after his choice has been made and acted upon.

Once this positive attitude has been formed it provides a reason for continuing the practice and creates a value-effect relation. Where practices are adopted not out of carelessness but lack of choice, then the newly-created value will reinforce the practice by adding a new social relation and a new reason for following it.

Furthermore, the fact that the practice can, contrary to the assertion of many theorists,[52] precede the attitude means that it can exist without it. Indeed, if the social relations that provide reasons for the practice are strong,[53] or if the individual cannot or does not think of any reasons against it, then the practice can survive a long time without such attitudes - perhaps even long enough for those attitudes to develop!

Ideology

In the above there lurks a bare-bones Marxist theory of ideology.

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51 Like most humans, we believe most of our actions are justified.
52 Who usually require these attitudes to take the form of rules e.g. BP p. 183, Idea, O&D p. 31.
53 Some theorists point to the other factors which may reinforce the positive attitude (O&D p. 2) or provide an alternative basis for practices (LAP p. 45).

From the ideas available to them, men choose the ones that suit their practices and their experience. The key determinants of men's final ideas become the practices and experience of men on the one hand and the supply of ideas on the other. The latter is not a random matter. Some, especially those in mass media and educational institutions, or those in ordinary life who are "opinion leaders", play a greater part than others in providing the pool of ideas from which people choose to fit their behaviour. These people and institutions have power - one or more out of manipulation, persuasion, competent and personal authority. Apart from some cases of manipulation, the ideas they promulgate are the ones they hold and will therefore be related to their <u>own</u> experiences and practices rather than to those of the people to whom they communicate their ideas.[54] This should not lead us to imagine that people are likely to accept <u>any</u> ideas that are supported by such persons. The ideas ordinary people will accept will be the ones[55] from those presented, and to which they are given sufficient exposure, that sit most easily[56] with <u>their</u> experiences and practices.[57] This integrates recent Marxist notions about ideological institutions with the more traditional emphasis on practices providing the material basis of intellectual life.[58]

The ideas of ordinary men <u>may</u> be changed by devising and disseminating new ideas that will fit <u>better</u> with their experience of the world than those currently held. But for further modifications of belief,

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54 So there is no need to assume either a conspiracy of the powerful or wholesale manipulation.

55 There will be several for reasons noted below.

56 There is a balance between exposure and fit. People are unlikely to adopt views of which they are only dimly aware, but for most there is a level of exposure at which they are capable of taking on ideas that fit better than other ideas to which they are more frequently and forcefully exposed.

57 Thus there is no need to assume that ordinary people will soak up any labels to which they are exposed (see Althuser <u>ISAs</u>).

58 Larrain <u>The Concept of Ideology</u> p. 59.

material practices and conditions have to change as well.[59] This is why Marx and others believed socialist ideals could be accepted by the working classes and would gradually become more acceptable as those ideals were disseminated (thereby supplanting the ideology that had best fitted their material conditions until then) and conditions changed as they predicted. But they believed that those ideals would never be adopted by the peasantry because their environments and practices were so different.

So far the argument has been that a person's environment shapes his ideas which shape his view of the environment, and the combination of his ideas and environmental perceptions determines his action. This might appear to provide the "white hope" for a theory that in any one society the ideas, perceptions and practices will be the same for all because they all share the same environment. But such a theory requires that we really do share the same environment. The word itself should make us suspicious of such assumptions, for an environment is that which surrounds something. My environment is what surrounds me, your environment is what surrounds you. The above discussion provides substantial reasons to back the suspicion that the view that one person has of "his environment" will be different from the one another has of his own. First, in purely physical terms, the view from one place in the social milieu will vary. Different objects will be in view; and even when the same object is viewed, it will be from at least a slightly different angle. Second, what is seen depends on the direction in which the individual's sensory and brain mechanisms for observing the environment are focussed. Third, these

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59 Some argue that ideas can themselves change material conditions. Of course ideas can lead power-holders to change physical conditions. But they can also change the most important social conditions directly: by changing the way a social relation is viewed from one end and hence how it operates to produce effects. Changes in the beliefs of power-subjects may wipe out some relations completely (e.g. if a power-subject of legitimate authority no longer thinks the power-holder ought to be obeyed) or make them less effective, more costly or more difficult to exercise (e.g. if the power-subject decides he no longer values or fears what a power-holder can offer or threaten, inducement and coercion become ineffective). However, such changes in ideas will not easily be produced. Changes in values are difficult to achieve, especially where they fit in well with practices and other values. Changes in the inducement value of desperately needed goods and services or the coercive value of threats to life and limb are not readily achieved.

mechanisms vary from person to person, involving different ideas and word-meanings which are applied to processing the sensory inputs and creating an image of his environment within his brain. The differences between individuals' experiences may well magnify the differences in the ways that an otherwise identical experience are seen because the earlier experiences have led to differences in the ways the two individuals appreciate and define those experiences. Finally, and probably most importantly, social relations, which are a key part of anyone's social environment can look quite different from their respective ends, so producing a variation in their environments.

There are clear consequences in this for any theory of ideology. Such a theory may tell us how these ideas are generated. It may even tell us something about the content of people's ideas - given adequate knowledge of their practices and the opinion leaders and idea-disseminating institutions with which they come into contact (very big "givens"). But it is unlikely to uncover a uniform ideology of shared beliefs. Indeed it gives good reasons why key beliefs will vary within society - explaining the actual results when people were asked what they believed (§4.3). But the view outlined here, of practices being developed and supported by social relations without the benefit of shared values, indicates that we can get by without them. So that which makes these shared values unlikely also makes them unnecessary.

5.8 RELATIONS OF PRODUCTION

The extent to which the experiences and environment of different people vary (and with that their ideas, values and points of view) largely depends on the number and importance of social relations between them which look significantly different from each end. A theory of society or of social relations is needed which will explain why there is going to be either a broad or narrow range of experiences and, with it, a broad or narrow range of ideas. If the theory can also explain how ideas emerge and/or spread then so much the better. Marxist theories claim to do both. Although the form of the explanation varies it is always based on

the paramount importance of the social relations of production - the set of social relations between members of a community when engaged in the physical production of goods. It is this set of social relations that constitute the "mode of production". Much of the variation in Marxist theories is due to the different ways in which these social relations are described - from what can come close to a pure empiricist description of the manufacturing process[60] to what amounts to a set of legal norms.[61] Naturally enough, the description adopted here sees those relations of production as a species of social relation.

Like all social relations they have the general form that what one man is or does affects what another is or does. The relations are mostly power relations, predominantly authority relations. Consider a simple case where a "capitalist" power-holder gives an order about how the "worker" power-subject is to act towards certain physical objects - processing them as, and handing them to those to whom, the capitalist directs. The reasons for obeying the order are mixed because capitalists, no less than any other group of power-holders, have extended deliberately and otherwise, the range of power relations they can exercise over employees. Initially the relation may be one of inducement - a landlord, merchant or skilled artisan may have resources with which he can induce another to work for him. In addition, they may have forged personal links with the workers (giving them personal authority), gained a reputation as efficient users of economic resources (competent authority), or persuaded or manipulated workers to think that this is the best way to work. Finally, norms which treat the capitalist's control of what goes on in "his" factory as legitimate may have spread. They have also acquired the ability to make threats, sometimes of the crudest kind, but more often via political and legal institutions. The actual powers held and their sequence of acquisition are a matter of history. The general processes by which these further forms of power are acquired are a matter for the

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60 Shaw Marx's Theory of History p. 28 ff.
61 ML p. 85ff.

theory of social change (§5.12). There are other relations too - unintended effects (e.g. the capitalist seeking after profits may impoverish his workers) and anticipatory reactions (e.g. the owner of the small plant who doesn't even conceive of his "loyal" workers wanting to strike whereas they all know that he would sack them all if they did).

The relations of production, in any mode of production, are a <u>set</u> of social relations involving different levels within the same production enterprise. These relations point in both directions. The manufacturer may be the power-holder in several power relations involving his workers but in other areas of activity they may have power over him. They may enjoy the power of the strike weapon (seen as coercion by management and many others) and what Veblen calls the "conscientious withdrawal of efficiency" (either a form of coercion or manipulation). Just as capitalists seek to extend the forms of power exercised over workers, so will workers over capitalists. The workers may also cause many unintended effects and there may be normative relations in which one side or the other is inhibited from action because of similar values held by its members. The ratio of power to other social relations may be higher than in other sets of social relations because the constant conflicts will make each side less likely to feel constrained from actions in their perceived interests, but all types of social relations will still be present.

It is axiomatic in Marxist theory that the environments of workers and capitalists are radically different, and when the relations of production are put in the above terms we can clearly see why. These relations look quite different from each end,[62] and the <u>effects</u> of these relations on the environments of "capitalists" and "workers" are very different, providing an abundance of material goods to the former and far fewer to the latter. These environmental differences lead to the generation of different ideas, values and attitudes which lead to different perceptions of those environments.[63]

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62 <u>OLI</u> p. 103.
63 <u>LOP</u> p. 59.

Classes are defined in terms of the relations of production - a class includes all those at one end of the same type of relation of production. The similarities in their environments mean that they are likely to have similar values, ideas, perceptions of the world and "point of view" and to act in similar ways. However, the variations in the environments of different capitalists (the sort of enterprise they are in, their wealth, other social relations and especially the particular mix of relations they have with their workers) will ensure differences in those values, ideas, perceptions and points of view. The same will be true of different sets of workers.

Marx dealt in detail with only one set of relations of production. This is not to imply that there is only one in any society. The Marxist theory of history deals with the rise and fall of relations of production and their attendant classes. Thus, at any one time there could easily be four classes - the two defined by the new mode of production and the two defined by the old. Indeed there may be survivals of even earlier modes of production (e.g. the role of the wife is more reminiscent of the place of a junior member in the old familial system of production than that of a peasant or wage-labourer). If the key relations are seen as including the production of services (as well as goods) or the relations of distribution and exchange (which formed Marx's trinity of key relations) we see the possibilities of yet more classes, all with their own sets of values, perceptions and point of view. It could be argued that the distinctive productive relations of guilds are alive and well in the professions. In the notes which formed the basis of the last page of Capital Vol. 3 Marx listed ten classes[64] in nineteenth century England. Was that his final tally or was it just where he wearily put down his pen?

5.9 INSTITUTIONS

Society consists of the individuals within it and the social relations between them. However, we cannot understand society by looking at all these separately - we would never have the time to do it and we

64 Capital Vol. 3, pp. 862-3.

would be none the wiser for it once we had.[65] Fortunately the social relations between individual members of the society are not completely haphazard. Some sets of relations can usefully be distinguished and, as such, recognised as institutions.

There are two common uses of the word institution and both are useful in social description. The first is a set of particular social relations, often found between pairs of people. The relations of production constitute such a set - the institution of "wage labour". Another example is provided by the "institution" of marriage, consisting of the set of social relations commonly found between husband and wife. As such, they can be a significant part of the environment of each person and can go a long way towards explaining how each thinks and acts. Of course, the most commonly found combination of relations between husbands and wives do not determine the actual relations between particular husbands and wives. Likewise, their actual thinking and actions will principally be affected by these actual relations (except to the extent that they are also affected by others who have role-expectations of them based on the typical role-orientations and role-behaviour of husbands and wives related in the more common way). Given this rider, it can be useful to look on all those who stand at one end of such a set of relations as a group or class (see §5.10). Note that the members of such a group may have no contact or relations between themselves but only with their opposite numbers.

The second use of the word, and the use in this dissertation is the web or matrix of social relations between a set of persons in closer, more frequent and more intense interaction with other members of the set than with non-members.[66] Corporations, government departments, courts, prisons, Trade Unions and political parties and individual families are examples. On such a definition the boundaries are vague - each institution is likely to be a part of another institution and include

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65 But such a process is useful for understanding small groups.
66 Close to Eisenstadt's description, 14 IESS p. 409.

parts or all of several other institutions.[67] But this is true of any of the examples we come to ponder. The constellation of relations between a set of persons that is called an institution will be based on descriptive utility on one or more of the following criteria: (i) the relations between the members are particularly stong or numerous,[68] (ii) the relations between members of this group and outsiders tend to take on a particular characteristic, (iii) the relations between the members are such that some of those members act with greater strength or power against or upon outsiders because the actions of, or the resources held by, other members can be directed against or upon those outsiders. We might loosely say that the institution's existence places greater power in the hands of some of its members or that they act through these persons.

The last is the most common reason for the identification of institutions. It is a consequence of the internal social relations implied by the definition. The web of relations will include a number of chains of relations - some of the most common are "chains of command", a series of authority relations by which one man acts and affects others with whom he has no direct relationship. These are common in corporations, Kelsen found them in law. Other chains become evident only as effects pass through them. In response to outside circumstances a set of intra-institutional social relations are activated.

The social relations that constitute the institution and the chains of relations within it have all the characteristics of social relations discussed above. They will be as mixed and varied as social relations in

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67 There is a balance between these two factors - the inclusion of extra people in an institution reduces the number of relations with outsiders but also reduces the average number and intensity of relations between members. The cut-off point will be somewhat arbitrary and based on descriptive convenience or terminological familiarity.

68 This is similar to Homan's definition of a "group" based on the relative frequency of interaction. But the difficulties Honoré (WG p. 162) finds in this do not apply to the theory presented here. Interactions were defined in §5.2. This particular definition does not rely directly on frequency of interaction but the numbers of relations. Strength is part of this definition and is based on how great an effect these relations have on the thoughts and actions of members.

general.[69] The environments of the parties to these relations will tend to differ as will their perceptions and points of view. But because much of the members' social interaction is with others in the institution, and ideas will flow more freely between members in such constant interaction, there will tend to be more similarity of environments, perceptions and points of view among members than between members and outsiders. These similarities will lead to talk of the "institutional point of view" and are part of the explanation for the pursuit of "institutional interests" (§4.11).

Each member will be linked to other members by a number of relations. These relations will not only be of varying types but the one person will be power-subject in some and power-holder in others; anticipator in some, reactor in others etc. The proportions will vary and those who are most often power-holders, reactors, effectors and value-beneficiaries hold the key positions within the institution and will play the greatest part in determining the overall effect that the institution has on its members and on society at large (this provides a working definition of senior "officials"). Although attempts are made to fit these relations into structures (especially the "formal structures" of authority relations drawn on management flow charts[70]), these structures only include a fraction of the relations. Any attempts to add an "informal structure" are misleading as it is neither "structured" nor separable from the rest of the institution (§4.11). In short, it is not helpful to see the social relations as structured at all.

The individual members will also be linked by social relations to individuals outside the institution. It is through those social relations in which members of the institution are power-subjects, anticipators and value-holders that the institution is affected by those outside it; and it is through those social relations in which the members are power-holders,

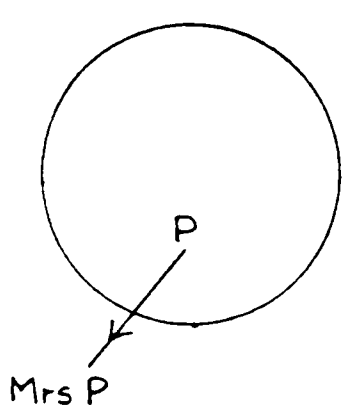
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69 Pace some of the more classical organisation theorists who treated them all as legitimate authority relations and those like Etzioni who treat them as largely coercive or inducement relations. (A Comparative Analysis of Complex Organisations.)

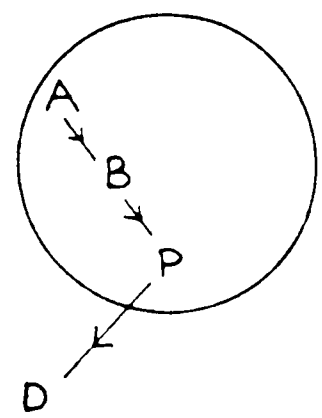
70 Although even these are looking messier nowadays (Beer ST(2) p. 259).

reactors and value-beneficiaries that the institution has its effects. Not all the effects achieved through the latter relations could be called "institutional" - the relationship of a policeman to his wife is not an external relation of the police force, and if Constable P beats Mrs. P it will not usually be seen as an effect of that institution (Fig. 2). The effects of an institution typically involve the activation of a chain of relations between members of an institution before the effect is achieved on an outsider. If Chief Commissioner A orders B (his senior officer on the spot) to disperse a demonstration, and if the same Constable P hits a demonstrator, then <u>that</u> is one of the effects of the institution. The effect is gained through the activation of two mixed authority relations within the institution and a pure relation of force between P and the demonstrator (Fig. 3). Even in an apparently isolated interaction involving a member of the institution and an outsider, the effect can still be seen as an institutional one if it is largely caused by social relations within the institution (e.g., when an off-duty policeman sees someone breaking into a store and arrests him, the action is the result of his police training and his standing orders, both received through intra-institutional, social relations - Fig. 4).[71]

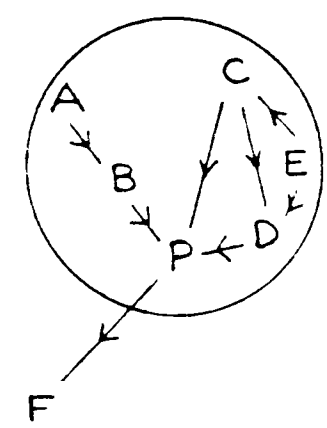
<u>Figure 2</u>



<u>Figure 3</u>



<u>Figure 4</u>

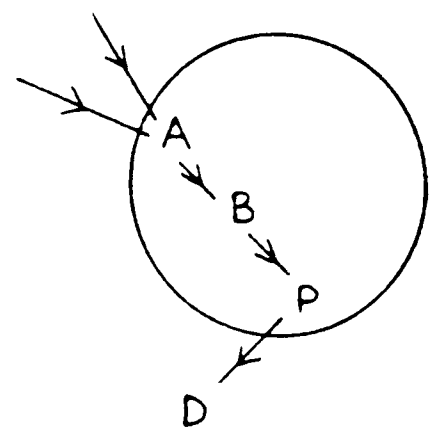


Of course, in none of these cases will the chain of interaction have "originated" with A (in a world of continuous and mixed causation, such original causes are best left to metaphysics). He will probably have been

71 So P's beating his wife, although unlikely to be an effect of the institution, <u>could</u> be one if P had been drilled to react firmly and physically to any challenge to his authority.

affected by social relations such as the anticipated unfavourable reaction of politicians or rate-payers if the demonstration gets out of hand (Fig. 5).

Figure 5



This raises an important point about officials. Holding a key institutional position may greatly increase the strength and number of his social relations in which he is power-holder, affector or value-beneficiary. But he is also subject to and limited by a large number of social relations with people, both inside and outside the institution, which impose practical limitations on his action. He is rarely free to use his powers as he chooses and, to the extent that others have sufficient power over him to direct his use of that power, it is not really his power at all. But he is still usually left with a significant range of actions to choose from. By making a choice from within that range he can shift the overall effect of the institution on its social environment. It is for this reason that conflict over such positions is an endemic factor of social institutions.

This image of institutions as made up of these social relations seems to accommodate with the paradigmatic examples of institutions listed earlier. But it also helps to explain why they do not possess the supposedly key characteristic of other conceptions of institutions - a purpose, function or goal.

The conception of legal institutions in terms of their function was rejected in §4.11. The same sorts of arguments can be applied to institutions in general, especially when they are seen in terms of webs of

social relations. However clear any initial goals of founders or members may be, those of new members will not necessarily be the same and cannot be ensured to be the same. They join for their own reasons, usually provided by the inducements offered, favourable reactions anticipated, or the power relations they hope to exercise through the institution. Even if institutions are created within a group holding common goals, the creation of social relations within the institution and external social relations with non-members changes their environments. They give most (though not all) a reason for strengthening the external relations of the institution through which it affects the outside world (although the fact that these relations will be through individuals introduces a conflict - those individuals will want to maximise their range of choice in the exercise of those relations while others will want to minimise it). But as the internal relations of an institution multiply, they provide a greater diversity of environments for the members, and make the sharing of goals and interests less likely.

This matrix of internal social relations, which provides the source of an institution's strength, is also the source of its weakness in carrying out its goals. It makes possible the pooling of resources to magnify the action of individual officials through whom the institution affects its social environment.[72] But this must be done through chains of relations that include several members whose perceptions and purposes vary, and who are subject to social relations emanating from outside the institution that may limit the effect of the chains of relations on the above officials. Furthermore, in a matrix of social relations, different chains of relations pass through the same person, some pushing him one way, some the other. Finally, the institution's resources, though considerable, are in the hands of its members (partly because of the impossibility of complete concentration and partly because subordinate members have to be given resources in order to achieve the effects

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72 Blau and Schoenheur call this a new form of power but it is just a complex combination of ordinary social relations : The Structure of Organisations p. 347.

expected of them). But these very same resources are the basis of some of the social relations in which subordinate members are power-holder, reactor etc. and their superiors are power-subjects, anticipators etc. - these give subordinates the ability to resist their superiors' attempts to affect their behaviour.[73] Thus relations in a chain will be, like all social relations, only partially effective. By the time we reach the end of an internal chain of relations where effects on the environment are supposed to be achieved, the individuals concerned may be achieving quite different effects from those intended. Sometimes the chain of relations breaks down and no effects are achieved at all. Furthermore, where the institutional effect must be achieved through several such persons acting on the institutional environment, they may be acting at cross purposes[74]. Thus the overall effect the institution has is likely to be rather crude. Institutions are a powerful but very blunt and unwieldy instrument. It is not always clear whose instrument it is and for what purpose, if any, it is wielded.

Structural-functionalists may choose to look at some of the effects[75] they claim the institution has and dub them the "function" of the institution. But the lack of common purpose makes the fulfilment of that function problematic; and the disparate nature of institutional effects makes the selection of one such function a distortion of how the institution affects society.

Another justification for treating institutions as having a purpose is offered by Honoré (he uses the term "group", but it covers the same sort of phenomena as "institution" in this thesis). He rejects the idea that the purpose will be consensually held but considers coordination of action as conclusive evidence of a common purpose.[76] The meaning of

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73 Thus the power is not quite the threat imagined by Blau and Schoenheur loc.cit.

74 See Trubek 11 Law & Soc.R 529, 539

75 This is a completely different kind of arbitrariness from that involved in choosing which sets of persons are to be regarded as institutions - it involves making that choice and then disregarding some of the relations between them.

76 WG p. 169. Such common purposes, even if demonstrated, are unlikely to fit into a system of common purposes so it was not considered in ch. 4.

coordination is, in his own words, "liberal" - one action following another as in a game of tennis. This is a little too liberal. It is in the nature of causality that events follow each other. What is clearly meant is that the nature of the activity (or, as this thesis puts it, the relations between the people engaged in it) leads to a sequence of actions. But the same could be said of a street-fight, in which one punch follows another. One action follows another because of the nature of the activity and the relations between the parties - yet no-one could find a common purpose. There is not even a desire for the interaction to continue as each action is intended to stop the interaction. The next example is of workers on a building site who coordinate their action to erect a building although they have a variety of reasons for taking part in the activity and conflicting interests in how and at what speed it is completed. This shifts the emphasis on to the result, or effects, of the activity rather than the way in which one action follows another. But if the institution concerned is a construction company it will continue after the completion of the building. If it is merely a group of workers employed solely for the job then they may have a real, felt and actively pursued common purpose of delaying the completion indefinitely. More fundamentally, in either case the completion of the building is only one of the effects and results of the activities within the institution - people are employed,[77] pay is handed out, taxes are paid, dividends are given, materials are diverted to private use. Just as in functionalist theories the purpose chosen is only one of many effects and to see the way actions are inter-related to produce that one effect distorts the image of interaction within the institution.

Honoré argues that the achievement of a common purpose requires and stimulates the coordination of action.[78] But this does not mean we can infer a common purpose wherever there is "coordination", for that coordination may result from other factors. First and foremost it may

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77 This may be the principal effect and, in "job-creation" schemes, that which is primarily intended.

78 WG p. 177

merely involve a sequence of actions each of which affects the next. The subsequent action may, in turn, affect the initial actor (as in the tennis match or street-fight) or may go on to affect other actors through a chain of social relations. It may be coordination imposed by a third party who uses power relations to affect the behaviour of each (e.g. a slave-driver coerces two members of the chain-gang to throw rocks to each other, or a foreman induces site-workers to do the same). Finally, actions may be coordinated because various factors lead one person to engage in a practice of which another becomes aware and takes advantage.[79]

The beliefs that people hold about the functions or common purposes of the institution are important and may be one of the key factors affecting their actions and leading them to interact with other members. But this will happen even if those other members have different beliefs about those functions and purposes. In such cases the institution will probably not fulfil either function or achieve either supposedly common purpose. But this is no bar to the continued existence of either interaction or institution. People also have beliefs about the existence of institutions and what they can get or achieve by interacting with them. This leads to an increase in interaction among members of institutions.[80] This is borne out by Finnis's archetypical institution - a family. There is intense and frequent interaction within families that live under the same roof. The belief its members have that they constitute a family is an important stimulus to interaction. Yet its members would find it extraordinarily difficult to agree what common purpose a family has.

Institutions involve both more and less than actions coordinated to

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79 Even when members do coordinate their actions to achieve common purposes they will not necessarily be common to an institution. Much organisation theory is concerned with the strength of sub-groups in institutions and their tendency to conflict with each other and prevent the achievement of institutional purposes. These are especially prevalent in large permanent organisations with low staff-turnover, low technology in a differentiated social setting (Froman in SLSS) - virtually a blueprint for major legal and social institutions!

80 This could not be accepted as a definition of institutions because of the multiple and overlapping classifications of institutions that individuals adopt.

achieving purposes. They involve more because the purposes are so many and the institution continues even when a purpose is achieved. They involve less because those purposes, if achieved at all, are so ambiguously and partially achieved. This is borne out by the names used to describe institutions, which rarely refer to purposes they are expected to achieve. This is just as well for it makes it possible for people who expect different things from the same institution to still talk about it.[81]

But the importance of institutions is not their ability to fulfil goals, purposes or functions. Their importance lies in their ability to concentrate, albeit partially, via their internal social relations, the resources of their members into the hands of a few of their members who interact with the outside world. These individuals cannot exercise those resources as they please, they are subject to the internal social relations, especially the chains of such relations that link them to key officials. They are also subject to the social relations they have with others, especially officials in similar positions in other institutions. It is a useful shorthand to say that society consists of a network of institutions. But it should be remembered that those institutions are not black boxes with arrows coming in and out. They act through individuals who do not experience institutions as such, but as social relations with other individuals. Institutions inject some organisation into social life, but only some - and as we will see in the next two sections, they provide a good deal of the disorganisation and disorder of social life too.

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81 Yet people do link institutions to ideas, functions, goals and purposes. This could be partly due to manipulation as key officials justify their positions and the resources the institution gleans from society. But it is due more to the fact that individuals are concerned with only some of the effects of institutions - either the effects they know the institution has on them or those they hope to achieve through the institution. This selectivity is natural for the individual indulging in his own practical reasoning in pursuit of his activity. But it cannot be justified for the social observer who must notice the variety of such practical reasoning and activities within each institution and the consequences it has for their operation.

5.10 GROUPS

A group was defined earlier as a set of people at one end of a type of social relation. Unlike members of an institution, there will not necessarily be any social relations between members of such groups. Indeed, groups are defined in terms of the relations members have with persons different from themselves. These groups can be very important socially because they are likely to share certain characteristics on which could be grounded common subjective interests and other values (§5.7). But different groups are likely to have subjective interests that are antagonistic to those of other groups (in the sense that their subjective interests cannot be realised simultaneously). This is essentially because the asymmetry of the social relations between men are a source of difference rather than similarity. Most social relations appear different from each end, they affect each individual differently, so that the environments of the two people involved in a social relation are made more, rather than less, different because of the interaction. These environmental differences lead to different perceptions of that environment and different values and ideas generally. The various relations of production are especially important because of the part work plays in the lives of most and because they usually lead to a differential distribution of the social product. This differential distribution produces clashes of subjective interest, not only via its effects on the environments experienced by the classes at either end of the relations of production, but also quite directly. There will always be someone who proposes alternative social arrangements that would reduce the inequality, and those who believe they would benefit under them have a subjective interest in their introduction. It may or may not be true that in the proposed alternative the poor would be better-off. Dr. Pangloss might claim that we have reached a maximum distribution of social benefits, but the acceptance of that argument by the "worst-off" is problematic. This conflict of interest does not cease with the aspirations of the worst-off. If someone does accept the existence of inequality, there is

every chance that he will want to be one of the beneficiaries of that inequality. Individuals will desire entry to the wealthier classes, and groups will seek to better the positions of their members. Even the wealthiest classes are subject to a desire for more: first because of the general tendency of all people to make comparisons with those better-off rather than worse-off than themselves; and second because, once someone believes he is entitiled to, or is prepared to seek, more goods than his neighbour, there is no logical point at which his preponderance of possessions should stop.

If a group comes to see these subjective interests as common interests based on common characteristics they become, subjectively, a group - they have "group consciousness". Where they direct their resources (e.g. votes, money, labour, skills or time) towards the realisation of those subjective interests, they can provide a significant social force. This process is usually called group "mobilisation". It can occur spontaneously - the individuals become aware of a subjective interest and act independently to achieve it. But such action will be uncoordinated and unlikely to enjoy much success.

Far more effective is the mobilisation of groups by institutions. Frequently it is an institution that arouses the group to awareness of common characteristics and subjective interests. The institution may be specifically set up to do so or may be an opportunist institution (especially a political party) which sees the potential for mobilising a group. Once mobilised, the subjective group may then be said to exercise power through that institution, although all the caveats about achieving purposes through institutions should be inserted here - especially in the latter case. Indeed, sometimes such mobilisation may do more to increase the institutions' resources than to extend the power of groups.

In all cases only some of the group's resources will be mobilised, and among different groups there can be wide variation in the degree of mobilisation. There are many reasons for this.[82] One point, however,

82 Olsen The Logic of Collective Action.

should be made. The more directly the position of a group is threatened, the more likely it is to become a subjective group and mobilise or be mobilised against the persons or institutions threatening their position. Any ensuing conflict strengthens the group's cohesion and organisation.[83] This is so well known that other persons and institutions will frequently modify their actions in order to avoid these anticipated reactions. If the group is unaware of this then it is a social relation of anticipatory reaction: if they are aware then it is a case of power. These constitute important social relations and strong reasons for the anticipators.

These relations include cases where actions are modified because of the anticipated reaction of as yet unformed groups as well as existing ones. In such cases the anticipating group is reacting to perceived resources and willingness to mobilise them for action - the anticipation is merely of a two-stage rather than a one-stage process. An example can be found in Hough and Fainsod's[84] book on the U.S.S.R.: they argue that much government policy is based on avoiding action that will mobilise the as yet disorganised and passive population against them.

Yet members of a group whose interests would be threatened by the mobilisation of other groups frequently do not anticipate the threat that such mobilisation poses. Consequently, they and "their" institutions may unwittingly act in such a way as to provoke it.[85] Yet if they see this mobilisation in progress they will not be unmoved. It is common for institutions and groups under threat from another to attempt to limit the latter's effectiveness by making it more difficult to mobilise or by affecting the form the mobilisation takes (e.g. compulsory strike ballots).

Thus, the form and extent of group mobilisation is affected by the action of other groups and institutions as well as the characteristics and

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83 FSC chs 2, 5.

84 How the Soviet Union is Governed.

85 The relative lack of organisation of groups (especially those not subject to immediately perceived threat: FSC p. 104) means that even if most were to perceive the threat, if some of their members do not see the possible mobilising reaction then they may act independently to promote it unwittingly.

interests of the group itself. And whether mobilised or not, social groups are important components of any social description.

5.11 AN OVERALL VIEW - THE SOCIAL MÊLÉE

We now have the dramatis personae of the social stage: institutions and groups. The description of society as a whole becomes one of providing an overall model or picture of how they interact. Descriptions of society in terms of systems of commonly-held norms or systems of institutions with interlocking and complementary functions have already been rejected.[86]

The non-systematic picture to be drawn in their place is naturally complex but the single word that most captures it is "mêlée" - a fluid, constantly changing set of interactions in a complex struggle between a large number of groups and institutions. The members of those groups and institutions will have conflicting subjective interests and other values which they will pursue and defend, sometimes individually but usually through institutions.

Institutions will be in conflict with each other because of the conflicting interests,[87] not only between members of different institutions, but also between members of the various groups whom the institutions have mobilised. Their resources and power will vary, but none are so powerful as to ignore the others in choosing how to act.[88]

The mêlée is not a Hobbbesian war of all against all. There is a degree of organisation of persons into institutions. More importantly, there is not all-out "war" (nor is there any likelihood or generally any apprehension of it). Indeed the nature of institutions would make it very difficult for them to take part in one. First, there are all the difficulties of directing the activity of institutions towards singular purposes. The basic problem for any institution is that, being a web of

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86 §§4.3, 4.10 respectively.

87 Most conflicting interests will be supported and justified by conflicting values as well. Those without the interest may hold these values and their resources may be mobilized but such contributions are likely to be small.

88 The variation in the power of institutions is greater than between men under "Humean conditions" but probably less than between states.

mixed relations between different persons with different environments and values, there is rarely a consensus or unity of purpose within that institution. Those in key positions can influence the action of other members by exercising the power that they have over them, but the range of actions they can demand is limited. Second, though the total resources held by a group's members may be quite massive, these resources are rarely, if ever, fully mobilised. There are many reasons for this:

(i) Commitment of resources to the mobilising institution means that the group members will have to forego the benefits of alternative uses for those resources.

(ii) Even if greater benefits could be achieved by pooling resources, there is always the temptation to be a "free rider".

(iii) Even if someone is prepared to put his resources at the disposal of a mobilising institution there may be several such institutions for his group and he may see himself as a member of several groups with conflicting demands on his resources.

(iv) The inability of institutions to achieve intended purposes and their tendency to pursue their own interests is well enough known to inhibit the size and number of contributions.

(v) Mobilisation of large groups itself requires resources.

(vi) Many resources involve the activation of power relations over others, these may be effective in normal times but not at times of extreme conflict.

The actual degree of mobilisation will vary for different groups and at different times. Conflict tends to increase mobilisation of any group. If a perceived threat develops the group will, unless they believe that the threat cannot be met, probably become more mobilised. This is a factor that parties who seek to mobilise the working class must remember. The privileged groups are by no means fully mobilised against them. Mobilisation of one side's resources is pointless if it provokes the other

side to mobilise even more[89] (especially if it stimulates coalitions of subjectively threatened groups - infra). Also important is the rate of mobilisation of resources and the capacity to switch them to different purposes. This may enable an apparently weaker group to pursue its own interests successfully to the prejudice of a stronger group. But neither even approaches full mobilisation, which would entail the complete commitment of all resources to the conflict.

Thus the intensity of conflict is reduced by the disorder within the combatant groups and institutions. This is the complete reverse of those social theories which postulate that social peace must be the result of order and common values. Here we see that social peace is not aided by common values (which are found in the groups of persons with conflicting interests) or order (which is found in the institutions that mobilise these groups). Instead social peace is preserved by the disorder which hampers the combatants in their struggle.

The mêlée is not a conflict between two sides. It is not simply a "class" war. It is a disorganised struggle between many different institutions and groups with the frequently noted limitations that this imposes on the extent and decisiveness of conflict.[90] The first reason for the large number of combatants is the number of social relations which are significant enough to produce pairs of important subjective groups - workers and capitalists, consumers and retailers, husbands and wives. Following Marx, the relations of production are regarded as the most significant - but there are likely to be several relations of production in any one society (§5.9). Some may claim other relations are as significant, (e.g. black and white in the U.S.A.). To the extent that such distinctions are not essentially economic (thereby representing versions of the above relations of production), these relations add more

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89 Unless neither mobilising institution actually intends to apply the resources to the conflict, in which case the mobilisation actually reduces conflict.

90 SD, LIMS. (Unger notes a contrary tendency to larger and fewer groups in "modern society" but this will be ameliorated by the difficulties of mobilising larger groups - one of the reasons for the "crisis in authority" that he sees.)

groups to the mêlée. The second reason for the number of combatants is the divisions of interest within those groups at either end of a social relation. A third reason is the tendency of institutions to perceive and pursue their own interests. Whatever purposes or interest groups that institutions are created to serve, there is the tendency for them to develop an interest in their own aggrandisement. Even institutions that are founded to mobilise the resources and further the interests of the same group frequently develop their own interests and values to the point that they conflict with each other as well as other institutions (e.g. Trade Unions and the Labour Party).

The numerous combatants are not involved in a general conflagration but are involved in specific struggles, each threatening or defending the subjective interests of one or more institutions or groups. Some of these struggles are over the distribution of spoils from a common activity. Other struggles are over influencing the actions of, or filling key positions in, a third institution which has the power to make decisions affecting their interests (e.g. influencing the actions of courts and political parties by imposing or exercising power relations over them or influencing the appointments of judges and party presidents). As we saw in §5.9, the holder of such a position cannot do just as he pleases but, within the limitations imposed upon him by the external[91] and internal social relations to which he is subject, he has a range of choice, making the attempt to influence appointments to such positions worthwhile. The outcomes of such attempts depends not only the size of, and speed with which, resources can be applied to the struggle, but also the internal power relations within the target institution. These battles are fought out within the institution and the results are naturally affected by the terrain over which they are fought. Institutions that are, in general, weak may have special advantages in certain target institutions and may succeed where generally stronger institutions fail.

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91 Especially the social relations in which the conflicting institutions are power-holders, reactors and value-beneficiaries.

Of course, the network of social relations in which each institution is immersed will include some relations by which it can bring other institutions to its aid to create coalitions[92] in defence and promotion of some of their interests. This is a matter of cross-institutional rather than intra-institutional or intra-group mobilisation. But it will be hampered by all the problems of the latter and, unless the interests of the members of the other insitution are affected, these problems will be magnified because it is at one further remove.[93] The mobilisation is likely to become weaker the further it moves from the few institutions or groups whose members' interests are directly affected by the outcome of that particular struggle. Thus the shockwaves of conflict tend to be damped as they pass through the social mêlée. In the rare cases where this is not so, and mobilisation of resources to the struggle runs right through society, the conflict will polarise the society into two rival camps in a civil war (or perhaps a civil version of the "cold war").

The image of society outlined above has similarities to a view of group conflict common among American political scientists. In this view conflicting parties fight for political power by attempting to mobilise the votes and other resources of various social groups, this conflict being regulated by, and subject to, commonly-held rules and conventions about its conduct.[94] But even this minimum liberal consensus about the "rules of the game"[95] is rejected. Although political scientists may lecture and write about them, they are certainly not much discussed by the politicians who supposedly practice them. When they are discussed, members of different political institutions tend to refer to different ones. The opposition will emphasize full disclosure and discussion in the house, the government will emphasise the confidentiality of ministerial

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92 These may even include some institutions and subgroups to whom they are normally opposed (ML p. 56).

93 Even where common interests are affected the mobilisation will tend to be limited to defending that interest (FSC p. 149).

94 Dahl Pluralist Democracy in the United States FSC pp. 121.

95 The sorts of rules envisaged by political scientists are duty-imposing - imposing limits on the kind of activity acceptable (e.g. FSC p. 118). In such a conflict, any power-conferring rules would not be limiting. They would merely point to the positions to be fought over.

discussions. Conservatives will emphasise claimed constitutional restraints on the exercise of power, reformists the principles of parliamentary sovereignty. Even when the same rule or convention is referred to, it will often be in a formulated differently or given a different meaning (e.g. ministerial responsibility). This is another example of how the same norm may appear different to different people: and we see again that if beliefs restrain action, they tend to be different beliefs for different people.

But let us assume that there were such commonly-held rules. Such rules would be unlikely to hold a key place in the value systems of politicians. The goals of personal power, or of advancing the cause in which they believe, are likely to be valued more highly than the goal of "doing it the right way". People are not participants in the political process because of their belief in political rules[96] but because of what can be achieved by political action. Such single-minded determination is possibly even a prerequisite for political success. Thus any rules would be likely to lose in choices between following them and achieving personal or party goals.

These rules would also figure minimally in the consciousness of ordinary citizens. Public discussion about rules and conventions is generally subdued. Politicians do not like to use the little time the public allows them agreeing with their opponents. Alleged rules and conventions are usually raised only when one side accuses the other of a breach and hence come to the public eye as partisan issues. Since those who lean towards one party rather than the other normally do so because they give it more attention and have greater trust and respect for it and its aims, they are more likely to adopt that party's viewpoint on the issue. Therefore, the loss of votes will not be a significant restraint on unconventional action.[97] In other areas of social conflict, we will expect even fewer rules governing conflict, and that those who support a

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96 Pace Winch (Idea p. 131), in an ironically Winchean way, that would be to miss the "point" of the activity for each side, which is conflict!
97 See Sampford 12 MelbULR 210, 236

person or institution on substantive issues, will also adopt their interpretation of the rules governing their pursuit.

Commonly-held rules would not act as internal constraints on social action so much as weapons that can be used against someone who breaches them. If, as argued here, there is no such consensus then we are left with the fact that individuals have values which affect their actions but, those values vary from person to person and are no more likely to lead to cooperation or mutual limitation than conflict.

Conflict is not limited by commonly held rules. It is limited by each party's perception of how far conflict can successfully be pursued before their interests would be prejudiced by the anticipated reactions of those whose interests would be harmed by the conflict. This reaction may be direct or <u>via</u> other institutions (e.g. courts or unions) that they can mobilise.

The complex interaction between such heterogeneous entitites that constitutes the social mêlée is hard to picture. Most analogies will be poor because they will be taken from the lower levels of social life which tend to be more organised - clubs, organisations and, the perennial favourite, ships at sea. One image that may be enlightening is of a football game in which all the different codes are being played at once. There are many sides of differing sizes whose players have different abilities. Some play as individuals although they usually try to gather other team members where possible. There are no rules to cover the overall game but some teams have their own which they generally adhere to until they can clearly see the advantage of not doing so. The teams themselves do not play very well togther because, although there are often captains, the organisation of the team is complex and several vice-captains may pass on instructions to ordinary players that bear little relation to the instructions they received from the captains. Players are usually involved in several teams at once which limits the extent to which they can devote their time or effort to any one of them. They are taking part for a variety of (usually personal) reasons, and some

did not want to play in that team or play that code of football at all.

The objects of the teams vary considerably. Several teams want to put the ball between certain posts, (or a different part of those posts). But most others have targets of varying size and shape all around the field. Some are playing with different balls. Whatever their team's object, they must take note of the actions of other teams - in dribbling a soccer ball it would be foolish not to watch for the line of rugby players coming down the field. The rugby players may make it obvious to the soccer players that they had better get out of the way. But usually the soccer players will move and the rugby players will not realise that they were even there and have kept out of their way.

There is cooperation between the teams but each team eventually goes its own way. There are umpires but it is very hard for them to decide what rules to use or even what it is to be an umpire and they are often ignored. They organise[98] into teams to be more effective but invariably get involved in the play. There are several scoreboards manned by historians and sociologists, but they have a nightmare in deciding what to record. Their team affiliations make it difficult for them to decide what it is that they should be recording and those who try to write down everything contract writer's cramp and terminal confusion. One could continue: the more complex the picture becomes, the more like society it seems - but such is the nature of society.

The social mêlée is seen as disordered conflict. The disorganising influences that produce the conflict[99] also operate to frustrate and mute it.[100] The inconclusiveness of the struggle over the short-term leads to a kind of social inertia in which certain interests of groups tend to

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98 Only partially of course. Umpires have at least as much problem forming effective institutions as others.

99 I.e. the asymmetry of social relations, the indeterminacy of language, the variety of environments that produce differing values and interests among the members of different groups and institutions.

100 The relative inability of groups to mobilize the resources of their members and of institutions to concentrate their effect are both due to the above influences.

become entrenched because of the inability of others to dislodge them.[101]

To state that a person's or group's interest is entrenched is to sum the effects of all the relevant social relations on one aspect of their fortunes.[102] Interests are entrenched either if they can be successfully defended or if they will not be attacked. The strength of both attack and defence will be largely determined by the resources of the attacking/defending party, the resources of those on whose support it can call in such a conflict, the extent and speed of their mobilisation, and the power relations in which they can be deployed.

Interests are being defended all the time but, even more will not be under attack at all. A common reason for this is that those who are in key positions in the institutions whose members would benefit from a successful attack have considered the question and concluded that the interest could, in fact, be defended. Here we see relations of power or anticipated reactions at work. The calculations may be right or wrong but have the same effect in restraining the attack. A point made earlier is apposite here: it is easy to overestimate the strength of others because you do not take account of the fact that their ability to mobilise their members' resources may be just as limited as yours (see §5.4). Wrongly assumed strength is not disproved and provides another source of interest entrenchment. However, it is not suggested that this is a major determinant. Those in key positions on either side usually do have a fair idea of each other's strength because one of the results of conflict is that the parties establish each other's power.[103]

The discussion in §5.7 indicates other reasons for the non-challenge of interests. First, there are all the practices generated by the social relations in which those with the entrenched interest are power-holders, reactors and value-beneficiaries. These will tend to generate practices that do not challenge the interest. Many potential challengers will adopt

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101 Cf. Riesman's notion of the "balance of veto groups" The Lonely Crowd pp. 244-255.

102 That aspect is identified by the person making the statement, avoiding problems with subjective/objective interests.

103 FSC p. 137.

these practices - either because they are subject to the relations themselves (and hence have little choice), or because they adopt the practices of others who are so subject. Second, these practices have the effects on values noted in §5.7 which produce value-effect relations that may prevent action challenging certain interests. If previous practices had left the relevant interest unaffected, values will have been adopted justifying these practices which are, if not supportive, at least not inimical to the interest. Third, perceptions depend partly on experiences. Someone who has not had any experiences in which he was affected by the entrenched interest may not even be aware of his conflicting interest. Finally, there are "ideological" limitations - the potential challengers may not have been exposed to ideas congruent with or conducive to the challenge of the relevant interest. The ideas that are actually disseminated are those of certain "ideological" institutions and individual opinion leaders, many of whom may actually have the relevant interest and who would not conceive of, let alone disseminate, the ideas facilitating its challenge.

This entrenchment of interests exists for the weak as well as the strong. Although the weak have, by definition, few resources and little power to defend their interests, they also have few resources for more powerful groups to plunder. The taking of those resources and the attack of the weak group's interests may not be worth the costs involved. (There is the "opportunity cost", using the resources for that rather than another purpose, and the costs imposed by the weak in the resistance they put up.) A point would normally be reached, even for very weak groups, where attacks on their interests would fail. These attacks would be so prejudicial to what little they have left that most of their resources would be mobilised to its defence; whereas few members of any resource-rich group could be mobilised for so unlucrative a challenge. In such cases a greater proportion of the weaker group's fewer resources outweighs a lower proportion of the potential challenger's greater resources. Thus even where there is a great disparity of power and

resources the social mêlée can produce social inertia.

5.12 SOCIAL CHANGE

The last section depicted society as a mêlée of conflicting groups and institutions. Social peace and stability are the result of frustrated or inconclusive conflict endemic in such a society. This explanation does not suffer the problem posed by some strong theories of social order - how is social change possible? If stability is related to the balance of forces mobilised by the parties to these conflicts, change results from alterations in that balance. To the extent that interests are not successfully challenged there is social inertia. But the converse of this is that where officials of institutions or members of groups do see that it is possible successfully to challenge an interest to their own or their members' benefit, then that interest will usually be challenged (value-constraints being rarely sufficient to stop this by themselves - supra). When such challenges occur there will be conflict, adding to the social mêlée, and if the challengers are right, social change will occur. Such challenges and changes are happening all the time. What a theory of social change needs is a criterion for distinguishing more and less significant ones (simultaneously providing "criteria of similarity and difference"[104] between societies). The theorist's choice will be a matter of value, of which differences are important to him - although some of the more ambitious will claim that changes in the criteria they establish will be accompanied by changes in just about everything else that anyone could regard as important. A theory of social change also needs to provide some explanation of the mechanism(s) by which such significant changes occur;[105] and a theory which postulates an overall direction of social change must explain that as well.

The theory adopted here uses Marx's criterion of difference between societies - the dominant mode of production (the one by which the greatest

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104 LIMS p. 37.

105 These may emerge in the theory's development, but are still pace Cohen (Karl Marx's Theory of History p. 280) needed. Cohen admits as much (p. 287) although he has renamed the mechanism "elaboration".

proportion of the social product is produced). But the importance placed on the relations of production is not solely because of work which takes up so much of our lives. They will affect a much wider range of human activity. This is partly because of the way such relations affect our environments and ideas. But it is also because the power-holders in these relations, like all power-holders, have a tendency to extend the range of power relations that they exercise over their power-subjects. This diversification is made particularly easy by the differential distribution of economic resources produced by the exploitation inherent in most relations of production. These resources make it possible for the group which benefits most from the dominant relations of production to have greatest success in the social mêlée. They are more likely to be able to set up, take over, hold and limit the actions of institutions so that their interests are furthered rather than challenged. It is highly probable that such changes will alter other outputs of these institutions so that those who define social change in other ways will find society altered according to their criteria as well.[106]

This account also demystifies the Base/Superstructure relation. The social relations of production constitute the Base. The relations involved in the institutions not primarily engaged in production constitute the Superstructure. The Base does not determine the Superstructure. It provides the resources that can be, at least partially, mobilised for attempts to create and influence non-economic institutions in order to provide outputs favourable to the interests of classes created by the relations of the production in the Base.

The second requirement of a theory of social change, a mechanism, is provided by the development of "productive forces". This potentially nebulous concept is unpacked neatly by Shaw to include "labour power" (skills and technology) and the "means of production" (tools and raw materials).[107] Marx sees their development as initially aided but later

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106 For them, change in the relations of production causes rather than defines social change. The Marxist advice to them is "watch this space".
107 Op.cit. pp. 10, 14

"fettered" by the relations of production.[108] The optional extra for a theory of social change, an explanation of the direction of historical development, is provided by the claim that productive forces have a tendency to increase. This is not adopted here. Continuous improvement of productive forces is not inevitable. They declined in late Roman and immediately post-Roman Europe, and might again if mineral and energy resources ran low or a nuclear war were to destroy most of the North's means of production. In such cases the relations of production may well change, but in response to a decline in productive forces rather than a rise.

Where this theory differs significantly from that of most Marxists is in its emphasis on the slow rise and fall of modes of production. New relations emerge and grow while the old decline, rather than the old spontaneously disintegrating under the weight of their own contradictions and the new emerging from that.[109] Although it criticises Marxist pictures of instantaneous change it attempts to construct a coherent picture of gradual social change using the same theoretical building blocks as Marxist theory.

Productive forces do change - skills are developed, science and technology improved, machinery invented, minerals discovered. In the opposite direction, skills can be forgotten or deteriorate, or the number of people trained in them decline; science and technology may suffer waves of reaction; minerals can be used up and machinery destroyed. Increasing productive forces will often lead to increased production using the existing relations of production but the ingenuity that improved the productive forces may also conceive of new ways of producing things.[110] The realisation that more can be produced by doing things differently will be a first-order reason of very great strength for doing so, appealing to rich and poor alike.

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108 Feuer (ed.) Marx and Engels: Basic Writings p. 84
109 Larrain op.cit. p. 62, Shaw op.cit. p. 142
110 Although the ideas held by most people are a result of practices copied from others and the ideas adopted to justify them, the range of experience is usually sufficient to generate these new ideas.

If sufficiently different, these new ways of doing things will constitute new relations of production. Most relations of production include power relations, anticipated reactions and various value-effects relations (§5.8). But they will usually begin as power relations: their newness means that others will not be used to considering the reactions of those involved, and norms and values are likely to be congruent with the old rather than new practices.[111] The power-holder in these new relations will be using resources that he possesses to ensure that the power-subjects involved produce goods in the new way. For this he will require resources or a belief in the power-subject that he possesses resources to induce or coerce, compliance. The resources need not be great, for new relations of production are likely to start in a small way and the power-subjects are likely to come from the very weakest members of the society (early factory workers were women and early townspeople runaway serfs). But the need is still there, and as the resources predate the social relations, those resources must have been acquired under old relations of production. Therefore the new class of power-holders are not likely to be the least powerful under the old relations. Capitalists are unlikely to come from the peasantry (although wage labourers might). They will come from the dominant or, more usually, the fringe groups like merchants and guildsmen.

Not only is the new way of producing things unlikely to be congruent with men's values, but there will be many institutions unsympathetic or antagonistic to it. Key personnel will hold the old values and their action will be limited by those groups most powerful under the still predominant old relations of production.[112] Legal institutions may treat the new relations of production as illegal - there may be limits on the number of workers a "master weaver" may employ,[113] or the serfs who made up the population of the towns may be regarded as still bonded to their

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111 So, pace Collins ML p. 77, there are unlikely to be norms in the base.

112 So, pace Cohen op.cit. p. 226, legal rules supportive of the new relations will not be made quickly.

113 Hamerow Restoration Revolution Reaction

lords.[114] But such restrictions will frequently have little effect. The new relations of production may be set up outside the jurisdiction of those legal institutions, (e.g. in nearby villages[115]). The law may be hard to enforce, as in the case of runaway serfs. Loopholes may be found, as in the prohibitions on usury,[116] or the old legal forms may be very flexible, as in the case of U.K. land-tenure.[117]

More often legal institutions will have simply failed to consider the new relations. Indeed, restrictive laws are likely to be reactions by those legal institutions to the creation of the new relations of production and are a part of the fight put up by the groups adversely affected by their spread. But, such restrictive law will not be enacted or decided until conflicts of interests have emerged, been recognised and legal institutions have been successfully influenced by adversely affected members of the old dominant class.[118] Even then the new laws may be circumvented,[119] or impede the new class only slightly.[120]

If the new relations really are more efficient and productive then there is a good chance of their spreading. Others in a position to change existing relations of production or set up new ones along the same model will see the practices of other power-holders in the new relations of production as models for their own action. With the spread of these relations, the class of power-holders in them grow in size. As these new relations become established, the forms of power exercised by that class also grow, and the activities of those involved in these relations become practices with all the consequences for value generation outlined in §5.7. Most importantly, as these new relations of production are more

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114 LRC p. 83

115 Pirenne Economic and Social History of Mediaeval Europe p. 211.

116 LRC p. 38

117 Turning old concepts to new uses is a traditional legal skill.

118 In the Duke of Buccleuch's cases v Alexander Cowan & Sons [1876] cited ML p. 79, the conflict emerged rather late in the development of British capitalism, got to the courts later, and were even longer in producing any results.

119 Though not as easily because these institutional actions are more "purpose-built" than old laws like usury.

120 E.g. in the Duke of Buccleuch's case the stream-polluting manufacturer and the agrarian lord might agree a suitable compensation fee (or, in many cases, a higher rent!).

efficient the power-holders gain disproportionately more resources than would be indicated by the proportion of labour (and even the proportion of social product) created by those social relations. If mobilised, these resources can be a potent force for creating new institutions and taking over old ones.

There is no inevitability about what happens next.[121] Although the emergent class is growing and powerful for its size, it is still weak in relation to the dominant class in the pre-existing mode of production. In terms of pure economic resources the latter will still be stronger because so much of social production will still be under the old relations of production. In control over institutional action, the old class is likely to be even more favourably placed. They are more likely to have been able to influence the filling of key positions with suitable personnel, frequently former members of their own class, and their general power would limit the institutions to actions broadly favourable to them. The dominant class in the still most prevalent mode of production would clearly have the resources to crush the emergent new class. Certainly some attempts will be made to mobilise those resources to that end: most legal restrictions on trade and industry dated from the period of the rise of capitalist modes of production rather than from mediaeval times when they had not even been conceived. Should these attempts be successful then social change would be halted, or even reversed, despite the increased production possible had the change continued. The new class has to fight with the resources, currently rather than ultimately, available to it. Such reactions might explain why some societies appeared completely unable to change - a unified ruling class, based on one mode of production making the rise of new classes and relations of production impossible.[122]

But this ruling class reaction may never occur. Their members will

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121 Pace Cohen op.cit. chs. 7 & 8

122 So China's apparent incapacity for change can be explained without reference to a special "Asiatic mode of production" (Marx op.cit. p. 84).

be hard to mobilise, especially as the mobilisation would be against an unfamiliar enemy (ideology and experience attune them to conflict with the class of power-subjects of the pre-existing relations of production[123]). The unfamiliarity of the situation will also increase the likelihood of error and unintended effects. But most important of all, if society conforms to the rather disordered model sketched in the last section, then such a reaction is unlikely. The society in which new relations of production grow will be fragmented by old disputes. Some members of the old class will be unprepared to join the necessary coalition. The mere fact that small quantities of certain goods are produced in a different way does not appear immediately threatening and, if produced more profitably, may even be inviting. Many members will benefit from the changes (e.g. landowners from increased rent from town-land and improved markets for agricultural produce). Furthermore, the emergent class provides useful new allies in the old disputes. Initially, they will be seen as minor newcomers whose resources can be mobilised to tip the balance in old struggles rather than as an ultimate threat which will make all the old struggles redundant, and against whom the old class must unify to survive. In Mediaeval Europe the nobility was split by rivalries between great landlords and princes. Merchants and towns provided allies for the princes against the great landlords, providing loans and taxes in return for economic concessions and independence from the nobles.[124]

If not "nipped in the bud" the new relations of production will spread further - their greater efficiency will mean that more people adopt them as a model and increasing proportions of the social product will be produced within them. The size and resources of the emergent class will grow. This constitutes significant change in itself but will also provide the motive force for further, "superstructural", social change. Members

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123 Indeed victory over their old enemies would make them complacent and less mobilisable: FSC p. 104. Mobilisation will later become harder as some members take part in the new relations of production and some of the emergent class gain positions within it (e.g. by buying bankrupt estates).
124 LRC ch. 6

of the new class will develop ideas as justifications of their practice which will challenge the old ideas and make the new class into a subjective group.

The emergent class will be mobilised into new institutions. They will also be mobilised into attempts to "takeover" existing institutions - or at least shift the range of choice open to key personnel within them. As the resources of the groups and institutions involved in the social mêlée change, so also do the successfully challengeable interests of those groups and institutions. Challenges will be made and succeed, further weakening the old class and strengthening the new. The institutions which once acted so much in the interests of the old dominant class will now act more in the interests of the new (e.g. the changing decisions of the courts) or lose out to the institutions that do act in the new class's interests and hence receive their support (e.g. the decline of the House of Lords and the rise of the Commons). Over time it will be the new class, rather than the old, whose position is bolstered by non-economic forms of power. Naturally, this will be a gradual process. Different institutions will "fall"[125] earlier than others depending on their internal social relations and personnel (e.g. the judiciary was controlled by capitalist sympathisers long before the army).

The ideological struggle will also shift in favour of the emergent class. Ideas favouring it will be given wider circulation both because "ideological" institutions will come under the increasing influence of institutions sympathetic to it, and because opinion leaders will increasingly come from the new class. As the spread of the new relations of production affects the practices and the environments of more people, the new ideas will seem to fit them more than those which appeared to fit the old practices best. It is not that the liberal conceptions of political democracy <u>best</u> fit the lives of wage-labourers, but they fit <u>better</u> than the old aristocratic ideas of status and feudal privilege.

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125 Though never completely - conflict will continue over the personnel and actions of those institutions.

Furthermore, whereas the new practices could be, with some mental agility, squeezed into conformity with old ideas (e.g. loan-interest into usury), they could be practiced more self-confidently and comprehensively under later ideas more favourable to them (e.g. interest is justified by risk).

The actual place of political revolutions in this process is relatively small. Taking over the state is merely a matter of taking over one of society's institutions. It is a very strong one and one that can be used to create and take over other institutions. But it is still an institution with all the difficulties that institutions have in mobilising resources to achieve desired goals. Controlling the state to the extent that it is possible to control it, may be sufficient to tip the balance of power between the old and new classes. But it cannot be the sole or prime instrument of social transformation.

If there is to be a successful political revolution in which institutions sympathetic to the new class take over the state by force, it will come late in the process of social change. It cannot pre-date the social changes for two reasons. First, for there to be a class war there must be a class and the class can only have emerged if the new relations of production already exist.[126] Second, for the revolution to succeed the institutions fighting it must be able to mobilise sufficient resources to overcome those of the old class and, more than anything else, such an overt challenge is likely to mobilise those old classes. Even if the new and still weak class could be quickly mobilised to launch a pre-emptive strike to take over the state, and withstand the almost inevitable reaction of the old class, production of goods must, and will, continue. Indeed, the damage inevitably done to the means of production - destroyed machinery, lost labour-power because of dead workers, and liquidated or uncooperative managers - will provide great urgency.[127] The new

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126 The exploited class from the old relations of production will not suffice (infra).

127 This is a particular problem for those Marxists who see their the relations of production arising naturally or inevitably from greater productive power of labour. If productivity reaches the point which triggers the revolution, the revolution will push productivity back through the threshold.

relations of production will not emerge spontaneously, nor are they likely to grow from next-to-nothing to provide suddenly the bulk of the social product. In fact, people will produce things as they know how to, according to existing practices.[128] If the existing practices are those congruent with the old relations of production then the old relations will continue[129] (e.g. the NEP after the Soviet revolution) although sometimes slightly modified (e.g. it could be argued that the removal of the Russian capitalists left most productive relations unchanged and merely eliminated the relations between managers and owners). If the relations of production change little then, according to this theory's criteria, neither does society. It is only if the new relations of production have reached a point where they can provide most of the social product in the post-revolutionary period that social change will accompany the revolution.[130] But if the new relations of production have reached this point, then significant social change has <u>already</u> occurred and the revolution merely quickens the pace, putting the final touches to the victory of the new class.

There may not even <u>be</u> a political revolution or any particularly violent change.[131] The corollary of the tendency for <u>interests that can be defended not to be attacked</u> is that <u>interests that can be successfully attacked are rarely defended</u>. Challenges will lead to violent conflict only if members of one side miscalculate the resources they can mobilise and hence the power they can wield, thereby wrongly believing they can win, or if they decide to fight despite this. Where some institutions of the emergent class believe they have grown strong enough to take over the

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128 This does not imply that they hold values or norms supporting those practices, merely that this is the only way they know how.

129 This is why the victorious new class must be based on new relations of production - victory by an exploited class does not change the relations of production.

130 Social change may occur in the period following a revolution but this will be in the nature of the gradual more or less peaceful change outlined above in which the state is one of several institutional actors in the social mêlée.

131 Social change does not require a revolution but if there is one it tends to involve more destruction of old (and creation of new) institutions and less "taking over" and transformation of existing ones.

target institutions or act to prejudice the relevant interests, and some institutions of the class declining may believe they can resist the challenge, there will be mobilisation of resources on each side. If one side does not realise its miscalculation, conflict will increase and more resources will be mobilised, including, sooner or later, the capacities of both sides to apply physical force. But the calculations will be made by several people in several positions in several institutions. They will not all make the same miscalculation. The mobilisation that is weak in theory becomes doubly weak in practice. Thus the too early revolutionary attempts of a new class are weakly supported; and at the other end of the process of change the old class may finally go under with the spasmodic kick of its the more foolish members. Of course, miscalculations could be made on the stronger side too. If sufficiently more on the stronger side than the weaker side underestimate their strength then a potentially successful revolution or reaction will fail. But it is more likely that the overall level of conflict will be less, mostly involving those on each side who think they can win. If any tendential law is to be offered, it is probably that more declining classes will make miscalculations than emergent ones because perceptions of strength are strongly influenced by experiences of the past (when the declining classes and their supporting institutions really were stronger).

It should be emphasised once more that the above process is one of gradual change during which there will be several classes involved in struggle carried on through conflict within and between different institutions. The institutions "fall" at different times,[132] revolutions merely making the passing of state institutions more rapid and violent. A society in the process of social change is a disordered one, with different institutions emerging as both the battleground for the interests of rising and falling classes and, once won, as attempted instruments for one class to use against the other. Even if I am wrong and social change

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132 Consequently, pace Althusser (ISAs p. 140), the state or any other collection of institutions is unlikely to be captured and wielded as a unity by a single class or its "representatives".

is not simply the ebb and flow of class fortunes within a disordered mêlée but change from one kind of order to another, slow social change will still produce disorder in the interim. Furthermore, slow change will make this interim period very long so that many, probably most, societies will be in the process of change with its concurrent disorder. Our society is surely one of these. It has long since passed the high point of capitalism[133] and although we do not know to what other type of society it is changing, we can be fairly certain it has not yet done so. If I am right it will not be ordered even when it has.

The view of social change by conflict reinforces the view of society as disordered by conflict. Rather than requiring separate theories to explain each phenomenon, conflict is used to explain both social stability and social change. Conflict always seemed the most suitable explanation for change,[134] but that very suitability seemed to disqualify it from explaining social peace or stability. But as this chapter has attempted to demonstrate, it can do this if conflict is seen as disordered and unsystematic in a disordered and unsystematic society.

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133 Avineri Social and Political Thought of Karl Marx p. 158. He insists that it was even then a potentiality not a reality.

134 It has certainly been the most common.

CHAPTER 6

LAW WITHOUT ORDER

6.1 INTRODUCTION

The last chapter outlined the bare-bones of a non-systematic theory of society. This chapter will attempt to do the same for law. It will attempt to show that such a theory is possible, plausible, and therefore, if the criticism in the earlier chapters of systematic theories is accepted, preferable. It is not necessary to accept the picture of society outlined in the last chapter in order to see law as unsystematic and disordered. It would be theoretically possible to find a legal system within a disordered society and even an unsystematic law in an otherwise ordered society. But the two disordered images of law and society sit easily together, draw on each other for plausibility and rest on similar theoretical positions and empirical claims.

If law is seen as a part of society as depicted in the previous chapter then we would expect that:

(i) Law will be made from the same building-blocks as the society of which it is a part i.e. social relations between its members;

(ii) Law will be subject to the same forces and tendencies as other parts of society, showing the same centripetal tendency to become partially organised into institutions, the same centrifugal tendencies to conflict and disorder;

(iii) Law will be part of the social mêlée.

Accordingly, the description which follows will depict law as composed of social relations of the various kinds already described and build up an image of conflicting disordered institutions affecting and affected by other institutions in the social mêlée. As such, it provides

evidence that a part of society is disordered - and also a further reason why the rest of society is likely to be disordered (because the effects of law will tend to make it so).

6.2 THE WEB OF SOCIAL RELATIONS WITHIN LAW

Within the mass of social interactions and relations that constitute society there is no shortage of material to be included within law. Policemen raise their hands and people stop.[1] Some sign documents and others hand over goods. Lawyers stand up and talk in court and judges say what is to be done to third parties by fourth ones. Debates are held in parliament, bills are signed by sovereigns and citizens act differently thereafter. All of these interactions are regarded by most members of society as part of the operation and processes of the law. Few social observers would find reason to differ. Most of these involve language-games in which the word "law" is used. Most of the remainder will involve actors who think of the word "law".[2] These social interactions take the familiar form outlined in §5.2: some thought, attribute or action of one person affects the thoughts, attributes or actions of another. These social interactions are the instances of social relationships between these persons. In the policeman/citizen example we witness a power interaction within a power relation. These social relations are not isolated. They are all affected by other relations that would be generally be regarded as part of law. If all these links were traced we would discover an enormous interconnecting web of social relations involving large numbers of those we regard as "officials", their dealings with each other and with ordinary citizens. All the officials

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1 One could insert here: "those who are usually called policemen". There is nothing mysterious about the use of official titles within law. When considering their actions in relation with such persons most people use their official titles or words they regard as applying to the same persons. The different words used, and differences in meaning given to them, naturally affect the interactions of the parties. Indeed, they are part of the interaction because the effect that an official has on a citizen is frequently dependent on how and whether the official is seen. But the interactions are not dependent upon culturally accepted definitions; they are affected, even created, by the diversity in them.

2 The fact that frequently only one of the actors involved will regard these interactions as part of law is merely an instance of the asymmetry of much social interaction.

are involved in social relations with some officials like themselves and others who are not. Judges are involved in social relations with their brother judges and also with barristers, police and citizens; police are involved with other police, citizens, prison officials, magistrates etc.; and each citizen is involved in social relations with several kinds of officials. These social relations are not localised in the individual official's or citizen's immediate social environment but may be with persons throughout society, the legislator who votes in a division may be affecting policeman or citizens on very distant streets.

In any society one could start with any legal actor and see the many relations he has with others during the operation of the law. One could look at the jurisprudentially popular figure of the appeal court judge. He has relations with other judges, his associate, and officers of the court (masters and bailiffs). He has relations with barristers in the cases before him. One could look at the social relations that were activated by the processes by which the cases came to be heard there: the relations of appeal-court to inferior-court judges and the relations within the lower court, between judge, accused, barristers, etc.; the relation to the legislature and the relations created by the exercises of its power relations over courts and citizens. One could look at the social relations that are activated subsequent to the court hearing - relations with police and prison officials, relations with law reporters and through them with solicitors and ultimately their clients. We unearth more and more social relations within the operation of the law. In theory we could probably trace the entire phenomenon of law by this process. But it would take an impossibly long time, and would be hopelessly confused by the number of interconnections in the web of relations. It would be like trying to walk through the whole of a multidimensional maze that has dozens of paths leading from each intersection.

Fortunately, these social relations may be usefully seen as forming several "institutions" (in the sense used in §5.9: "a constellation of social relations between a set of persons in closer, more frequent and

more intense interaction with each other than with the community as a whole"). Institutions most frequently cited as part of the operation of law includes courts, legislatures, police, bureaucrats, prisons, the bar and firms of solicitors. All these institutions satisfy all three criteria of descriptive utility outlined in §5.9 (although one would suffice): (i) the relations between members of the institutions are particualrly strong and numerous, (ii) the relations between members of this group and outsiders tend to take on particular characteristics and (iii) the relations between the members are such that some of its members act with greater strength upon outsiders because the actions or resources of other members can be directed against or upon those outsiders.

The exact division of law into institutions is a matter of descriptive convenience and terminological familiarity (e.g. the division of the legal profession into barristers and solicitors, and treating the courts as one institution or several). As to which institutions are included in law, the same applies. Some might wish to exclude from "law" some of the aforementioned institutions and the social relations that constitute them. But a decision to exclude some only divides the social relations that are a part of the operation of law into the internal social relations of law (between members of legal institutions) and the external relations of law (between members of legal institutions and outsiders).

It has already been argued that law should be seen to include several institutions beyond the courts. Our experiences of the word "law" are not confined to what goes on in court-rooms (the internal social relations of courts) and how that affects us (the external social relations of courts). The word "law" is associated with a host of social relations involving legislators, bureaucrats, policemen and citizens as well as relations such people have with courts. Furthermore, jurisprudential traditions go well beyond the courts. For Hart, the existence of law was largely a function of the internal views of "officials" who were not always confined to judicial ones.[3] Llewelyn saw law involving the action

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3 CL p. 107

of officials - specifically including non-judicial ones.[4] Unger regards bureaucrats not only as involved in law but, in one of his forms of law, central to it.[5] Finally, that law is expected to operate outside the courts. Some institutions were actually founded to make this more likely, most notably the police.

6.3 TYPES OF SOCIAL RELATIONS IN LAW

The social relations found in law include all the types discussed in the last chapter.

Power relations are widespread in law. Persuasion is exercised by successful counsel over judges. Direct force is exercised by prison officials over prisoners and by bailiffs over some unsuccessful litigants. But the power relations that most epitomise law are authority relations, in which officials indicate[6] what lower officials or citizens are expected to do and they comply. There are many relations of legitimate authority. But other authority relations are also abundant. Coercion has always been a part of law, threatened sanctions being commonplace if not universal. Evidence of fairly simple coercive relations is seen when police give warnings and judges issue suspended sentences. Personal authority may appear in its most dramatic form in the sway held by a charismatic dictator, but it is more often found in relations between members of institutions in fairly close contact with each other - especially within offices in the bureaucracy, units of the police force and in such small groups as the members of an appellate court[7] or a cabinet. Competent authority is seen in the testimony of regular expert witnesses and in the expertise of some officials. Finally, inducement, is not only found in tax concessions and government grants but

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4 JP p. 364
5 LIMS p. 50. He sees this form of law is not just an historic phenomenon but a current one.
6 Not always verbally, e.g. the policeman in §5.2.
7 LL p. 120.

also in contracts and wills (nullity may not be a sanction but enforcement is certainly an inducement[8]).

Value-effect relations (where values held affect the value-holder's action which in turn affects others) are similarly widespread and are as important in law as in the rest of society. The values that individuals hold are vital in affecting the content of their actions, in creating relations of legitimate authority (when the value-holder considers himself obligated by the commands of other), and in neutralising the power of certain key actors (e.g. most policeman could easily "verbal" suspects and many judges could indulge their whims in decision-making - but many believe they should not[9]).

Unintended effects are inevitable in anything so complex as law. In fact it is riddled with them. Budgets help to expand the money supply they were intended to contract, tax rises may lead to increases in evasion rather than revenue. In the courts, consideration of the general effects of decisions is often deliberately excluded.[10] Some attempts are made to reduce these unintended effects - there are debates in parliament over the effects of legislation, there are reports from specially appointed commissions, "judicial notice" is taken in English courts and the "Brandeis brief" is used occasionally in American ones. But it would be rash to claim that our ability to predict the effects of law is improving more quickly than an increasingly complex society makes such prediction problematic.

Anticipatory reactions occupy a particularly important place in law. The behaviour of many citizens is much modified by what they or their lawyers anticipate judges' reactions will be in circumstances those judges

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8 Note that for this inducement to work courts must actually do the enforcing, giving individuals the power to affect the court's action in certain circumstances ("private power") and hence the power to threaten others with this action.

9 The fact that some do indicates the differential distribution and strength of such values and the necessity for other relations to limit their actions.

10 If Dworkin were right and decisions were made purely on principle then their unintended effects would be even greater. Paterson reports that fewer than half the law-lords even consider who reads their judgements (LL p. 10). This must increase the unintended effects they produce.

have not considered. Such occasions are particularly common where legislation is new, where the members of a court have recently been appointed,[11] or where no potential pair of litigants have had both the funds and the willingness to test a question in court. The anticipation of such judicial reaction is a part of the lawyer's skill in filling the interstices of law and advising their clients on whether to settle or proceed.[12] It is also part of the skill of the parliamentary draughtsman to anticipate judicial interpretation in choosing the wording of statutes.[13]

Social relations are subject to all the same limitations and vagaries as social relations in general. First, they refer to a probability that one person will affect the behaviour of another in that the second person takes the action of the first (as it appears to him) as a reason for action. In particular instances the probability may not be realised. In many others the effect will be weak or swamped by other influences so that the second person modifies his action only slightly, if at all. This limited effectiveness of legal relations leads directly to the oft-noted limited effectiveness of law.[14] Law is a limited resource in the hands of legal officials and a limited weapon in the hands of those who would use it.

Second, as in the rest of society, relations between officials of legal institutions and between officials and citizens are rarely pure but tend to be a mixture of the different types of social relations. In the many authority relations in law the reasons for compliance will tend

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11 Even if the law is supposedly settled, when new members of an ultimate appellate court take their places on the bench lawyers will ask themselves whether the new court is likely to reverse old decisions. If the new judges have not considered the question then the lawyers and their clients are not subjects of power relations but anticipators in anticipatory reactions. This is important in establishing the persistence of law after those who first specified required behaviour (or definitions, characterisations etc.) have died or vacated office. Cf. CL p. 60.

12 Lawyers are used to advising their clients on the anticipated reactions of judges but not of legislatures. Yet the latter can be just as important when the advice is on how to structure business affairs. One structure may be very popular with legal advisers and temporarily more lucrative but more likely to arouse legislative retaliation.

13 D'Amato calls this "anticipatory feedback" 14 WOntLR 171, 197.

14 LOP p. 160 ff.

to be mixed and the mix will vary from individual to individual. This is uncontroversially true of citizens and has been shown to be true of officials by compliance theorists (§4.11). Some respond more to the threats of sanctions for breaches (coercion), some respond more to a belief in the right of the institutions to require certain forms of behaviour (legitimate authority), and yet others respond more from a belief in the benefits of compliance (inducement and competent authority) or personal loyalty to the person issuing the statement (personal authority).[15] The individual may also believe it is the right thing to do irrespective of the command, in which case the authority relation is mixed with a value-effect relation. To the extent that this belief was induced by honest arguments put, or false facts spread, by the power-holders, then the relation is also mixed with persuasion or manipulation respectively.

This mixture of reasons is not confined to citizens. When a lower court judge follows a higher court's ruling it may be for reasons not only of the legitimate authority of precedent, but also from hope of promotion (inducement), fear of being overruled (either anticipated reaction or coercion), or of criticism by colleagues and senior members of the Bar (another example of anticipated reaction[16]). Even higher court judges will take into account the anticipated reactions and sometimes even direct[17] threats of executives and legislatures if they go "too far" in constitutional interpretation and they can never ignore the power relations within society.[18] Another mixed relation between judges is that of "persuasive authority" where a lower or equal judge has decided a similar case in a certain way. The relation of persuasion is suggested by the name but is mixed with value-effect relations (especially stemming from the value of not changing or varying "the law") with competent and,

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15 Where it is made by an institution the loyalty is to those they believe are behind the issuing of the statement.

16 This is no weaker for the criticism being private or largely unvoiced (pace Paterson LL ch. 2).

17 E.g. Roosevelt and the 1930s Supreme Court.

18 SD pp. 590-1.

in some cases, personal authority. Indeed, the very same mix is also found in the relations between appellate judges and between superior and inferior judges (where it backs up the other reasons and relations mentioned above).

The pressures on judges over the content of their decisions are many - their study constitutes much of the sociology of law. These involve the social relations outside social groups and institutions have with judges - some may be power relations but they are more likely to be relations of persuasion, manipulation and especially anticipatory reactions (they may anticipate the influence of offended groups on parliament or the chaos that might ensue if, for example, a judge were to gaol a unionist engaged in an industrial dispute). Even if we confine ourselves to the immediate relationship between the lawyer presenting the arguments and the judge hearing them, that relationship is a mixture of persuasion and manipulation, the latter being affected by the selection of cases and facts and the light in which they are presented.

This is not just a matter of confusion and variation in the minds of power-subjects about their reasons for compliance with official directions (although that would be sufficient to make the relations mixed ones). The mixture of relations is created by power-holders' attempts to extend the types of power they exercise over a large and varied group of subjects. This is unsurprising given that much legislative, bureaucratic and judicial official action is intended to control, channel and redirect the behaviour of so many subordinates and citizens, and given the limited effectiveness of some of those relations. These attempts are evidenced in the efforts of all régimes to claim legitimate authority, to claim competence in governing to attempt to establish the charisma of key members of the ruling institutions and to persuade the public of the rightness of their edicts (though rarely hesitating to manipulate the flow of information in the process). These attempts are also seen in the way some courts use their coercive contempt powers to restrict unfavourable comment about them to bolster their personal authority, and in the way

bureaucrats use bureaucratic secrecy (a form of manipulation) to bolster their competent authority.

This process of power extension can be seen in microcosm when a judge passes sentence. He will usually not merely state the term of imprisonment (thereby exercising force over the accused and coercion over those who hear of it), but also emphasise the wickedness of the act (an attempt at persuasion), and claim the legitimacy of the state's rights to proscribe such activity.

In a sense, law can be said to be "hedging its bets". Far from confining themselves to claims of legitimate authority to determine questions of law, officials in legal institutions attempt to exercise several forms of power in order to achieve the desired effects.[19] For some subordinates and citizens some of the power relations will prove ineffective, but the hope is that, for most, at least one will not. Honoré has noted that laws are usually not phrased in normative terms[20] - they are usually expressed in the indicative mood. This reflects what was said above. Officials state what is to be done, the individual supplies the reason (or reasons) himself - it does not much worry the officials which ones they are.

6.4 CHAINS OF RELATIONS IN LAW

The relations between individuals within law, especially between higher officials and citizens can be quite indirect. Even the power of a judge to incarcerate a convicted person and hence exercise force requires the activation of other relationships involving police and prison officials. The relation between a legislator or law lord and a citizen involves an even longer chain of intermediate relations. The complexity and variety of relations to be found in such chains can be exemplified by a crackdown on tax evasion. Influential MPs persuade the relevant minister to act. He presents legislation which is passed because of his

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19 Pace Selznick, no institutions rely for social control on formal authority and rule-making, least of all those involved in law: Law Society and Industrial Justice p. 7.

20 LM&S p. 106 ff.

party's majority and then contacts his department head and instructs him to devote extra resources to catching evaders. Because he believes ministers have the right to issue such directions the departmental head complies. Further instructions are passed down through the department through some who act out of similar beliefs, some who act out of loyalty to their superiors, and some for fear of losing their job. An investigator discovers facts about a tax-evader, and gives this information to the section that deals with prosecutions. Trusting the investigator's reliability and hence his information, they offer a fee to a barrister to act as prosecuting counsel. The barrister persuades the judge that the "taxpayer's"[21] income is higher than declared, and the judge issues an order under which the bailiffs descend upon the taxpayer's house and seize sufficient chattels to meet his debt to society. The effect of the influential legislators on the taxpayer is by way of a chain of power relations: persuasion, legitimate, personal and competent authority, inducement, persuasion again, and finally force.

The situation is further complicated by four factors. First, some of these intermediate relations may be weak, making the whole chain liable to break-down. Second, these intermediate relations are likely to be mixed in the way seen in the last section rather than taking the pure forms described above. The relations throughout the bureaucracy that are activated will probably be mixed authority relations in which the mixes vary with the bureaucrats involved. The lawyer may take on such cases partly because he believes that such persons should be prosecuted (value-effect relations), and we have already seen how the relations between lawyers and judges are mixed. Third, there may well be several chains of relations between the legislator and citizens, some involving essentially persuasion and some essentially coercion and force as above. The persuasive relations will operate through quite separate, and probably shorter, chains involving those who record and transmit speeches and interviews. Fourth, the relations between the legislator and citizen may

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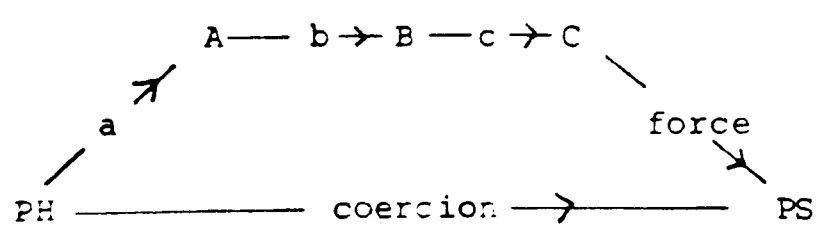
21 As he is ironically called in tax reports.

take different paths for different citizens. Consider a second "taxpayer" who pays up before prosecution. In his case several relations are not activated, and the final relation is one of coercion rather than force.[22]

Thus the social relations in the web that comprises the institutions of law vary greatly in their nature. This contradicts those theories of law which picture those relations as systems of either legitimate authority or coercive relations. These theories are persistent because two factors make them easy to set up and create many apparent examples to support them: (i) there is often at least some element of coercion or legitimate authority in the mix, and (ii) so much human action is over-determined so that this element may be sufficient to produce it. But such theories should be rejected on several grounds. They distort the relevant social relations by over-emphasising the part that legitimate authority or sanctions play in what is a variable mixture of both and much more besides. They also ignore other relevant power relations operative in law (usually and most importantly the one out of coercion and legitimate authority on which the system is not based). These theories also ignore the many power relations that are deliberately created by officials of legal institutions to increase their effectiveness. Systems based on one type of relation will not explain situations where a relationship between two legal actors is clearly operative despite the lack of the relevant relation: there will be inexplicable gaps in the chains where command and sanction theorists could not explain what

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22 This is a common feature of force and coercion, especially in law. A power-holder may threaten a power-subject directly, but in order to carry out the threat he must activate separate relations, often of a different type, to influence others to impose the force. This could be called a "force loop":



In the example given: A, B, C are barrister, judge and bailiff respectively; and a, b, c are inducement, persuasion and legitimate authority).

sanctions were faced by judges,[23] or when legitimate authority theorists have to deal with those who accorded law no legitimacy at all.[24] The reverse is also a problem: where the type of relation on which the system is based exists, yet people supposedly subject to the relation are quite unaffected by it (e.g. there is a sanction but the law is not observed, or people who see law as legitimate still break it). Thus the law operates where it is not supposed to and it does not operate where it is. Both puzzles are solved by seeing the social relations in law as mixed, so that sometimes the mixture is powerful enough to produce compliant action and sometimes not. This view cannot be as neat and systematic as some other theories: the claim is that it is more realistic.

6.5 ASYMMETRY IN LEGAL RELATIONS

Asymmetry, the differential perception of a social relation by those who are a part of it, is an important property of many social relations in law.

Legal language provides much scope for such differential perception. So much of law involves communication and it is notorious that the language used is very difficult for laymen to grasp - it may mean nothing to him or else may convey a quite distorted or different message. Certainly laymen will rarely appreciate the full content of what is sometimes[25] intended to be very precise. Yet the communication may well be directed towards the layman as the subject of a power relation. Criminal laws are passed to influence his behaviour yet words like "theft" may have different meanings for him than for members of legal institutions. Directions are issued to the layman in the witness box, for example when he is stopped from giving hearsay evidence. It is very easy for these directions, and the relations in which they take place, to be misunderstood - being seen as a general mark of hostility and disinterest in what he has to say.

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23 CL p. 30
24 Hodson 62 ARSP 380, 394.
25 But not always - (§3.4). Stone suggests that the flexibility inherent in legal categories is partly deliberate LSLR p. 274 ff.

Laymen are not alone in drawing from communications in legal language different meanings from those perceived by the communicator. Stone's "categories of illusory reference"[26] list some of the ways in which legal communication may have several meanings (categories of concealed multiple and competing reference) or those which have little (categories of circular or indeterminate reference) or no meaning (categories of meaningless reference). In all such cases the meaning has to be chosen or inserted by someone and it is quite possible for the speaker/writer and the listener/reader to insert different ones.

The situations and social relations in which legal communication takes place are rife with potential sources of misinterpretation. There is antagonism between the litigants and often between at least one of the litigants and the legal officials concerned: defendants may be unhappy with the way they have been treated or the fact that they are defendants at all. The legal representatives themselves do not come to litigation free from bias. Each will be looking for interpretations that will suit his client's case and although each will attempt a mental somersault to look for opposing interpretations with which he will have to contend, neither will see those interpretations in quite the same light as their opponents. Furthermore, several of the participants may have come from, and exist in, different environments with all the consequences which that has for different interpretations of social relations. Whereas lawyers may share more similar backgrounds than police, legislators, bureaucrats, defendants and witnesses, they are not a homogeneous group. Different initial perspectives may lead them to seek different kinds of legal practice, separating them from lawyers in other kinds of practice and providing experiences which reinforce the original perspectives. At more exalted levels, Caracciolo points out that "ideological discrepancies" between legislators and judges can lead to "break-downs in the process of linguistic communication".[27] These ideological discrepancies are made

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26 LSLR pp. 242-263.
27 65 ARSP 457, 464.

all the more likely by the differential rate at which the institutions of law will fall to the groups involved in the social mêlée (§5.12).

The long chains of relations involved in law make the asymmetrical way in which they are viewed even more likely. There will be little or no direct contact between legislators or higher judges and the citizens who are subject to their indirect exercises of power - especially when the intermediate relations in the chain depend on individuals who hold yet other perspectives.

Examples of asymmetry will be found wherever the law includes social relations of anticipatory reaction, manipulation or attempted manipulation and most relations of unforeseen effect. Face-to-face relations may suffer from asymmetry too. A barrister putting an argument to a judge was earlier given as an example of persuasion. The judge may see it as either persuasion or a recitation of his duty, but the lawyer may see it as a form of manipulation. The different views of judges and defendants are the stuff of which criminology is made - judges see their warnings to defendants as examples of legitimate authority but the defendant will usually see it as some kind of force or coercion.

As most authority relations in law are mixed there is always a good chance that those at either end of the relation will pick a different reason for the perceived compliance and hence see the relation as a different type of power relation. Even if the relation is perceived as mixed, there is a good chance that a different mix will be presumed - power-holders such as judges and legislators believing the legitimate authority part of the power relation to have greater weight than it really has with the citizen. In §5.2 we saw how all power-holders are likely to over-estimate the extent of their legitimate authority due to their desire for legitimacy. The judge's remoteness from his power-subjects (§6.4) and general reluctance to consider the effects of their decisions (§6.3) aggravate their ignorance of the citizen's reasons for compliance and hence of the very nature of the power relations in which they are power-holders.

The view of the power-subject is also inadequate. He may be unaware that he is being manipulated, unaware that certain values he holds have effects on others, or uncertain of where some of the effects he experiences originate. In cases where several social relations bear upon him, providing several reasons for action, he may not have considered them all. This is especially so if one of the reasons provides sufficient justification for his action and that reason better accords with his perception of what he is and how he reasons than the others. He may see himself as a victim of society and hence driven by coercive authority relations, or he may see himself as a responsible citizen freely following legitimate authority. Once again, the overdetermination of action and the concomitant over-sufficiency of reasons for action provide a barrier to social perception.

Judges are no more immune than citizens from such self-deception, making their perceptions of the relations in which they are involved as power-subjects as faulty as of those in which they are power-holders.Judges are under pressure in key judgements.[28] In a petition claiming that a parliament is invalidly elected (as actually happened in McKellar's case[29]), there may be arguments from authority for each side. But declaring the invalidity of parliament is just not feasible. Legislators would react so much more strongly to the denial of their seats than to the invalidation of even their most cherished legislation. Furthermore, there may be no alternative parliament to install as the old one may have been dissolved or the last validly elected one's time may have run out. Even if there were an available alternative, it would probably contain many members of the "invalid" parliament who might not co-operate. Thus the judges are subject not only to relations of legitimate authority but also of anticipatory reactions by parliamentarians that could frustrate the court's order and even threaten

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28 The enumeration of these pressures is part of the task of the sociology of law.

29 Cited Ch. 2, n. 33.

the court itself.[30] The judge may not be aware of the exact nature of these social relations but only of a vague "pressure" on them. If a judge is under such pressure and accepts an argument from authority pointing in the same direction, he may convince himself that the latter is his only reason and that there are no other social relations affecting his decision. But it would be wrong for the social observer to confine it to such terms.

The view of social relations in law provided from either end is inadequate because of the asymmetrical properties of those relations. This provides yet another justification for this thesis's continued rejection of the Jurisprudential tradition among positivist and content theorists of taking the judge's point of view in considering such relations.[31] This is not to deny the importance of views of such relations held by judges and other legal actors have for understanding those relations. The effect of one party on the other is mostly achieved *via* the thought processes of the person affected. The rejected positivist and content theories of legal system offered many insights into those views. The problem was that those insights tended to be distorted or buried by the theorist's zeal to turn them into systems - systems which judges neither could nor even sought to construct.

Positivists emphasised the similarity between the sources that judges use for law and the rules some might make about them (*fiats*, secondary rules etc.). This directs our attention to the similarities between the social relations which affect judicial decisions. Some will be relations of legitimate authority in which the judge is power-subject and those whom the judge regards as sources are power-holders. Some of these social

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30 The ways in which this can be done will vary from society to society. Sampford (12 *MULR* 210) provides some Australian examples.

31 (§§2.8 & 3.6). Ironically, some positivists pointed to the asymmetry by saying that the barrister realist or cynical practitioner's viewpoint would not do for the judge. They rarely noted the corollary that the judge's viewpoint would not do for the barrister (who knows that however he argues from authority, the suit will succeed or fail depending on the judge's decision). Yet despite the asymmetric perception of judges and barristers they are in constant interaction. The asymmetric perception of social relations may also help to explain the differences in perception of each other's roles (*LL* chs. 3 & 4).

relations will be value-effect relations in which the judge's values provide the foundations for the former. But to back up these relations, there are other social relations not accounted for in positivist theories. Indeed it is these other relations which probably generated the values necessary for the value-effect and legitimate authority relations, whether directly or *via* the generation of individual and group practices.

But all the above refer to *similarity* in social relations providing *similarity* in the way resources are viewed and *similarity* in the way they affect judicial decisions. The *actual* variation in them helps explain the differences, not only between judicial actions, but also between the rules of recognition or legal science *fiats* that different judges would construct if they tried. The far greater variation in the social relations affecting other legal officials helps explain the very different rules or *fiats* that they would generate (see §2.4).

Positivists also emphasised the way judges and other lawyers generate rules for their own action from the actions of others (especially decisions written and statutes passed). This theory accounts for this as part of the way individuals view the social relations that constitute their social environment. Yet the effect such social relations have on decisions are not always so formalisable into rules and frequently not even consciously considered. Furthermore, the differences in social relations and internal processes of rule-generation and practical reasoning mean that any rules so generated vary from person to person and time to time. A rule is not inherent in law because legal scientists will derive it, even less is it inherent in the statutes and precedents produced by the actions of those the judges regard as sources. When judges and other lawyers come to act, they look at the actions of those who have power over them or whose reaction they anticipate. They read a rule into those actions which they use in their practical reasoning to decide how to act themselves.

This is largely a transient phenomenon. The action is performed - the argument made or judgement given - and the lawyer moves on to his next

task. The rule may stick in his memory, but is as likely to be forgotten and a new rule generated in his mind if he must take the same power-holder's action into account at a later date. Even where a form of words is used in a statute and mouthed by many saying it is their reason for acting, the internal workings of their minds either give the words different meanings or translate it into other words which they are more accustomed to use in their decision processes. Of course, the action of these different lawyers in similar positions will probably be very similar. But this is only partially due to the similarity of rules (which by themselves are insufficient to produce similar actions: general rules cannot be used to derive specific actions and small variations in meaning or wording can make significant differences - §2.3, §3.2). It is as much due to the continuity of social relations that limit the freedom of action of legal officials. Law provides classic examples of language-games. The same word or set of words is used by different people and given different meanings as in the earlier example of the use of the word "theft" by judge, barrister, accused and jurymen (§5.3). Yet interaction occurs because we all know what happens next and that will be determined largely by the social relations which affect the various actors.[32]

This transience does not pose the problem for this theory that it did for "psychological" theories of law like Scandanavian Realism. There is something relatively permanent - the social relations that lead legal officials to derive rules and other reasons for action from the actions of others. There is often relatively permanent evidence of the "other's" action. Production of this evidence is usually the immediate (and agreed) purpose of the actor(s) involved, and it is through this that the ultimate effects of the action are largely intended to be achieved. This evidence is frequently used to derive rules in later cases. Yet this evidence should not be regarded as "the law".[33] However long-lasting the marks on

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32 Hart is right to say that the use of legal words silently assumes a special and very complicated setting. But the setting is not, as he claims, a "legal system" (70 LQR 37, 42). It is a set of rather disordered social relations.

33 As Christie does Law, Norms and Authority p. 65.

the paper, it is the continuity of the social relations that provides the continuity of law and it is those social relations which lead lawyers to take any notice of those marks.

Other theorists rightly pointed out the importance of the content of the rules derived by legal actors. At times, a rule derived from the action of some person or institution usually regarded as a source may not be used in a judge's practical reasoning because of its content. This indicates that sometimes value-effect relations can overcome other social relations (though usually only when those other relations push in different directions). At other times, a judge may attempt to link the content of one rule to the content of another. This indicates the persistence of judicial values as well as their use of persuasion, or even manipulation, to lessen the anticipated reaction from those who might not like the contemplated judicial action. But any attempt to build a system out of these values is doomed to failure. This is partly because judges are unwilling and incapable of doing it. But it is principally because these values are only one of the many factors affecting a judge's decision-making, so that no system of values could determine a judge's decision-making.

6.6 LEGAL INSTITUTIONS AND THE EFFECTS OF LAW

Within the massive and immensely complex web of social relations that constitute law there are smaller, tighter webs of legal institutions. Through this web of relations one person may affect the actions of many others both inside and outside legal institutions. He achieves a far greater impact than ever he could acting alone - by initiating multiple chains of interactions he can mobilise the resources of many others (including some resources he does not possess in any quantity himself - as frail judges can mobilise the physical strength of bailiffs). Yet those who are affected by these chains will usually be affected by other chains of interaction starting with the actions of other legal officials. Thus through the web of relations in law, one individual can affect many, and many may affect one individual. These effects are regarded as effects of

law if (i) they are produced by the actions of a member of a legal institution, and (ii) that action was itself affected by the action of at least one other member of a legal institution i.e. they are part of a chain of interactions within law.

The effects that the social relations of law have on the action of any one individual varies enormously. Sometimes an individual loses life, liberty or a substantial proportion of his possessions. But most individuals experience law as imposing limitations and providing opportunities for the actions they take in everyday life. The limitations will sometimes take the form of barriers that make certain actions impossible if the attempt is discovered - we just cannot hold on to goods we have forcibly removed from another's possession, or live in a single storey house closer than a certain distance from the boundary. But the limitations will usually be in the form of costs imposed on specific actions. Those costs may involve money and time or greater risk (as in the unenforcability of some contracts). Law may provide opportunities for citizens - tax concessions, social welfare, and ways of enforcing their wishes after death.

The effects of law on individuals go further. They affect their environment by affecting others and their actions. Furthermore, by generally preventing or encouraging certain behaviour, law creates habits and, through them, ultimately attitudes (see §5.7). Above all the law affects an individual's practical reasoning by making some things impossible and by providing him with reasons for and against action (when there are opportunities and limitations respectively).

The sum of these effects on individuals is the overall effect of law on society. Some theorists have tried to see in this the purpose(s) or function(s) of law. In Chapter 4 such notions were criticised for several reasons which are worthwhile recapitulating:

(i) It is very difficult for an institution (let alone a set of them) to have an overall purpose or function because of the number of people, usually with differing values and perceptions, involved in it.

(ii) Even where the institution is founded by an individual or group with a distinct goal in mind, new members may have quite different reasons for joining, including redirecting its activity.

(iii) The assignment of a function or purpose is no than the selection of certain of an institution's effects because of their significance to the assignor. That significance is based on the assignor's beliefs about what the institution's greatest effects are or what they ought to be.

Nevertheless, the functions and purposes that have been suggested for law provide a good short list of what some of the major effects on society may be. In §4.7, these effects were reduced to nine: dispute resolution; "reinforcement" or "reinstitutionalisation" of existing practices; change (usually by reinforcement and reinstitutionalisation of new practices); guidance; regulation; participation by the state in social and economic affairs (including the redistribution of resources); punishment or vengeance; maintaining social peace and preventing outbreaks of violence; and legitimisation.

These are some of the effects of law. Indeed, to some extent it is because institutions achieve, at least partly, one or more of these effects that we call them part of law. But it should not be forgotten that these overall effects are, where achieved, made up of enormous numbers of individual effects indirectly or directly imparted by members of legal institutions on individual citizens through social relations. Conversely, where these effects are only partially achieved, those relations are fewer and/or weaker, producing fewer or weaker individual effects. For instance:

(i) Dispute resolution involves officials dealing with disputes by imposing settlements on parties who come (or are brought) before them, and by the effect this preparedness has on others who settle for fear of losing in court and sometimes even the costs of winning.

(ii) Guidance is achieved by many individuals taking on new values or strengthening existing ones through relations of legitimate and competent authority in which members of legal institutions are power-holders, by

having their values strengthened by witnessing the imposition of force on non-compliers, and by perceiving the implied threat that the exercise of force has for them.[34]

(iii) The effect of vengeance is produced by legal officials exercising of physical force. It consists of the satisfaction this brings to the many and the physical or financial discomfort it brings to the few.

(iv) The maintenance of social peace is produced by the many relations of inducement, coercion, force, and anticipated reaction by legal officials that impose effective limitations on the use of force by individuals.

(v) Participation by the state in areas of social and economic life involves opportunities and limitations for individuals in those areas of life engendered by the action of officials.

(vi) Reinforcement and change involve the creation of new power relations using state resources that supplement those social relations already existing within society. This encompasses the functions of law described by Bohannen as the "reinstitutionalisation" of practices or norms (his word) existing in other institutions[35] and Collins in his "metanormative theory" of law.[36] The essence of these ideas is that there are practices in the community and that officials within the institutions of law, usually judges or legislators, make legal rules with more or less the same content. Collins points out that there will usually be a choice of conflicting practices and that it is this conflict which brings the matter to court. The theory outlined here maintains that practices[37] in the community reflect the power and other relations to be found there, for instance the practices of employers and employees are largely the result of the exercise of various power relations by both groups. The parties attempt to extend or resist these exercises of power and change the practices involved. If the dispute comes before it, the court creates a

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34 This illustrates how the exercise of power in one relation (force) achieves another effect, activating another power relations (in this case, coercion).

35 9 IESS 73

36 ML p. 90 ff.

37 I.e. regularities of behaviour backed up by a variety of perceptions of, and reasons for, behaviour (§5/7).

new power relation between employers and employees that operates via the insitution of law. This will involve a chain of relations in which one citizen has a power of legitimate authority over some official in the institution of law and, through other relations internal to the institution of law, will end in a relation of some kind between another official and the other citizen. This new power relation will not enshrine the whole of the relationship between the parties but only a part e.g. by adding to the power of the employer to remove employees from the premises, or adding to that of the employees by increasing the costs or difficulty of dismissal (by requiring redundancy payments or tribunals to hear cases of alleged unfair dismissal). Thus the balance of the power relations between two classes of citizens can be changed, frequently also changing practices or the resources each can derive from them. Each side involved in the dispute will naturally enough attempt to persuade and pressure the court into reinforcing the areas of their relationship where they are strong. Such new power relations created by law are an important part in the process of social change discussed in §5.12. Naturally enough, citizens may attempt to persuade or pressure a court (or a legislature or an official) into creating power relations that counteract power relations that another citizen has over him. However, in order to be successful this will normally require resources and consequently power relations in another area which can be brought to bear on the outcome. By this, law provides facilities for converting power in one area of activity into power in another.

6.7 LEGAL INSTITUTIONS IN THE SOCIAL MÊLÉE

In the last section we saw how the action of legal officials can have significant effects on individuals throughout society. It is hardly surprising that individuals, groups and the institutions that mobilise them attempt to influence that official action so that its effect upon them is favourable. They will attempt to exercise the full range of power relations over those officials. In so doing they may be aided by the officials' anticipation of unfavourable reaction and holding of values in

which the group are value-beneficiaries.

If there were only one powerful group involved and they could mobilise all their resources to the task, no legal official could resist. But there are, of course, many groups attempting to affect the actions of legal officials in different directions. Indeed such attempts occupy a central place in the social mêlée and, like other conflicts in that mêlée, they are frequently limited and inconclusive. The resources of the relevant groups can be mobilised to only a limited extent, and the mobilising institutions do not always direct those resources into the conflict (and would, in any case, have to decide into which conflicts to direct them). The other group is active in providing support for the legal official if he resists the attempts to control his action, and active in resisting him if he succumbs. The targeted legal officials will themselves tend to resist attempts to control their actions as it is in their (usually perceived) institutional interests to do so (§5.9).

The extent to which the outside group or institution can affect the targeted officials depends not only on the resources that can be mobilised and brought to bear on them, but also on the intra-institutional social relations by which other members of the institution affect his behaviour, and on the officials themselves (they will have their own values which may either support or militate against the particular action sought).

The outcome of the external conflict will also be complicated and affected by internal conflict between and within the institutions of law. This is partly due to the usual causes of inter- and intra-institutional conflict - the constant struggle by key officials within each institution to reduce the limits placed on them by officials in other institutions, and increase the opportunities for affecting officials in other institutions.[38] But the internal conflict is also partly stimulated by the external conflict itself. The different members are subject to the

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38 I.e. to reduce the number and strength of social relations in which he is the power-subject, anticipator etc. and increase the number and strength of those in which he is power-holder, reactor etc.

influence of, or hold values supportive of the interests of, competing groups.

Legal history is replete with examples of conflict between the institutions of law: Crown against Courts then Commons in the seventeenth century, Lords and Commons, and Congress and Supreme Court in this century. These major conflicts were attempts to throw off or impose power relations that severely limited the actions of officials in one of the institutions. Usually the conflict is neither as dramatic nor as intense[39] and involves a constant struggle of boundary-maintenance (which inevitably involves an attempt to push out those boundaries a little) as in Lord Denning's attempt to expand the role of the Court of Appeal by claiming the ability to ignore limitations imposed by House of Lords precedents[40] and his more successful attempt to impose limitations on the actions of bureaucrats.[41] Key bureaucrats have tried to resist the latter by influencing governments to push through legislation protecting their discretion from court-imposed limitations; and the struggle continues. Other examples are to be found in the attempts by courts to control police arrest and interrogation practices.

There is also ample evidence of intra-institutional conflict. Permanent internal conflict between party groupings[42] is now regarded as central to the very nature of legislatures in Western countries. Though less public, conflict within courts is endemic over both style[43] and substance.[44] Bureaucracies, of course, are a by-word for intra-institutional conflict.

There is a danger that this internal conflict within law may divert our attention from the external conflict. Debates about the content of statutes and judgements, and clashes of personalities or interests within institutions, may be seen as the origins and determinants of conflicts

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39 Legal institutions have at least as much difficulty mobilising their members for conflict as do any other institutions.

40 Broome v Cassell [1971] 2 QB 354

41 E.g. Congreve v Home Office [1976] 1 All ER 697

42 And usually within as well.

43 "Grand" v "formal" - Llewelyn The Common Law Tradition.

44 "Liberal" v "Conservative" in studies like Schubert's 3 Politics 21.

rather than as a part of an overall conflict. The law is not above the conflict, nor unaffected by it. It is not "autonomous". But it is, in a sense, "relatively autonomous".[45] This is because conflict over the action of legal officials must be fought on a particular battleground within legal institutions where the outcome is affected by the nature of those institutions, the officials and relations that comprise them. On that battleground some of the resources of conflicting groups are more useful than others, so that a generally weaker outside group may have success in some legal institutions disproportionate to its overall strength.

Law is also relatively autonomous in a further sense. Because the conflict over the action of legal officials is relatively inconclusive, it leaves certain officials with a relatively wide range of choice of actions that they can, "get away with". Of course, there are many things these officials cannot do, either because they lack the resources or because they are subject to social relations that make performing the action either impossible or counter-productive (especially where it mobilises an overwhelming coalition of opposing groups and institutions[46]). Where the official is left with a choice of action, other social relations, only some of them imposed by the conflicting groups, will provide reasons for choices within that range: power relations to which he is subject and reactions he anticipates will provide reasons whether because of sanctions or inducements they offer for various actions. His "role" in the institution also has consequences for his choice of actions. As we saw in §5.6, this has two aspects - an internal matter of how he values his place within the institution and what he believes his action should be within it (role-orientation); and a relation of anticipatory reaction in the criticism (and worse) he

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45 ML p. 63

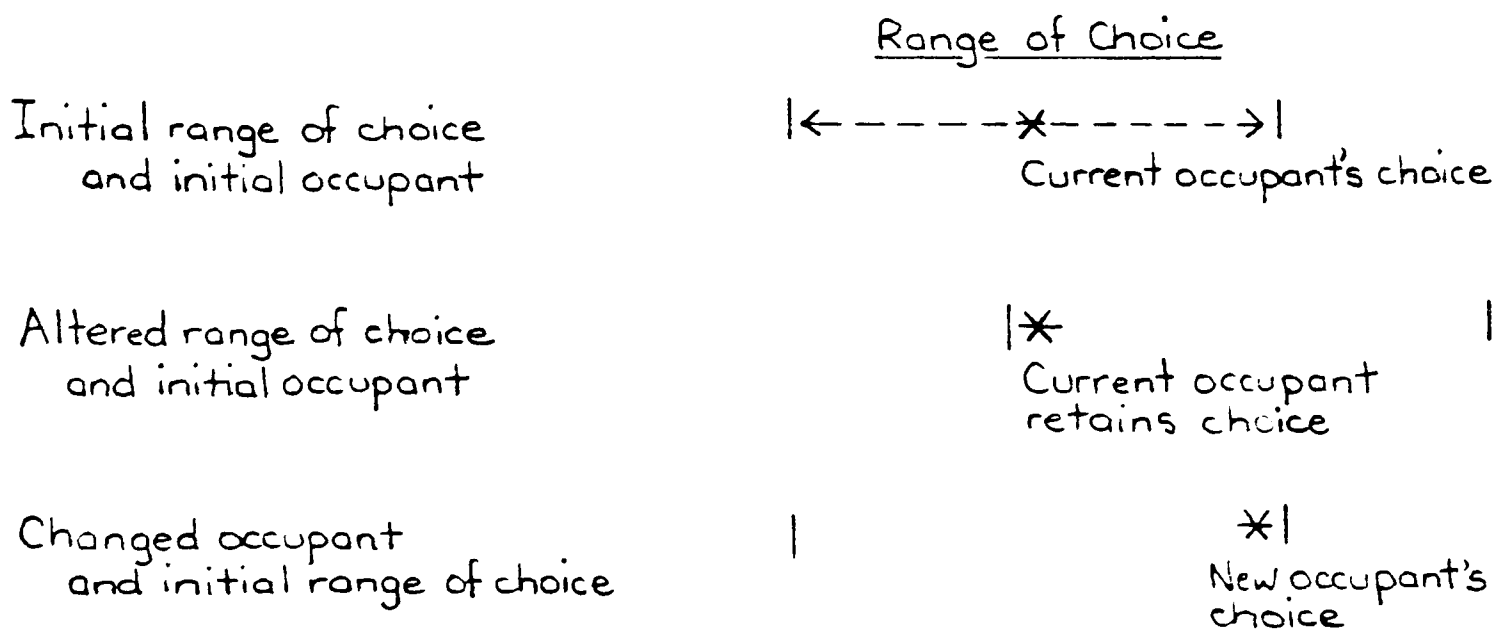
46 As the House of Lords did in rejecting the budget bringing the Commons, Crown and a plurality of the voting population together against them.

anticipates, should he not fulfill what others perceive to be his role (role-expectations[47]).

Other relations will provide the individual with the resources and hence the opportunities to take one or more actions. Thus the key officials, those who are power-holders in relatively more relations and power-subjects in fewer ones, will have more resources and probably a greater range of choice of what to do.

Because of this, outside groups struggle with each other in an attempt to affect not only the action of those in such key positions but who fills them as well. Indeed, changing the range of choice open to the holder of such a position (by altering the power relations affecting it) may have far less effect than changing the occupant. If the current occupant previously exercised his discretion within the middle of the range of possible options then, unless the range of options is changed so drastically as to exclude the old decision as a possibility, the occupant is unlikely to change the way he acts (see Fig. 1).

Figure 1: Schematic Representation of Effects on the Range of Choice



As in the conflict over official action, so the struggle over key official posts varies with the forms of power that the various groups can exercise over those who make the appointment. In England the cabinet determines most senior judicial and bureaucratic appointments. However,

47 As noted in §4.5, there is usually a range of role-expectations. Criticism will be limited and partly matched by counteracting praise if the action falls within the range of action consistent with one of the commonly held role-expectations.

particular appointments are frequently affected by other incumbents and by specific interest groups (e.g. Bar influence on judicial appointments).

This struggle is carried on simultaneously for all the key posts in legal institutions. But success, if it comes at all, will be preceded by long periods when struggle is inconclusive and each side must accept some appointments from the other. Even when certain groups or classes do succeed in dominating appointments within several institutions such success is not simultaneous.[48] Appointment is often subject to power relations internal to the institution, and subject to those factors that tend to produce a much higher proportion of uncontroversial candidates from some groups than others. Thus a group may find itself with the specific resources necessary for some appointments rather than others. Thus, a rising group may fill posts in the legislature first, the bureaucracy and judiciary next, and the police last of all (§5.13). This differential rate of success in capturing institutions within the shifting social mêlée provides a prime source of the institutional conflict discussed above, through the different ideologies that appointees from different groups are likely to hold.

6.8 INDIRECT ACHIEVEMENT OF EFFECTS IN LAW

What enables key officials to have widespread effects on others is the large number of social relations in which they are power-holder, reactor and value-beneficiary, and the many chains of social interaction that their own actions can set off. But the corollary of this is that the effects they have on individual citizens are achieved very indirectly. In the tax crack-down example from §6.4 we saw how legislators can have very considerable effects on individual citizens. But those effects may be achieved only via a chain of interactions that pass through virtually every institution in law - at least one House of Parliament, cabinet, a ministry, the bar and a court. This is a major reason for including all

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48 Even if there were no other forces in operation on the legislature than the vote, and no other forces on court appointments than the cabinet, the political orientations of judges and legislators would change at different rates.

those institutions in law. Unless they are considered a part of law, we must conclude that the effects of law are felt mostly through non-legal institutions. Rejecting such inclusions is possible but it tends to confine law to little more than a complicated rite, performed by a few high priests, with only indirect effects on society or ourselves. If the law is felt to be central to society and something with which we do have close and frequent contact, then this more inclusive approach to law will be preferred.

These institutions do not act as monolithic, impersonal machines through which effects are transmitted. Institutions are made up of chains of relations linking discrete individuals. These people have their own ideas and values, each will exist in his own (at least slightly) different environment and will have his own (frequently different) view of the relation through which he receives and passes on the effect to those at the other ends of relations.

At each link in the chain of interactions, a separate action is required. In taking that action, each subsequent offical actor will be affected by several social relations in which he is involved - the social relation one step back in the chain is only one of these. Those other social relations may be completely external to law (especially power relations in which outside groups attempt to affect him). They may be parts of other chains of relations within legal institutions or may be mixtures of the two (e.g. when a court makes a decision favourable to suspects, civil liberties groups may attempt to coerce police to follow the ruling with a threat of adverse publicity.) The conception of chains of relations should not be presumed to obscure the fact that they are part of the web of social relations and that these chains have been picked out because we are interested in how one person affects another via his effects on the decisions of others. Rather than being a solitary chain as in Fig. 2, it is more like that in Fig. 3, with the dotted line being the chain picked out because of an interest in the ultimate effects Official A has on Citizen X.

Figure 2

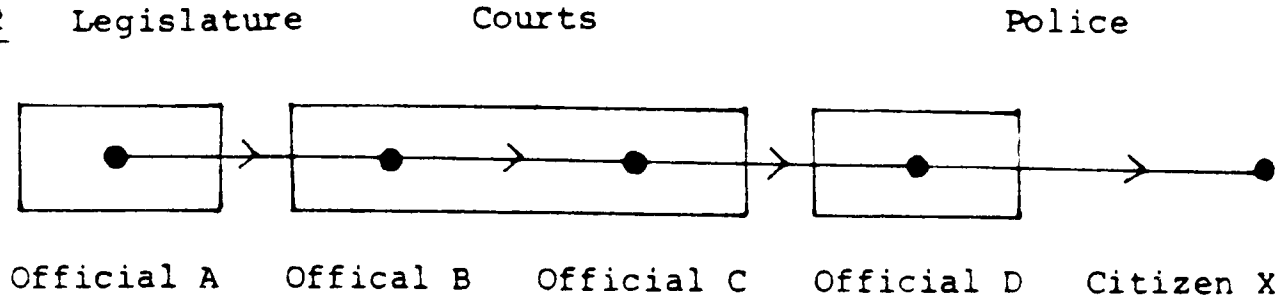
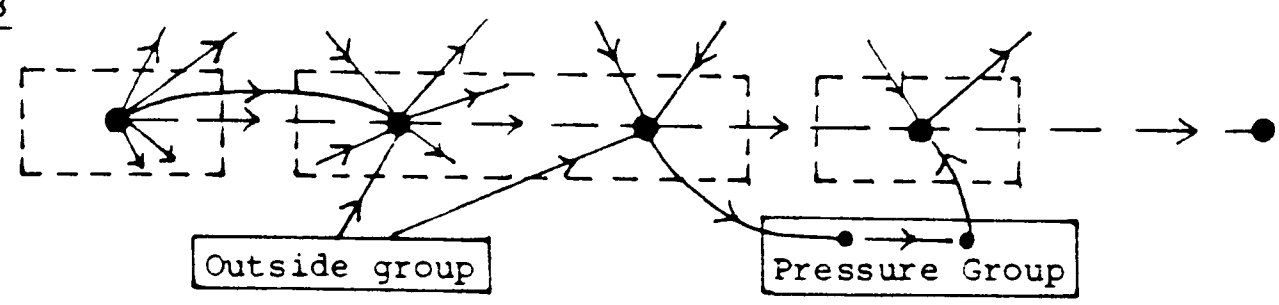


Figure 3



The range of choice of these subsequent offical actors will vary. Those social relations, and the practices and values they generate, may limit it to the extent that for all practical purposes there is only one action the actor can realistically expect to perform. Depending on what that action is, the chain of reactions will continue, stop dead, or move off at a tangent. But many officials are not so constrained, and if they are left with a significant range of choice, they can divert chains of interaction[49] that pass through them from their intended path. Such officials are likely to include ministers and senior bureaucrats, policemen, prison officials and judges. It also includes those who have strong power relations over a small number of persons with few social relations which impose limitations on their action (including prison officers in inmates' cells, policemen in the "deep peace" of the interrogation room, and the man who handles the punch cards).

The range of choice open to even key officials should not be exaggerated. Courts may twist legislation and, in some countries, rule it unconstitutional; but they could not interpret <u>all</u> legislation contrary to its initiators intent or rule <u>all</u> legislation unconstitutional. Senior bureaucrats may frustrate their ministers but cannot do exactly as they please. So it is emphasised that only within the range of choice in the action they can take, dictated by the social relations in which they are

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49 This diversion could be intentional, because he has different values from the initiator of the chain. More often he will merely be looking at the immediate rather than the ultimate effect of his action.

involved,[50] that they have discretion and an opportunity to deflect the chain of interaction of which they form a part.

Four aspects of law and society as depicted in the last two chapters enhance the significance of these intermediate steps in the chains of interactions, and the extent to which these chains of interactions are deflected to produce effects quite different from those expected by the initiator (or, for that matter, the social observer).

(i) The variable success by different social groups and institutions in affecting the action of legal officials means that some officials in the chain will be influenced by some groups and some officials by others.

(ii) The variable success by those same outsiders over the filling of different official posts will likewise mean that different officials within the chain of interaction will want to deflect the chain in different ways. Where appointments to an institution are shared between conflicting groups (§6.7), the direction of deflection will depend on <u>which</u> official the chain passes through.

(iii) The conflict between legal institutions weakens the links in the chain of social relations prior to that official's action, increasing the discretion of that official to do as he believes fit and again increasing the chance of deflection.

(iv) Some institutions have a disproportionate share in achieving some of the effects of law. Lower courts are more involved in the exaction of vengeance and the settlement of minor disputes, higher courts in the settlement of disputes and the choice of power relations that will be duplicated by law. Police are more involved in the maintenance of social peace, the legislature with guidance and the bureaucracy with the participation of the state in social and economic affairs. This disproportionate share may lead to practices and priorities that shift the effect that is finally produced on the citizen when a chain of effects

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50 The range of choice left by the "law" (or, more strictly, by the social relations in law) may not be coterminous with that left by other social relations. Actions apparently possible taking into account purely legal criteria may not be real possibilities.

passes through a member of a particular institution. For instance, the police may be delegated authority to bring evidence of offences before the court but their concentration, and consequent emphasis, on achieving the public order effects of law may lead them to see their role as one of obtaining convictions instead.

The indirect achievement of legal effects means that many of the effects finally achieved are not quite as intended. They may not even be intended at all (hence the high proportion of unintended effects in law). Nevertheless, the conflicting parties still consider the total effects achieved to be so great that even the intentional portion is worth fighting over.

6.9 THE CRUDITY OF LAW'S EFFECTS

The indirect achievement of legal effects and their consequent dilution, deflection and distortion leads to one of the great ironies of law. At the highest levels, the action of key officials is extremely precise. Acts of parliament can quite literally go to enormous lengths to define words and concepts and judges will spend pages of their judgements on finer points.[51] Yet the effect on the public is far less precise - indeed it can only be called "crude". Law will affect an individual in one of three ways: (i) by the actual action of members of legal institutions towards him; (ii) by his knowledge of the "law", or of how members of legal institutions will act towards him, and any consequent modification of his actions; and (iii) indirectly by the effects law has on other citizens thereby changing his environment. Only the first two will be considered in this section, it being fairly obvious that the indirect effects will be cruder still.

The interaction between members of legal institutions and citizens is certainly affected by the actions of legislators and superior court judges - through loose chains of interaction leading ultimately to minor officials and citizens. However, despite all their efforts at

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51 Though the number of judges involved often means that conflicting exercises in precision produce extremely imprecise results.

precision[52] and the clear specification of what should be done to people who have done specific kinds of things, the actions of the juries, police and bureaucrats who deal with individual citizens bear only a resemblance to that specification. This is again largely because of the number of intermediate relations through which the interaction must pass before it reaches the citizen, and all the causes of deflection and distortion inherent in such chains of interaction - the mixed and weak nature of the intermediate social relations; the many other relations that affect the intermediate actions, and the mutual hostility, institutional independence, and varying ideological bents of the officials through whom the chains pass. (Indeed, a combination of these reasons may mean that the actions of the legislator or judge come to nothing, many of the chains of interaction in law petering out long before they reach the public.) It is partly because, along with a chain of intended effects, the initiator also initiates a chain of unforeseen effects which may reduce, or even cancel, the effects of the intended one. It is partly a matter of discovery and proof. The legislator or judge may specify what is supposed to happen to someone who has performed a specific type of action e.g. taken goods from another with criminal intent or set up a secret trust before death. But actually to find out whether the act has been done and then prove it is another matter. These are the weakest links in the chain of interactions between legislator and citizen. All the fine points of law come to nothing if you cannot even prove the basic ones. Indeed, the finer the points are, the more difficult it may be for JPs and juries to comprehend them and decide correctly whether they have been established. Finally, the crudeness of the overall effect is partly a simple matter of the difficulties involved in communication. However precise the message is initially, it is degraded at each translation - each time another has to receive, absorb and put it into his own words or actions - each time, indeed, that the action of a superior is turned into a rule or other reason for action. The message is degraded even more rapidly if the

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52 Or perhaps because of those efforts. See infra.

receiver holds different perceptions of the communication from the communicator (i.e. if the relations are, as so often in law, asymmetrical).

By the time the message reaches the citizen it is a parody of its former legal exactitude. His knowledge of the law will be weak - gained, if at all, in a "muddled and accidental fashion".[53] Certainly he does not know the finer points as spelt out in judgements or statutes. He knows that depriving another of the goods in his possession is generally unlawful but he might be surprised at some of the acts made criminal under the Theft Act (1968).

It might be objected that for an ordinary citizen the values he holds and the other relations in which he is involved provide an abundance of reasons not to steal. The law is unnecessary for him so he need not know its details. We should look instead for the effect law has on those for whom the balance of reasons is finer - those who contemplate or actually do steal - and who are more likely to find out exactly what the law is. But even a thief's knowledge of the law will tend to be weak.[54] He has perhaps a fair idea that certain contemplated actions are against the law and that if discovered it will fall upon him heavily. If a lawyer later told him his action was not covered by the law, he would consider it a miraculous loophole, and the lawyer a clever twister of words.

Examples need not be taken from deliberate law breakers. A trader may hear of a new Fair Trading Act that has been passed. He will vaguely appreciate some of the specific requirements he must meet, and generally that standards of conduct must be raised. But the effect on him will be to take more care in his business practices generally. He still may be breaking the law or his honesty may surpass the minimum required. The law has had an effect on him as it has had in deterring some from theft. But it does not operate as a fine navigational instrument charting the paths a citizen may and may not tread: it is rather an institutional bludgeon

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53 Hughes 35 NYULR 1001, 1011.

54 The views of "real" "bad men" are not good guides to the law.

which many take as a warning to steer clear of whole areas of activity.

Even when lawyers are consulted, the law does not operate as a fine tool. Lawyers have practices and documentary precedents which are designed not merely to skirt legal pitfalls, but to keep the citizen well away from them. They will advise their clients to avoid many kinds of claims in their advertising so that there will be absolutely no danger of making statements for which he could be prosecuted. They will advise the use of two witnesses to a will rather than the use of any of the exceptions to this requirement, and they will even advise the use of the same pen by witness and testator to avoid any suggestion that the signatures were added later to validate an informal will. In doing so they are not so much considering what would ultimately happen in an appeal court if ever their client ended up there, but the difficulties the client could experience because of the doubts and the queries that could be raised by lower officials. They are offering advice on how to avoid possible time and money-wasting encounters with lower officials, officials whose attempts to carry the effects of the appeal court's precise formulations of law to the public are fairly crude.[55]

Similarly, when barristers advise and act for clients, they are not merely armed with the knowledge of what would happen on an appeal. They also consider processes involved in the lower courts in which they argue and how to handle the functionaries of such courts. Others who advise citizens on how to act in relation to the institutions of law are likewise concerned with the crude way in which the law ultimately operates. A Civil Liberties Union's advice on how to react to policemen will spend a little time on the niceties of arrest law as expanded in courts, but will emphasise courtesy and civility when requesting your rights when under the physical control of the police. Again, a social worker's best advice to one of his clients may be on how to deal with town hall, welfare and

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55 This will be something of a self-fulfilling prophecy. Practices set up by lawyers will be presumed by many non-legally trained official to be lawful, and legally trained officials will have practiced or seen them practiced and regarded it as normal.

unemployment officials, rather than merely the criteria for welfare recipients. A citizen's contact with the law is almost exclusively through its lower officials, that is how the law affects him, to a large extent that is what the law is for him. The operation of the law through these officials is far cruder than in the judgements and statutes that prompt such official action. Lawyers who advise those citizens should ever be aware of that fact.[56]

6.10 CONFLICT, INCOMPLETENESS AND NON-UNIFORMITY IN THE EFFECTS OF LAW

In §6.6 the overall effect of law was seen as the sum of the many effects law had on all the individuals in the community. The following three sections dealt with the indirect process by which those individual effects are achieved - in which those effects are diluted, deflected and distorted. Unsurprisingly, when we do sum those effects they appear non-uniform, incomplete and conflicting. This is a disordered, non-systematic view of law's effects which explains why we found it impossible to create a systematic view of law based on its alleged systematic functioning.

Conflict

The effects law has on a single person can, and frequently do, conflict. They are the result of several chains of interaction culminating in the production of an effect on that individual. These chains originate in the actions of different officials, often in different legal institutions. The effects the chain of relations is intended to have on that person or type of person (if any) will vary with: (i) the variety of actions possible for those officials given the social relations which affect their actions; (ii) various institutional interests those officials share; and (iii) their personal values (partly accidental and partly because of the differential ability of major outside groupings to influence those appointments). Thus the intended effects may conflict.

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56 Another reason for the lawyer's view of law to include institutions other than courts.

Unintended effects are even more likely to conflict. Even if two chains of relations originate from the same official position, that position may be occupied at different times by persons with different values, or even one person with inconsistent values[57] (a government wishing to promote investment and pollution control may start chains of relations some of which end with officials seeking to encourage the same investment that other officials at the end of other relations set out to stop). Finally, different relations, though originating within the same institution or with the same official may pass along different paths, through different chains of relations. These chains will pass through different institutions and hence through different individuals who have their <u>own</u> aims and values, and are affected by different social relations. Accordingly, their actions tend to deflect the chains of interaction in different directions. For instance, in a crack-down on violent crime a minister may force through legislation drastically increasing penalties and devote more resources to the police for the investigation of such crime. The police may bring more people before the courts meaning that more suspects suffer the indignities of police custody. But the juries who decide cases, reacting against the heavy penalties consequent on a guilty verdict, might convict in fewer cases than before.

<u>Incompleteness</u>

The effects of law are <u>incomplete</u> in that only some areas of an individual's behaviour are affected. Law does not constitute a system of social control, but is felt by each individual as a set of discrete effects that impose limitations and provide opportunities in limited areas of his life. The social observer's view of law will take the same form, merely adding effects that the individual does not notice - effects of

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57 Which is usual given the difficulty of ordering one's views of the world (§5.7). This is especially so if the official is subject to different social relations in the different situations in which he has to act. In one situation he may find himself pressured into a practice or action which later justifies by adopting certain values. In another situation he may be pressured into a practice or action which he needs conflicting values to justify. The actions or practices may not interfere with each other but the values, being derived separately, may not mesh together well and could easily conflict.

chains of relations ending in relations of manipulation, value-effect and unforeseen effects.

This incompleteness in the effects of law is largely due to the limited effectiveness of legal institutions. It will be only very partially due to the more usually offered explanation of limited desires to regulate social life - desires which should not carelessly be attributed to officials of legal institutions!

Non-uniformity

The vast number of individual effects of widely differing nature allows the many claims as to the functions of law to be made - if only some of the effects are observed it will be easy to see law providing guidance, exacting vengeance, settling disputes, maintaining social peace or reinforcing existing practices. It allows many of these effects to be achieved simultaneously.[58] But it also allows different sociological theorists, by focussing on other individual effects, to claim contradictory functions to exacerbate disputes, to aggravate social tension, and to promote social change by reinforcing new practices. The law can have a large number of unrelated or even contradictory effects on society because each of those effects involves summations of different sets of individual effects.

The various kinds of effects will not be distributed uniformly, some may fall predominantly upon certain social groups, the individual effects summed being mainly between legal officials and members of that group. Certain classes may be more affected by the law's vengeance than its ability to solve disputes,[59] the actions by which legal officials maintain social peace may fall on some groups rather than others. Sometimes this will be because the chains of relations culminating in that

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58 Even contradictory effects on the same person (supra).
59 OLI p. 96.

effect will originate[60] or pass through[61] different officials. Sometimes it will be because the officials through whom those chains pass may have different attitudes to the different groups,[62] resulting in different treatment of their members.[63] Even completely unprejudiced officials may find it virtually impossible to act against members of some groups because of the power relations to which he is subject or the reaction he can anticipate if he tries.

This differential effect of law on different groups may strongly colour the view of law held by their members. Feeling certain effects of law, they tend to see the achievement of those effects as the function law has in their society. They will also tend to generalise from the nature of the social relations they experience (i.e. the last social relations in the chains of such relations linking them to members of legal institutions). If, when seen from their end, these relations appear coercive or legitimate, then they will tend to believe all social relations in law to be similar. This may account for much of the disagreement between those Marxists who emphasise repressive aspects of law and other theorists who emphasise dispute-settlement and the facilitation of private arrangements. The former consider the effects of law on the "working class" and how the relations they have with members of legal institutions (mainly police and magistrates) appear to them. The latter may be thinking of the effects of law on the clients of lawyers, and how their relations with members of legal institutions (mainly lawyers and judges) appear to them.

6.11 "THE LAW OF ..."

The social impact of law is now seen as a set of discrete effects on citizens engendered where the chains of social relations in legal

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60 E.g. laws controlling business may originate in Labour majorities and laws controlling unions may originate in Conservative ones.

61 E.g. legislation outlawing "white collar" and "ordinary" may be devised by the same Attorney General but are administered by a Corporate Affairs Commission and the police respectively. These bodies treat suspects very differently.

62 Which amount to different value-effect relations.

63 This can be quite unconscious but no less significant. E.g. judges may consider business men less likely to "jump bail".

institutions finally emerge to touch citizens. This reinforces the possibility and importance of the concept of discrete areas of the law - wills, theft, contract, tax, etc. These areas of law do not comprise merely compilations and rationalisations of what judges and legislatures have said and done; but the effect those and other actions by key officials in legal institutions ultimately have on citizens via other officials. Law is not just a matter of "what judges do about disputes", that was always too narrow a formula, it is what members of legal institutions ultimately do about citizens.

Hence the answer to the question "What is the law of Theft?" is an answer to the question about what the members of the institutions of law do about protecting citizens from being deprived of their possessions. This includes answers about what the legislature does in passing the Theft Act, what the police do about apprehending those they suspect are engaged in what they consider to be theft,[64] and the difficulties and probability of discovery, what they do to those they arrest suspects on theft charges, what barristers do in court, the difficulties and probabilities of convincing juries of guilt, what the courts do in sentencing and other courts do on appeal, what prison officials and guards do with convicted thieves sent to them, and the relations between all these actions. In short, the law of Theft is about the type and probabilities of various indignities being performed by various members of legal institutions on those who do certain things to others' possessions, and about the interactions within social relations that produce these effects.

Similarly, the law of contract is a matter of how the various institutions of law affect the operation of private agreements.

This should not be taken as a denial of the value of specialised study of actions performed within one or two of the institutions - such as that by positivists on the way lawyers derive reasons and rules from the verbal actions of legislatures and courts. But from a social observer's

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64 Not necessarily the same as a court considers "theft".

viewpoint this is only a part of the law, a part of the chain of relations and institutions through which law operates - a fact which those who indulge in such specialised study should never forget. This requirement is even stronger for practitioners - as seen in §6.9, good advice to clients requires a knowledge of the likely action of officials who carry the final effect of thse verbal actions through to the public, and with whom clients have to deal.

6.12 SUMMARY

The preceding sections have attempted to say something about law as at least a part of a description of the social phenomenon we experience and associate with the word "law". It is seen as a mass of social relations in all the varieties and mixtures found in the rest of society. These relations are formed into a massive inter-connecting web in which each point is connected to many others rather than forming an ordered system of the types considered in Chapters 2 to 4.

Within this web there exist some more intensively inter-connecing constellations of relations that can be recognised as some of the familiar institutions of law. These relations concentrate resources in the hands of a small proportion of those individuals involved - the key officials of legal institutions. Thus, like society, law is partially organised into institutions but it does not have an overall structure, the shifting paths of the many chains of relations defying attempts to define one. These institutions are a part of the social mêlée. The institutions are in conflict with each other and with those outside. In the course of this conflict, key officials try to extend the range of choices open to them in the action they take, and to limit the range open to others. These institutions are also a subject of the social mêlée, with other institutions and groups attempting to control the action of key legal officials or at least influence their appointment.

The effects of law on society are considerable and many positions within the institutions offer scope for indirectly achieving such effects. However, the chain of relations of mixed nature and strength

through which these effects must be channelled means that the effects achieved are often diluted, deflected or distorted versions of that which was intended, so that the effect, while strong, is a crude one. Over all, the effects of law on society are not structured into a system of functions but are the sum of many effects originating in many different parts of law, travelling via many paths, to emerge at many different points, to affect many individuals. As such, these effects are frequently conflicting, incomplete and non-uniform. But as their only common characteristic is that they originate within a complex disordered entity, it is unsurprising that these effects are themselves disordered.

6.13 TWO QUESTIONS

It is hoped that this image of law, although different in total, is familiar in detail and fills the gap left by the rejected systematic pictures of law. But a lingering question remains - why do so many people see law as systematically arranged? No definitive answer will be attempted but some of the causes can be identified. Some have already been indicated - the comfort the belief engenders and the general fashion for systems theories (§1.2); the fact that judges sometimes strive to put some order into their decisions (Chs. 2, 3) and the limited range of effects law has on different groups (§6.11).

Another powerful impetus is a desire by jurisprudential theorists to unify the field they study. It is natural for theorists to consider that what attracts their interests is some thing, some whole, the unity of which they can demonstrate as a justification of their interest in it. Yet the subjects of academic study are affected more by institutional factors than the attributes of the things studied (which in any case can only be discovered after the study has been going on for some time). Nowhere is this more true than in Jurisprudence which has naturally tended to ask questions of interest to students and teachers of law. These questions are largely about the activity of law graduates and the influences upon that activity, neither of which is likely to constitute a unity.

But there is no need for objects of jurisprudential interest to constitute a unity. That the questions are of interest is sufficient justification in itself. Indeed, the factor which most contributes to the disorder of law provides a particular justification for its study. Every aspect of society seems to have an influence on and be influenced by law. Everything we know about men and their interactions with others seems important to our understanding of law.[65] Law is not a neatly unified, systematised whole floating around in the calm backwater of society but at the vortex of the social mêlée where the strains show up most. It is a great drama, perhaps the greatest drama in which we are involved. Even if it does not have a plot, a start, a finish and the direction is appalling, like the quintessential Hollywood movie, "it has got everything"!

There is one further reason for the common belief that law forms a system - the fact that we can and do talk about law in such positive, even emphatic, terms. How is this possible if law is so disordered? The remainder of this section attempts to answer this question and thereby allay one more doubt.

But what is it that we can be so positive about ?

(i) Certain statements will be more or less endorsed by judicial officials and colleagues. These are the statements about what "the law" is.

(ii) Certain actions are likely to be performed by certain officials.

(iii) After that action is performed, another person will be expected to act.

All these require actions (including speech-acts) and the successful prediction of action does not require a system, merely that there is a reasonable regularity of behaviour - under similar circumstances similar actions are likely to occur.[66] But under similar circumstances the social relations involved, and with them the actor's reasons for action, are also likely to be similar. Thus the similarity of outcome is

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65 Pace Kelsen, psychology, sociology, etc., seem essential to the understanding of law.

66 That is all the "laws" of the physical sciences, the model for so many systems theorists, claim to do.

unproblematic. And the real limitations on even the highest legal officials restrict them to a range of action within which it is very safe to predict they will act.

In any case, the predictability can be over-rated. The statements most likely to be endorsed by colleagues and officials are those already made by judges. Repetition of these with their citation is quite safe as no-one denies that the sayings of judges are a part of the law. The acceptability of new statements is less certain, but the closer they are to paraphrases of the above statements, the more confidence we have that they will elicit approving noises from judicial officials and colleagues. However, very little hangs on this. There are millions of such statements, and most of them will have multiple meanings among which the stater and endorser may well have taken different ones.

Prediction of what a judge will do is more difficult. It will involve an "order" and often a statement of his own about what the law "is" (which may be added to the millions there already are). We have no hope of predicting the exact words, merely that it will contain statements that are <u>similar</u> to <u>some</u> of the millions that are included in the above category and express some of the hundreds of sentiments that are expressed by them. (And all of this without even touching on judicial law-making!) The ideas he picks out and the priority he gives them are very difficult to predict and such prediction will require careful analysis of <u>his</u> personality, <u>his</u> social relations and his value priorites as revealed in his other judgments and/or from other sources if available.

The order he makes is related to his statements or, where there is no such statement, the statements of law made in front of him and those dredged from his memory that strike him as valuable. This statement, or statements, of law provides him with a reason for his action. But exactly <u>what</u> action it is a reason for will depend on the meaning of that statement to him, and how it meshes into the other processes within his practical reason. Consequently, we are not very good at predicting the orders that judges will give, something borne out by the fact that

something close to 50% of barristers advising in civil cases get it wrong. It may be objected that only the uncertain cases get to court. But out-of-court settlement is not so much due to certainty of what would happen in court but certainty about the possible cost of finding out. The art of settlement involves the skilful mixture of the two.

The final kind of prediction that we can be positive about is the fact that one person's action is regularly followed by another. This does nothing to indicate system in law. It merely asserts the existence of a social relation, the very stuff of the non-systematic social description adopted here.

6.14 FURTHER USES OF THE NON-SYSTEMATIC THEORY OF LAW

The last two chapters have provided the bare-bones of a non-systematic theory of society and law. This has been primarily directed to providing a description of law satisfactory to the social observer, both for its own sake, and to reinforce the earlier rejection of systematic theories by providing an alternative.

However, there are many other "problems" in social and legal theory that this theory can help to illuminate. It can do this by (a) using social relations as the basic unit of socio-legal description instead of social rules, norms or roles (all of which are seen as either phenomena of limited importance or complex phenomena built from varying combinations of social relations) and (b) throwing-off the constraints imposed by attempting to force these basic units into a system. Except where they bar on legal description, these problems have not so far been discussed. Space permits little more than a listing here.

(i) The relation between coercion and legitimacy in law is largely described and accounted for in the way possession of one can often be used to gain the other (§5.2).

(ii) The nature of legal obedience is seen to lie in the successful affecting of behaviour by members of legal institutions through the existence of all kinds of social relations in law.

(iii) The relationship between legislature and judiciary is simply analysed in terms of social relations between legislators and judges.

(iv) The nature of judicial discretion is seen in terms of the range of choice left open to judges by the social relations in which they are involved.[67] Discretion only appears broad when some of the social relations that limit it are ignored.

(v) The limits to law are established by the limited effectiveness of the social relations in law.

(vi) The specification of official positions. A useful way of specifying what a judge, barrister, policeman, etc. is can be provided by stating the set of social relations most commonly found involving such a person.

(vii) The choice of legal activity (for those among the jurisprudential audience who have not yet chosen). An individual can do this by looking at the range of choice of action that could confront him[68] in various positions open to him and how those actions can affect others[69] (including the limitation of the effects that third parties have on them by deflecting or stopping the chains of interactions started, intentionally or otherwise, by those third parties). He can choose on the basis of which range of choice includes actions that achieve the fulfilment of the most values according to his own political theory.[70]

(vii) Theories of law from the point of view of individual participants. The parts of law with which individual legal actors come into contact and which are significant for the pursuit of their chosen activities were earlier taken to be law for those participants (§1.3). Those parts are

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67 This is reasonably easy to discover cf. the difficulty of finding out the correct rule to be followed in a positivist system, the right answer in Dworkin's system or an official's role in a sociological one. There is no necessity to create impossible systems of rules, principles or roles - merely to identify the most significant opportunities for activity and the key restraints on them by seeing whom the judge can affect, who can limit that effect, and in what way.

68 This could vary slightly for different individuals occupying the same posts because of the different particular social relations of which he will be a part.

69 I.e. some idea of the mechanism by which his actions affect others and, in general, the wya his actions can contribute to the realisation of desired social changes and the blocking of undesired ones (§5.12).

70 E.g. utilitarianism, lineralism, or Marxism as interpreted by the individual theorist.

the social relations (and chains of such relations) in law that provide opportunities for, and limitations on, that individual's pursuit of his activity. The theory of law for that individual will involve those social relations as seen from "his end". Of course, from his end, some of the relations will not be visible at all. But knowledge of the non-systematic theory will mean he will attempt to discover relations of manipulation in which he is power-subject (thereby eliminating them) and relations of unintended effect in which he is reactor or affector (thereby converting them into power relations). He will also realise that his point of view will be affected by his practices and values. Knowing the haphazard way these can be adopted he will consciously reconsider his practices (infra) and ensure that the values pursued are those of his politcal theory and not someone else's.[71]

(ix) Choice of action within a legal activity.[72] This is a conscious exercise of the kind of practical reasoning discussed in §5.7. The legal actor's own political theory tells him which action to take from those the non-systematic theory tells us is open to him.[73] (The latter theory is also helpful in indicating how these aims are best pursued - e.g. because successful action within law is usually so dependant upon the actions and reactions of others, there is much to be said for putting actions in a form with which others are familiar and using the traditional legal skills to justify them.)

Some might criticize the deliberate insertion of personal political

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71 He should be especially careful to avoid the tendency to "dressup" power relations as internal constraints to make himself feel more the master of his own actions. He should reject the comfort this brings and identify very clearly the precise extent of this limitation, so that he does not curtail his actions unnecessarily or in ways his values do not require.

72 The more general aspects of this choice constitute a choice of role and a personal resolution of the controversy over the description of the activity (§1.2).

73 Although each individual will use his own particular political theory to make his own specific choices, general theorising is possible too. In fact the whole area of Jurisprudence which deals with the role of judges, lawyers, legislatures, etc. could be redrawn as the application of political theories generated elsewhere to the exercises of choice by individuals in certain positions. Here we could see how the various political theories like utilitarianism, liberalism and Marxism would suggest the choices that occupants of certain positions should make.

values into the practical reasoning of actors in place of a search for values embedded in legal institutions. The latter can be found in the sense that it is possible to use the actions of other officials to provide "reasons" for one's own action and also in the sense that many actions are stamped with the intentions their performers had for them. However, the skill of lawyers in deriving different reasons and justifications from the same actions, and the enormous variety of intentions of those whose actions have produced law and society, mean that a veritable Babel of values, irreconcilable and un-systematic, are stamped on society. From these the individual can choose those that correspond to his own political theory. Any criticism of that choice merely amounts to saying that the critic would have chosen different ones.

Another reply would argue that for each individual his "moral sovereignty" allows him to override any values derived from society. But no such terrible decision - between accepting or rejecting society's values - is forced upon him. Rather than declaring a one-man war against society's values, he chooses from the many values that have been pursued and received expression in law and society as he has observed it. He dives straight into the social mêlée of competing values, choices and ends; of competing groups and ideologies; with the consequent conflicting actions of those within competing and disordered institutions. He plunges into the struggle that has been raging within society since its inception, into the very struggle that <u>is</u> society and law. In acting in pursuit of the political aims of his own political theory, he is quintessentially social in a society without order, and quintessentially legal in a law without order.

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