MacCormick
Questioning Sovereignty

1

The Legal Framework: Institutional Normative Order

Introduction

The great jurist Hans Kelsen, who spent much of his life trying to clarify the concept 'norm', and the 'ought' that is the verbal sign of normative utterances, once remarked, almost despairingly, that the 'world of the ought' is a 'great mystery'. In Scandinavia, the disciples of Axel Hägerström doubted that any sense at all could be made of the ought. Said Karl Olivecrona of Lund: 'A mystery it is and a mystery it will remain forever.'[1] There continues to be controversy over the issue of properly accounting for normative elements in human thought and activity. It is a difficult thing to say just how (or if) a degree of order can be achieved in human lives, both individually and socially, by upholding and following normative requirements.

The basic idea of this book (and of companion volumes that will appear in the following years) is that norms belong within normative orders, of which some are, and some are not, institutional in character. A principal example of institutional normative order is law as this appears within contemporary states—municipal positive law. But this is by no means the only example, and it is illuminating for the purposes of reflection on the state to contemplate municipal positive law as a species of a genus, contrasting it with other species in the same genus. It is also of interest to compare and contrast morality as non-institutional order with law in its institutional character, and to contrast politics as institutional but not normative with law as both institutional and normative. These are fundamental contrasts for the present work, and this chapter works through them.

At any given time, any one of us has an idea of the world as it is now. But this is for the most part a broad and vague idea, with exactness and detail only in the contemporary foreground of perception and thought. Television, radio, newspapers, and other media keep us broadly informed about what is going on, though our attention is confined to particular subjects that interest us. Our awareness of history and geography let us locate ourselves somewhere terrestrially in the context of some narrative awareness of our present time in its continuity with past events, either directly recalled or spoken to in some memories or texts or reports available to us. Our own idiosyncratic understanding of the natural and social sciences gives us a

[1] See Olivecrona, *Law as Fact*, 1st edn. (London: Humphrey Milford, Oxford University Press, 1939), at p. 21. 'It is impossible to explain rationally how facts in the actual world can produce effects in the wholly different "world of the Ought". At one time Kelsen declared bluntly that this was in fact "the Great Mystery". That is to state the matter plainly. A mystery it is and a mystery it will remain forever.' The reference is to Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: J. C. Mohr, 1911), 441.

people have some cosmological [illegible] Universe, and either do or do not have an awar[illegible] underpins it all and in some sense guarantees it. With or without [illegible] actual perceptual consciousness of our immediate surroundings, and can to some extent give an account of what is going on here now, though by the time any such account is given, things have already moved on into some new state of being. Even the most learned and perceptive and well placed of us has only partial information in consciousness at any moment, always in a context of imperfect memory, possibly inaccurate scientific foundations, and rather inarticulate conjectures concerning probabilities.

Since David Hume's day, we have been used to contrasting the 'is' and the 'ought'.[2] It seems that this contrast has been mainly taken as highlighting the straightforward factuality of the 'is', in contradistinction with the somehow slippery character of the normative 'ought'. But is it not true, as just stated, that our grasp of the 'is' actually has a rather vague quality? If so, it is rash to jump into the assumption that the contrast drawn by 'Hume's guillotine' really favours the 'is'. Can we not usually be somewhat more certain about how things ought to be than about how they actually are? To hold or perhaps even to know that murder is wrong, or thus that people ought not to be killed wilfully and of malice aforethought, is to hold or know something that holds good everywhere and all the time. (If I am thinking in terms of municipal positive law, it holds good uniformly throughout the state in question.) Indeed, it is possible to be a good deal more confident that nobody ought to be murdered than that nobody is being, has been, or is about to be murdered, even in one's present quite near vicinity. I can be certain that murder is wrong, but not that it will not happen. And the same goes for jumping the red traffic light, or for acts of housebreaking, or for lying or breaking promises.

To think about the world, certainly to think of it beyond one's perceptual field, is to have some kind of picture or narrative account of it. This frames how I think it has been, has come to pass, now is, and will probably go on. The meaning of such thoughts is clear enough, for they either match the world or they do not, and if they do, that is how it really is. (The trouble is that we cannot check it all by direct immediate inspection—that is indeed the very trouble from which I started.) The 'ought' is of course different. The picture or narrative as I hold it ought to be is not one that is confirmed by how events are or turn out. It is an ideal picture or narrative, one to which I envisage the world being made to conform, as it does on all the occasions when no one murders a neighbour, breaks into another person's house or jumps a traffic light, tells a lie or breaks a promise.

If, however, I have some practical commitments concerning the way the world

[2] See Hume, *A Treatise of Human Nature* (Oxford: Clarendon Press, 1978, ed. L. A. Selby Bigge and P. H. Nidditch), Book III, Part I, sect.1, last para.

ought to be, or the way it ought to go on, I can be fairly certain what these commitments add up to. In this way, I can have greater certainty about the 'ought' than about the 'is'. I can know better how the world ought to be (assuming my commitments are valid ones, and ignoring for the moment the question of what, if anything, validates such commitments) than I can know how it actually is. So far as concerns the positive law of the country I am thinking of, the rules in its statue book are nearly all cast in universal terms ('No one shall . . .', 'Whoever is in such and such a situation shall be liable/entitled to . . .', and so on). Their universality entails that, assuming I have a correct grasp of valid norms of the envisaged system of law, I can know with considerable certainty how things ought to be according to that system. This is so, even when I can never be so certain how things are or have been in the territory for which the law is valid.

Let us therefore acknowledge that the 'ought', however puzzling we may sometimes find it at the deepest ontological level, has at least the possibility of a degree of clarity and certainty that the 'is' often lacks. Nevertheless, all is not entirely simple. In a concrete situation I may wonder what some person (perhaps myself) ought to do or to have done, and may with some confidence conclude that the case is covered by a relevant norm. For example, 'thou shalt not kill' governs the case when I feel myself getting furiously angry towards Jim, and 'promises ought to be kept' governs the promise I made to Fred that is now due for performance. So I judge I ought here and now to calm down and avoid falling into some murderous impulse, or there and then to do the promised service. Or I may take a single simple norm like the no-killing one or the promise-keeping one, and reflect on it as in some way clearly valid for some context or jurisdiction. Yet it does seem to be the case that no such single normative judgement or proposition really makes sense on its own or in isolation. It is in its fitting together with a whole bundle of other norms that it makes sense. Especially in the context of the particular judgement—'what ought to be done or to have been done?'– or deliberation—'what to do now?'—there may be many normatively salient aspects of the situation, so that one's judgement or conclusion all things considered has taken account of more than one norm in its bearing on the situation. In this sense, normative judgements and deliberations do not relate to or presuppose or derive from single isolated norms. Rather, they depend on some larger conception of normative order, about the way things ought to be and ought to go on, taking the whole range of events things and possibilities as they appear to us at any particular time and place. This prompts an inquiry into the idea of 'normative order'.

Normative order

Normative order is a kind of ideal order. At any given time we may form a view of the world as we think it is, including the set of ongoing human actions and intentions for action. We may set against that a view of the world as it could be or could become, leaving out certain of the actions, leaving some actual intentions abandoned

or unfulfilled, while other actions take place instead of those left out, and other intentions are fostered and brought to fulfilment. A view of the world as it could be or could become is an ideal view of it. An ideal view may be constructed in terms that rule out or imperatively exclude certain ways of acting on all occasions on which such action might otherwise be contemplated, and that insist on or imperatively include certain other ways of acting as always called for despite any contrary temptation.[3]

There is a notorious ambiguity in the term 'ideal' and most of its cognates in the various European languages. Sometimes we mean by it that which exists merely in idea, that is, within ideas held by some person or persons, whether for good or ill or in a neutral way. Sometimes, however, 'ideal' conveys the notion of a favoured or even highly favoured idea. Normative order, of course, is ideal in the sense of the favoured or preferred idea, not merely the neutral idea. Yet it falls short of any 'best of all possible worlds' perfectionism. Normative order is practical, both in the sense that it guides praxis, guides what we do, and also therefore practical in the sense of practicable. It is an order that is envisaged as a practically realizable state of the world given things as they are and persons as they are here and now; to the extent that it is realized, the world is a better, more satisfactory, world than if no such guideline were envisaged or followed.

'Norms' are propositions that we formulate with reference to, and as singled-out elements of, normative order. In primary form, they are either exclusionary provisions (negative duties, prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (positive duties, obligations) that call for or insist upon certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action.

This is not an attempt to explain norms or values in terms of value-free facts, of course. The notion of the 'better' or 'more satisfactory' built into the account of normative order as ideal order shows normative order to belong within, not independently of, values as fundamental elements in all human consciousness.

Also essential to making sense of these concepts is the way in which the practical concerns that which engages a person's will. Merely to envisage a possible world extrapolated from the actual one, even to think of it in some purely contemplative way as better than the actual is not to cross over into the realm of the normative. A steady commitment of the will to realization of some ideal order as a coherent and realizable state of the world is what is required for that transition. The will directed towards realizing a practicable, rationally coherent and humanly satisfactory ideal order constitutes it as normative order. Only by reference to such an order is it possible to establish the difference of right and wrong in action. Those actions are right

[3] Cf. G. H. von Wright, 'Is and Ought', in E. Bulygin *et al.* (eds.), *Man, Law and Modern Forms of Life* (Dordrecht: D. Reidel, 1985), 263 at 267–8, discussing norm-formulations and the use of the 'ought' therein.

that are not excluded from the conceived order, those that it excludes as actions and to which it denies fulfilment in intention are wrong. The dichotomy between wrong and not-wrong (or between wrong and right-in-the-sense-of-not-wrong) is the fundamental differentiation of actions or of intended or planned acts in a normative order. What a person engages upon when aiming to make normative order actual is the task of, or commitment to, avoiding wrongdoing.

The world as already-in-part-ideal order is that upon which we base our conceptions of normative order, the ideal order that would exist were practically removable imperfections purged from the way things go on now. Most promises that are made are in due course kept. Truthfulness and honesty are more frequent for most of us than lying and cheating. To formulate the principles that promises ought to be kept, that lies ought not to be told nor frauds perpetrated, is to set terms for an ideal order, but not one that stands absolutely apart from actuality, neither in terms of what is commonly done, nor in terms of what are commonly asserted as principles of acceptable conduct by others in our communities.

Thus normative order does not stand in absolute contrast with actuality. Quite a lot of what goes on is perfectly compatible with what is right from the point of view of any reasonable moral attitude. Moreover, this is the case, at least in part, because people share legal systems and moral attitudes or converge in the moral demands and conceptions of moral order they endorse. The world as it is does not unfold independently of human wills. On the contrary, the human world-as-it-is goes on as it goes on through human choices and decisions. However imperfectly, these choices and decisions reflect and conform to the conceptions of legal and moral rectitude held by the choosing and deciding agents. So normative order as ideal order does not by its envisaged contents or substance stand in any absolute contrast with the world as it is. Indeed, our normative commitments come out of our response to the world as it is, our satisfaction or dissatisfaction with it as it is and as it goes on, and our sense of the practicable alternatives to what does or might happen.

There are, it seems to me, three ways in which human beings come to an awareness and understanding of normative order. Through nurture, socialization, and education, we are exposed to and socialized into some common views of the right and the wrong, and gradually led to an ability to be at least partly self-regulating against the standing norms implicit, and partly explicit, in this common view. Then, in modern conditions, we fall into a series of rather institutionalized settings in which rules are made even more explicit than in the general familial and social milieu. For everyone nowadays this includes the experience of school, with compulsory attendance; for many, still, even in a secularizing society, participation to some extent in a church, mosque, synagogue, or other structured religious observance plays an important part. Nearly everybody participates in sports and games actively or as spectator or as both, and expertise about rules of play and rules of national and international competitions organized by officials and representative bodies is at least as widespread as knowledge and understanding of state-law. Thirdly, though, state agencies such as police and courts and in a more remote way other official organs up

to and including parliaments and international agencies define one particularly authoritative, explicit, and highly regulated normative order for us.

At the very least, our picture of normative order emerges out of heteronomous orders, where others communicate norms to us and we learn to follow them, usually under some external incentive. The idea that any of us could invent a whole moral order for her- or himself is absurd; it is inevitable that we start from some learned or acquired framework of practical thought, and gradually develop our own critical awareness of it as something for which we take responsibility, and can adjust in the light of what seems to us reasonable. Our learning experience is one geared to developing an at least partial autonomy.[4] What we learn is to monitor and guide our own conduct against criteria of right and wrong that are conventional norms in some cases and formally enacted rules in others.

In a fundamental way, though, the possibility of developing fully autonomous judgement at the end of one's learning experience is that which makes intelligible the very concept of normative order. The telos of moral development is the fully responsible moral agent who takes responsibility for his or her judgements at all levels, and whose volitional commitment to some ideal of order is categorical, not conditional. Only a being that can act in a self-regulating way, judging between possible courses of action through voluntary commitment to some rationally willed order, and seeking to realize the willed order in action, can fully grasp the concept of 'wrong' action, or therefore the concept of right-as-not-wrong action. Only such a being can make full sense of auxiliary verbs such as 'ought' or 'should'. As Thomas Reid[5] observed in controversy with David Hume,[6] these are terms that every moral agent understands, but that are not definable in any terms simpler than themselves.

This account both presupposes and points towards reasons for believing the thesis that autonomy is fundamental to morality. Conceptually, I would suggest, the idea of autonomy that was sketched above is fundamental to any idea of normative order. For in the last result only an autonomous being can respond through acts of volition to the requirements of normative order. Normative order guides choices, but does not cause them. Choices are voluntary responses to an idea of order, not conditioned reflexes. On the other hand, the concept of a rationally coherent order in which universalizable principles find their place presupposes the agent's exposure to some conventional or institutional social ordering initially heteronomous in character from the agent's point of view. In the development of moral agency, heteronomy precedes autonomy.

Institutional normative order

Necessarily, normative order involves judgement. Being subject to a norm is being liable to judgement by oneself and by others in case one's conduct does not match

[4] See Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale Journal of Law and Feminism*, 1 (1989), 7, 8-9, 21–2.

[5] T. Reid, *Essays on the Active Powers of Man* (Edinburgh: John Bell, 1788), essay V; see Reid's *Essays on the Powers of the Human Mind* (Edinburgh, 1819), vol. 3, 578.

[6] See Hume, *Treatise*, Book III, part 1, sect. 1, final paragraph.

up to what is required. Particular norms are to be envisaged as fragments drawn from a presupposed ideal order in the sense indicated, or as propositions formulated to capture the sense of that order in relation to a given type of situation. They are exclusionary or mandatory prescriptions that posit some course of conduct as wrong, or as obligatory. To engage with a norm as an acting subject is to judge what must be done in a given context; to reflect in normative terms upon one's own or another's conduct in a given setting is to judge, against some envisaged norm, whether what was done ought to have been done or ought not to have been done. The judgement that an act ought not to have been done normally entails a consequential judgement of the measure of penitence or restitution, or of censure, that is apt to the case. All in all, to think normatively is to think judgementally. This is a general and significant truth about all forms of normative order.

Judgement is sometimes purely personal and autonomous; sometimes it is conventional and heteronomous, without being institutionalized. It can also, however, be institutionalized, or, if you will, organized. The first step towards this can be seen wherever in a question involving two parties, a third is asked to help. Such a third party can be a relatively impartial judge between two persons on whom some norm impinges differentially. Reference to such an impartial third party can become a standing practice in a variety of situations. Thus over some range of topics, some persons may acquire a standing role as judges, to whom reference may be made. It can come about that the judgement of such persons acquires mandatory force within some normative order, in the sense that a person who wishes action taken in virtue of some normative judgement must either handle the matter in a purely voluntary way, or resort to compulsory action only under judgement of such a judge. Then appeals may or may not be allowed; but once judgement is institutionalized, there has to be some rule about the finality of judgement; a rule that it is obligatory to accept and carry out the judgement of the ultimate court, and that it is forbidden to take any further action beyond that ultimately authorized under the final judgement.[7]

Norms involve judgement, and judgement, as we noted, is either personal and autonomous or in some measure institutionalized. Institutionalization of judgement is a fundamental feature of the organization of normative orders. In one form or another, it occurs in a wide variety of settings, through churches, sporting organizations, commercial guilds, and leagues, international organizations, and agencies; and also, of course, paradigmatically in the state.

An inevitable effect of institutionalization of judgement, especially where there comes into being a group or a corps of judges acting in a coordinated way under a common structure of appeals, is that normative order must come to be conceived as systemic in character. The system in question then necessarily possesses, as Teubner and Luhmann point out, a self-referential quality.[8] For it has to be a question in any

[7] Cf. Neil MacCormick, *H. L. A. Hart* (London: Edward Arnold, 1981), ch. 9.

[8] See G. Teubner, *Law as an Autopoietic System*, trans. R. Adler and A. Bankowska, ed. Z. Bankowski (Oxford, Basil Blackwell 1993), 13–24; N. Luhmann, 'Law as a Social System', *Northwestern Univ. Law Rev.* (1989), 136 at 141–3.

dispute what the governing norm is and how it is to be interpreted. Finality of judgement entails final authority on the question what counts as a binding norm, and how it bears on the case. What makes the judgement final is a norm of the normative order that makes respect for judgements obligatory in every case. But the judgement that such a norm, or any other norm, belongs to the order, is itself one which can only be pronounced with final effect by an appropriate judge or court. And the same postulated normative order is that which makes a given judge or court appropriate, or (in the more technical term) 'competent' to judge on the question.

Whenever this is so, it follows that, relative to any institutional normative system, there is a way, conclusive within the system, for determining what counts as an authoritative norm of the system, or a definitely established right or duty of some person under the system. There is even a way of determining what counts as a person under the system, and what kinds of practical social and business arrangements can be set up with binding effect in the system.[9] The way is, of course, that of recourse to the judgement of those competent to judge. Otto Brusiin has remarked that, although questions about sales or marriages matter to us in quite diverse ways in the ordinary social milieu, what counts in law as a 'sale' or a 'marriage' is a question which the law-courts necessarily have ultimate authority to determine.[10] And they have associated authority to say what ulterior legal rights, duties, powers and the like follow consequentially upon the existence of a sale or a marriage according to law. But which law-courts? Could there be merchants' tribunals deciding about sales? Or sporting tribunals deciding about the valid transfer through 'sale' of a footballer's contract? Or Church Courts deciding about marriages?

As we know, each of these is possible. There can be tribunals of many kinds, and these can deal with similar questions affecting the same human individuals. But the characteristic of an institutional normative order is that competent judgement in it is conclusive within its own order, except to the extent that there is coordinated cross-recognition of different orders. Such cross-recognition obtained between Pope and Emperor in the Middle Ages,[11] and obtains between European Communities and member-state legal orders today. Where a plurality of judgements each conclusive within a particular order can be passed, the question is: 'Which ought to prevail?' As a question within a self-referential system, such a question is of course self-answering, for the system's agencies can never say other than that the system's norm ought to prevail. As a question for a person confronted by competing judgements of substantially the same question in practically different senses, the issue is which to respect, on grounds external to the self-referential answer provided by rival

[9] See MacCormick, 'Institutions, Arrangements, and Practical Information', *Ratio Juris*, 1 (1988), 73 at 79–80

[10] See Urpo Kangas, *Otto Brusiin: der Mensch und sein Recht* (Berlin: Duncker & Humblot, 1990), 182.

[11] See Norman Davies, *Europe: A History* (London: Pimlico Press 1997), 336 ff. One can easily exaggerate the stability of church/empire jurisdictional relations in a period of considerable turmoil, but the independence of canon law from secular law remains a striking fact.

state tribunal or the Trade Union

There are both prudential and moral elements in any reasoned question, 'Which to respect?' Which ought one to respect all things considered? Which is it least disadvantageous, all things considered, to ignore? In cases of conflict the answer to the latter question, the prudential answer, will be considerably affected both by the weight and balance of conventional opinions and by power-relations, and these will also be relevant, though with different scales of weighting, to the former, the moral question. But in so far as power-relations enter the question, the issue is, as I shall shortly try to show, one of politics. Whoever can make a judgement prevail in the last resort, in the sense of its being carried through by main force if necessary, and can reliably and predictably enforce such judgements in the general run, has political power. That political power backs and to a degree reinforces the authority and prestige of the tribunal whose judgement is enforced and that of the normative order to which the tribunal self-referentially belongs.

In the world as it has been, and still to a very large extent is, power of the relevant kind has been territorially concentrated, and each relevant territory has been that of a state. The coercively predominant normative orders have been those of states, though they have rarely if ever succeeded in absolutely eliminating rival orders of one kind or another. This is why there has been such a tendency to take for granted the equation of 'law' with 'state-law', though this has had serious distorting effects for legal theory.

Two obviously significant aspects of the interrelation of coercive power with normative order (thus also the interrelation of state with law) are of course that of executive power and that of legislative power. The executive possesses the direct or indirect command of the agencies of organized physical coercion that can back up the power of judgement—or, in cases of serious breakdown, disown and overthrow it. The legislature possesses, normally, the kind of democratic or quasi-democratic (or other ideological) legitimation that contributes significantly to the acceptability and durability over time of the coercive power that is organized under the executive. A delicate and shifting balance of power-relations normally obtains here. But always there is a question whether the due exercise of either legislative or executive power is a matter subjected to judicial judgement, and hence itself incorporated into the normative order which it so crucially supports. Where it is so incorporated, the state is a *Rechtsstaat*, a state-under-law, a 'law-state', as Åke Frändberg tells us to call it.[12]

In a law-state, the question what exercises of executive power are valid is a question of law; the political power of the executive is restrained under the authority of law. Likewise, it is for the courts to say what resolutions of the legislature constitute validly enacted norms of law, and how they are to be interpreted. The authority of

[12] The 'Law-State', as yet unpublished manuscript by Professor Frändberg of the University of Uppsala, Sweden; I am grateful for permission to borrow this term.

the legislature is not a matter of democratic or ideological or hereditary legitimacy extraneous to law, but is itself conferred by law, or at least confirmed by it on terms that effectively limit the power of law-making. Self-referentiality here shades over into 'autopoiesis',[13] in this sense: the law is 'self-making' since the acts that make it are law-defined and it is a question of law whether a purported act of law-making is valid or not. The court which answers that question itself exercises a power of judgement defined and conferred by law.

In such a state there can also be an independent profession of legal science, analysing the valid law, discussing the limits of its validity, offering interpretations that display some overall coherence and systematicity in the legal (normative) order conceived as an ideal unity. This scientific construction of order and system is itself an act of rational reconstruction[14] extrapolating from the given material. But in turn it is a reconstruction that reinforces the conception of law as a 'system', and which posits the systematic character of law as a guiding ideal for judges in particular, and also to a degree for legislators and officials of executive government.[15]

Law conceived as institutional normative order can thus come to be constitutive of a law-state. However, as Kelsen pointed out, there are two possible ways to conceive and represent the order as a working system. One way is a dynamic way.[16] Here, the process of change through time is central, including the way in which legal provisions themselves set the terms for valid change. This produces a representation of the order with a special focus on the processes of norm-creation, and on the processes of establishing institutional arrangements (contracts, trusts, and the like) within private and lower-level public law. When we represent a normative order in this dynamic way, we represent it in terms of the norms that regulate change, individuated as norms of competence, power-conferring rules, institutive rules of legal institutions.

The other way is what Kelsen called a 'static' representation.[17] Here, we represent the order by individuating rules or norms prescribing duties, or conferring rights either permissive or beneficial. Sometimes, in an even more microscopic way, we simply individuate particular duties and rights, depending on the current focus of attention. But this 'static' conception proves to be misnamed. For it concerns not stasis, but rather momentary normative judgement, whether the judgement envisaged is that of a court seeking to determine a litigated question, or that of a citizen engaged in practical judgement what to demand in a given setting, or indeed that of a scholar trying to produce a coherent representation of some branch of the law. The

[13] As the Greek etymology suggests, 'autopoiesis' is a characteristic ascribed to systems that are considered to be self-making and self-sustaining; for a full account, see Teubner, cited above n. 8.

[14] See MacCormick, 'The Ideal and the Actual of Law and Society', in J. Tasioulas (ed.), *Law, Values and Social Practices* (Aldershot: Dartmouth Publishing Co. 1997), 1–25.

[15] Cf. Joxerramon Bengoetxea, 'Legal System as a Regulative Ideal', *Archiv für Rechts- und Sozialphilosophie*, 53 (1994), 65 at 70–8.

[16] See Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley and Los Angeles: Univ. of California Press, 1967), ch. 5.

[17] *Pure Theory*, ch. 4.

recognition of rights and duties in this practical–judgemental setting is in any event an intellectual procedure different from that of seeking guidance about the valid exercise of normative power within a normative order dynamically conceived; the two interact and overlap, but are not the same. Law as normative order has two aspects, the dynamic and the momentary. H. L. A. Hart sought to draw these together into a single structure of 'primary and secondary rules', but there is a notorious difficulty about the interconnection of his 'rule of recognition' with 'rules of change' and 'rules of adjudication'.[18] A proper representation of a legal system may reasonably take one or other of several forms, depending on one's practical concerns of the time. Material which is characterized in one way in a dynamic perspective takes a different shape when viewed in a momentary–judgemental perspective. There is no single uniquely correct reconstruction of the raw material of law into a single canonical form of 'legal system'.

Law and politics, law and morality

The final task of this introduction is to outline two distinctions, that between positive law and each of the two other realms of thought and action with which it is most intimately interrelated, politics and morality. For although interrelated and intertwined with these, positive law is nevertheless something clearly distinct conceptually. It is a genuine third term, not simply an amalgam of the other two. Politics is concerned with law—law making and law reform, appointments to key legal offices, maintenance of the forces of law and order, supporting the rulings of the courts. Yet politics is not law, nor law politics, despite occasional assertions to the contrary from the ramparts of Critical Legal Studies.[19] Morality is concerned with law, with the criticism of legal decisions and legal rules, with the issue of obligation to respect the law, with the question of law's claim to be genuinely normative, genuinely engaged with the world of the 'ought'. Yet morality is not law, nor is law morality, nor a subdepartment of morality, for all that this has sometimes been claimed by thinkers in the tradition of 'natural law'. For making the distinctions that it seems vital to make, the key ideas are those of power, which seems to me especially focal for politics, and autonomy,[20] which seems to me definitive for morality. Let us see how these ideas help with the distinctions sought.

Politics is a matter of power, of the actual exercise of power within human societies or communities, and of elaborating principles for the proper exercise of power. Political power is the power to direct social agencies and individuals to certain

[18] See Ch. 6 below

[19] See D. Kennedy, *A Critique of Adjudication: Fin de Siecle* (Cambridge Mass.: Harvard University Press, 1997), 133–57; M. Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London and Chicago: Pluto Press, 1996), 33–8.

[20] This concept is more fully explained and developed in MacCormick, 'The Relative Heteronomy of Law', *European Journal of Philosophy*, 3 (1995), 69–85.

defined ends presumptively for the common good, to exercise control over available goods (economic and non-economic) and to determine or influence their distribution among persons and groups. This power is exercised over and among the members of a reasonably identifiable society of people. Essential to it is power to protect the society against serious interference from agencies external to it and from subversive sub-societies or groups within it. The power that we have in mind here is power-in-fact, not simply normative power; that is, power to make sure that somebody in fact acts in a certain way, rather than power to bring it about that somebody ought to act in a certain way. Political power is power-in-fact; but what is sometimes termed 'legal power' is power of the other sort, normative power, power confined to the realm of the 'ought'.

Law interacts with politics in many ways; sometimes as an object over and through which political power is exercised; sometimes as a control upon the use and abuse of power. But law is not itself constituted by the power-in-fact to effect social change. Law is a form of normative order, setting patterns of right and wrong conduct and conferring powers that are normative rather than coercive in their intrinsic character. Nobody doubts that the United States Constitution conferred and still confers the normative power to ban the manufacture, sale, and consumption of alcohol for beverage purposes. If exercised, this entails that according to law alcohol ought not to be manufactured, sold, or consumed for those purposes. The experiment of the 1920s, however, proved that this legal normative power was not conjoined with sufficient power-in-fact to change the drinking practices of Americans. This sufficiently exemplifies the distinction I have here in mind—politics about power, law about normative order.

Certainly, one might want to add that not every exercise of brute power is itself a matter of politics. We are often inclined to contrast political with military approaches to the solution of civil conflicts (e.g. in Northern Ireland or in Chechnya). The difference is in the element of persuasion, negotiation, discourse. Politics concerns the exercise of power through mainly peaceful discussion, persuasion, negotiation, within forms of government which at least purport to be directed towards a pursuit of the common good in a way that could in principle win general consent among the population governed. Still, however discursive politics may be, the discourse remains one that relates to the obtaining and the exercise of power in the sense defined. In its discursive aspect, politics has essential connections with morality. Morality in its most fundamental sense has to be grasped in terms akin to those of Kant's *Groundwork of the Metaphysic of Morals*, and with some regard to Jürgen Habermas's ideas on a 'procedural' account of the foundations of moral reasoning.[21] Morality concerns a normative order that is conceived to be valid independently of political or other power and yet to be universal in scope, addressing

[21] See H. J. Paton, *The Moral Law* (3rd edn., 3rd printing, London, 1961), which is a commentary on and translation of Kant's *Groundwork of the Metaphysic of Morals*; and J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge Mass.: MIT Press, 1996).

autonomous in its force [illegible] in the commitment to it of that agent's own rational will. It is [illegible] and controversial as well as autonomous. Moral principles are those we can argue out in conditions of free and uncoercive discourse, accepting that they must be universal in application and must take account of the interests and ideals of all persons capable of participating in the discourse or capable of being affected by its outcome. Each person is as fully entitled to enter into moral discourse as every other. The ultimate judgement of right and wrong in moral matters is for each agent a matter of the conclusions one draws after engagement in actual or imagined discourse with others, and of the commitments upon which one determines as a consequence. The drawing of conclusions characteristic of a rational will depends upon arguments from a sense of overall coherence of the positions that we commit ourselves to in essentially discursive, uncoercive, contexts.

Morality in a less fundamental sense is located in the common or conventional principles and rules held by persons in communities, often in connection with religious observances and traditions. To show why this sense is less fundamental, one need only ponder the question why these principles and rules have authority over a moral agent. One or other of only two answers is possible. Either their authority derives from the agent's own willing commitment to them, or it derives from the power, however crude or subtle, of community opinion and persuasion or disapproval that keeps the individual in line. In the former case, they are incorporated in the agent's morality through autonomous choice, hence conventional morality is subordinated to individual autonomy. In the latter case, individuals are subject, in however diffuse and ill-defined a way, to the exercise of power by others, and the rules of conventional morality are an element in the politics of community. If we are to understand morality as a distinct realm of thought and judgement, it can only be through giving conceptual primacy to the discursive–autonomous conception of morality.

Law has positivity. We look to law for answers to questions about what is obligatory or not, permissible or not, within some determinate and institutional sphere of decision-making. Inside that sphere of decision-making, the given rules and principles indicate what ought to be done, indeed what has to be done to satisfy the institutionalized system. The norms of a system of law lay down what is obligatory or permissible in the perspective of that system, not what from some ideal point of view ought to be obligatory or permissible. A properly taken decision that a certain rule shall be enacted into law does confer on that rule the character of being an actual rule of law. A properly taken decision about some disputed point of right between two persons settles conclusively the legal rights of each upon that point, just as a properly taken decision upon an accusation of crime settles conclusively the legal guilt or innocence of the accused person.

Law resembles morality in that it is normative. It resembles conventional morality in being a normative order commonly observed in some community or society,

others apply norms that are regarded as common standards for the group in question. States being territorial political communities organized under governments capable of wielding coercive power over individuals and groups and in response to external forces, the law of states is backed not only by opinion but also by the coercive force of political power. But it is important to remember these two things: first, the law of the state is not the only law that human beings have; secondly, the *Rechtsstaat* is, as was argued already, that particular form of state in which the law provides decisive and actually operative criteria for the rightful use of power. Such states have empirically a greater durability than police-states or party-states. In law-states, the exercise of governmental power is both limited and yet guaranteed by law. This can over time have a powerful effect in generating a popular sense of the legitimacy of government, as a 'government of laws not men'. Such a sense of legitimacy does not flow from the mere existence of an effectively functioning sovereign state. This further indicates that the legal and the political are not to be treated as identical however closely they interact in fortunate circumstances.

One manifestation of law's positivity lies in the way in which, on questions of law, there frequently seems to be a fact of the matter, checkable by reference to publicly accessible sources. If a person wants to find out whether there is a maximum speed limit on the roads of a country, or a maximum permitted level of blood alcohol for drivers, there are sources to which one can quite easily look for an answer. Explicit rules on such matters are to be found in pieces of legislation, frequently supplemented by pieces of subordinate legislation; and secondary sources such as legal textbooks or government publications about road traffic assist in identifying them.

On the moral question how fast it is right to drive, or how much if any alcohol it is morally acceptable to drink before driving, there is no interpersonally checkable source establishing a quantitative limit. Such questions are capable of being settled only through moral discourse, weighing relevant arguments, and establishing considerations relevant to the issue in hand. Their settlement from time to time depends on the conscientious judgement of a moral agent, whether or not in conformity with the conscientious judgement of other agents actually or potentially participating in the relevant discourse. Of course, it would be difficult to comprehend a claim that the norms of positive law in the state regulating alcohol consumption by drivers are irrelevant or weightless in a moral deliberation on the topic in question. But it would be even harder to comprehend, far less accept, a claim that morally the enacted rules could have the conclusive character they have within legal deliberation.

The settled, positive, character of law is jurisdiction-relative.[22] How fast one may drive is a question differently answered in different places governed by different legal systems under the jurisdiction of different organs or agencies. The fact of the legal

[22] For a fuller statement of this point, see MacCormick, 'Comment [on G. Postema's 'The Normativity of Law']' in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), 105–13.

matter is a fact about some discrete legal system, and, where the law in question is state-law, the answer normally holds good only in respect of the territory of the given state. Sixty miles per hour is the maximum permitted speed on roads in the United Kingdom other than designated 'motorways', on which the maximum is seventy miles per hour. That applies, of course, only to roads in the United Kingdom regulated by the Road Traffic Acts. If I visit another country, such as Canada, I expect the rules to be different, and even expressed in different units of measurement. There, I have to check on maxima in terms of kilometres per hour; and so on. In each jurisdiction, I look for some distinct piece of legislation (or other authoritative law-text) that settles the matter within that jurisdiction.

Moral judgements, however personal and controversial, are not in this way relativistic. If I hold that driving above a certain speed is inherently dangerous to life and limb, or wasteful of natural resources, and if I hold that humans ought not to endanger each others' bodily safety, or make excessive demands on non-renewable resources, then I must hold that speeding is wrong wherever it may cause danger or use too much fuel. These judgements apply universally. No doubt they are susceptible only to being supported with arguments in a moral discourse, without any interpersonally authoritative source to check against; but in their own character they are universalizable claims, not restricted by jurisdiction or territoriality. Certainly, circumstances alter cases morally; but they do so in a universalizable way. The truth of moral matters is not checkable by reference to established, public and institutional sources. But their truth is an unrestricted and universal truth to the extent we can establish it at all.

Here may rest the argument on the dual contrast of law with politics and with morality. Law is both a normative and an institutional order, and this connects it with the two poles of the contrast. As a normative order, it replicates certain features of morality, and connects necessarily to morality in certain ways. As an institutional order, it connects necessarily to politics and is in part constitutive of the political, while well-conducted politics is necessary to the maintenance of satisfactory systems of positive law, especially state-law.

Conclusion

I have tried to show in outline how to approach an understanding of law as institutional normative order conceptually distinct from morality and from politics. By focusing on an idea of institutional normative order, one negates the existence of any analytically necessary nexus between law and state. Law is institutional normative order, and state-law is simply one form of law. Conversely, the state is a form of territorial political order with some internal power-structure and power-relations, and the law-state is simply one form of state. This opens the question what are the possible, and the proper, relationships between state and law. Such will be the question pursued in the next chapter.