Institutions of Law

An Essay in Legal Theory

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Law and the Constitutional State

3.1 Introduction

The last chapter ended in reflection on the way in which specialized agencies can come into being with authority under higher-level rules to carry out the essential tasks of government. These are tasks of making law and keeping the executive under scrutiny, tasks of executive government concerned with the pursuit of public policy in implementation of the law or otherwise within a legal framework, and tasks of adjudication aimed at upholding the law, both in disputes between private persons and in matters involving private persons and public authorities. The distinction between legislature, executive, and judiciary is, as was noted, a feature of the modern constitutional state. Upholding the principle of separation of these powers is the particular hallmark of this kind of polity. Democratic forms of election to public office as a member of the legislature or as the chief or a member of the executive government, though not (with a few exceptions) to judicial office, have come to be a feature of these states also. This has been more a consequence than a cause of establishing a successful separation of powers within a 'balanced constitution'.[1]

The present chapter commences with a discussion of states, proceeds to a consideration of constitutions as legal frameworks for states, then reflects on the institutions of public law set up by or under constitutions. There follow some preliminary remarks on 'Civil Society and the State' that look forward to part 3, followed by a brief interim conclusion on 'Law as Institutional Normative Order'.

3.2 States

All states, whether or not conforming to the pattern of a constitutional state to be discussed here, have four essential characteristics. First, they are *territorial*, that is, they lay claim to and exercise, to at least a significant degree, effective control over a specific territory, in a way that involves when necessary the use of coercive force

[1] Cf R C van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995) 19–20.

against external and internal threats. Secondly, they claim *legitimacy*: that is, their governing authorities claim that in exercising such effective control they do so as of right and are properly recognized as being rightfully in authority over the territory. Thirdly, they claim *independence*, that is, their governing authorities claim that the people of the state are entitled to a form of government free from external interference by other states. The fourth, closely related, feature is that these claims are acknowledged by other states. For in international law, a state is a territory with a *recognized and effective government*, and states are entitled to respect under the principle of mutual non-interference. (Nowadays there is growing recognition of an exception to non-interference in the case of a duty of humanitarian intervention where a state's governing authorities are grossly violating fundamental human rights,[2] a topic to which we shall return in a later chapter.)

Government requires the maintenance of some kind of order, and to the extent that order is secured by reference to a body of rules that addresses the population and that the enforcement agencies take seriously, there is a legal element in government. It is under these same rules that non-official use of force to pursue claims and take action against alleged wrongdoing is prohibited. This is essential to the state's claim to a monopoly of legitimate force, though that claim is usually also backed up by some ideological claims of a democratic or a nationalistic or republican or religious kind. Seen in this way, states are conceptually identified primarily in territorial and political terms.[3] Also, however, they have a basis in international law as this emerged in the period after the Peace of Westphalia of 1648, and came to be expressed by theorists of international law starting with De Vattel in 1758.[4] (In a slightly anachronistic way, it has become common to describe states in the form they had acquired by the twentieth century as 'Westphalian' states.)

In what circumstances can a state have differentiated and mutually balancing powers of government? The answer that follows from the discussion in chapters 1 and 2 is that they can do so by having appropriate practices of a kind that can be summed-up in terms of norms, rules, and principles of conduct. If it is acknowledged that everyone in the state ought to accept and act in accordance with statutes enacted by a certain parliament, and if it is acknowledged that the parliament's membership is established by a certain recognized and itself regulated process of election, this means that institutionalized law-making exists. If it is acknowledged that executive power is exercised by or in the name of a head of state, subject to the answerability of executive ministers to the parliament, and

[2] Geoffrey Robertson, *Crimes against Humanity in International Criminal Law: The Struggle for Global Justice* (London: Allen Lane, 1999).

[3] Cf MacCormick, *Questioning Sovereignty* 17–18.

[4] E de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (ed J Chitty) (Philadelphia Pa: T & J W Johnson & Co, 1883); cf P Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002) 41–45.

that their exercise of power in ways affecting the rights of other persons must be in accordance with some rule of law, then executive government is thus institutionalized. If it is acknowledged that the ultimate authority in the interpretation of the rules enacted by the legislature, including those that regulate executive activity, is exercised by a corps of judges organized in a system of courts, then judicial power is institutionalized. 'If it is acknowledged,' I have said. 'Acknowledged by whom?' is obviously the next question. The answer must be rather like that which applies in the case of queuing. It has to be acknowledged by enough people for the practice to be a viable one. In a state, it must be remembered, coercive force is organized. Practices whose legitimacy is not acknowledged by those who command the state's forces are unlikely to be effective. In respect of practices that those same forces support as legitimate, the dissent of other sections of the community may not be sufficient to make the practices unviable.

All this must seem quite banal, and also must seem to conceal far more than it reveals. In any real parliament, the body of electoral law determining its composition and the proper practice of elections and the organization of political parties is enormous and elaborate. So are the procedural rules concerning the conduct of business in the parliament, and how it must proceed when enacting binding rules—'statutes' or 'laws'—of the state. The same goes for the voluminous body of public law concerning the organization of the executive government and subordinate public authorities, including possibly also regional and local authorities. Similarly voluminous are statutes establishing and regulating courts of justice and arraying them into criminal or civil, possibly also commercial, administrative or taxation jurisdictions, with at least one, and more often two, levels of appeal courts. There is often also a final constitutional court that interprets the law of the constitution that sustains the whole set-up. In addition to all that, all courts have elaborate sets of rules of court regulating their procedure.

Moreover, in some states it is openly acknowledged that decisions by the courts, particularly the higher courts in the hierarchy of appeals, constitute precedents that other courts are bound to follow except in exceptional circumstances, hence forming rules for the conduct of persons in general, not only the courts. In other states, precedents are considered to have authority only for the particular case, though also having a kind of exemplary value in guiding interpretation of the law in future similar cases. Whether formally recognized or not, precedent can thus be a source of rules and principles and of approaches to interpretation that add up to a body of 'case law' running parallel to the laws laid down in enacted statutes.[5] The various states that belong to the common law tradition have inherited from premodern times a body of law originally grounded in custom but nowadays having its most authoritative source in judicial precedents of the higher courts, including

[5] For an account of different national legal systems' approaches to precedent, and differences about the formal recognition of precedent as a 'source of law', see D N MacCormick and R S Summers (eds) *Interpreting Precedents: A Comparative Study* (Aldershot: Dartmouth, 1997).

precedents of courts from long-past eras of law. A further authoritative source, as noted earlier, is found in 'institutional' writings by jurists of earlier ages. Anyway, all such law is now subject to amendment by decision of the contemporary legislature.[6]

The huge bulk of this specialist public law governing the conduct of the several branches of government is itself highly institutionalized. How then can chapter 2's simple-minded account of a transition from informal queuing to formalized queuing have anything to say by way of an explanation of this? The vital point to observe by way of answer is that nothing comes out of nothing. Constitutional law and all the specialized elements of public law are surely normative, surely set standards about how officials and others ought to—indeed, must—conduct themselves. What, however, makes them normative, what gives them their 'ought-quality' on which we can base the key distinction of what is right from what is wrong? My suggestion throughout this work has in effect been that the key to normativity lies in what H L A Hart called the 'internal aspect' of conduct.[7] For this, there have to be standards that participants in practices implicitly or explicitly refer to in forming reciprocal expectations of conduct and in acting accordingly.

The human capacity—the quintessentially human capacity—for interactive co-ordination[8] in this 'ought-based' way is what lies behind every kind of more formal rule-making and rule-application. For the point about legislated rules is that the legislature makes them on the assumption that they ought to be obeyed and ought to be enforced (and the better enforced the likelier obeyed). The point about formal adjudication lies in the assumption that the addressees of the judgment ought to accept and implement it, and other enforcement agencies ought to see to this if either party proves recalcitrant. The point of an executive decision to allocate certain sums in the state's budget for the armed forces and certain others to the health services is that these sums ought then (if approved in a Finance Act, no doubt) to be spent as authorized, no more and no less. The 'ought' that issues from these decision-making processes has to have entered it from the beginning. Where does it come from? The answer lies in informal, non-institutionalized conventions seated in the customs and usages of the citizens of the state, including particularly those from time to time called to serve in public offices. In saying that, one should also bear in mind, in relation to those states which are to a greater or lesser extent democratic, that turning out to vote in

[6] Cf N Luhmann, *Law as a Social System* (trans K A Ziegert) (Oxford: Oxford University Press, 2004) 363–4 on the emergence of democracy and the development of legislation.

[7] H L A Hart, *The Concept of Law* (eds P Bulloch and J Raz) (Oxford: Clarendon Press, 2nd edn with Postscript, 1994) 56–57, 88–90, 102–104. There are some difficulties about this, with which I try to deal in ch 4 below.

[8] On the idea of co-ordination problems, and possibilities of solution, see D Lewis, *Convention: a Philosophical Study* (Oxford: Basil Blackwell, 1986) 5–51; cf G Postema, 'Co-ordination and Convention at the Foundations of Law' Journal of Legal Studies 11 (1982) 165–189.

elections is properly considered to be the exercise of a fundamental public function. So even in the massively institutionalized order of a constitutional state there lies behind the powers of each of its great institutions a convention or custom[9] whereby it ought to be respected in carrying out its functions as these are constitutionally conferred. To the extent that such a norm is not observed, normativity is also missing, though a crude practical effectiveness in the exercise of sheer physical power may remain.

Conventions and shared usage have another vital role to play in the sustenance of a constitutional order involving a separation of powers. Checks and balances among the different branches of government are often said to be essential to the successful constitutional self-government of a state, particularly with a view to sustaining the conditions of a free government, in contrast to some form of tyranny or despotism.[10] The point is that each branch of government should be checked and controlled by another, or should contain internal checking practices, or both.[11] The executive must pursue vigorous policies in relation to the economy and the social conditions of the state and must see to the maintenance of effective internal and external security, through law-enforcement agencies internally and military forces (including intelligence services) externally. But the more vigorous the executive, the greater the risk of over-extension or abuse of power to the detriment of the citizens or some sub-set of them. So it is important that the executive be politically accountable in some way to the legislature, and the principle of legality of government action—the 'Rule of Law'—requires also that there be statutory authority for acts of the executive that impinge on citizens and other private persons. So the legislature controls the framework within which the executive can act. At least, it does so provided the courts have adequate power and independence to ensure the legality of governmental action when this is challenged by appropriate forms of action before the courts (appropriate forms of action thus have to be provided through the statutes and rules of the relevant court). The courts in turn must be sensitive not to usurp the province of the legislature in deciding the content of the law and the direction of law reform from time to time. But they must at the same time also police the boundaries of the legislature's province by ensuring that it does not override constitutional restrictions on it, or act beyond the authority conferred on the legislature where such a grant of authority is in issue.

Checks and balances of this kind are variously interpreted in various contemporary states with different constitutional traditions that have developed within

[9] On custom, see J Bjarup, 'Social Action: the Foundation of Customary Law' in P Ørebech, F Bosselman, J Bjarup et al, *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2005) 89–157, especially at 135–151.

[10] van Caenegem, *Historical Introduction*, 168, 185.

[11] M J C Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967); G Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971).

essentially the same broad family of constitutionalist thought.[12] All face the risk of deadlock. Each of the principal constitutional organs can block or render impotent actions of another. A dynamic balance can degenerate into stasis and immobility, provoking the kind of constitutional crisis that has so often been broken only by the 'strong man' who suspends the constitution and assumes personal rule with the backing at least of the military. No amount of formal rule-making can resolve the issue of balance to sustain an effective dynamic working system—if only because, in conditions of crisis, the issue is likely to concern or include the very question as to who has authority to make the rule that authoritatively breaks the deadlock. Since formal rule-making can never completely secure balance and reciprocity in practice, the alternative to 'strong man' interventions lies in constitutional conventions—as discussed already in chapter 2. These are essential to the balance-sustaining function, and themselves depend on a shared or overlapping 'internal point of view' among those exercising roles determined by the constitution in the three great branches of the state.

This draws attention to a fact on which David Hume remarked to telling effect.[13] If, he said, constitutions are a kind of social contract agreed upon by all affected and brought into force by popular will, you would expect states to be most soundly established nearest the time of their adoption of a new constitution. In the case of monarchical government, the introduction of a new royal house, as in Great Britain in the early eighteenth century, would be a parallel case. History, however, shows that the newness of a constitution or a royal house is far from tending to secure its stability. Constitutions grow more stable the longer they acquire an overlay, or underpinning, of custom, usage and convention. The same goes for the sense of legitimacy of a monarchy. The step from an ideally structured state to a working constitutional order is one that takes time and (subject to certain exceptions) acquires an increasing sense of legitimacy with the passage of time.

In saying this, however, I may be thought to be making the error of generalizing from one case that happens to be familiar to me. The United Kingdom constitution (so far as there is such a thing) is fundamentally a matter of custom and convention, supplemented by various more or less solemn statutes and treaties and by judicial precedents. Moreover, its version of the separation of powers is a rather precarious one,[14] since the central constitutional doctrine of the legal

[12] van Caenegem, *Historical Introduction* 150–174; P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) 16–21, 56–58, 113–116, 159–160.

[13] See D Hume, 'Of the Original Contract', in *Essays Moral, Political and Literary* (Oxford: Oxford University Press, 1963) 452–473.

[14] It is even possible to assert that Montesquieu completely misunderstood and misinterpreted the constitutional system of Great Britain ('England', he called it) in discerning a 'separation of powers' there at all. See L Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' Oxford Journal of Legal Studies 25 (2005) 419–452—but for a different view see van Caenegem, *Historical Introduction* 123–124.

sovereignty of the monarch in Parliament implies that the legislature has the last word about everything. In the circumstances of strongly organized political parties, with pre-eminence attaching to the Prime Minister as leader of the largest party in Parliament, the theoretical absoluteness of the legislature can come dangerously close to a near-absolute position for the executive. Certainly, the functioning of the state is more flexible and fluid, and the balance between elements more volatile, than under the more normal contemporary form of state, based on a 'written' or, as I shall call it, a 'formal' constitution.[15]

3.3 Constitutions

It might be said, not at all unreasonably, that the story of this chapter so far has been too roundabout. The obvious thing about states is that, in addition to the four characteristics I mentioned, they all have constitutions. If you ask how powers and functions of government are divided among different agencies, and how checks and controls are then maintained between and within different branches of government, there is an obvious answer. It is that you do this by adopting a constitution that makes appropriate provisions, and then by observing in good faith the constitution you have adopted. Who, then, are you? Here we confront a long-recognized paradox. Whoever assumes the constituent power to constitute a state has to presuppose that they are already members of the state they constitute.[16] Indeed, it is the specific distinguishing mark of new republics from old kingdoms that republics are constituted by the sovereign will of their citizens, or of the nation. (Feudal kingdoms emerged from wars or conquests, and only gradually did kings come to accept that they too were bound by the law and custom of the realm they ruled). In the republic, however, neither citizens nor nation exist until the constitution brings them into being as such, or confers that character upon them.[17]

One way out of this bind is to say, with Hans Kelsen, that the authority of the founders of a constitution simply has to be presupposed—no positive, laid-down rule could confer upon constitution-makers the authority to do so.[18] Everyone just has to act as if they had such authority—at least, they have to do so in the event that the constitution they made comes to be efficacious as the normative basis for state activity, that in virtue of which acts are right or wrong, valid or invalid. Given a constitutional order that is by-and-large efficacious, it makes

[15] An account of the distinction between 'formal' and 'functional' constitutions is given in N MacCormick, *Who's Afraid of a European Constitution?* (Exeter: Imprint Academic, 2005) 39–46.

[16] Cf H Lindahl, 'Sovereignty and Representation in the European Union' in N Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2004) 87–114 at 90–107.

[17] Cf A Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005).

[18] H Kelsen, *The Pure Theory of Law* (trans M Knight) (Berkeley and Los Angeles: University of California Press, 1967) 193–219.

sense to treat the constitution as that which ought to be respected. That is, it makes sense to act on the footing that state coercion ought to be exercised only in accordance with the provisions laid down by the constitutional founders, and that all other forms of coercion ought to be repressed as legally wrongful. Thus, from a theorist's point of view, each state constitution is backed by a presupposed 'basic norm' or *Grundnorm*, in all those states in which there is an effective normative order based on a constitution.

Two points need to be made. First, this presupposes that we know what a constitution is. This knowledge is necessarily based on an understanding of the already discussed functions of allocating powers and establishing checks and balances among them. That is, it is from an appreciation of the functioning of a territorial legal order with judiciary, executive and legislature in some kind of working interrelationship that we can explain what goes into a constitution. Secondly, the existence of a constitution is not primarily a matter of the adoption, by whatever procedure, of a formal document that purports to distribute powers of government in the way we have discussed. It is, again, an issue of functionality, to do with the response of political actors over time to the norms formulated in the text of the constitution. These either are or are not taken seriously as governing norms of conduct. To some variable degree, but at least in the great majority of relevant situations, conduct must be oriented towards these norms by actors, and understood by reference to the same norms by those acted upon. Only those that are in this sense taken seriously do really exist as working constitutions.

In the typical case of a modern state like France or Portugal or Poland or Japan, or a modern federation like Germany or the USA or Canada or Australia or Switzerland, the constitution has both formal and functional aspects. Formally one can point to a text that was first drafted by some convention or committee then adopted as the constitution of the state or federation named in it by the citizens whose citizenship is confirmed in it. The date of its adoption and the dates of any subsequent amendments that have brought the text to its present form can be specified, indeed are usually stated in the text itself in its currently authoritative printed version. Functionally, it either is, at least to a reasonable extent, or it is not even to a reasonable extent, a genuinely observed source of the genuinely observed norms followed by those carrying out official public roles specified in or under it (including roles of the armed forces of the state).[19] Only someone who seeks to understand conduct normatively in the way discussed at such length in the first two chapters of the present work can tell whether or not the formal constitution is also functional in the life of the state, its officials and its citizens. Only if the formal constitution is functional to a reasonable degree can it be acknowledged as a genuine constitution, rather than a failed constitution or a mere sham.

By no means all states or federations that have adopted democratic constitutions as a basis for free government under the rule of law have succeeded in being

[19] Again, see MacCormick, *Who's Afraid of a European Constitution?* 39–46.

what they tried to become by adopting the constitution. Dictators (military, or civilian with support of the military) and oligarchies can seize the commanding roles within a state and subvert the institutional balance that its constitution pretends to establish. They can even continue with the show of parliamentary elections and the pretence of an independent judiciary, while in truth the organization and execution of governmental powers is centralized, autocratic, discretionary and (quite possibly) corrupt. Even in cases that fall short of this kind of collapse of constitutional government, there can be fairly widespread cynicism and corruption. Only in some cases does the formal constitution really shape or constrain most of the activities of the state at official level, thereby securing a stable rule of law for citizens and indeed all persons subject to the state's jurisdiction by residence or otherwise. There, we may say, there is a coincidence of formal and functional constitution.

By this analysis, conversely, it is possible to have a functional constitution, even without the adoption of any formal documentary or written constitution. There are at least two contemporary illustrations of this, in the United Kingdom—which is a state—and the European Union—which is not a state, but a confederation or 'commonwealth' of states.[20] Historically, studies of the constitutional order of the United Kingdom (at the time commonly called 'England') in contrast with other contemporary kingdoms, gave clues to the structure of a functioning constitutional state. None of these studies was more influential, for all its inaccuracies,[21] than that of Montesquieu.[22] Together with various essays in political theory about the 'social contract' by thinkers such as John Locke,[23] David Hume,[24] and Jean-Jacques Rousseau,[25] and about constitutions themselves by such as Tom Paine,[26] these studies contributed greatly to the ideas of those who drew up the new constitutions of the late eighteenth century. That of the USA has proved remarkably durable, through a civil war and more than two dozen amendments. That of revolutionary France has had more discontinuities, yet the current constitution of the Fifth Republic recognizably owes a great deal to its eighteenth century origins, overlaid by experiences of the nineteenth and twentieth centuries. Other contemporary republics have learned from and adapted the kind of model

[20] Cf N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 137–156.

[21] Or alleged inaccuracies, as per L Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' Oxford Journal of Legal Studies 25 (2005) 419–452.

[22] Montesquieu (Charles de Secondat, Baron de Montesquieu), *The Spirit of the Laws* (trans and ed A M Cohler, B C Miller, H S Stone) (Cambridge: Cambridge University Press, 1989).

[23] John Locke, *The Second Treatise of Civil Government* (ed J Gough) (Oxford: Basil Blackwell, 3rd edn, 1966).

[24] As cited above, n 13.

[25] J-J Rousseau, *The Social Contract* in Rousseau, *Collected Writings* (ed R D Masters and C Kelly), vol 4 (trans J R Bush, R D Masters, and C Kelly) (Hanover, NH: University of New England Press, 1994).

[26] T Paine, *The Rights of Man* (with introduction by E Foner, notes by H Collins) (New York/London: Penguin, 1985).

yielded by the USA and France and others in that line of descent. There are still also contemporary constitutional monarchies, existing in a remarkable number of countries, most of them apparently rather stable. There, monarchy functions under constitutions that were in different ways drawn up by trying to make formally explicit what had emerged by a more evolutionary process in the United Kingdom or other old monarchies like those of Sweden, Denmark or the Netherlands. The UK has in its own turn amended and adjusted its (never fully formalized) constitutional arrangements in the light of prevailing political ideas and pragmatic necessities. It is a continuing case of a functional constitution that has achieved no formal expression through a deliberate act of holistic constitution-making.[27]

Meanwhile, in the European Union, there has been a series of treaties that established and then extended the European Communities, equipping them with organs such as the Commission, Council of Ministers, and Court of Justice. This was the legal basis of the Community that became encapsulated in the European Union by the Treaty of Maastricht of 1992. The whole complex of treaties has been considered by the Court of Justice to amount to a 'constitutional charter' of the European Community and now Union.[28] The Court in this line of decisions held that the treaties necessarily conferred on itself the final power of interpretation of their own provisions. Under the interpretation favoured by the Court, and over the long run accepted, with whatever reservations, by the member states of the Union, the treaties and the laws made under them ('Regulations', Directives', 'Framework Decisions') constitute a new legal order of its own kind.[29] This legal order has direct effect to create rights and obligations for citizens and corporations as well as for the states themselves. Its laws have primacy over the laws of the member states within the areas of competence transferred to the organs of the Community or Union by the states in the treaties (as interpreted by the Court). There is a self-referential quality about all this—the treaties as interpreted by the Court gave the authority for the Court to interpret the treaties as a new legal order distinct both from international law and the laws of the member states. Self-reference of this kind is typical of independent constitutional orders. Indeed, another case of self-reference is found in the adoption by citizens of the constitution that creates or confirms their status as citizens.[30]

[27] van Caenegem, *Historical Introduction* gives a clear account of the development of most of the states mentioned in this and the preceding paragraph (196–200, UK; 200–217, France; 217–229, Germany; 230–241, Belgium and the Netherlands). Cf E Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Oxford: Hart Publishing, 2006).

[28] Case 294/83 *Parti Ecologiste 'Les Verts'* v *European Parliament* [1986] ECR 1339; *Opinion 1/91 (Draft Opinion on the EEA)* [1991] ECR I 6079; J H H Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) 12–26.

[29] S Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002) 516–520; J Shaw, 'Europe's Constitutional Future' Public Law (2005) 132–151.

[30] On self-referentiality, see G Teubner, *Law as an Autopoietic System* (trans A Bankowska and R Adler, ed Z Bankowski) (Oxford: Blackwell, 1993) 19–24.

During 2002 and 2003, a Convention established by the European Council under its Declaration of Laeken took wide consultations and undertook intensive studies, then drafted a 'Treaty Establishing a Constitution for Europe'. This was further amended during an Intergovernmental Conference meeting intermittently in 2003 and 2004, and the Heads of State and Government adopted a final version of the Treaty, signing it on 29 October 2004. To come into effect, it required ratification by all member states, including the ten new states which acceded to the Union on 1 May 2004. By referendum decisions of quite substantial majorities in France in May 2005 and the Netherlands in June of the same year, the process of ratifying the Treaty and thus adopting the Constitution was derailed for the time being, perhaps forever. There had been an opportunity to substitute a formal constitution for the existing functional constitution contained within the treaties, but there was no sufficient surge of enthusiasm to turn this possibility into an actual achievement, and meantime the old functional constitution continues in operation.[31]

To conclude this section: the institutionalization of legal order in a state or other polity depends on the evolution or adoption of a constitution that establishes the essential agencies of government and assigns powers to them. These institution-agencies have to be understood in terms of the defining functions they fulfil, as well as by reference to how persons come to hold office in them, how they must conduct themselves in fulfilling their functions, and how they may demit office. All constitutions have to be understood functionally, but usually also have a formal and definitive text adopted by some constituent act. The formal constitution has also to be a functional—and functioning—constitution if a state is to acquire or sustain the character of a law-state, in which the rule of law is realized to some substantial extent in the conduct of its governance. A customary or conventional basic norm is the necessary normative foundation of the whole structure.

3.4 Institutions of Public Law

The institutional analysis developed so far ought now to be summarized. In relation to constitutional law, and more broadly to public law in general, we find functions assigned to institutional agencies. Institutive rules set these up as legal entities ('There shall be a Scottish Parliament' says, for example, the opening subsection of the opening section of the Scotland Act 1998, and many other related rules say how exactly it is to be composed and to function). Such entities

[31] For a personal account of these events and an evaluation of the upshot, see MacCormick, *Who's Afraid of a European Constitution?*; more objectively, compare P Norman, *The Accidental Constitution: the Story of the European Constitutional Convention* (Brussels: EuroComment, 2003) and A Lamassoure, *Histoire secrète de la constitution européenne* (Paris, Editions Albin Michel SA for Fondation Robert Schuman, 2004).

are then given ('consequential') powers and duties, with express or implied limits. These rules presuppose the legal existence of the entity in question, since they are in the form of sentences in which the name of the entity is their grammatical subject. ('The Scottish Parliament may make laws, to be known as Acts of the Scottish Parliament', for example—Scotland Act s 28(1)). Entities of this kind can carry out their functions—exercise powers and perform duties—only if they have human beings as their members or agents. Further institutive rules lay down the conditions for becoming, or being appointed, or (in the running example of a parliament) elected to the position of a relevant member. Such members have consequential rights and powers, and those that are exercised in a collective manner take effect as exercises of the powers that belong to the constitutional entity itself. Terminative rules also exist concerning when and how members demit membership, or the entity itself may be disbanded.

This patterned way of representing the structured character of constitutional or sub-constitutional rules relating to entities and agencies that exercise public functions can be replicated in a quite general way. All have a commencement, a duration in time and a possible termination. All have members who take up membership or office on particular conditions, exercise it effectually to the extent that they observe the consequential rules of their office, and eventually, if only by death, lose or demit office. It is by reflecting on the functions or point (or final cause) of different kinds of agency that one can appreciate the range and extent of activities a state performs or causes to be performed in the public domain. Certain characteristic ones are necessary and omnipresent.

Legislatures are one example. It is a particular, indeed defining, feature of institutional order that it contains in itself the possibility of making norms of conduct explicit, by giving to specific texts produced by relevant agencies obligatory force and effect. In content such texts contain sentences that are linguistically appropriate to express requirements concerning conduct, or empowerments, or limitations on these by way of exemptions or exceptions, or by way of disempowerment. Sometimes, they contain other normative material (eg, concerning rights) that is related to requirements and empowerments in ways to be considered later. What it means to say that they can be understood as making norms explicit can be clarified by reference back to the introductory discussion of the queue. There, it was noted that what may in some circumstances be attributable to implicit and inexact practice-norms, expressed in mutual expectations about who ought to go forward for service next, can become in other circumstances a practice subject to authoritatively issued rules. Constitution texts, where there is a formal constitution, have this very property that they make what might otherwise be a somewhat vaguely understood convention into a hard-and-fast rule.

Supreme and subordinate legislative authorities—parliaments and the like—with their legislative, that is, rule-making, power are an essential element in institutional normative order. Their defining function is their ability to make general rules of universal and uniform application throughout the state's territory, governing all persons therein, or to make them for some definite sub-set that is in its entirety regulated universally and uniformly. Legislatures as such are not necessarily disempowered from also making specific or individualized norms, though the principles of constitutionalist governance are in many states interpreted as precluding this. Everywhere, their main business is general rule-making, whatever other more particularistic activity there may be powers to carry out.

It typically belongs to the executive branch of government and to administrative or localized agencies to take decisions having a more particular or temporary or short-term effect. Such decisions can also constitute norms, but they may be individual norms, or norms applying to small sets of addressees. They can, for example in licensing and related domains, be in the form of exceptional or individually addressed permissions or licences. Thus there may be general rules of law that prohibit driving motor vehicles on public highways except in the case of persons holding valid drivers' permits or licences, who are driving validly licensed vehicles. Or it may be prohibited to develop land outside its normal established use except when planning permission has been validly granted by a relevant public authority. In such cases there must be an agency or agencies with power to grant a valid licence or planning permission. The effect of this is to bring the grantee of the licence or the permission within the exception to the general prohibition in question. Permissions that exempt from some general prohibition have significant normative effect. They are also apt to be of some, perhaps considerable, economic value.

The whole idea of 'binding rules' (and of effective exemptions) demands further consideration. What does it mean for a rule-text such as that contained in the section of an Act of Parliament to be a 'binding rule'? Whom does it bind, and how? One part of the answer was already given in the discussion of the idea of a 'basic norm'. If it is obligatory to respect the constitution, this entails its being obligatory to conduct oneself in accordance with norms that are in turn valid in accordance with the constitution. Hence it is obligatory to respect rules, decisions, and orders or permissions that are made by properly established agencies, and thus by persons properly instituted in office as members or officials of such agencies. (This is normally challengeable by some means, to the extent that acts infringing constitutional limitations, including those guaranteed in a charter of rights, may be set aside as null and of no effect.) Whom does this obligatory character bind? The answer from a point of view internal to the legal order is: everyone who is within the territory constitutionally belonging to the state, except for specifically exempted classes, such as those having diplomatic immunity, and everybody whom the state constitution identifies as owing allegiance to it.

Does it follow that all those for whom this is obligatory must acknowledge it to be so, or must feel committed or bound, or give some high priority in their moral reasoning to fulfilling a duty of respect to the constitution and the laws made under it? Clearly not; no empirical claim of that kind follows at all, and the evidence of ordinary experience suggests that no real states ever achieve full-hearted commitment to a law-abiding life from the totality, or perhaps even a majority, of those who are obligated according to the law and the constitution. No assumption about empirical attitudes can or should be built into an attempt to grasp the concepts involved here.[32]

Different considerations apply, however, to persons holding office within, or membership of, state agencies. Oaths or affirmations of loyalty to law and constitution (perhaps personified as committing one to fidelity to the person of the head of state, as occurs in some monarchies) are commonly required of those holding office, and the higher the office, the more solemnly so. These are, on close consideration, not merely formal solemnities. They express something logically implicit in holding offices of the kind in contemplation. These agencies, and these offices in them, have existence only as legal-institutional facts. There is no position to hold except if the law declares it so, and if this law is made effectual. There would a pragmatic self-contradiction in formally accepting office while expressly declaring a refusal to uphold the law, or to uphold it save on a selective basis.[33] It would be like uttering the sentence 'I refuse to speak English' intending this as a refusal ever to speak English (for one breaks the resolve not to speak English in the very act of uttering it in English). In this sense, there is a logical commitment to a 'basic norm', that the constitution and the law made under it must be obeyed, in the act of taking or exercising public office.

This, however, does not entail that every office-holder actually does fulfil this fundamental duty of office. Hypocrisy and corruption are always possible, and it is an open question how much concealed malpractice a constitutional state can survive, assuming (as one must) that some jobbery and malpractice is always likely to be present. But as malpractice it does have to be *concealed* and cannot by any means be openly avowed. Thus a duty of fidelity, though not a guarantee of its being respected, is a necessary accompaniment of public office. The possibility of sustaining a functional constitution that is truly compatible with the formal constitution is conditional on very substantial fulfilment of the duty of fidelity by the great majority of office-holders for the greatest part of the time. Where this obtains, we could consider the state as possessing a 'constitution in the plenary sense'.[34] This is one crucially important condition of a constitution's being, as Kelsen put it, by and large efficacious.[35] Hart's thesis that the 'fundamental rule of recognition' had to be accepted 'from the internal point of view' by the officials of a legal system is similar in effect.[36] But his concept of a 'rule of recognition' is

[32] On the risks of unfounded empirical assumptions, see B Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) 58–65.

[33] An exception exists in the case of elected politicians in parliaments and the like who seek election on the basis of support for campaigns of selective civil disobedience, and get elected on this basis.

[34] The idea that wherever functional and formal constitutions largely coincide one can discern a 'constitution in the plenary sense' is proposed in N MacCormick, 'On the Very Idea of a European Constitution: Jurisprudential Reflections from the European Parliament' Juridisk Tidskrift (2001–2) 529–541.

[35] Kelsen, *The Pure Theory of Law* 211–214.

[36] Hart, *Concept of Law* 148.

different from the concept of a 'basic norm' developed here, as an inheritance from Kelsen's line of thought. Hart's idea belongs at a different place in the overall account (see pp 56–57 below).

There is another aspect of the effectiveness of a constitution and of laws. This concerns enforcement rather than obligation as such. The institution of legislation makes possible the formal structuring of public institution-agencies and the conditions of holding office within them. It also makes it possible to formulate as explicit rules the norms of conduct that impose requirements upon both officials and persons acting outside any official capacity. A fundamental place among the law's requirements is held, as we saw already, by the rules about what conduct is wrongful and in this sense prohibited. These subdivide in the modern state into the two classical types of the criminally wrongful, and thus punishable, and the civilly wrongful, and thus subject to civil remedies such as awards of damages.

If the state is to be a theatre of relative civil peace, and if its law is to be a law of peace promising protection to citizens and other residents, it is necessary that most people most of the time refrain from what the law stigmatizes as wrongdoing. It is also, therefore, necessary that the state sustain effective law-enforcement agencies. In relation to punishable crimes, this requires the existence of police forces and prosecution services, courts of criminal jurisdiction, and agencies (prison service, etc) charged with implementing sentences passed by courts upon those convicted after prosecution. In the case of civilly wrongful conduct, effective civil courts must exist, with procedures enabling those who claim to have suffered wrongs to have their claim properly heard in courts that are also open to hear any defence offered by the alleged wrongdoer. There must be effective means of enforcing civil remedies awarded by courts in such cases, through associated public agencies.

To the extent that such institutions exist and function effectively, all persons have reason to take seriously the requirements the law imposes. They have reason to do so whether or not they are personally inclined to endorse the law's requirements as morally desirable or morally obligatory, and whether or not willing to pursue personal preferences where these diverge from what the law requires. There are powerful reasons for conformity, and these can have a daunting reality even for someone who, on good grounds, dissents for fundamental reasons from the state's rules requiring certain conduct. This could be the case in relation to rules upholding apartheid, or requiring denunciation of Jews, or discrimination against ethnic or religious minorities, to take examples that have recent or current grim reality. Evil rules may be enforced rules, and those who perceive the evil, even or especially those who openly resist it, are fully and painfully exposed to the risk or the actuality of enforcement action. The peace of the institutional state and its institutional law is not in every case the peace of justice.

Law-enforcement is not perfectly carried out anywhere, but in every viable state there is necessarily some serious and sustained official effort to enforce most legal requirements against most offenders and against people who have sustained adverse civil judgments but have not observed them. The more there are such serious efforts at enforcement, the more reason citizens and residents have to be law-abiding, both on grounds of prudence and on grounds of reciprocity, for all have reason to suppose that no-one's self-disciplined respect for legal rules simply creates space for others to take unfair advantage. It is not of the essence of law to be a coercive system, as many commentators have claimed.[37] But it is a defining character of states that they are territorial and coercive associations, claiming a monopoly of the legitimate use of coercion within their territories. (Strictly they can sustain this claim to a *legitimate* monopoly only provided they succeed in upholding certain basic human rights, and do not themselves engage in violations of rights or crimes against humanity. Unfortunately those with the least genuine legitimacy are the least likely to admit this, and thus to admit they should forfeit the monopoly they purport to exercise, often with extreme violence.) Hence it is a necessary aspect of state-law that it is coercively enforced through the use, when necessary, of physical means to compel compliance. State law is a coercive as well as an institutional form of normative order.

This has in turn profound implications for the idea of 'institutional normative order' in the theatre of the state. State agencies and the officials that represent or constitute them do not exist only in a shadowy domain of normative reality available to the contemplation of the mind. They are an omnipresent aspect of contemporary societal reality, exercising both coercive and thus also, in a more diffuse way, enormously persuasive impacts on the choices people make. This is how they bear upon human social reality throughout its whole texture. Normative powers are not themselves the same thing as physical power or economic power or the power of social prestige.[38] But empowerment by the law of the state contributes incalculably to all these and other forms of power. Whether this means that law and state are essentially 'violent' institutions is questionable. The argument[39] that constitutions originate in revolutions and at any rate are founded on the threat of violence since there is always a gap between the announcement of a constitution and its acceptance by the populace seems far-fetched. Even what has commenced violently may over time come to function in a mainly peaceable way, though

[37] See most recently G Lamond, 'The Coerciveness of Law' Oxford Journal of Legal Studies 20 (2000) 39–62, and 'Coercion and the Nature of Law' Legal Theory 7 (2001) 35–57. Lamond takes issue with my thesis in 'Coercion and Law', ch 12 in N MacCormick *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982) that legal coercion intervenes at the point of enforcing civil remedies or criminal punishments, but that the existence of provisions for civil remedies and criminal penalties is not itself a form of coercion. He does not, however, engage in any convincing explanation for his rejection of the narrower conception of coercion for which I argue there. He also, in my submission, fails to note that it is the state which is a coercive association, hence state law that is coercive either on his broader or my narrower conception of coercion. Coercion in either sense is a feature of state law, not of all law as such.

[38] Ch 9 below.

[39] J Derrida, 'The Force of Law' in *Deconstruction and the Possibility of Justice* (ed D Cornell et al) (New York: Routledge, 1992) 19 at 36; cf M Davies *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto, 1992) 77 and I Ward, *Kantianism, Postmodernism and Critical Legal Thought* (Dordrecht: Kluwer, 1997) 75. Cf Tamanaha, *General Jurisprudence* 65–71.

not without the threat of coercive force against law-breakers. The thesis that all functioning constitutions depend on custom and convention suggests that there is a tendency to diminish violence over time, not that it can ever be eliminated, given the human condition.

Adjudication has already entered the account of institutional normative order. Not only are there institutional agencies (perhaps too grey a term to capture the grandeur and solemnity of a democratic parliament for ordinary purposes, but justified for present theoretical ones) that can and do enact rules of law. Not only are there heads of state and of government, with cabinets of ministers arrayed around them and all manner of ministries and specialized agencies arrayed around the ministers, and local and regional authorities that replicate in defined localities some of the features of the central state. There are also courts and judges, and clusters of surrounding officers of court and other officials. For many approaches to legal theory these are the quintessentially legal institutions, though not all have been as articulate about the reasons for taking what Hamish Ross has called a 'Iudexian' approach as he has been.[40] His argument is that the standpoint of a judge in a highest-level state court is the one that can enable us to discern most clearly the most prominent features of the legal landscape.

We have already seen one critically important reason for tying the idea of law very closely to the idea of a court, at any rate in the context of a discussion of state-law. The enforceability of requirements imposed by legal rules, and other aspects of the recognition of effects of validly exercised legal powers, ties the quality of 'law-ness' to the process of enforcement. The essential function (final cause) or point of courts and the judges who staff them is the hearing and determining of issues for trial under law whenever a binding decision is required on a case competently brought to court. Courts have different types of jurisdiction, for example as between criminal and civil jurisdictions, specialized tribunals in public law or family law or labour disputes, constitutional courts or councils, *Conseils d'Etat* dealing with administrative law in a manner which lies outside the sphere of the judiciary strictly so-called. But it is certainly the case that all law that is regularly enforced law is enforced through some court or court-like agency. So, if it is a defining feature of state law that it is a coercively enforced institutional normative order, then the possession of an institutionalized system of courts and other tribunals is a part of that defining feature.

Moreover, it is important to remember that the concept or term 'law' and its cognates are in day-to-day use within such an order. Usage in this setting generates a specific sense of the term 'law' according to which rules that purport to be legal

40 H Ross, *Law as a Social Institution* (Oxford: Hart Publishing, 2001). Others who implicitly share the view made explicit by Ross include H L A Hart, R Dworkin, and more or less the whole of the 'American Realist' and 'Critical Legal Studies' movement in its North American form. It is perhaps a particular feature of legal theorizing in common law countries to be so strongly judge-centred.

rules count as genuine and valid rules of law belonging to the relevant order only so far as they are recognized and applied by courts and tribunals. If there is some rule purporting to have an appropriate pedigree within some law-making institution, but this is a rule that no tribunal exercising any relevant jurisdiction is considered, or considers itself, duty-bound to apply, can this really be called a rule *of law* within that legal system? Or is it something else? A convention or a guideline or an extra-judicial standard, or, at best, some sort of 'soft law'?

We have at last entered fully into the terrain of Hart's celebrated 'rule of recognition'. Hart's legal theory places at the apex of any legal system the 'ultimate rule of recognition' which contains a ranked set of 'criteria of validity' of law. This rule if it exists at all exists as a complex social fact concerning the mutual acknowledgement of shared and reciprocal attitudes among the superior officials of a legal system. These superior officials must each regard themselves and others as obligated to observe and apply all, and only, the rules that satisfy a specific set of criteria of validity.[41] Clearly, this is normative. The criteria say what ought to be accepted as law, not what is in fact. So an Act of Parliament (for example) is already law even before any Court has been called upon to apply it. For all judges have to acknowledge that whatever parliament enacts is valid as law, and ought to be applied as such.

This theory, not surprisingly, seems to give a good account of the workings of a quite highly centralized state with a tradition of ultimately entrusting all litigation and all criminal causes to a single set of 'common law' courts, the highest of which is technically also one of the houses of the legislature. This is the case in the United Kingdom. There is a single élite corps of judges whose judicial decisions under the doctrine of binding precedent themselves generate a kind of law ('case law'). They have developed a doctrine of the sovereignty of the (monarch in) parliament. Thus all enacted rules validly passed by parliament have to be acknowledged as binding law whatever their content, and whatever else otherwise counts as law has to be considered repealed in the face of a later inconsistent Act of Parliament. In fact, this simplified vision never applied uniformly to the whole United Kingdom, and since the development of the European Union, and with the adoption of the principles of the direct effect and supremacy of European Community Law within the United Kingdom, it has to be severely qualified.[42] As has been pointed out by others, criteria of recognition—and rules of recognition—are court-relative. In federal systems, different courts have different criteria, according to whether they are state or federal courts. In many states, there is a difference between public law tribunals and private law tribunals, and in quasi-federal states there can be other localized differences.[43] So the elegant simplicity of Hart's 'rule

[41] Hart, *Concept of Law* 100–109.

[42] For a full account of these and related matters in the spirit of the institutional theory of law, see N MacCormick, *Questioning Sovereignty* (Oxford: Clarendon Press, 1999), especially ch 5.

[43] K Greenawalt, 'Hart's Rule of Recognition and the United States' Ratio Juris 1 (1988) 40–57; cf M Bayles, *Hart's Legal Philosophy* (Dordrecht: Kluwer, 1992) 77–83.

of recognition' theory disqualifies it as a satisfactory general account of law in all constitutional states. If there is a single ultimate rule of every institutional normative order that is the law of a state, it cannot be a rule of recognition. Courts and tribunals of all sorts must indeed have criteria of recognition that identify what rules their members are duty-bound to apply as law in the discharge of their specific constitutional functions, and there must be some overall coherence among various court hierarchies within a single state. But achieving that coherence is a task for the constitution and for constitutional law (or even for constitutional politics). If anything could be regarded as a single and unitary ultimate rule for a state's legal system as such, it would have to be the rule that the constitution as a whole must be respected. This brings us back to a new variant on Kelsen's *Grundnorm*, not a version of Hart's rule of recognition.

As acknowledged above, it is indeed the case that the character of state-law as enforced law is crucially affected by the fact that enforcement in individual cases has to be mediated through the judgments of courts and tribunals. This entails that the law as it is enforced is necessarily the law as the courts interpret it, their orders and decisions being necessary steps towards its being enforced. The courts inevitably have a power of interpretation, and thus a power to further determine the law's meaning as it passes from general constitutional norms that empower legislative acts, through legislative acts that institute general rules of law, to judicial decisions. Their interpretative decisions give such norms and enacted rules concrete meaning for specific cases, whether or not any doctrine of respect for precedents, or practice of respecting them, in turn clothes these decisions of the courts with a kind of law-making effect for future cases.

'What is the law?' can be a general question of legal theory, or it can be a practical question posed inside a state's legal order concerning the requirements that apply to some person in a concrete situation. In the latter sense, there is little value in an answer that fails to attend carefully to the conclusions about validity of rules, and the interpretations of valid rules and relevant precedents, that the judges have handed down or are likely to hand down. This would be important, for example, in the case of a professional legal adviser advising a client. That the law, for these practical purposes, is what the courts and judges say it is, is a trivial truth. This does not however apply in the same way to the general theoretical question. Judges have no particular standing as legal theorists, despite their necessary authority as practical jurists.[44]

The theory of institutional normative order enables us to survey legal orders in all their manifestations and to note, for example, differences from system to system in the rules and practices concerning recognition of binding precedents. This in turn makes it possible to see what specially privileged status attaches to a judge's

[44] R Dworkin takes a sharply different view on this, holding that the question 'What is law?' is always a practical question, indeed always the same practical question, no matter who asks or answers it. Discussion of this point is deferred till ch 16—see n 8 and accompanying text there.

'law-saying' on particular practical questions within that judge's defined jurisdiction (law-saying competence) in some particular system. The theory thus stands above and apart from particular law-sayings of a jurisdiction-bound kind in offering a view of the general character of the normative orders in which binding jurisdictions are found.

3.5 Civil Society and the State: Introduction

Constitutions and sub-constitutional public law are not alone sufficient to constitute or facilitate the existence of civil society within and alongside the state. Civil society is that state of affairs in which persons can interact reciprocally with each other as at least formally equal beings, however different individuals may be in character, beliefs, origins, and resources. Civil society is the context of voluntary associations and of economic activity among free persons. The activity envisaged includes orientation both to non-commercial ends (religion, philanthropy, political speculation and mobilization, environmentalism and the like) and to commercial or economic ones. Civil society requires the secure existence of an effectively guaranteed body of law. This means that the constitutional obligations of courts must include the obligation to uphold and apply an adequate body of private law, including commercial law, and criminal law. These are bodies of law that sustain the framework for civil society, and they exist alongside explicit constitutional law and those other subordinate parts of public law that regulate agencies of state. Such a body of law amounts to a set of articulated and express rules (supplemented or not by precedents and the partly implicit rules of case-law) concerning persons, things (property rights and succession rights), obligations among private persons, and forms of action whereby to enforce private obligations and vindicate private rights. There must also be a corpus of rules defining the forms of criminal wrongdoing, and generally prohibiting wilful commission of crimes, with authorization of public officers to instigate appropriate judicial intervention and trial in the event of alleged breaches of criminal law. In commercial law must be handled the specialities of corporate personality and the rights and obligations arising thereunder, as well as employment rights and powers. Powers and obligations involved in commercial transactions must be defined, and connected again to provisions for regulated litigation before the courts, or before arbitrators with powers partly defined by general commercial law, partly by private commercial agreements.

To the extent that the courts and other official agencies do actually respect and uphold these bodies of law, as well as, and in the spirit of, the constitution, state law acquires that institutional reality of which we have spoken. The particular institutions of private and commercial law that were mentioned earlier acquire the actuality that effectively constrains action by imposing requirements on it. This constraining actuality is a practically unavoidable counterpart to their normativity as rules that have formal validity and thus enforceability within the whole constitutional system. This does not presuppose either that all persons affected have fair or equal opportunities of participation in civil society or in the advantages it makes available to some at least of its members. Nor does it imply that all persons who are institutionally bound by the law are either fully aware of it, or consider themselves bound in conscience by it, or endorse it as a scheme of interpersonal justice. But it seems to be a practical necessity that some should, and a high probability that those who find the burdens imposed by law to be at least compensated by the benefits it confers will, accept the law as binding on moral as well as prudential grounds. Such individuals and groups can be considered as autonomously endorsing the law and freely acknowledging the binding character of the legal norms involved. Persons in that position typically find their mutual expectations, and their other-directed normative expectations, reinforced by official action. For such persons, the security provided by regular, even if not invariable, official enforcement of law confers a further sense of legitimacy on the norms endorsed and the expectations and judgments founded on the norms.

It is true indeed that without effective political power, and effective political co-ordination among power-holders, a state cannot be kept in existence. It is likewise true that a constitution and a constitutional state cannot exist without power that upholds the norms both of the constitution itself and of the whole legal system that the constitution validates as binding law for officials and citizens alike. Yet popular legitimacy is a powerful source of political power. Human beings are led by opinion more than by force, and the opinion that power is being exercised under law is a notable inducement to accept as legitimately in authority those who do in fact exercise effective political power over the state's claimed territory. So law can contribute to power perhaps almost as much as power contributes to law, wherever people subscribe to an ideology that proclaims the value of rational government under law.[45] For then even the most cynical and deviously motivated public official has a strong motivation to act out the public observances of commitment to law, however little these may truly express an inward motivation of the private will.

3.6 Conclusion: Law as Institutional Normative Order

The constitution and sub-constitutional law of any state amount to a huge quantity of normative material. Yet we are now in a position to see how the institutions they establish create the basis for the formalization and articulation of these very rules and many other rules for the conduct of human life and affairs for citizens

[45] M Loughlin, 'Ten Tenets of Sovereignty', in N Walker (ed), *Sovereignty in Transition* 55–86, at 75–76, incorrectly ascribes to me a denial of the views expressed in this and the preceding paragraph.

and members of civil society. The normative quality of the whole depends on a conventional norm according to which all persons holding public office ought to observe and uphold the constitution and the laws validly made under it. Observance of this conventional or customary basic norm is essential to the existence of a constitutional state in which the rule of law can thrive—that is, a 'law-state' or *Rechtsstaat*. By virtue of this, a vast array of rules and principles are in force within the territory of the state, and these determine the legal position of all persons within the jurisdiction of that state, and the legal relations that obtain between all the persons, in ways that may or not be of conscious concern to them from time to time. The same goes, *mutatis mutandis*, for polities within the state, such as England, Wales, Scotland and Northern Ireland within the United Kingdom, or the Länder within Germany, or autonomous regions within Spain, and for confederal polities or commonwealths that bring together many states on a basis of shared and divided sovereignty, as in the European Union.