

e. Law, Morality, Religion

While recognizing law as the specific social technique of a coercive order, we can contrast it sharply with other social orders which pursue in part the same purposes as the law, but by quite different means. And law is a means, a specific social means, not an end. Law, morality, and religion, all three forbid murder. But the law does this by providing that if a man commits murder, then another man, designated by the legal order, shall apply against the murderer a certain measure of coercion, prescribed by the legal order. Morality limits itself to requiring: thou shalt not kill. And if a murderer is ostracized morally by his fellow men, and many an individual refrains from murder not so because he wants to avoid the punishment of law as to avoid the moral disapprobation of his fellow men, the great distinction still remains, that the reaction of the law consists in a measure of coercion enacted by the order, and socially organized, whereas the moral reaction against immoral conduct is neither provided by the moral order, nor, if provided, socially organized. In this respect religious norms are nearer to legal norms than are moral norms. For religious norms threaten the murder with punishment by a superhuman authority. But the sanctions which the religious norms lay down have a transcendental character; they are not socially organized sanctions, even though provided for by the religious order. They are probably more effective than the legal sanctions. Their efficacy, however, presupposes belief in the existence and power of a superhuman authority.

It is, however, not the effectiveness of the sanctions that is here in question, but only whether and how they are provided for by the social order. The socially organized sanction is an act of coercion which an individual determined by the social order directs, in a manner determined by the social order, against the individual responsible for conduct contrary to that order. This conduct we call "delict." Both the delict and the sanction are determined by the legal order. The sanction is the reaction of the legal order against the delict, or, what amounts to the same thing, the reaction of the community, constituted by the legal order, to the evil-doer, the delinquent. The individual who carries out the sanction acts as an agent of the legal order. This is equivalent to saying that the individual who carries out the sanction acts as an organ of the community, constituted by the legal order. A social community is nothing but a social order regulating the mutual behavior of the individuals subject to the order. To say that individuals belong to a certain community, or form a certain community, means only that the individuals are subject to a common order regulating their mutual behavior.

The legal sanction is thus interpreted as an act of the legal community; while the transcendental sanction — the illness or death of the sinner or punishment in another world — is never interpreted as a reaction of the social group, but always as an act of the superhuman, and therefore super-social, authority.

f. Monopolization of the Use of Force

Among the paradoxes of the social technique here characterized as a coercive order is the fact that its specific instrument, the coercive act of the sanction, is of exactly the same sort as the act which it seeks to prevent in the relations of individuals, the delict; that the sanction against socially injurious behavior is itself such behavior. For that which is to be accomplished by the threat of forcible deprivation of life, health, freedom, or property is precisely that men in their mutual conduct shall refrain from forcibly depriving one another of life, health, freedom, or property. Force is employed to prevent the employment of force in society. This seems to be an antinomy; and the effort to avoid this social antinomy leads to the doctrine of absolute anarchism which proscribes force even as sanction. Anarchism tends to establish the social order solely upon voluntary obedience of the individuals. It rejects the technique of a coercive order and hence rejects the law as a form of organization.

The antinomy, however, is only apparent. The law is, to be sure, an ordering for the promotion of peace, in that it forbids the use of force in relations among the members of the community. Yet it does not absolutely preclude the use of force. Law and force must not be understood as absolutely at variance with one another. Law is an organization of force. For the law attaches certain conditions to the use of force in relations among men, authorizing the employment of force only by certain individuals and only under certain circumstances. The law allows conduct which, under all other circumstances, is to be considered as "forbidden"; to be legally forbidden means to be the very condition for such a coercive act as a sanction. The individual who, authorized by the legal order, applies the coercive measure (the sanction), acts as an agent of this order, or — what amounts to the same — as an organ of the community constituted thereby. Only this individual, only the organ of the community, is authorized to employ force. And hence one may say that law makes the use of force a monopoly of the community. And precisely by so doing, law pacifies the community.

C. VALIDITY AND EFFICACY

The element of “coercion” which is essential to law thus consists, not in the so-called “psychic compulsion,” but in the fact that specific acts of coercion, as sanctions, are provided for in specific cases by the rules which form the legal order. The element of coercion is relevant only as part of the contents of the legal norm, only as an act stipulated by this norm, not as a process in the mind of the individual subject to the norm. The rules which constitute a system of morality do not have any such import. Whether or not men do actually behave in a manner to avoid the sanction threatened by the legal norm, and whether or the sanction is actually carried out in case its conditions are fulfilled, are issues concerning the efficacy of the law. But it is not the efficacy, it is the validity of the law which is in question here.

a. The “Norm”

What is the nature of the validity, as distinguished from the efficacy of law? The difference may be illustrated by an example: A legal rule forbids theft, prescribing that every thief must be punished by the judge. This rule is “valid” for all people, to whom theft is thereby forbidden, the individuals who have to obey the rule, the “subjects.” The legal rule is “valid” particularly for those who actually steal and in so doing “violate” the rule. That is to say, the legal rule is valid even in those cases where it lacks “efficacy.” It is precisely in those cases that it has to be “applied” by the judge. The rule in question is valid not only for the subjects but also for the law-applying organs. But the rule retains its validity, even if the thief should succeed in escaping, and the judge, therefore, should be unable to punish him and thus apply the legal rule. Thus, in the particular case, the rule is valid for the judge even if it is without efficacy, in the sense that the conditions of the sanction prescribed by the rule are fulfilled and yet the judge finds himself unable to order the sanction. What is now the significance of the statement that the rule is valid even if, in a concrete case, it lacks efficacy, is not obeyed, or is not applied?

By “validity” we mean the specific existence of norms. To say that a norm is valid, is to say that we assume its existence or — what amounts to the same thing — we assume that it has “binding force” for those whose behavior it regulates. Rules of law, if valid, are norms. They are, to be more precise, norms stipulating sanctions. But what is a norm?

1. The Law as a Command, i.e., Expression of a Will

In our attempt to explain the nature of a norm, let us provisionally assume that a norm is a command. This is how Austin characterizes law. He says: “Every *law* or *rule* . . . is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.”¹ A command is the expression of an individual’s will (or wish) the object of which is another individual’s behavior. If I want (or wish) somebody else to conduct himself in a certain way and if I express this my will (or wish) to the other in a particular way, then this expression of my will (or wish) constitutes a command. A command differs from a request, from a mere “entreaty,” by its form. A command is the expression in an imperative form of the will that somebody else shall behave in a certain manner. An individual is especially likely to give his will this form when he has, or believes himself to have, a certain power over the other individual, when he is, or thinks he is, in a position to enforce obedience. But not every command is a valid norm. A command is a norm only if it is binding upon the individual to whom it is directed, only if this individual ought to do what the command requires. When an adult directs a child to do something, this is not a case of a binding command, however great the superiority in power of the adult and however imperative the form of the command. But if the adult is the child’s father or teacher, then the command is binding upon the child. Whether or not a command is binding depends upon whether or not the individual commanding is “authorized” to issue that command. Provided that he is, then the expression of his will is binding, even if, in fact, he should not have any superior power and the expression should lack imperative form. Austin, it is true, is of the opinion that “a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.” Further, he says: “A command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire. Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command.”² Thus he identifies the two concepts “command” and “binding command.” But that is incorrect, since not every command issued by somebody superior in power is of a binding nature. The command of a bandit to deliver my cash is not binding, even if the bandit actually is able to enforce his will. To repeat: A

¹ John Austin, *Lectures on Jurisprudence* (5th ed. 1885) 88.

² Austin, *Jurisprudence* 89.

command is binding, not because the individual commanding has an actual superiority in power, but because he is “authorized” or “empowered” to issue commands of a binding nature. And he is “authorized” or “empowered” only if a normative order, which is pre-supposed to be binding, confers on him this capacity, the competence to issue binding commands. Then, the expression of his will, directed to the behavior of another individual, *is* a binding command, even if the individual commanding has in fact no actual power over the individual to whom the command is addressed. The binding force of a command is not “derived” from the command itself but from the conditions under which the command is being issued. Supposing that the rules of law are binding commands, it is clear that binding force resides in those commands because they are issued by competent authorities

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The judgment that something — in particular human conduct — is “good” or “bad” can also mean something else than the assertion that I who make the judgment, or other individuals, desire or do not desire the ~duc~~ that I who make the judgment, or other individuals, find the conduct pleasant or unpleasant. Such a judgment can also express the idea that the conduct is, or is not, in conformity with a norm the validity of which I presuppose. The norm is here used as a standard of valuation.³ It could also be said that actual events are being “interpreted” according to a norm. The norm, the validity of which is taken for granted, serves as a “scheme of interpretation.” That an action or forbearance conforms to a valid norm or is “good” (in the most general sense of the word) means that the individual concerned has actually observed the conduct which, according to the norm, he ought to observe. If the norm stipulates the behavior *A*, and the individual’s actual behavior is *A* too, then his behavior “conforms” to the norm. It is a realization of the behavior stipulated in the norm. That an individual’s conduct is “bad” (in the most general sense of the word) means that his conduct is at variance with the valid norm; that the individual has not observed the conduct which, according to the norm, he ought to have observed. His conduct is not a realization of the conduct stipulated in the norm. The norm stipulates the behavior *A*; but the actual behavior of the individual is non-*A*. In such a case we say: The behavior of the individual “contradicts” the norm. This “contradiction” is, however, not a logical contradiction. Although there is a logical contradiction between *A* and non-*A*, there is no logical contradiction between the statement expressing the meaning of the norm: “The individual ought to behave *A*,” and the statement describing the individual’s actual behavior: “The individual behaves non-*A*.” Such statements are perfectly compatible with each other. A logical contradiction may take place only between two statements which both assert an “ought,” between two norms; for instance: “*X* ought to tell the truth,” and: “*X* ought not to tell the truth”; or between two statements which both assert an “is,” for instance: “*X* tells the truth,” and: “*X* does not tell the truth.” The relations of “conformity” or “nonconformity” are relations between a norm which stipulates a certain behavior and is considered as valid, on the one hand, and the actual behavior of men on the other hand.

g. Efficacy as Condition of Validity

The statement that a norm is valid and the statement that it is efficacious are, it is true, two different statements. But although validity and efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two. A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, on the whole, efficacious. This relationship between validity and efficacy is cognizable, however, only from the point of view of a dynamic theory of law dealing with the problem of the reason of validity and the concept of the legal order.⁴ From the point of view of a static theory, only the validity of law is in question.

h. Sphere of Validity of the Norms

Since norms regulate human behavior, and human behavior takes place in time and space, norms are valid for a certain time and for a certain space. The validity of a norm may begin at one moment and end at another. The norms of Czechoslovakian law began to be valid on a certain day of 1918, the norms of Austrian law ceased to be valid on the day when the Austrian Republic had been incorporated into the German Reich in 1938. The validity of a norm has also a relation to space. In order to be valid at all, it must be valid, not only for a certain time, but also for a certain territory. The norms of French law are valid only in France, the norms of Mexican law only in Mexico. We may therefore speak of the temporal and the territorial sphere of validity of a norm. To determine how men have to behave, one must determine when and where they have to behave in the prescribed

³ C.f. *infra* pp. 47 ff.

⁴ Cf. *infra* pp. 118 ff.

manner. How they shall behave, what acts they shall do or forbear from doing, that is the material sphere of the validity of a norm. Norms regulating the religious life of men refer to another material sphere than norms regulating their economic life. With reference to a certain norm, one can, however, raise not only the question of what shall be done or avoided, but also the question who shall perform or avoid it. The latter question concerns the personal sphere of validity of the norm. Just as there are norms valid only for a certain territory, for a certain time, and with respect to certain matters, so there are norms valid only for certain individuals, for instance for Catholics or for Swiss. The human behavior which forms the contents Of the norms and which occurs in time and space consists of a personal and a material element: the individual who somewhere and at some time does or refrains from doing something, and the thing, the act, which he does or refrains from doing. Therefore, the norms have to regulate human behavior in all these respects.

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NOMODYNAMICS X. THE LEGAL ORDER

A. THE UNITY OF A NORMATIVE ORDER

a. The Reason of Validity: the Basic Norm

The legal order is a system of norms. The question then arises: What is it that makes a system out of a multitude of norms? When does a norm belong to a certain system of norms, an order? This question is in close connection with the question as to the reason of validity of a norm.

In order to answer this question, we must first clarify the grounds on which we assign validity to a norm. When we assume the truth of a statement about reality, it is because the statement corresponds to reality, because our experience confirms it. The statement "A physical body expands when heated" is true, because we have repeatedly and without exception observed that physical bodies expand when they are heated. A norm is not a statement about reality and is therefore incapable being "true" or "false," in the sense determined above. A norm is either valid or non-valid. Of the two statements: "You shall assist a fellowman in need," and "You shall lie whenever you find it useful," only the first, not the second, is considered to express a valid norm. What is the reason?

The reason for the validity of a norm is not, like the test of the truth of an "is" statement, its conformity to reality. As we have already stated a norm is not valid because it is efficacious. The question why something ought to occur can never be answered by an assertion to the effect that something occurs, but only by an assertion that something ought to occur. In the language of daily life, it is true, we frequently justify a norm by referring to a fact. We say, for instance: "You shall not kill because God has forbidden it in one of the Ten Commandments"; or a mother says to her child: "You ought to go to school because your father ordered it." However, in these statements the fact that God has issued a command or the fact that the father has ordered the child to do some thing is only apparently the reason for the validity of the norms in question. The true reason is norms tacitly presupposed because taken for granted. The reason for the validity of the norm, You shall not kill, the general norm, You shall obey the commands of God. The reason for the validity of the norm, You ought to go to school, is the general norm, Children ought to obey their father. If these norms are not presupposed, the references to the facts concerned are not answers to the questions why we shall not kill, why the child ought to go to school. The fact that somebody commands something is, in itself, no reason for the statement that one ought to behave in conformity with the command, no reason for considering the command as a valid norm, no reason for the validity of the norm the contents of which corresponds to the command. The reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable in a sense that will be investigated later. Let us, for the present, discuss a concrete example. We accept the statement "You shall assist a fellowman in need," as a valid norm because it follows from the statement "You shall love your neighbor." This statement we accept as a valid norm, either because it appears to us as an ultimate norm whose validity is self-evident, or — for instance — Christ has bidden that you shall love your neighbor, and we postulate as an ultimate valid norm the statement "You shall obey the commandments of Christ." The statement "You shall lie whenever you find it useful," we do not accept as a valid norm, because it is neither derivable from another valid norm nor is it in itself an ultimate, self-evidently valid norm.

A norm the validity of which cannot be derived from a superior norm we call a "basic" norm. All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. Whereas an "is" statement is

true because it agrees with the reality of sensuous experience, an “ought” statement is a valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid. The ground of truth of an “is” statement is its conformity to the reality of our experience; the reason for the validity of a norm is a presupposition, a norm presupposed to be an ultimately valid, that is, a basic norm. The quest for the reason of validity of a norm is not — like the quest for the cause of an effect — a *regressus ad infinitum*; it is terminated by a highest norm which is the last reason of validity within the normative system, whereas a last or first cause has no place within a system of natural reality.

b. The Static System of Norms

According to the nature of the basic norm, we may distinguish between two different types of orders or normative systems: static and dynamic systems. Within an order of the first kind the norms are “valid” and that means, we assume that the individuals whose behavior is regulated by the norms “ought” to behave as the norms prescribe, by virtue of their contents: Their contents has an immediately evident quality that guarantees their validity, or, in other terms: the norms are valid because of their inherent appeal. This quality the norms have because they are derivable from a specific basic norm as the particular is derivable from the general. The binding force of the basic norm is itself self-evident, or at least presumed to be so. Such norms as “You must not lie,” “You must not deceive,” “You shall keep your promise,” follow from a general norm prescribing truthfulness. From the norm “You shall love your neighbor” one may deduce such norms as “You must not hurt your neighbor,” “You shall help him in need,” and so on. If one asks why one has to love one’s neighbor, perhaps the answer will be found in some still more general norm, let us say the postulate that one has to live “in harmony with the universe.” If that is the most general norm of whose validity we are convinced, we will consider it as the ultimate norm. Its obligatory nature may appear so obvious that one does not feel any need to ask for the reason of its validity. Perhaps one may also succeed in deducing the principle of truthfulness and its consequences from this “harmony” postulate. One would then have reached a norm on which a whole system of morality could be based. However, we are not interested here in the question of what specific norm lies at the basis of such and such a system of morality. It is essential only that the various norms of any such system are implicated by the basic norm as the particular is implied by the general, and that, therefore, all the particular norms of such a system are obtainable by means of an intellectual operation, viz., by the inference from the general to the particular. Such a system is of a static nature.

c. The Dynamic System of Norms

The derivation of a particular norm may, however, be carried out also in another way. A child, asking why it must not lie, might be given the answer that its father has forbidden it to lie. If the child should further ask why it has to obey its father, the reply would perhaps be that God has commanded that it obey its parents. Should the child put the question why one has to obey the commands of God, the only answer would be that this is a norm beyond which one cannot look for a more ultimate norm. That norm is the basic norm providing the foundation for a system of dynamic character. Its various norms cannot be obtained from the basic norm by any intellectual operation. The basic norm merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities. The norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm. This authorization is a delegation. Norm creating power is delegated from one authority to another authority; the former is the higher, the latter the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created. A norm forms part of a dynamic system if it has been created in a way that is — in the last analysis — determined by the basic norm. A norm thus belongs to the religious system just given by way of example if it is created by God or originates in an authority having its power from God, “delegated” by God.

B. THE LAW AS A DYNAMIC SYSTEM OF NORMS

a. The Positivity of Law

The system of norms we call a legal order is a system of the dynamic kind. Legal norms are not valid because they themselves or the basic norm have a content the binding force of which is self-evident. They are not valid because of their inherent appeal. Legal norms may have any kind of content. There is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. The validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value. A norm is a valid legal norm by virtue of the fact that it has been created according to a

definite rule and by virtue thereof only. The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive and lose their validity. The statement “Any man who manufactures or sells alcoholic liquors as beverages shall be punished” is a valid legal norm if it belongs to a certain legal order. This it does if this norm has been created in a definite way ultimately determined by the basic norm of that legal order, and if it has not again been nullified in a definite way, ultimately determined by the same basic norm. The basic norm may, for instance, be such that a norm belongs to the system provided that it has been decreed by the parliament or created by custom or established by the courts, and has not been abolished by a decision of the parliament or through custom or a contrary court practice. The statement mentioned above is no valid legal norm if it does not belong to a valid legal order — it may be that no such norm has been created in the way ultimately determined by the basic norm, or it may be that, although a norm has been created in that way, it has been repealed in a way ultimately determined by the basic norm.

Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to be the expression of the “will of nature” or of “pure reason.” The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created. It qualifies a certain event as the initial event in the creation of the various legal norms. It is the starting point of a norm-creating process and, thus, has an entirely dynamic character. The particular norms of the legal order cannot be logically deduced from this basic norm, as can the norm “Help your neighbor when he needs your help” from the norm “Love your neighbor.” They are to be created by a special act of will, not concluded from a premise by an intellectual operation.

b. Customary and Statutory Law

Legal norms are created in many different ways: general norms through custom or legislation, individual norms through judicial and administrative acts or legal transactions. Law is always created by an act that deliberately aims at creating law, except in the case when law has its origin in custom, that is to say, in a generally observed course of conduct, during which the acting individuals do not consciously aim at creating law; but they must regard their acts as in conformity with a binding norm and not as a matter of arbitrary choice. This is the requirement of so-called *opinio juris sive necessitatis*. The usual interpretation of this requirement is that the individuals constituting by their conduct the law-creating custom must regard their acts as determined by a legal rule; they must believe that they perform a legal duty or exercise a legal right. This doctrine is not correct. It implies that the individuals concerned must act in error: since the legal rule which is created by their conduct cannot yet determine this conduct, at least not as a legal rule. They may erroneously believe themselves to be bound by a rule of law, but this error is not necessary to constitute a law-creating custom. It is sufficient that the acting individuals consider themselves bound by any norm whatever.

We shall distinguish between statutory and customary law as the two fundamental types of law. By statutory law we shall understand law created in a way other than by custom, namely, by legislative, judicial, or administrative acts or by legal transactions, especially by contracts and (international) treaties.

C. THE BASIC NORM OF A LEGAL ORDER

a. The Basic Norm and the Constitution

The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm. To the question why a certain act of coercion — e.g., the fact that one individual deprives another individual of his freedom by putting him in jail — is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals

whom we do not regard as such, between acts of human beings which create legal norms and acts which have no such effect. All these legal norms belong to one and the same legal order because their validity can be traced back — directly or indirectly — to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order. The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command. Similarly, the basic norm of a legal order prescribes that one ought to behave as the “fathers” of the constitution and the individuals — directly or indirectly — authorized (delegated) by the constitution command. Expressed in the form of a legal norm: coercive acts ought to be carried out only under the conditions and in the way determined by the “fathers” of the constitution or the organs delegated by them. This is, schematically formulated, the basic norm of the legal order of a single State, the basic norm of a national legal order. It is to the national legal order that we have here limited our attention. Later, we shall consider what bearing the assumption of an international law has upon the question of the basic norm of national law.

b. The Specific Function of the Basic Norm

That a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God. The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.

The basic norm is not created in a legal procedure by a law-creating organ. It is not — as a positive legal norm is — valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act.

By formulating the basic norm, we do not introduce into the science of law any new method. We merely make explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts, and at the same time repudiate any natural law from which positive law would receive its validity. That the basic norm really exists in the juristic consciousness is the result of a simple analysis of actual juristic statements. The basic norm is the answer to the question: how — and that means under what condition — are all these juristic statements concerning legal norms, legal duties, legal rights, and so on, possible?

c. The Principle of Legitimacy

The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.

This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called *coup d'Etat*. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the “legitimate” organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order “remains” valid also within the frame of the new order. But the phrase “they remain valid,” does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution “continue to be valid” under the new constitution, this is possible only because validity has expressly or tacitly been vested in

them by the new constitution. The phenomenon is a case of reception (similar to the reception of Roman law). The new order “receives,” i.e., adopts, norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. “Reception” is an abbreviated procedure of law-creation. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order — to which no political reality any longer corresponds — has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

d. Change of the Basic Norm

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

e. The Principle of Effectiveness

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid, not only when they are annulled in a constitutional way, but also when the total order ceases to be efficacious. It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.

f. Desuetudo

This must not be understood to mean that a single legal norm loses its validity, if that norm itself and only that norm is rendered ineffective. Within a legal order which as a whole is efficacious there may occur isolated norms which are valid and which yet are not efficacious, that is, are not obeyed and not applied even when the conditions which they themselves lay down for their application are fulfilled. But even in this case efficacy has some relevance to validity. If the norm remains permanently inefficacious, the norm is deprived of its validity by “desuetudo.” “Desuetudo” is the negative legal effect of custom. A norm may be annulled by custom, viz., by a custom contrary to the norm, as well as it may be created by custom. Desuetudo annuls a norm by creating another norm, identical in character with a statute whose only function is to repeal a previously valid statute. The much-discussed question whether a statute may also be invalidated by desuetudo is ultimately the question whether custom as a source of law may be excluded by statute within a legal order. For reasons which will be

given later, the question must be answered in the negative. It must be assumed that any legal norm, even a statutory norm, may lose validity by desuetudo.

However, even in this case it would be a mistake to identify the validity and the efficacy of the norm; they are still two different phenomena. The norm annulled by desuetudo was valid for a considerable time without being efficacious. It is only an enduring lack of efficacy that ends the validity.

The relation between validity and efficacy thus appears to be the following: A norm is a valid legal norm if (a) it has been created in a way provided for by the legal order to which it belongs, and (b) if it has not been annulled either in a way provided for by that legal order or by way of desuetudo or by the fact that the legal order as a whole has lost its efficacy.

g. The "Ought" and the "Is"

The basic norm of a national legal order is not the arbitrary product of juristic imagination. Its content is determined by facts. The function of the basic norm is to make possible the normative interpretation of certain facts, and that means, the interpretation of facts as the creation and application of valid norms. Legal norms, as we pointed out, are considered to be valid only if they belong to an order which is by and large efficacious. Therefore, the content of a basic norm is determined by the facts through which an order is created and applied, to which the behavior of the individuals regulated by this order, by and large, conforms. The basic norm of any positive legal order confers legal authority only upon facts by which an order is created and applied which is on the whole effective. It is not required that the actual behavior of individuals be in absolute conformity with the order. On the contrary, a certain antagonism between the normative order and the actual human behavior to which the norms of the order refer must be possible. Without such a possibility, a normative order would be completely meaningless. What necessarily happens under the laws of nature does not have to be prescribed by norms: The basic norm of a social order to which the actual behavior of the individuals always and without any exception conforms would run as follows: Men ought to behave as they actually behave, or: You ought to do what you actually do. Such an order would be as meaningless as an order with which human behavior would in no way conform, but always and in every respect contradict. Therefore, a normative order loses its validity when reality no longer corresponds to it, at least to a certain degree. The validity of a legal order is thus dependent upon its agreement with reality, upon its "efficacy." The relationship which exists between the validity and efficacy of a legal order — it is, so to speak, the tension between the "ought" and the "is" — can be determined only by an upper and a lower borderline. The agreement must neither exceed a certain maximum nor fall below a certain minimum.

h. Law and Power (Right and Might)

Seeing that the validity of a legal order is thus dependent upon its efficacy, one may be misled into identifying the two phenomena, by defining the validity of law as its efficacy, by describing the law by "is" and not by "ought" statements. Attempts of this kind have very often been made and they have always failed. For, if the validity of law is identified with any natural fact, it is impossible to comprehend the specific sense in which law is directed towards reality and thus stands over against reality. Only if law and natural reality, the system of legal norms and the actual behavior of men, the "ought" and the "is," are two different realms, may reality conform with or contradict law, can human behavior be characterized as legal or illegal.

The efficacy of law belongs to the realm of reality and is often called the power of law. If for efficacy we substitute power, then the problem of validity and efficacy is transformed into the more common problem of "right and might." And then the solution here presented is merely the precise statement of the old truth that though law cannot exist without power, still law and power, right and might, are not the same. Law is, according to the theory here presented, a specific order or organization of power.

i. The Principle of Effectiveness as Positive Legal Norm (International and National Law)

The principle that a legal order must be efficacious in order to be valid is, in itself, a positive norm. It is the principle of effectiveness belonging to international law. According to this principle of international law, an actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, and the community constituted by this order is a State in the sense of international law, insofar as this order is, on the whole, efficacious. From the standpoint of international law, the constitution of a State is valid only if the legal order established on the basis of this constitution is, on the whole, efficacious. It is this general principle of effectiveness, a positive norm of international law, which, applied to the concrete circumstances of an individual national legal order, provides the individual basic norm of this national legal order. Thus, the basic norms of the different national legal orders are themselves based on a general norm of the international legal order. If we conceive of international law as a legal order to which all the States (and that

means all the national legal orders) are subordinated, then the basic norm of a national legal order is not a mere presupposition of juristic thinking, but a positive legal norm, a norm of international law applied to the legal order of a concrete State. Assuming the primacy of international law over national law, the problem of the basic norm shifts from the national to the international legal order. Then the only true basic norm, a norm which is not created by a legal procedure but presupposed by juristic thinking, is the basic norm of international law.

j. Validity and Efficacy

That the validity of a legal order depends upon its efficacy does not imply, as pointed out, that the validity of a single norm depends upon its efficacy. The single legal norm remains valid as long as it is part of a valid order. The question whether an individual norm is valid is answered by recourse to the first constitution. If this is valid, then all norms which have been created in a constitutional way are valid, too. The principle of effectiveness embodied in international law refers immediately only to the first constitution of a national legal order, and therefore to this order only as a whole.

The principle of effectiveness may, however, be adopted to a certain extent also by national law, and thus within a national legal order the validity of a single norm may be made dependent upon its efficacy. Such is the case when a legal norm may lose its validity by desuetudo.

D. THE STATIC AND THE DYNAMIC CONCEPT OF LAW

If one looks upon the legal order from the dynamic point of view, as it has been expounded here, it seems possible to define the concept of law in a way quite different from that in which we have tried to define it in this theory. It seems especially possible to ignore the element of coercion in defining the concept of law.

It is a fact that the legislator can enact commandments without considering it necessary to attach a criminal or civil sanction to their violation. If such norms are also called legal norms, it is because they were created by an authority which, according to the constitution, is competent to create law. They are law because they issue from a law-creating authority. According to this concept, law is anything that has come about in the way the constitution prescribes for the creation of law. This dynamic concept differs from the concept of law defined as a coercive norm. According to the dynamic concept, law is something created by a certain process, and everything created in this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms a part of a certain legal order. And the answer is, a norm belongs to a certain legal order if it is created in accordance with a procedure prescribed by the constitution fundamental to this legal order.

It must, however, be noted that not only a norm, i.e., a command regulating human behavior, can be created in the way prescribed by the constitution for the creation of law. An important stage in the law-creating process is the procedure by which general norms are created, that is, the procedure of legislation. The constitution may organize this procedure of legislation in the following way: two corresponding resolutions of both houses of parliament, the consent of the chief of State, and publication in an official journal. This means that a specific form of law-creation is established. It is then possible to clothe in this form any subject, for instance, a recognition of the merits of a statesman. The form of a law — a declaration voted by parliament, consented to by the chief of State, published in the official journal — is chosen in order to give to a certain subject, here to the expression of the nation's gratitude, the character of a solemn act. The solemn recognition of the merits of a statesman is by no means a norm, even if it appears as the content of a legislative act, even if it has the form of a law. The law as the product of the legislative procedure, a statute in the formal sense of the term, is a document containing words, sentences; and that which is expressed by these sentences need not necessarily be a norm. As a matter of fact, many a law—in this formal sense of the term — contains not only legal norms, but also certain elements which are of no specific legal, i.e. normative, character, such as, purely theoretical views concerning certain matters, the motives of the legislator, political ideologies contained in references such as "justice" or "the will of God," etc., etc. All these are legally irrelevant contents of the statute, or, more generally, legally irrelevant products of the law-creating process. The law-creating process includes not only the process of legislation, but also the procedure of the judicial and administrative authorities. Even judgments of the courts very often contain legally irrelevant elements. If by the term "law" is meant something pertaining to a certain legal order, then law is anything which has been created according to the procedure prescribed by the constitution fundamental to this order. This does not mean, however, that everything which has been created according to this procedure is law in the sense of a legal norm. It is a legal norm only if it purports to regulate human behavior, and if it regulates human behavior by providing an act of coercion as sanction.

XI. THE HIERARCHY OF THE NORMS

A. THE SUPERIOR AND THE INFERIOR NoRM

The analysis of law, which reveals the dynamic character of this normative system and the function of the basic norm, also exposes a further peculiarity of law: Law regulates its own creation inasmuch as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm. Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former. The relation between the norm regulating the creation of another norm and this other norm may be presented as a relationship of super- and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. The legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms. The unity of these norms is constituted by the fact that the creation of one norm — the lower one — is determined by another — the higher — the creation of which is determined by a still higher norm, and that this *regressus* is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity.

B. THE DIFFERENT STAGES OF THE LEGAL ORDER

a. The Constitution

1. Constitution in a Material and a Formal Sense; Determination of the Creation of General Norms

The hierarchical structure of the legal order of a State is roughly as follows: Presupposing the basic norm, the constitution is the highest level within national law. The constitution is here understood, not in a formal, but in a material sense. The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. The constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes. The formal constitution, the solemn document called “constitution,” usually contains also other norms, norms which are no part of the material constitution. But it is in order to safeguard the norms determining the organs and the procedure of legislation that a special solemn document is drafted and that the changing of its rules is made especially difficult. It is because of the material constitution that there is a special form for constitutional laws or a constitutional form. If there is a constitutional form, then constitutional laws must be distinguished from ordinary laws. The difference consists in that the creation, and that means enactment, amendment, annulment, of constitutional laws is more difficult than that of ordinary laws. There exists a special procedure, a special form for the creation of constitutional laws, different from the procedure for the creation of ordinary laws. Such a special form for constitutional laws, a constitutional form, or constitution in the formal sense of the term, is not indispensable, whereas the material constitution, that is to say norms regulating the creation of general norms and — in modern law — norms determining the organs and procedure of legislation, is an essential element of every legal order.

A constitution in the formal sense, especially provisions by which change of the constitution is made more difficult than the change of ordinary laws, is possible only if there is a written constitution, if the constitution has the character of statutory law. There are States, Great Britain for instance, which have no “written” and hence no formal constitution, no solemn document called “The Constitution.” Here the (material) constitution has the character of customary law and therefore there exists no difference between constitutional and ordinary laws. The constitution in the material sense of the term may be a written or an unwritten law, may have the character of statutory or customary law. If, however, a specific form for constitutional law exists, any contents whatever may appear under this form. As a matter of fact, subject-matters which for some reason or other are considered especially important are often regulated by constitutional instead of by ordinary laws. An example is the Eighteenth Amendment to the Constitution of the United States, the prohibition amendment, now repealed.

2. Determination of the Content of General Norms by the Constitution

The material constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the contents of future laws. The constitution can negatively determine that the laws must not have a certain content, e.g., that the parliament may not pass any statute which restricts religious freedom. In this negative way, not only the contents of statutes but of all the other norms of the legal order, judicial and administrative decisions likewise, may be determined by the constitution. The constitution, however, can also positively prescribe a certain content of future statutes; it can, as does, for instance the Constitution of the

United States of America, stipulate “that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, etc. . . .” This provision of the constitution determines the contents of future laws concerning criminal procedure. The importance of such stipulations from the point of view of legal technique will be discussed in another context.

3. Custom as Determined by the Constitution

If, within a legal order, there exists by the side of statutory also customary law, if the law-applying organs, especially the courts, have to apply not only the general norms created by the legislative organ, the statutes, but also the general norms created by custom, then custom is considered to be a law-creating fact just as is legislation. This is possible only if the constitution — in the material sense of the word — institutes custom, just as it institutes legislation, as a law-creating procedure. Custom has to be, like legislation, a constitutional institution. This might be stipulated expressly by the constitution; and the relation between statutory and customary law might be expressly regulated. But the constitution itself can, as a whole or in part, be unwritten, customary law. Thus it might be due to custom that custom is a law-creating fact. If a legal order has a written constitution which does not institute custom as a form of law-creation, and if nevertheless the legal order contains customary law besides statutory law, then, in addition to the norms of the written constitution, there must exist unwritten norms of constitution, a customarily created norm according to which the general norms binding the law-applying organs can be created by custom. Law regulates its own creation, and so does customary law.

Sometimes it is maintained that custom is not a constitutive, that is to say, a law-creating fact, but has only a declaratory character: it merely indicates the preexistence of a rule of law. This rule of law is, according to the natural law doctrine, created by God or by nature; according to the German historic school (at the beginning of the 19th century), it is created by the “spirit of the people” (*Volksgeist*). The most important representative of this school, F. C. von Savigny,⁵ advocated the view that the law cannot be “made” but exists within and is born with the People since begotten in a mysterious way by the *Volksgeist*. He consequently denied any competence to legislate, and characterized customary observance not as cause of law but as evidence of its existence. In modern French legal theory the doctrine of the *Volksgeist* is replaced by that of “social solidarity” (*solidarité sociale*). According to Leon Duguit⁶ and his school, the true, i.e. the “objective,” law (*droit objectif*) is implied by the social solidarity. Consequently, any act or fact the result of which is positive law — be it legislation or custom — is not true creation of law but a declaratory statement (*constatation*) or mere evidence of the rule of law previously created by social solidarity. This doctrine has influenced the formulation of Article 38 of the Statute of the Permanent Court of International Justice, by which the Court is authorized to apply customary international law: “The Court shall apply . . . international custom, as evidence of a general practice accepted as law.”

Both the German doctrine of the *Volksgeist* and the French doctrine of *solidarité sociale* are typical variants of the natural-law doctrine with its characteristic dualism of a “true” law behind the positive law. What has been said against the latter can be maintained to refute the former. From the viewpoint of a positivistic theory of law the law-creating, and that means the constitutive, character of custom can be denied just as little as can that of legislation.

There is no difference between a rule of customary law and a rule of statutory law in their relationship to the law-applying organ. The statement that a customary rule becomes law only by recognition on the part of the court applying the rule⁷ is neither more nor less correct than the same statement made with reference to a rule

⁵ FRIEDRICII CARL VON SAVIGNY, SYSTEM DES HEUTIGEN ROEMISCHEN RECHTS (1840) 35: “So ist also die Gewohnheit das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund” (“Custom, therefore is an indication of the existence and not a ground of origin of positive law”). Cf. also SAVIGNY, VOM BERUF UNSERER ZEIT FUER GESETZGEBUNG UND RECHTSWISSENSCHAFT (1815).

⁶ LEON DUGUIT, L’ETAT, LE DROIT OBJECTIS ET LA LOT POSITIVE (1901), 8off., 616.

⁷ AUSTIN, LECTURES ON JURISPRUDENCE (5th ed., 1885) 101f.: “The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.” Austin overlooks the fact that the rule created by custom may be a rule providing sanctions — and must be such a rule in order to be a rule of law — so that “custom” is “clothed with the legal sanction” before it is “adopted by the courts.” It is true that the court which has to apply customary law must ascertain that the rule to be applied to a concrete case has actually been created by custom, just as the court which has to apply statutory law must ascertain that the statute to be applied to the concrete case has been actually created by the legislative

enacted by the legislative organ. Each was law “before it received the stamp of judicial authentication,”⁸ since custom is a law-creating procedure in the same sense as legislation. The real difference between customary and statutory law consists in the fact that the former is a decentralized whereas the latter is a centralized creation of law.⁹ Customary law is created by the individuals subject to the law created by them, whereas statutory law is created by special organs instituted for that purpose. In this respect, customary law is similar to law made by contract or treaty, characterized by the fact that the legal norm is created by the same subjects upon whom it is binding. Whereas, however, conventional (contractual) law is, as a rule, binding only upon the contracting subjects, the individuals creating the norm being identical with those subject to the norm, a legal rule created by custom is binding not exclusively upon the individuals who by their conduct have constituted the law-creating custom. It is consequently not correct to characterize the law-creating custom as a tacit contract or treaty, as is sometimes done, especially in the theory of international law.

organ. That means, however, that the rule to be applied is actually a rule of law; and this ascertainment is certainly a constitutive act, whether it is a rule of customary or statutory law which is to be applied by the court. (Cf. *infra* pp. 143f.) Austin presupposes that only the State (the “sovereign”) can make law. The courts and the legislative organ are organs of the State. Since custom is constituted by acts of “citizens or subjects,” not by acts of State, the customary rule can become a rule of law only by adoption on the part of the courts. This is a fallacy. The assumption that the courts have to apply rules created by custom necessarily implies the assumption that the written or unwritten constitution institutes custom as a law-creating procedure; and this implies that the individuals who by their conduct constitute the custom are organs of the legal order or, what amounts to the same, of the legal community constituted by this order: the State, just as are the parliament and the courts. Since the State is nothing but the personification of “its” law, the law of the State, that is to say national law, is necessarily law made “by the State,” meaning law created according to the legal order constituting the State.

⁸ HOLLAND, ELEMENTS OF JURISPRUDENCE (13th ed. 1924) 60.

⁹ Cf. *infra* pp. 308ff.