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THE CONCEPT OF RULES AND THE CONCEPT OF LAW - PART II

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There is no doubt that the concept of law involves rules. The problem is to determine the precise relationship that the one has with the other. A popular and quite reasonable conclusion is that the concept of law concerns rules which have certain associated characteristics, for example which are supported by sanctions of a particular kind and in a particular way, which involve a particular form of authority, and so on. A consideration of these associated characteristics and their relationship with law must be left to a further study. The remainder of this article will be concerned simply with a more thorough examination of the relationship between law and rules in the light of the foregoing analyses. In sum, just as rules are inter alia regulative or constitutive, also is law - or rather, so also are laws (the generic term 'law' here signifying no more than a corpus of individual laws). More particularly, the concept of law comprehends two more specific concepts, namely the concept of a law qua a form of regulative rule (the 'regulative' concept of law), and the

concept of a law qua a form of constitutive rule (the 'constitutive' concept of law).

Regulative laws, like regulative rules (which basically they are), are conditions under which members of an association are entitled to benefit from their membership of the association in question. The association here, however, is distinctive in that it is either an independent society[16] or a sub-group defined in terms of such a society. The main corpus of criminal laws, for example, clearly concern a society as a whole. Breach of these laws accordingly result in lack of entitlement pro tanto to the benefits that accrue from living in the society concerned. Our common attitude towards those who break such laws, for instance as evidenced by statements by the courts, reflect this fact. Other laws, however, primarily concern only sub-groups of society. Road traffic laws, for example, primarily concern only road-users. Breach of any of these latter laws accordingly result in lack of entitlement pro tanto to the benefits that follow from being a member of the road-using sector of society; these include not only use of the roads but the right to priority over other road users in particular situations, and so on.[17] This particular example explains why we so often regard those who break a traffic law, for example by not giving the appropriate signals when changing lanes or making a turn, as not being entitled pro tanto to the benefits relating to use of the roads, but no more than this unless the law in question should also apply to the same person qua a member of some other group - including some larger group - within society; in the latter case the lack of entitlement would be wider in ambit and might include even lack of entitlement to

the benefits of society as a whole. It should be emphasised that the consequences being considered here are simply the natural consequences of breach of any regulative laws; any contingent consequences, for example liability to suffer a sanction or pay compensation, are quite distinct matters beyond the scope of the present subject of consideration.

Certain objections to this account of regulative laws, may spring to mind. Perhaps the most important is that an independent society, at least in the form of a modern State, cannot reasonably be regarded as an association as described in the previous section/of this article as membership of such a society is not necessarily, indeed is usually not, voluntary. Some people - emigrants for example - may voluntarily join a particular society. Most people, however, do not; they are born or find themselves at an early age in a particular country, and social, political or simply economic reasons preclude their having any real choice on whether to stay or go elsewhere. However, these considerations do not in fact prevent a person from being a voluntary member of the society in question, for 'voluntary' in the present context implies no more than that the person concerned actually recognises that he is a member of an association.[18] More precisely, 'voluntary' here implies simply that the person concerned does in fact recognise that he has a particular relationship, other than a purely natural relationship, with one or more other individuals for a certain purpose, and in the case of an association with regulative rules that rightful receipt of the benefits at large that may be gained from membership of this association is subject to certain conditions.[19] The essential element of choice is present in that anyone can in fact not recognise

such a situation as existing if he so wishes. It is not at all relevant that the persons concerned may have been socialised into recognising these factors, nor even (paradoxical though it may seem, at least to non-psychologists) that that person has come to recognise these factors because he has no choice but to be physically with people who form a particular association.[20] Recognition of the matters outlined is alone sufficient to make membership of any association voluntary.

Another possible objection is that regulative laws may primarily concern just a particular individual or a particular class of individuals and not an independent society or one of its sub-groups. In fact, however, when laws do have this characteristic they invariably concern an individual qua a member of one or other of these groups; this is so even if any given law should apply to a named individual instead of just the holder of an office or status for the time being. Similarly in respect of any association whatsoever. There is no logical reason why different members of the same association should not be subject to different conditions for receipt of the benefits that accrue from their membership; indeed, this is the only way in which particular members of any voluntary association can have special functions to fulfil or special personal states to attain.

If there is a problem resulting from the present account of regulative laws it is that of determining to which group any particular law applies. The solution here depends on fact rather than theory; it depends upon ascertainment of the group - or groups - to which any regulative law applies as a condition of entitlement for the receipt of general benefits. The easiest way in practice to solve this problem

is by answering the two interrelated questions: if the person subject to any given regulative law fails to perform the act or attain the state involved, then all other things being equal which general benefits will he without more (and pro tanto) not deserve, and which group is the principal source of these benefits? So to take a minor though nonetheless interesting example. There is in Western Australia a provision of the Police Act which states that the Commissioner of Police 'shall take care that a sufficient number of Police Constables shall be in attendance upon every Justice sitting in every Police Court...for the purpose of executing... summonses and warrants...' (s.22). Now if the Commissioner should simply not comply with this statutory direction he would doubtless be regarded as not deserving pro tanto the benefits that follow from his being a Commissioner of the Police; these come primarily from that sub-group of society which is the police force. On the other hand, if he should breach certain other sections of that Act, for example that which relates to the police taking bribes (s.15), he would probably be regarded as not deserving pro tanto both the benefits that accrue from his being a Commissioner of Police and those which accrue from his being a public official in a more general sense; and these come not just from the sub-group which is the police force but also from society as a whole. The wider province of the law relating to the police taking bribes is suggested - but no more than suggested - by the fact that infringement of this particular law makes a defaulter liable to a term of imprisonment; non-compliance with the previously-mentioned law, on the other hand, results in no official liability or sanction at all. These contingent

features, however, are not without more indicative of the scope of any regulative rule qua a condition of entitlement; this matter depends solely upon the factors previously mentioned. Different people may of course come to different conclusions in respect of these factors; in other words they may treat the same regulative laws as being conditions for the receipt of the benefits from different groups within society. This, however, is a problem which arises not from the nature of either regulative rules or regulative laws but from the way in which regulative laws are presented, particularly within statutes in common law countries. Another problem arising from the same cause will be discussed a little later.

Constitutive laws, again like constitutive rules, are the necessary and sufficient conditions under which action is deemed to have a particular result. Subject to one exception these results, or the end results of those constitutive laws that form systems, all concern regulative laws, either directly or indirectly. And they are of four basic kinds. The first is the creation (or, understood, the alteration or abolition) of regulative laws and the second is the creation of further constitutive laws. A statutory provision which specifies the way in which a government authority can make official regulations would often be an example of a constitutive law capable of having both of these effects. (So too would Constitutional provisions concerning the exercise of State legislative powers, but this may raise further issues concerning the nature of law which are best not pursued here.) The third result is the creation of a situation whereby an individual or body is brought within the scope of a regulative law either immediately or upon some future occurrence;

examples of laws with a result of this kind would be provisions concerning how to make a will or how a policeman shall make an arrest. The fourth result is the creation of an ability in another person or body to achieve one or more of the previous effects; here provisions on how a commercial principal can confer a power of agency would be an example in point.[21]

There is, however, a fifth result to be taken into account, and this is the creation of an office or status. In the great majority of cases the creation of any such position will involve the previous results for it will also involve the creation of new regulative rules which confer rights and/or impose duties on the holder, it may involve the creation of abilities in that person to achieve one or other of the first three results, and so on. To the extent that the creation of any office or status involves the creation of the first four results previously described the constitutive law in question is in no way exceptional; the office or status in question is to that extent simply a summation of those results. However, to the extent that an office or status does not involve those results - to the extent, that is, that it involves without more a formal distinction in personal relationships - it must be particularly regarded.[22] There is no reason why any group should not recognise one or more of their number as having a special status without any distinctive and concomitant rights, duties and abilities, and to this extent special status within an independent society is unexceptional. (In the United Kingdom, where there is a variety of Orders of Knighthood, mere distinctive status is not even uncommon.) In fact,

however, most offices and status within modern societies do also involve special rights, duties and abilities: that is why they are created and why they continue to exist. It is accordingly tempting to regard constitutive laws as without more directly or indirectly concerning regulative laws, and to treat those which simply create a status as being anomalous.[23] It may be better, however, to regard constitutive laws in wider terms and in particular to regard them as the means of adjusting, not merely the regulative laws, and not even just the regulative and constitutive laws, of a society, but also the formal relationships that exist within the society in question.

The distinction that has been made between regulative rules and laws on the one hand, and constitutive rules and laws on the other, is a logical one. There may be problems in isolating individual rules and laws in actual situations - the 'problem of individuation' as Joseph Raz has put it[24] - but this does not affect the clear theoretical distinction between the two types of rules and laws involved. (An example of the kind of problem just referred to is whether s.5 of the Public Order Act 1936 (Eng.), which makes it an offence to use 'threatening, abusive or insulting words or behaviour', creates one, two, or even six regulative laws and therefore the same number of distinct offences.[25]) There is, however, one problem which does deserve consideration here as it concerns not the isolation of rules the species of which is known, but the determination of whether a given rule is a member of one species or the other, or of both.

The root of this problem concerns the way in which rules are presented, and especially the way in which legal rules

are presented is common law countries. Take, for example, s.283(1) of the Canadian Criminal Code ('Theft'); this states:

> Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with [a specified] intent.

Does this section state a regulative or a constitutive law? The answer in this instance is without doubt that it does both. First, it clearly specifies the necessary and sufficient conditions by which action is deemed to have a particular result, viz. constitute theft, and to this extent it states a constitutive law. (It is worth observing that it is primarily as a constitutive law that this section would be regarded during any trial for the commission of this office, counsel for either side attempting to establish that the relevant conditions either were or were not satisfied on the established facts and thus that theft was or was not committed by the accused.) However, this section also specifies a regulative law as it also indicates what is improper behaviour for a particular independent society - or more specifically, following the thesis put forward in this article, it indicates a condition under which the members of a certain independent society are entitled to the benefits that flow from their membership of the society in question.

The conclusions from the example just given should not be taken to mean that regulative and constitutive rules can be one and the same thing though it certainly does mean that a single statement can sometimes be interpreted as a rule of either kind. This will be the case, in short, whenever a statement specifies the conditions under which action or an

attainable personal state is either proper or improper in respect of a particular association, including of course a whole society. It will then present both a constitutive and a regulative rule. This results from the fact that all regulative rules have a constitutive aspect[26] in that every regulative rule can be restated in the form that the basic action or state involved is deemed to be - and thus constitutes - not merely the right or wrong thing to do or be in a given situation as might at first be thought, but rather a condition of entitlement to receive the benefits at large from the voluntary association concerned. It is the latter circumstance, as was explained in the previous section of this article, that makes the basic action or state involved the right or wrong thing to do or be in the situation in question.[27] This constitutive aspect of regulative rules explains more precisely the apparently paradoxical feature that was observed at the beginning of this article, namely why both regulative and constitutive rules can easily be presented in the same form, particularly using the term 'must' ('A cricket batsman must move all the way from one crease to the other in order to score a run', 'You must eat your peas from a fork in order to eat properly'). In all such cases any regulative rule involved is then in its corresponding constitutive form.

Some of the statements in the last paragraph may appear contentious in the light of the cited example concerning the law of theft. Theft, it may be argued, is always wrong all other things being equal, at least given the institution of private property, whereas statements in the preceding paragraph imply that under s.283(1) of the Canadian

Criminal Code theft as defined is simply 'made' wrong for one particular purpose - viz. entitlement to the benefits of a voluntary association - and for no other. There is, however, no real problem here, or at least no problem involving inconsistency. Instead a clear distinction must be made between those acts which are right or wrong because they are the subject of a regulative rule and those which are right or wrong for any other reason. An act which is the subject of a regulative rule is right or wrong because its performance or non-performance is a condition of entitlement for the receipt of the general benefits that result from membership of a voluntary association.[28] This reason, however, is not exclusive. The same act may also be right or wrong for some other reason, not least because it is also the subject of a moral principle.[29] Given, then, the intimate relationship between morals and society it is not surprising that particular societies should wish to support certain moral principles by making compliance with them a formal conditions of entitlement for the receipt of the benefits of that society. One practical consideration here would be that the sanctions that support the regulative rules (laws) of the society in question would thereby support the moral principles as well. In the light of the importance of the institution of private property in Canada and elsewhere, and the moral principles that pertain to this institution, it is not surprising that the Canadian Criminal Code makes theft the subject of one of its regulative laws; the surprise would be if it did not. A question that then arises from this general point concerns the extent to which the laws of any society should reflect its moral principles. This matter, however, has been

extensively, and for the most part inconclusively, debated elsewhere[30] and need not be pursued any further here.

Perhaps the principal problem that arises concerning the statement of rules is that of determing whether any particular statement, not least one which is in constitutive form, presents, or also presents, a regulative rule. From a theoretical point of view this problem is easy to solve; one has simply to ascertain whether the statement in question does in fact indicate the right or wrong thing to do or be qua a condition of entitlement in respect of a particular association In practice, however, the problem may not be quite so easy to solve. To a certain extent the difficulty of this problem is alleviated in respect of regulative laws by the fact that all societies that have law also have institutions whose function it is inter alia to identify legal rules, and in theory this must involve the ability to distinguish between those which are constitutive and those which are regulative. In fact, however, these institutions - the courts - often do not make this distinction clear. They simply identify rules and authorise a particular consequence without giving any, or very many, clues as to whether the rules in question are constitutive or regulative.

To illustrate this difficulty reference may again be made to s.283(1) of the Canadian Criminal Code ('Theft'). This, as has been observed, states a constitutive rule whatever else it does. The question presently under consideration is whether it also states a regulative rule. Now one indicator that it does state such a rule is that there is a sanction attached to this provision; s.294 of the Code ('Punishment for theft') states:

> ...[E]veryone who commits theft is guilty of an indictable offence and is liable
> (a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty dollars, or
> (b) to imprisonment for two years, where the value of what is stolen does not exceed fifty dollars.

Sanctions, as has been seen, attach only to regulative rules (the constitutive aspect of any such rules not affecting this state of affairs). Another indicator is the use of such a word as 'theft' in s.283(1) and of such words as 'guilty' and 'offence' in s.294 to which it is directly related. These words normally have a moral connotation and thus indicate wrongness in a sense pertaining to regulative, and not mere constitutive, rules (laws). In fact there is no doubt at all that s.283(1) does specify a regulative rule for in addition to these indicators (and doubtless also because of them) judges do make it clear in cases concerning theft that this form of behaviour is very much the subject of a rule of that particular kind.

But now consider the following provision. It is from reg. 1101 of the Road Traffic Code 1975 of Western Australia and is no doubt paralleled in many other common law jurisdictions. This states:

> (1) A person shall not stand a vehicle -
> (a) in a No Standing Area;
> (b) in a parking area, except in the manner indicated...;
> (c) in a parking area contrary to any limitation in respect of time, days, period of the day [&c.]....

Does this state a regulative rule? (It may be noted in passing that unlike s.283(1) of the Canadian Criminal Code this particular regulation does not by itself specify a constitutive rule.[31] There are again clear indicators that it does. For example, there is a penalty relating to this provision; in Part XIX of the Code ('Penalties'), reg.1901 states:

> (1) A person who contravenes or fails to comply with any of the provisions of these regulations, commits an offence.
>
> (2) A person who commits an offence against these regulations is liable to a penalty not exceeding $100 and, for a subsequent offence, to a penalty not exceeding $200.

There are also such significant words as 'shall', 'offence' and 'penalty' employed in one or other of these related provisions.

However, although most people in Western Australia undoubtedly do treat reg.1101 as stating a regulative rule (law), at least some appear to regard it simply as the first half of a conditional provision by which financial liability may be assumed without any discredit or blame whatsoever, the second half of the provision in question being contained in reg.1901 which has just been set out. Together these two regulations, which at their face value state 'A person shall not stand a vehicle....; Penalty: a fine of up to $x', are re-interpreted as saying 'If a person shall stand a vehicle... then he is liable to pay a mere charge of/up to $x', or more plainly still 'A person may stand a vehicle...if he is prepared to pay a charge of up to $x'. Those who adopt this interpretation thus treat reg.1101 as part of a provision concerning the imposition of in effect a special parking fee, or as a kind of taxing provision, in the general way outlined over eighty years ago by Oliver Wendell Holmes in connection with his 'bad man' theory of law.[32] The same attutide cannot of course be

taken in respect of s.283(1) of the Canadian Criminal Code ('Theft') for by s.294 the liability there involves imprisonment and there is no liability of a similar form - as there is with a fine - that can ordinarily be assumed without discredit or blame.

There can be no doubt that the Government intended reg.1101 to state a regulative rule; this is clear from the use of such terms as 'offence' and 'penalty' in the associated reg.1901 if not by the word 'shall' in reg.1101 itself. But as Joseph Raz points out, ' the character and interpretation of legal materials can be changed without any intervention by the original author of that legal material'.[33] So 'penalty' (qua 'financial penalty') can come to be interpreted as 'tax' or even as 'special parking fee' in certain circumstances, and similarly a word like 'offence' can take on an altered, and in particular a morally neutral, meaning just as words and expressions like 'tort' and 'breach of contract' have already done in many instances. The courts alone, of course, have the ability to make an authoritative statement as to the correct status and interpretation of reg.1101.[34] Until they do the official nature of this regulation must, in theory at least, remain open to question.

Regardless of the correct status of reg.1101, the problem just discussed does raise an interesting question concerning the position of that regulation under the present theory if it does not present a regulative rule. First, however, it should be observed that even under the re-interpretation there is still in existence a regulative rule (law). What has happened as a result of the re-interpretation is that the subject of the regulative rule that is present

has changed from the act of standing a vehicle to that of paying a charge, or special parking fee or whatever. In other words, what are commonly regarded as two distinct entities, (viz. a provision setting out a regulative rule and another which specifies a supporting sanction - which may in turn, of course, be the subject of yet a further regulative rule) are regarded under the re-interpretation of these provisions as together stating a single regulative rule. Thus, following the thesis concerning regulative rules put forward in this article, under the more common interpretation the condition of entitlement for general benefits is that one does not stand a vehicle under certain circumstance; under the re-interpretation it is that one pay a charge under related circumstances.

Under the re-interpretation, then, reg.1101 specifies nothing more than part of a rule (law). Although this conclusion may be somewhat difficult to appreciate in the light of the more common, not to say more obvious, interpretation of this particular regulation it is nonetheless noteworthy, for the fact is that many so-called rules are only, and can logically be no more than, parts of rules. To appreciate this apparent paradox a distinction must be made between two further senses in which the term 'rules' is used (and naturally also two corresponding senses concerning the term 'laws'). 'Rules' in the first, basic sense signifies those things which are recognised as rules by their very nature. Included here are conditions of the kind which have formed the main subject of this article together with any other things that are commonly recognised as naturally being rules; moral rules for example. One feature of rules in this basic sense is that they can be

either specified or unspecified, though in the latter case they must be specifiable.[35] Another feature is that they inherently concern action; they can all be 'followed', 'applied', 'complied with', or 'broken'.

'Rules' in the second sense signifies those things which are not rules by their very nature but which are nonetheless given this title. The term 'rules' is thus here being used in an extended sense. The most common instances of rules in this sense are those enumerated and written statements which attempt to set out rules in the basic sense. Those statements which go under the title 'The Rules of Golf as approved by the Royal and Ancient Golf Club of St. Andrews, Scotland, and the United States Golf Association', and 'The Road Traffic Code, 1975' of Western Australia, are two sets of particularly formal examples of such rules; the printed 'rules' which one finds in children's boxed games would be more informal instances. Sometimes these rules do in fact individually specify rules in the basic sense; reg.1101 does under its more common interpretation, and s.283(1) of the Canadian Criminal Code ('Theft') does so too. Often, however, they simply specify either individual conditions pertaining to constitutive rules or, like reg.1101 as re-interpreted, mere parts of conditions that form regulative rules.[36] On other occasions these so-called rules do no more than define terms employed in respect of such conditions or specify characteristics of things (including acts, relationships and status) with which these conditions are concerned.[37] Rules in the extended sense, then, need not inherently concern action though

to the extent that they pertain to rules in the basic sense they will have some connection with action, tenuous though it may at times be. Occasionally they may even be found to have no connection whatsoever with rules in the basic sense but will simply state an extraneous fact. Article 143 of the 'Constitution (Fundamental Law) of the Union of Soviet Socialist Republics' is one example in point; this simply describes the coat of arms of the USSR:

> The arms of the Union of Soviet Socialist Republics are a sickle and hammer against a globe depicted in the rays of the sun and surrounded by ears of grain, with the inscription "Workers of All Countries, Unite!" in the languages of the Union Republics. At the top of the arms is a five-pointed star.

Because the particular rules being considered here are not recognisable as rules by their very nature they must be not only specified, but specified as being 'rules', in order to exist. They need not, however, be reduced to writing, though most are. Among those which are not always in written form are H.L.A. Hart's 'rules of recognition'; according to Hart these 'specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of a group to be supported by the social pressure that it exerts'.[38] These 'rules' thus do no more than state the defining characteristics of a particular (in fact legal) rule in the basic sense.[39] The use of the term 'rules' in this extended sense, that is to comprehend not just rules in the basic sense, or even (out of deference to common parlance) enumerated written statements which set

out such rules, but mere definitions or statements pertaining to rules in the basic sense, is unfortunate and can be criticised on two grounds. First, it is not conducive to clarity of thought or expression, and second, the statements involved can easily be signified by other, more appropriate terms. It is particularly unfortunate that Hart should use the term 'rules' to cover so many logically distinct things[40]; this is, perhaps, one of the weaker features of his contribution to jurisprudence.

The principal purpose of this article has been to study the relationship between the concept of rules and the concept of law, and from this has followed some observations on theoretical and practical problems relating to the recognition of rules, with special reference to legal rules. From one important point of view, however, this study is still incomplete. It has indicated the connection between rules and law but not the distinction. Law may be a compendious term which signifies a corpus of laws, and these laws may all be rules. But there is nonetheless a clear distinction between law and rules. A consideration of this distinction is, however, a topic which must involve an examination of other characteristics of law and in particular an exploration of one of the more controversial questions of analytical jurisprudence today, namely the relationship between law and force.[41] And this is perhaps best left to a further study.

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FOOTNOTES

16 A full account of what for present purposes constitutes an independent society would be out of place here as it would necessarily involve a detailed discussion of the relationship between law and (brute) force. In short, however, an independent society is here a community which recognises the use of force by certain of its own members as being without more the ultimate legitimate means of coercion within that society. It thus does not without more recognise any use of force from outside as being a legitimate means of coercion in respect of its own members.

17 It should be stressed that what is being considered here is a law qua a form of regulative rule; i.e. qua a condition of entitlement and not qua a counsel of prudence. The former may, however, reflect the latter and will often do so with respect to road traffic and other situations where safety, security or welfare generally is an important consideration. Breach of a counsel of prudence has quite a different result from breach of a regulative rule. (Note also in respect of rules of the road the interesting observations by R.E. Ewin,

op.cit. supra n.13, at pp.136-37; see also the point made in n.11, supra.)

18 That the word 'voluntary' can have several meanings was recognised, for example, by Jeremy Bentham; see his Introduction to the Principles of Morals and Legislation (ed. J.H.Burns and H.L.A. Hart)(1970), at p.84n.

19 The thesis put forward here in the text should not be confused with a simple social contract theory leading to an obligation to obey the law (though further consideration of this particular matter may well lead to a similar theory with similar results, especially given the theory of commutative rights and obligations referred to in n.13, supra). For a discussion of the traditional social contract theory in connection with an obligation to obey the law, see Anthony D'Amato, op.cit. supra n.13, at pp.1089-98; see also H.L.A. Hart, loc.cit. supra n.13, esp at p.186; D.S.Schwayder, op.cit. supra n.7, at p.271.

20 As Hans Oberdieck correctly states (here with respect simply to behaviour), 'Although coerced behavior is unfree, it is nonetheless voluntary; coercion never results in involuntary behavior': The Role of Sanctions and Coercion in Understandin Law and Legal Systems, (1976) 21 Am.J.Juris.71, at p.81. Note in the connection Leon Festinger's theory of cognitive dissonance which states, in short, that whilst people normally adopt forms of behaviour which conform with their attitudes, if their behaviour cannot so conform, e.g. because they are coerced into acting in a particular way, they then tend to change their attitudes so as to avoid any disharmony

('dissonance') between the two; see, e.g., his Theory of Cognitive Dissonance (1957). That some individuals actually do not recognise the corpus of regulative laws of the particular society in which they live despite even severe constraints on their actions is apparent from, e.g., Jerry Rubin's We Are Everywhere (1971).

21 Those who are conversant with Wesley Newcomb Hohfeld's schema of fundamental legal conceptions may tend to regard the ability in question here as a simple Hohfeldian 'power'; it is, however, rather more extensive than this, involving the ability to alter 'power-liability' as well as 'right-duty' relationships. Because of this the word 'ability' will be retained for present purposes in the text. I have discussed the theoretical scope of a 'power' in my article, A Fresh Approach to the Analysis of Legal Relations (1974) McGill L.J.361, at p.276, n.49.

22 Little of substance has yet been written on the concept of status. For introductory jurisprudential considerations, see John Salmond, Jurisprudence (7th edn.)(1924), at pp. 264-68 (cf. idem (12th edn. ed. P.J.Fitzgerald)(1966), at pp.240-41); George Whitecross Paton, A Textbook of Jurisprudence (4th edn. ed. G.W.Paton and David P. Derham)(1972), at pp.398-403.

23 H.L.A.Hart in his first account in The Concept of Law of 'primary' and 'secondary' rules (which have a clear correspondence with regulative and constitutive laws as outlined in this article) adopts this line though for all practical purposes he ignores the element of status; see op.cit.supra

n.1, at pp.78-79. For an isolated, and equivocal, reference by Hart to secondary rules and status, see op.cit., p.94. It is, however, important when considering Hart's concept of 'secondary' rules to note that this concept changes character fundamentally later in The Concept of Law; compare the account loc.cit.with that presented at p.92. For a discussion of this surprising feature of Hart's work (with a not entirely convincing resolution of the theoretical problems that it involves), see Rolf Sartorius, op.cit. supra n.2, at pp.135-38.

24 See Joseph Raz, The Concept of a Legal System (1970), p.72; for his consideration of this problem see esp. pp.70-77, 140-47.

25 The English Courts have in fact held that s.5 creates only one offence; see Vernon v. Paddon,[1973] 3 All E.R. 302 (Q.B.D.). These problems are not just of jurisprudential interest; important practical questions relating to duplicity (as in Vernon v. Paddon) or double jeopardy may depend on their answer.

26 Cf. on this point J.C.Smith, op.cit. supra n.10, at p.196; John R. Searle, op.cit. supra n.4, at p.36.

27 See n.13 and text, supra.

28 See loc.cit., and note also the comment in n.29, infra.

29 See on this general topic, A.I.Melden and D.S.Schwayder, opp.cit. supra n.13.

It should be emphasised that the distinction being made here

is between the reason why an act is right or wrong and not between types of right and wrong. As the thesis in this article concerning regulative rules seeks to establish, the sense in which it is 'right' to comply and 'wrong' not to comply with regulative rules is a moral and not a mere conventional sense.

30 The locus classicus here is the 'Hart/Devlin' debate; see, Patrick Devlin, The Enforcement of Morals,(1959) 45 Proc. Br. Academy 129 (reprinted with other essays on the same topic sub nom. The Enforcement of Morals (1965)); H.L.A.Hart, Law, Liberty and Morality (1963). See also on this subject, Eugene V. Rostow, The Enforcement of Morals, (1960) 18 C.L.J.174; Basil Mitchell, Law, Morality, and Religion in a Secular Society (1970).

31 However, read in conjection with reg.1901(1)(referred to subsequently in the text) this regulation does specify a constitutive rule; it then specifies the conditions under which action is deemed to result in the commission of a distinctive offence.

32 See The Path of the Law (1897) 10 Harv.L.Rev.457, at p.461. And see with respect to this aspect of Holmes's theory, H.L.A.Hart, op.cit. supra n.1, at pp.239-40. Hart's own account of the distinction between a fine and a tax is not well-developed in that work; see op.cit. at p.39. A well-known example of a fine being regarded by a businessman as a tax, or at least as a business expense, is A.G. v. Sharp, [1931] 1 Ch. 121. There is also the story from ancient Rome of L.Varatius 'whose recreation took the form of walking

about the streets and striking people in the face; he was then followed by a slave with a tray full of asses, which he distributed among his master's victims according to the law of the Twelve Tables': A.M.Prichard (ed.), Leage's Roman Private Law (3rd edn.)(1961), p.418.

33 op.cit. supra n.24, at p.152.

34 See, e.g., Joseph Raz, op.cit. supra n.24, at pp.151-56.

35 And see on the point, Newton Garver, op.cit. supra n.10, at p.231.

36 It is interesting to note that some of the examples of rules (laws) cited by H.L.A. Hart in the opening part of The Concept of Law are in fact rules of the kind being referred to here and are not rules in the basic sense; see esp. at pp.28, 31. See also on this particular point the observations by Joseph Raz, op.cit. supra n.24, at p.158. Cf. the categories of legal rules enunciated by J.C.Smith, op.cit. supra n.12, ch.11 and summarised at pp.230-32; these would seem to involve rules in both the basic and the extended sense.

37 In connection with the last-mentioned function of rules in the extended sense, see J.C.Smith's account of what he terms 'rules of correlation', op.cit. supra n.10, at pp.199-201, 231. See also Joseph Raz, op.cit. supra n.7, at p.117.

38 op.cit. supra n.1, at p.92. And see generally on Hart's 'rules of recognition', op.cit., at pp.92-93. Cf, however, p.41 where these rules would seem to be rules in the basic sense (though note in this connection the change in Hart's

account of 'secondary rules' referred to in n.23, supra); see also the observations in n.39, infra. For another critical assessment of Hart's 'rules of recognition', see Joseph Raz, op.cit. supra n.7, at pp.146-48.

39 If Hart's 'rules of adjudication' in fact each comprise two distinct rules, then the first of them also does no more than state defining characteristics (of judges). See in this connection his statement: 'Besides identifying the individuals who are to adjudicate, such rules also define the procedure to be followed' (op.cit. supra n.1, at p.94). Other statements on the same page, however, seem to indicate that 'rules of recognition' are each single entities only. See generally on these rules, op.cit. at pp.94-95.

There is some indication in The Concept of Law that Hart did in fact consider his 'secondary rules' in general, and his 'rules of recognition' in particular, to be rules in the basic sense and not mere definitional statements. Thus he speaks of judges 'applying' rules of recognition (see op.cit. at pp.110, 112) and of all three secondary rules as being accepted as 'common standards of behaviour' (op.cit. at p.113). Cf. his earlier statement that 'secondary rules ... all ... specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined' (op.cit., p.92).

40 Note also in this connection the observations in n.36, supra.

41 Compare the theories and propositions put forward on this matter in E. Adamson Hoebel, The Law of Primitive Man (1967), chs. 2, 11, and by the present writer in n.16, supra, with those put forward ir Joseph Raz, op.cit. supra n.7, at pp.154-62, and Hans Oberdiek, op.cit. supra n.20.