

# LAW AND POLITY: TOWARDS A SYSTEMS CONCEPT OF LEGAL VALIDITY \*

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## I. INTRODUCTION

### A. EXISTENCE AND VALIDITY OF LAW

#### 1. Plurality of conceptions

While lawyers have little trouble finding the law, jurists have no end of trouble trying to reach agreement on what law is. Identification of law in the concrete, in terms of particular legal orders, seems a prosaic matter of easily learned rules of thumb. On the other hand, the definition of law in general, without reference to particular legal orders, remains a matter of grave controversy. Virtually every serious work of jurisprudence presents a conception of law which differs from others in important respects. The great variety of definitions reveal wide disagreements in scholarly understanding of what the law is.

A number of explanation underlies this predicament. First is the complexity and pervasiveness of the phenomenon as it occurs in society. Law permeates and colors a broad spectrum of individual and communal activity. Law is not only known in diverse forms, it is taught, it is obeyed, it is violated, it is interpreted, it is applied, it is enforced. Association with such diverse situations reinforces inherent ambiguity of the phenomenon and renders it more elusive. Law, perceived in the context of a particular situation takes on the configuration impressed by the element or elements distinctive of the situation. For example, the manifestations of human purpose and human will loom large in the making, shaping and changing of law, cognition in the finding, human volition and action in the obeying or violation, human language in the interpreting, and power manifestations in the enforcing. Such distinctive element or elements occurring in a particular situation involving law may find emphasis in a particular conception or definition of law, accounting for particularisms in conceptual contour.

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Then law occurs in diverse types of political society. Every human group, which is politically organized, develops its own system of rules, from the ancient pastoral families or primitive tribes to the associations of States in the present day. Understandably, each type of human society produces a legal order in its own image, differentiated and distinct from those developed in other types. The typology of legal systems follows closely the typology of political systems. The law of patriarchs differs from tribal law, and the law of the nation-state from that of the family of Nations. Here the primary distinction may lie in the mode of creation and the agencies of promulgation or adoption. In one, custom may predominate; in another, legislation; in a third, judgments of tribunals; in a fourth, agreements. Hence, the well-known categories of customary law, statute law, common law, treaty, etc. Since speculation is likely to be colored by the familiar, it is inevitable that general conceptions of law tend to bear the imprint of the particular legal system in which the theoretician is most at home.

At even greater variety of conceptions results from relating law to social purposes or ends. If we are agreed that law is an instrument to attain the Good, what form shall this take? Shall it be salvation, justice, liberty, or order? If justice is our concern, what should be our criterion, individual welfare or social utility? Whatever be the ultimate value that we seek through law, does not such value enter into our conception of law so as to make such value at least a defining element, and thereby make rules cease to be law whenever they cease to serve such value? So we find some ultimate value or other emphasized in some conceptions of law. This perhaps justifies the observation that many definitions which purport to describe what law is are actually disguised notions of what ought to be.

## 2. Law and Science

The identification of law raises the problems of whether law can be known, and how it is known. We must ask in what sense law can be said to exist, and how we are to know this. In the case of natural phenomena, our knowledge consists of a body of propositions which are true, i.e., laws derived from experience and particular statements verified or capable of being verified through sense observation. Through sense observation, we are able to tell a cow from a truck and through our experience with cattle, we give the cow grass for its sustenance and not gasoline.

In the case of law, however, this approach takes us only part of the way. In terms of sense observation, we see only groups of words we call rules. These rules we experience, for words and their arrangements are observable facts. Take the rule "Theft shall be punished by hanging". As printed,

we see the words and their arrangement, and by our understanding based on our experience, we grasp the meaning that is conveyed. This meaning has empirical content, i.e., elements in human experience. For "theft" refers to observable behavior of persons with reference to things not belonging to them, and "hanging" refers to an observable practice of suspending a person in air with a rope or similar implement around his neck for the purpose of killing him. Although the rule has empirical content, however, its meaning is not a fact but a command. It does not describe what is done, or what will be done, but instead prescribes what should be done. Its purpose is not to state what is observable, but to alter the conduct of the person or persons concerned, i.e., to warn off would-be thieves and to define the penalty to be imposed by a judge for one guilty of theft. The rule is thus an instance of imperative propositions, which convey not information but behavior which *ought* to be. While the meaning of an indicative or descriptive proposition is a fact or facts, the meaning of an imperative proposition is a *norm*, that is, behavior which ought to be. Thus, the statement about a cow eating grass has its meaning in an observed occurrence in the world of nature, i.e., in a fact. On the other hand, the rule "theft shall be punished by hanging" has as its meaning a *norm* of human behavior.

A norm is not a physical occurrence, object or event but an abstract entity. Thus, it belongs not to the class of physical phenomena but that of cultural entities, i.e., culture objects. Culture objects are, of course, apprehended through physical things, to which they relate in a representative or symbolic way. This is best illustrated in mathematics. Thus, a triangle has no physical existence, although the symbol is familiar to us all. This applies to points, equations, numbers, as well as to all mathematical propositions. Other fields of cultural phenomena are logic, ethics, theology and metaphysics. "P or not-P" is not an occurrence in nature but a logical construct, hence, a culture object. This goes for Nirvana, the Trinity, Absolute Justice, the monads of Leibniz, and the *ding in sich* of Kant.

In terms of symbolization, a fundamental difference obtains between physical phenomena and norms. While propositions concerning the former are generally either true or false, this is not the case with directives containing norms. Thus, the statement "it is snowing" is true if in the immediate vicinity of the speaker snow is falling, so that he sees the same or would see it if he looks outside. The statement is, of course, false if instead the sky is clear and the sun is shining. On the other hand, the statement "eating pork is sinful" is neither true or false. Although couched in the form of an indicative statement, it is actually an imperative statement that "Pork should not be eaten; whoever eats pork will be punished". It does not assert a fact; it expresses a command. Its meaning, then, is a norm. But is it a valid norm? That is to say, is there any system of culture objects where

the norm expressed is recognized as valid, hence, existent? We find that the rule is part of Moslem doctrine, but not of Christian doctrine. We, therefore, say that the norm expressed by the rule is valid, hence, an existing norm in the Moslem religion but it is not a valid or existing norm in the Christian religion.

Other illustrations of how "culture-bound" are culture objects may be given. It is now a common place that the principle that "two lines parallel to each other will never meet" is limited to the Euclidean system of geometry, and does not apply to the non-Euclidean systems. The theory of types is well-known in modern symbolic logic; it is unknown in traditional or Aristotelian logic. The rules of declension found in Latin grammar do not apply to English and to many other languages. We find a rich diversity in cultural norms in the contrasting practices of monogamy and polygamy, patriarchy and matriarchy, endogamy and exogamy, dowry and bride-price, private property and communal ownership of land.

From these examples, it may be seen that a culture object exists only in relation to a particular cultural system or systems. If it satisfies the criteria required in a particular cultural system, then it is valid for that system. It may then be said to be "existing" in that system and not in any other system, unless it also meets the criteria for the latter. Thus, the existence of a culture object is syntactical, that is, dependent upon the criteria of validity obtaining in the cultural system concerned.

We now turn to our problem in the light of these considerations. The identification of a rule as a rule of law involves two stages. The first is concerned with the nature of the proposition. That there is a rule is shown by our experience of the symbols which make up the rule. As we have said, words and their arrangements are observable facts. That a rule is expressed is shown by its imperative character. Such imperative character may be manifest or self-evident, as when the language is expressive of a command or an order, or it may be implied from the context, as where a statement describing conduct also describes a sanction to be imposed for engaging in such conduct, or order is given by a superior to a subordinate.

Our second problem is, given a rule, is it a rule of law? Otherwise expressed, does the rule have as its meaning a valid legal norm? Still differently put, does the rule designate a "existing" legal norm, i.e., belonging to or a member of any system of law? The answer cannot be known from the rule itself, we must go outside of it and beyond it. Legality is not expressive of some physical quality of a rule, but of its validity, i.e., its relation of membership to a system of law (legal order). We must, therefore, inquire ultimately into what makes a body of norms distinctively a legal order, as distinguished from other normative orders, such as an ethical

system, or theological system, or a system of organizational by-laws. Our quest is for a general criterion of legal validity, by which we can classify normative orders into those which are legal orders and those which are not. Such a criterion would be the ultimate test for the existence of law. Assuming that it can be found, we say tentatively that a legal order is an order of norms which meets the criterion of legal validity, and a legal rule or a rule of law is one which satisfies the criterion or criteria of a particular legal order. It is in this sense that legal orders and legal rules can be said to exist.

### 3. Toward an empirical concept of law

In order that the field of law may be demarcated as a distinct and separate subject of study, it is essential that our general concept of law should be empirical. A concept is empirical if it enables us to decide through observations whether it applies in a given case, that is, whether or not a particular body of rules constitutes a legal order. An example will make this clear. Suppose we conceive of law as "rules created by the volkgeist." We will not, through this concept, be able to identify, by observation, both the volkgeist and its activities of rule-creation. To attain an empirical concept of law, the criterion of legal validity must state observable conditions, which will provide a basis for concluding, in a particular case, that said criterion is or is not satisfied.

## B. LAW AND THE POLITICAL SYSTEM

### 1. State as the matrix of law

In our quest for a criterion of legal validity, it is logical that we examine the relation of law to the state. For it is in association with state activity that we find law. In virtually all countries of the world today, it is state organs which make the law, administer the law, interpret and apply the law, and enforce or execute the law. On the other hand, the activities and processes of the state are regulated by law. The obvious connections have received due notice in legal theory. In most conceptions of law, the link with the state, or with a particular state organ or activity, is recognized. Indeed, there are theories pinpointing such link as the defining criterion of law. Thus, law has been identified as the commands of the sovereign, or as rules enforced by the courts, or as prophecies of what the courts will do in fact, or as general rules enforced by a sovereign political authority, or rules prescribed by the supreme power in a state, or the rules which the courts lay down for the determination of rights and duties. Such conceptions have been valuable on two counts. First, they indicate the state as the source of law, which permits a sharp division of legal from other

types of normative systems. Second, they establish law as a manifestation of political power, hence, an ethically neutral instrument, which is flexible enough to serve a wide variety of social ends.

## 2. Law as a means of governing social conduct

Valuable as they are, however, such conceptions do not touch the more fundamental aspects of the relationship of law to the state. If the state is the source of law, what is law to the state that it should make law? For what particular uses or functions is law necessary, even indispensable?

### a. *Elements of government*

In every political society, the following elements are compresent: a regime able to govern, a common value system already existing or emergent, and an order of rules governing conduct. These elements are interrelated. To begin with, every regime (governing elite) seeks to maintain and preserve its power. In its quest for stability, it must satisfy community expectations, otherwise it might be overthrown. A minimum of social well-being conducive to the stability of the regime requires, on the one hand, protection of communal values from hurtful conduct, and on the other hand, the advancement of social goals (economic especially) through positive measures of upliftment. These tasks of government impose two basic conditions: an effective organization, and a system of regulation.

An effective organization requires a structure of authority in which the hierarchy of command is clear, and tasks are allocated according to special capabilities. In the typical case, a functional allocation will be made. Thus, different organs will handle the enactment of policy decisions (legislation), the execution of such decisions (administration), the determination of violations (adjudication), and the implementation of specific judgments or orders (enforcement).

Regulation of conduct or behavior within a society requires, on the one hand, specification of what ought to be done and what ought not to be done and the sanction or sanctions to be applied in case of violation, or rewards to be accorded in case of conformity: and on the other hand, the communication of decisions on these matters. Without enactment (acts creating norms), there is no governance of social conduct, and without communication of such enactment (promulgation), the society at large has no basis for compliance.

### b. *Essentiality of rules*

It is thus clear that in both its aspects (organization and regulation), government of a political society must operate through an order of rules.

In connection with organization, rules are needed for institution of specific organs and offices, definition of their functions, specification of their powers, limitations of their authority, procedures for their operations, designation of their holders or occupants, and the terms and conditions of occupancy of office. In connection with regulation of conduct, rules set forth what acts are prohibited, authorized or permitted, as well as the consequence entailed by violation of or conformity with such rules. In the typical case, both types are found in the legal system.

### 3. Law as an instrument of legitimation

Even as it functions as an instrument of government, law also functions as an instrument of political stability. This is so, because law is the medium through which legitimation of power is exchanged for legitimation of private interests and through which mutual expectations concerning legitimation are institutionalized. In every society, some people are rulers and the rest are the ruled. The rulers exercise the powers of government, and the ruled submit to their authority. For the stability of political rule, however, its legitimacy is vital. Subjectively, legitimacy means belief that rule by the existing government is just and right and proper. Objectively, it means acceptability and approval of the regime, manifested by external acts of obedience, cooperation and support. The most efficacious method of acquiring legitimacy is for the regime to take proper care of the interests of the ruled. This the regime can do by manifesting its approval of and concern for such interests, through outward acts of recognition, protection and enhancement. Otherwise put, the legitimation of political rule can best be secured through legitimation of the interests of the ruled. To this end, resort to law is inevitable, for through the medium of law the mutual expectations of the rulers and the ruled concerning legitimation of their respective concerns are institutionalized, that is to say, given an impersonal, public and permanent character. Through the legal order, the acts and decisions of the rulers or power holders are made the acts and decisions of the entire society, i.e., the state, in accordance with the principle of imputation or representation. Thus, power is institutionalized as authority, rulers collectively become the government, and individually become its officials. Likewise, through the legal order, the recognition, protection, or enhancement of private interests is achieved by institutionalizing them as social interests giving rise to rights and duties binding on the entire society, including the government itself. Thus, for every society, under a stable because legitimate regime, the most comprehensive and concrete expression of common or general values is to be found in the legal order. Because law is the medium through which the state achieves and maintains the legitimacy of its power in exchange for legitimation of private interests, because law is the medium by which state power is organized and institu-

tionalized as governmental authority, and because law is the medium through which the state recognizes and protects private interests by institutionalizing a regulative system of rights and duties, law and the state stand in a relationship of systematic conjunction. While law is one output of state activity, law is the institutionalizing medium through which state power is organized, directed, and effectuated.

## II. THE EMERGENCE OF LAW IN HUMAN SOCIETY

### A. HUMAN SOCIETY AND AUTHORITATIVE CODES

#### 1. Structure of authority and its components

While law is a creature of polity, it is obvious that not every community is a polity, as it is obvious that not every rule is a legal rule. The polity, therefore, must be identified and distinguished from other types of human society. The hallmark or criterion of a society, which distinguishes it from other human groups, is community of purpose. There is a shared commitment to a specific purpose or set of purposes. The commitment may be to a general sharing of values by members of the society, as in the case of family, a tribe, or a nation, or it may be limited to particular goals, as in the case of a church, a labor union, or a chamber of commerce. In either case, the community of purpose or purposes must be realized through an organization which can marshal resources, discipline members, and deal with contingencies. Thus, every functioning society (whether a community or association) is a structure of authority, supported by consensus flowing from the shared commitment to its goals. This means to say it has a government with two distinct components: the person or group of persons who exercise the authority in behalf of the society, and the rules or system of rules by which social behavior is channeled in furtherance of the societal goals. Otherwise phrased, there is present in every society an order of power (organization) and an authoritative code (system of rules). Both may range from the simple, as in the case of the family, to the highly complex, as in the case of the major churches and the federated states.

#### 2. Organizational aspect of government

Organization is an indispensable means of channeling both authority as well as responsibility. Realization of societal purpose or purposes means that some group of persons must have the power and the duty to govern, i.e., make decisions and direct action towards communal goals. Whether only one person is thus charged, as is usual in the case of the family, or a massive group of functionaries, as in the case of the modern

state, such person or group constitutes the organization, and it is in this sense that a society is organized. We are not for the moment concerned with how a particular person or group becomes such organ or how the power to govern is legitimized; it is enough to notice that every human group functioning as a society is organized, that is, there is an organization that governs its affairs, however rudimentary it may be. The test is that action is taken in a representative capacity, that is, in behalf of the society, and that the taking of such action (exercise of authority) has the support of consensus within the society. The extent or degree of consensus may vary greatly: in highly integrated societies, the consensus may approach virtual unanimity; in societies where the commitment to the communal goals (dominant value system) is on the wane, or is substantially absent, the authority to govern may increasingly rely on coercion, rather than popular assent. This goes to the problem of stability, or even survival, of particular societies, about which more will be said in connection with legitimation of regimes.

### 3. Social regulation and authoritative codes

The endeavor to realize communal purposes underlies the government of the community, that is, the regulation of human conduct so as to encourage action congenial to such purposes and to inhibit action hostile to them. Such regulation embraces a whole complex of activities, such as formulation of policy decisions (legislation), communication of such decisions to the members of the society (promulgation), implementation of policy decisions (administration), determination of violations (adjudication) and enforcement of judgments or orders (execution). Two considerations underlie the inevitability of rules. One is that regulation is aimed at influencing conduct; what act or acts are prohibited or permitted need to be stated, or made explicit. The other is that what ought to be done or what ought not to be done must be communicated to those who are to obey. Necessarily, then the government of human conduct requires the enactment of rules, that is, norms in linguistic dress. The body of such rules obtaining in a particular society constitutes its authoritative code.

### 4. Rules constituting authoritative code

In each such code, two general types of rules may be found. One type directly regulates behavior by specifying the acts which are prohibited, permitted or encouraged. The rules governing homicide, or the making of wills, or the giving of gifts are of this type. These rules deal with the conduct of persons in their general capacity as members of the community.

The other type institutes the organs of government and regulates their operations. Matters dealt with generally include the establishment of particular organs, their functions and powers, the scope and limits to their authority, the procedures they must observe, the designation of particular office holders, their tenure, privileges, and restrictions. All these rules also deal with conduct, but it is conduct of office holders that is regulated, or persons acting in a special capacity as representative or agent of the society. Illustrations will make the distinction clear. In the case of the Catholic Church, the rules governing the incidence of sin apply to all members, including all officials of the Church; on the other hand, the rules governing election of the Pope regulate only the conduct of the functionaries of the Church, principally the College of Cardinals. In the case of a modern state, the rules on murder and theft apply to inhabitants, including all officials, but the rules governing the enactment of statutes generally regulate the conduct of official functionaries, principally those involved in the legislative process. The test is: in what capacity is a person under a duty to obey? If the duty is imposed in relation to official functions, or because of his official status, the rule is organizational, even if it regulates personal conduct.

#### 5. Organizational rules

The place and importance of organizational rules in authoritative codes has been obscured by the fact that in most societies, such rules have generally been implicit. Primitive codes carried no organizational rules. Early kings needed no explicit or formal rule authorizing them to legislate; they just issued their laws and decrees. Common law judges considered themselves bound by their prior decisions, although no rule on precedents had been legislated. Judicial decisions constituted law, although no rule had ever declared them to have that effect. These are but a few illustrations of that familiar social phenomenon: the transformation of persistent conduct of power holders into rules. The so-called "rules of recognition" as applied to authority structures without written constitutions are no more than mere linguistic summation of observed patterns of conduct.

The prominence of organizational rules in many authoritative codes of today is the outcome of organizational complexity, which in turn is the product of several factors, including bigness, democratization and specialization. The social units that have emerged in the past few hundred years are massive, both in terms of the population they embrace and the territory covered by their activities or operations. The ancient polis corresponds at present to a mere municipality, and the greatest of ancient empires is minuscule compared with the superstates of today. Many countries sprawl across continents and count their population in hundreds of millions. There are churches, such as the Catholic Church and Islam, whose membership is

drawn from many nations in all the continents. There are business corporations whose activities and operations extend to virtually all countries. There are international associations and regional groupings not only of governments, but also of workers, of professions, of commercial or industrial interests. The sheer size of these societies require that the manifold tasks of government be undertaken by a complex organization of specialized workers. This tendency is further stimulated by the current bias towards democratization of power. Modern organizations are welded by constitutions and by-laws. The ordinances of constitutionalism hold sway not only in the political realm but in aggrupations dealing with other aspects of human life, as well. Thus, separation of powers and representation, which characterize most modern governments, often find application in the organization of non-political bodies or associations. In the typical case, administration of government is in the hands of elected officials, and the execution of policy pertains to an executive officer, while the making of policy pertains to a governing board. These tendencies are accompanied by a process of bureaucratization, by which work is further divided and subdivided into special functions or activities and entrusted to specialized workers, and the administrative machinery (bureaucracy) becomes larger and more complex. As the machinery of government grows in size and complexity, more and more rules are needed to cover every aspect of its operation. In the larger societies of today, it is inevitable that in large measure, the authoritative code should consist of organizational rules.

#### 6. Rules and their pattern of development

The point must be made that, whether organizational or not, the rules in a particular authoritative code may arise in different ways and at different times. It must not be supposed that in every society, the authoritative code is as formal and explicit as the Decalogue, or as prolix as the Corpus Juris, or authored in one stroke by a Lycurgus. There are abundant examples of societies where the rules are unwritten, relatively few, and evolved by consensus over a period of time, rather than enacted or promulgated on any particular date. These are mostly non-literate communities based on the kinship principle, such as extended families, clans, tribes and similar groups. In fact, it is only in the modern state and in modern associations that we find general sustained resort to explicit promulgation of rules and their codification by special organs (legislatures and governing bodies).

#### 7. Evolved or customary rules

Where rules are evolved rather than promulgated, a problem of ascription may arise. It may be asked in what sense such rules are authorita-

tive, or how they become part of the authoritative code of the society. In the typical case, which usually involves a non-literate or primitive society, there are rules recognized as binding but which had never been promulgated as such, although regularly applied by the chief or headman in disputes that come before him. Two approaches may be made to this problem. The first is that such rules become part of the authoritative code by action of the community itself. Such rules emanate from the community acting as a legislative organ. They become part of the authoritative code not by formal promulgation but by consensus of the community. Their validity is antecedent to their application in particular disputes. Such application is but a recognition of their status as rules in the authoritative code, which the headman or chief acting as judicial organ is bound to apply.

The other approach rejects presumed adoption by the community acting as legislative organ as too hypothetical. There is no way of knowing in advance the level of consensus required to enact, nor precisely the time when such enactment takes place. Also, different customs within the same society may conflict; presumably, they do not issue from the same communal will. Formal enactment is deemed to have taken place only when the headman or chief acting as an organ of the community adopts the rule as a basis for decision in a dispute. Prior to such time, the rule commands acceptance by the community, but it is not an official rule. Its embodiment in a judicial decision constitutes its enactment as part of the authoritative code. The enacting organ is the headman or chief acting as judge.

#### 8. Rules of obligation and rules of validity

Rules in authoritative codes may also be classified into rules of obligation and rules of validity. Rules of obligation may be mandatory, as when they require particular acts to be done, or prohibitory, as when they forbid the doing of particular acts. Examples of the first are rules requiring respect for elders, or observance of Lent, daily entries of sales in company books, attendance at union meetings, participation in fund drives, or payment of taxes. Examples of the second are rules forbidding evening dates for girls in the family, or taking communion without prior confession, or giving loans without collateral, or crossing picket lines of other unions, or campaigning for candidates of rival parties, or refusing to serve in the armed forces.

On the other hand, rules of validity prescribe the conditions or requirements for recognizing or giving effect to acts, agreements or transactions that are authorized, permitted or even encouraged. These rules are easily distinguished from rules of obligation in that they do not require or forbid

particular acts; they merely provide ground rules for attaining the status of recognized or protected institution within the society. Primarily among these institutions is the structure of authority (social organization) within the society. There are rules for determining who shall be holders of offices, as by succession, election or appointment. These are rules of legitimacy, since they determine legitimate occupants of offices. Thus, in many kingdoms, one must be the male firstborn in order to succeed to the throne. In the Catholic Church, the Pope is elected by the college of cardinals. In most corporations, the chief executive officer is designated by the governing board. There are rules establishing particular organs or offices and specifying their powers and their functions. These are rules of jurisdiction, since they allocate and demarcate authority. Thus, in most families, the father has charge over the discipline of the children. In the religion of Tibet, only the Lama may lay down binding articles of faith. In most corporations, only the governing board may declare dividends. There are also rules of procedure, which govern the exercise of authority and the discharge of functions. A familiar example is the requirement of notice for meetings of membership, or governing boards. Another is that in most countries, a complaint or other pleading must be filed before courts will act.

Another area governed by rules of validity are transactions and agreements concerning members of the society. Among traditional families, betrothals must be negotiated by the parents of both parties. In the Catholic Church, marriage generally must be celebrated by a priest in church. In the case of many corporations, the transfers of stock must be recorded in the corporate books to be binding on the corporation. In most countries, wills and gifts must satisfy specific requirements of law. Upon compliance with the requisites of validity, the particular transaction or agreement is accorded institutional status and is extended the protection and benefit appropriate to institutions of its category. A valid contract, for example, attains the force and effect of law between the parties. A valid will controls successional rights to the estate of the deceased. In many primitive societies, a betrothal imposes sacred obligations.

## 9. Sanctions

Another important distinction between rules of obligation and rules of validity is that rules of obligation carry sanctions for violation, while rules of validity impose no sanctions. A sanction is a diminution or deprivation of value, which includes among others, life, liberty, property, and bodily or spiritual well-being. A sanction exists if the authoritative code authorizes some organ of the society to impose and exact the prescribed diminution or deprivation of value. In most families, a child subject to discipline may be deprived of his allowance, or denied food, or confined

to quarters, or even subjected to mild physical punishment. In many a traditional society, particularly primitive tribes, an erring member may be declared an outcast and expelled from the group. In religious societies, penitences and in serious cases excommunication may be imposed. In virtually all voluntary associations, sanctions may include suspension of membership privileges, fine, or expulsion. There are sanctions which entail the use of force in imposing or carrying them out, such as deprivation of life, curtailment of liberty, infliction of physical punishment, or seizure of property. These are coercive sanctions. On the other hand, there are sanctions which do not involve or entail the use of physical force, such as excommunication or expulsion from membership in the society. These are non-coercive sanctions.

## B. THE POLITY AS MATRIX OF LAW

### 1. Territorial aspect of polity

From the foregoing discussion, it is clear that the polity shares common elements with other types of human society, from the family to trade union. There remain, of course, important differences. As previously discussed, the polity is a territorial community; it is to begin with, a population living together on a permanent basis within a definite territory. This is one feature which the polity shares with other types of community. A family has its home, the tribe its tribal grounds, and the nation its territory. The importance of territory is most marked in the case of the modern polity, because for the most part territory demarcates the scope and limits of its sovereign authority. This need not have been the case in earlier times, but it is universally true in the modern world that political authority is control over a particular territory. In the case of other associations, authority rests on a personal basis, being founded on either kinship or membership; that of the polity on the other hand is founded on territorial domination, with resultant control which extends to everyone and everything found therein, subject to limited exceptions.

### 2. Polity as a coercive order

There is, an even more distinctive feature of the polity that marks it as *sui generis*. This is regular resort to the use of physical power in the regulation and governance of human conduct. In the case of all other human societies, the structure of authority rests on consensus flowing from the shared commitment to the value system of each society. Family, tribe, church, fraternity, club, partnership, corporation or civic associations — all are founded on common consent and continuing adherence to the purposes of

the society. In the typical case, consensus also underlies the government of a polity. There is generally mass support, especially in case of regimes which have been in power over a substantial period of time. The point, however, is that consensus is not the sole support of the structure of authority within the polity. In addition, the regime is backed by physical power. A coercive apparatus (police and army) is generally available, ready to move at the command of power holders, for the purpose of compelling obedience to orders and exacting compliance with rules. Such coercive apparatus may be overwhelming in terms of its capacity to overcome resistance or opposition (armed or otherwise) of any group within the community, which is usually the case in the modern state. In such a case, physical power may provide primary support to a regime, instead of consensus.

a. *Military rule*

Indeed, history records many instances of governments maintained by force of arms. It has been surmised that the earliest polities were communities subjugated and then dominated by roving armed bands or groups. In more recent times, the usual pattern is that when a nation or country is taken over by a military organization (conquest or coup), a military government is imposed and maintained, and in time, it is transformed into a civil regime after consolidating its authority. Initially, a military government imposed on a conquered country cannot expect and will not obtain cooperation and support of the population. On the contrary, it will be faced with resistance in many forms, including sabotage and armed attack. Where such resistance is substantial and continuing, the survival of the regime will require increased military capability and adoption of severely repressive measures. In such a case, military might and not consensus would be the true basis of the regime. At this stage, its efficacy as a government would be at a minimum.

b. *Coercive elements*

That the use of force is an essential feature of the polity, no matter how stable its regime, is manifested in a number of ways. First, its authoritative code (the legal order) explicitly provides for coercive sanctions. This would include the taking of life, imprisonment, imposition of fines, and other forcible measures. Second, such code authorizes explicitly the use of force for the purpose and in the course of enforcing the rules, subject to the rule of reasonable necessity. Third, the organizational set-up of each polity generally includes a coercive apparatus, consisting of the police and the armed forces and entrusted with exacting obedience to the orders and rules of the regime.

This does not mean, of course, that a state necessarily governs through force. In those cases where a polity has developed from an existing community, as in the case of the evolution of related tribes into a nation-state, the forces of cultural integration combined with the evolved legitimacy of the governing regime may keep the coercive aspect of political rule to the minimum. Then, as in recent times, there have been polities which were established with a high level of popular support. In such cases, the adoption of a charter or constitution through a popular election lends verisimilitude to the myth of social contract. But in such situations, consent does not wholly displace the element of force; the need or occasion for physical compulsion is merely reduced. Consent may thus be a sufficient for political rule under optimum circumstances, but it is not necessary. Because conflicts within the body politic are inevitable, however, well-integrated it may be, and have to be managed, if necessary with force, it is coercive capability that it is the true criterion of the polity. While consent is vital to its stability and perhaps its advancement and progress, it is not indispensable to its existence.

*c. Ruler exempt from law*

The coercive element in polity is emphasized in order to direct attention to one crucial point. It is that a government may function and direct a polity without being under its own law. It is of course desirable that every polity should have an authoritative code. This has been virtually the universal case. Even in the most primitive communities, systems of regulation seem to have naturally evolved. In larger or more complex communities, such as nations, the development of authoritative codes seems inevitable. It does not, however, follow that just because a polity inevitably develops an authoritative code, the regime is necessarily subject to the operation of such code. Because the rulers lay down the law, they are immune or free from the law, since the spring cannot rise higher than its source. The universal tendency has been that the Rule of Law extended only to the ruled, it did not embrace the rulers who laid down the rules. The notion that the king is above the law is not peculiar to the European monarchies; it is indeed the dominant principle in all types of polities. The untouchability of deity-rulers in theocratic communities and of chieftains in traditional societies, the prerogatives of kings and emperors, and the sovereign immunities of government even in liberal democracies, are manifestations of the basic idea that law is essentially for the ruled and not for those who make the rules. Of course, such general immunity of regimes from their own authoritative codes need not command acquiescence, much less admiration. On the contrary, it is to be deplored by all constitutionalists in good standing. Unfortunately, not all powerholders are good and practicing constitutionalists.

Assuredly it is desirable that the Rule of Law should apply alike to the rulers and the ruled, and that a regime should therefore be as much subject to its own authoritative code as those under its authority. Regrettably, this is not the universal case. Indeed, it is not even the preponderant case. The harsh fact of political life throughout recorded history is that while the impetus towards legitimacy may develop a regime into a constitutional government, the chances are also fair that it could develop into something else, and even worse, a constitutional government may be transformed into an illiberal regime. This fact that constitutional government is not an inexorable necessity carries far-reaching implications for legal theory, as will be seen presently.

We may, therefore, consider as a polity any human society (1) which institutionalizes as part of its organizational apparatus a machinery for coercion and whose authoritative code (2) provides for coercive sanctions and (3) authorizes use of coercion by its officials and functionaries whenever necessary to the discharge of their duties.

## 2. Forms of polity

In modern experience, the concept of polity is associated with that of the nation state, which is the predominant form of political organization. In all states today, organized government includes a coercive apparatus generally consisting of the police and the armed forces. In the authoritative code of each state (legal order), there is provision for coercive sanctions of varying kinds, and there is authorization for the employment of force whenever necessary to maintain the security of the state, preserve peace and order, and secure compliance with law.

### a. *Kinship principle*

In historical terms, however, the nation state is a recent phenomenon and the polity in earlier times was associated with other social organizations, many of which survive to this very day. One such organization was the ancient family, headed by a patriarch and consisting of his wife or wives, his children and their families, other kinfolk, servants and slaves. In the condition of ancient times, the family was a self-sustaining unit. Under the direction of the patriarch, it took care of its concerns and administered its own affairs. This was particularly the case of pastoral families moving across great stretches of desert in quest of grass and water. In such a situation, the patriarch was leader as well as father, and had the authority to take such measures as may have been required for the welfare and safety of the family and its members. It is in such conditions that the unlimited power of life and death of the Hebrew patriarch and the Roman paterfa-

milies must have developed. As supreme head, the father administered the family code and directed the imposition of coercive sanctions, utilizing whenever necessary the collective strength of the membership.

b. *Territorial principle*

The traditional basis of social organization is kinship, and the early polities, as well as traditional polities even in recent times, consisted of organized groups related by blood, whether real or fictive. In the beginning, such relationship must have been genuine and no one was a member of the community who was not so from birth. But the infusion of strangers through inter-marriages, incorporation of freed slaves, adoption of captives and other strangers must have so diluted or loosened the requirement, as to place it in time in general desuetude. This may have helped hasten the emergence of the territorial principle as the organizational basis of the polity. Historical times reveal many societies in a transitional stage. Thus, the Greek polis, which asserted jurisdiction on a territorial basis, continued nevertheless to adhere to the myth of common blood, and acceptable strangers within the polis became citizens by adoption. Ancient Rome followed a similar practice. The disintegration of kinship as a principle of political organization was largely due to conditions resulting from large-scale conquests. The habitual assertion of authority over a wide variety of peoples within the conquered area which necessitated a policy of assimilation, at last made it clear that political jurisdiction was co-extensive with controlled territory. The emergence of the territorial principle is evident in the experiences of many historical empires, particularly the Babylonian, Assyrian, Macedonian, and finally Roman empires.

c. *Religious affinity*

In some societies, religion has been the organizational basis of the polity, rather than kinship or territory. In ancient Hebrew, political authority devolved upon the religious leader, i.e., he who was most favored in the sight of Yahweh. In ancient Judea, whoever was anointed of the Lord became king. In ancient Egypt, the Pharaoh was not only a descendant of the Sungod, he was himself a divinity. During the medieval period, the Church was a secular power in its own right. Not only did the Pope administer the affairs of the faithful, he was ruler of a definite territory, commander of several armies, and a powerful ally in both war and peace. Examples are not wanting in modern times. There have been periods when the Japanese emperor was not merely object of reverence and workshop, he was also a genuine ruler of his people. In Tibet, divinity and authority are merged; the Lama is both king and deity.

### 3. Unity of the polity

In all but the most primitive polity, the organizational apparatus is hierarchical and complex. There may be political structures on several levels, such as federal, state, local, according to their respective territorial spheres. Each of these structures may consist of several component organs oriented to particular functions, such as the legislative, executive, administrative, and adjudicative organs. Within each organ, there are further divisions typical of which are departments, bureaus, divisions, and sections. A problem arises on how we are to know whether a particular organization, i.e., state government, is itself the government of a polity, or merely a part of a larger governmental organization within a polity. The distinction is clear between an independent government (organizational apparatus of a polity) and a sub-organization of a government.

#### a. *Status of structures*

First of all, was such organization created or established by another? If so, then it is a subordinate organization. If not, then it is likely to be independent. This is the criterion of origin or source. Thus, the British government, which was established by no other organization, is self-constitutive; on the other hand, the city government of London, which was chartered by the British Crown, is a dependent organization. Next, within the territory under its jurisdiction, does the organization have exclusive control, or do other organizations exercise governmental authority therein? This is the criterion of exclusiveness. Thus, under this test, the British Government is independent, because it has exclusive authority over Great Britain; on the other hand, the city of London is a dependent organization, because other organizations of the British Government exercise authority within the city limits. Then, does such organization habitually abide by or implement orders of other governmental organizations? This is the criterion of auto-regulation. Under this test, the British Government is independent because it implements no other orders except its own, while the city of London is dependent because it adheres to, abides by, or implements orders of other organs of the British Government, i.e., statutes, judicial judgments, administrative regulations and decisions. Further, does such organization include as part of it and subject to its full and exclusive control, a military establishment? This is the criterion of coercive capability. Under this test, the British Government is independent because it controls an organization of armed forces, while the city of London is a dependent organization because (although it may have a police force) it does not have or control a military establishment.

b. *Concept of government*

Thus, the "government" of a polity is an organizational apparatus (complex of organizations) which:

- (1) is self-constitutive, in that it was not created or established by any organization;
- (2) has exclusive control over a population within a definite territory, excluding therefrom exercise of political authority by any other governmental organization;
- (3) is self-regulated, in that it is bound only by rules of its own making, and does not abide by or implement orders of other governmental organizations; and
- (4) has a clear coercive capability, in that it has as part of itself and subject to its exclusive control, a military establishment.

c. *Agencies*

On the basis of the above criteria, virtually all the organizations which in common discourse are referred to as governments are in fact merely agencies or arms of one government. For example, the government of the United States or of the U.S.S.R. would not be limited to the federal government of these countries but would embrace the entire organizational structure through which political authority is exercised, of which the federal, state and local governments are but particular branches or departments (although they are in themselves highly complex organizations). Similarly, organizations administering dependencies, whether a colony, protectorate, or under trusteeship, are not true "governments", i.e., of particular polities, because they fail to measure up to the above-mentioned criteria, particularly the requirements of exclusive territorial control and auto-regulation.

Such dependent status is even more evident in the case of organizations discharging highly specific functions, such as the Parliament or the Cabinet in England, and the President, Congress and the Supreme Court in the United States, which are but special organs of their respective governments. While it is true that they perform or discharge exalted functions and exercise political authority of the highest order, their work is but part of the massive activity of the entire governmental machinery operating within the society.

C. EMERGENCE AND DEVELOPMENT OF LAW

1. *Political regimes*

A legal order is the authoritative code of a polity. Such code consists of all the rules found in the enactments of the organs of the polity. Where

the state operates under a written constitution, its organs may be readily determined from a reading of its provisions. Once such organs are ascertained, it becomes an easy matter to locate their enactments. The rules in such enactments, along with those in the constitution, comprise the legal order of that constitutional state. Where, however, the polity is without a written constitution, some difficulty may be encountered in ascertaining the organs of the state. In such a situation, the coercive apparatus must first be ascertained, generally consisting of a military organization with or without a police auxiliary. This done, the next step is to determine the particular regulations and orders which govern or control the activities of the military organization. Those persons or groups of persons who provide ultimate direction to the coercive apparatus constitute the organs of the polity.

a. *Regime of fiat*

Let us take a historically possible example. A gifted military leader gains power over his own people and then leads them on a program of conquest. Neighboring tribes are subdued and placed under his rule. The original community is expanded to embrace many people and considerable territory. Because of the prowess of his army and the steadfast loyalty of its officers and men, his power over the entire community is unquestioned. His wish is law; at his command, his enemies are executed, their families sold into slavery, their treasure and estates become his private booty. He issues decrees for the maintenance of peace and order, and for the gathering of the revenue. All disputes are decided according to his orders; important ones resolved at his discretion. Favored members of his court share in such arbitrary and whimsical exercise of authority. This is a *regime of fiat*, or modicum of legality.

b. *Regime of incomplete legality*

Ambition then develops in him to become king over one people. Getting crowned poses no difficulty, but wielding different tribes with varying cultures and customs into one community is a formidable undertaking. He divides the territory into provinces, with each province corresponding to the territory occupied by each tribe, and appoints a governor for each province. He divides each province into districts and designates leaders in each tribe as districts heads. In order to stabilize his regime, codes regulating private transactions, family relations, and public administration are framed on the basis of the laws of his own tribe and he then issues them for the governance of the entire population. To enforce these codes, he sets up a system of courts, starting with district courts and ending with a king's court, which deals with appealed cases and special remedies against wrongful acts of the king's officer and servants. The king, however, remains supreme and above

the law. He can take any case and decide it as he sees fit. He remains harsh with his enemies, who are summarily seized and executed, their families exiled and their estates confiscated. He can suspend any law, or a particular provision thereof, or change or supersede it. He can intervene in any case and decide it as he sees fit. Unless he intervenes, however, the judgments of the courts and the administrative orders of the king's officers are all rendered in accordance with the prevailing codes. We call this a *regime of incomplete or partial legality*. All officials, except the king, are under the law.

### c. *Constitutional regime*

The community prospers, but abuses of the king persist until at last the community reacts. The rich men of the realm, including the landed gentry and the merchants, combine with the local leaders in raising an army to fight the king. Before the start of hostilities, a petition is sent to the king, with demands for reform. The more important are that the king must govern according to the laws enacted by a popular assembly elected by the several districts; that all acts of the king and his men may be inquired into by the courts of this purpose; and that all acts contrary to the law are null and void and of no effect. News of the overwhelming strength of the rebel army reaches the king and he accepts the demands. Civil war is averted. District representatives are elected to draft a constitution, and after a month, the new constitution is submitted to the people who approve it. Under the constitution, the king remains head of the state, but real power is now in the hands of the popular assembly elected by the district and the king's ministers. We call this a *constitutional regime*, or a regime of legality. Here, the acts of all officials, including those of the king, must conform to the fundamental law.

## 2. Emergence of the legal order

The three stages of development shown in the foregoing illustration delineate the emergence of the legal order. At the first stage, in the regime of fiat, not all the basic elements of a polity have fully emerged. While the elements of population, definite territory, and effective governmental organization are clearly existing, the elements of a common value system and authoritative code for the new community have not yet developed. This is basically the situation where a government is newly installed as a result of conquest, or revolution, bloody or otherwise. In such a situation, divergence in value systems may arise. Thus, the value system of the conquered population may be different from that of the new regime. Or, as in our illustration, the value system of the different peoples taken into the new community may be in conflict with one another, or with the value system of the

new regime. The consequence of this is that the new community is yet to be developed; there is, strictly, no existing community covering the entire population because there is no community of values. Hence, the principal integrative or unifying element in such new community is government in the sense of power holders backed by the coercive apparatus. Having displaced legitimate rulers, the new regime for the time being must face hostility or even resistance. It can preserve itself and maintain its control over the territory and the inhabitants only by overwhelming physical power. Initially, in the process of consolidation, it must govern by martial rule and according to martial law. Its principal object is peace and order within the community and security for its leadership and personnel. Its principal method is use of force, controlling the population through executions, mass arrests, mass imprisonment and the like. When open and active opposition is wiped out and the new regime pursues a policy of attraction, hostility to it may subside and it may slowly gain acceptance.

a. *Nascent code*

In a regime by fiat, when the values of the new regime are still awaiting acceptance by the population, government is largely in the hands of the military. In our illustration, the military leader is the supreme organ, laying down fundamental rules, handing down judgments in important cases, and making the crucial administrative decisions. His military commanders constitute subsidiary organs, exercising administrative and judicial functions in accordance with existing regulations and decrees. In this situation, the authoritative code would have minimal content, consisting largely of military regulations, decrees and orders. Even worse, it would not be genuinely authoritative, because in the effort to maintain itself, the regime is apt to commit many acts against the conquered population which are without legality but which are deemed essential to its survival. Of course, within the government machinery and its military apparatus, there would generally be faithful observance of the code.

b. *Partial code*

In the next stage, which is the regime of incomplete or partial legality, power has evolved into authority. A legitimate government has developed from a coercive regime. In our illustration, the erstwhile military ruler is now king of the realm. In this situation, the government is now organized in accordance with the authoritative code. The governors, district heads, judges and other functionaries occupy offices established by law, perform functions and exercise powers determined by law, and exercise their authority within the scope and limits set by law. In contrast to the regime of fiat, there now obtains general observance of legality by the officials of the

government. The only exception is the king himself. Because he is above and beyond the law, his acts are not subject to the law and he is not accountable for harms which would otherwise have been violations of the law. Hence, the legality of the regime is incomplete because the king is not obliged to act according to law. This is the case with traditional or established despotisms of various kinds, including those of absolute monarchs, emperors, sultans, dictators and the like.

In the stage of incomplete legality, the authoritative code includes not only rules of obligation but also provisions on the structure of authority, with corresponding functions, powers, limits thereto and procedures. Except for the king, the whole complex of organs and offices which collectively constitute the government are described and regulated in the authoritative code. Thus, the apparatus of power obtaining in the regime of fiat is now transformed into an apparatus of legal organs.

### *c. Constitutional order*

In the third stage, which is the constitutional regime or regime of legality, the transformation of power holders into legal organs is complete. Political power is now legal authority, to be exercised by duly designated functionaries according to law. The distinctive feature of the constitutional regime is that every aspect of the governmental apparatus and activity is governed by norms. No one may hold office, except according to a norm of legitimacy (succession, election, appointment). A legal organ may not act except as authorized by a norm of jurisdiction, specifying its function and corresponding powers. The acts of organs and functionaries are not valid and efficacious, unless they conform to norms of validity, whether substantive or procedural. In contrast to acts of a tyrant or despot in a regime of fiat, or to acts of the traditional ruler in a regime of incomplete legality, the acts of government under the constitutional regime are all legal acts, that is, acts pursuant to and in accordance with applicable norms. The authoritative code blankets the entire governmental apparatus and activity like a seamless web.

### 3. Foundations of the legal order

The emergence or development of a legal order begins with the existence of a political regime. There is such a regime if a population living within a definite territory is under the exclusive domination and governance by power holders, i.e., persons with sufficient coercive capability to compel obedience to their orders, and to exclude all others from exercising authority within the territory. Generally such power holders are either individuals, as in the case of charismatic leadership especially in small communities, or a group of individuals, as in the case of all elitist societies.

However, it is constituted, a regime must govern. This implies, first, that it has an organization or authority structure, and second, that it must make policy decisions (rules) and enforce them. Inevitably, an authoritative code is created.

a. *Transformation of custom into law*

A regime of fiat best illustrates this process because initially it may have no authoritative code. Let us advert to our earlier illustration. Let us assume that for many centuries the tribe of our gifted military leader enjoyed peace due to its relative isolation; as a consequence, their community had no genuine leadership but consisted of independent households. Let us assume further that, as a result of an armed incursion from a hostile hunting party from another tribe, the community is roused to the need for collective security through effective leadership. After he organizes a band of defenders and wipes out the invading force, our military genius is acclaimed by the entire tribe and appointed the first chief. As the very first chief of the tribe, he is soon confronted by a problem: how is he to govern the community? If he is a traditionalist, he must do this in accordance with the customs of the tribe. But what are the customs of the tribe? In this, he may be advised by the knowledgeable old men of the tribe. In the course of advising the chief, the customary rules may be expanded or modified to meet new developments or changes in the life or circumstances of the tribe. Or the chief himself may expand or modify the rules given him or even devise new rules in the guise of interpretation. Or if he is more assertive, he lays down rules to govern situations not dealt with or covered by existing customs. Either way, he is acting as the organ of the community in the development of its legal order. Assuming that there were really no rulers or administrators before him, he is the initiator or creator of the tribe's legal order. As he applies the customs of his tribe, whether original, modified or expanded, to particular disputes, the rules thereof are enacted (as precedents) and become part of the legal order. As he issues supplementary ordinances for the governance of the tribe, such rules are enacted (by legislation) and further enrich the tribe's legal order. This process of legal development is accelerated, where the chief organizes his advisory council into a court, vesting them with final authority to adjudicate cases, while reserving the power to legislate to himself. In this situation, there would be two organs and therefore two independent sources of legal rules.

b. *Legislation*

If the chief is a bold innovator, as sometimes happens even in traditional communities, the statutory element (legislation) would soon outrun

the customary element (precedents). As codes, decrees and ordinances are promulgated, the legal order of the tribe would grow by leaps and bounds. Legal history records such innovators as law givers.

Pursuing further our illustration, the chief turned conqueror and then king faces a more difficult predicament. As chief of his tribe, he has its customs ready to hand, available for enactment, through judgments and ordinances, into legal rules. But as the king over a population consisting of different tribes with diverse cultures and customs, he cannot enact indiscriminately; he has to select the common elements and make them congenial, through modification or other adjustment, to the demands of the values he seeks to develop and nurture for his new community. Equally important, he must replace existing tribal customs which are hostile to or inconsistent with the new values with more appropriate rules. Thus, the legal order grows largely by legislation, through the enactment of codes and the promulgation of decrees. As regulation expands, so does the organizational structure necessary to administer the laws. Administrative organs and offices are instituted through appropriate decrees or ordinances to assist the king in governing the community. At this stage, the legal order is vastly expanded and is now complex.

#### 4. Authoritative code of the polity

In determining the authoritative code of a polity, the key is its governmental structure (organizational apparatus). Generally, the authoritative code is the totality of the normative output of its entire governmental structure. Necessarily, the complexity of the structure will be reflected in the code. Thus, in the case of a federal system, the three levels of governmental organization generate their own body of rules, corresponding to federal law, state law, and local law. Within the structure at the federal and state levels, organization may be functional. Thus, constituent organs or agencies create constitutional law, legislative organs create statutory law, judicial organs create case law, executive organs create administrative ordinances. Within each organ, which is in itself an organization, there may be departmentalization. Within the legislative organization, the two houses may develop rules peculiar to each, such as Senate rules and House rules, including appropriate precedents. Within the judicial organization, special bodies of case law may develop, corresponding to the particular departments that produce them, such as Supreme Court precedents, Court of Appeals precedents, Court of Claims precedents, etc. Within the executive organ, the several departments produce their own body of rules, as for examples, the regulations and rulings of the State Department, or Treasury, or of independent commissions, such as the Federal Trade Commission, National Labor Relations Board, Federal Commerce Commission, etc. Particular of-

fices may even each produce a body of rules all their own, in the form of regulations, executive orders and rulings, such as the Presidency, the Office of the Attorney General, the Internal Revenue Service, the Auditor General, etc. It seems clear that every organ, department and office of government, in the regulation or administration of the matters entrusted to it, tends to produce an elaborate system of rules that is distinctly its own.

In ascertaining, then, the authoritative code of a polity, two steps are involved: first, a determination of the particular organs, departments and offices constituting the structure or structures of authority within a polity (organizational apparatus); and second, the body of rules corresponding to each organ, department or office, created or developed by them in the course of exercising their functions or administering the affairs entrusted to them. The authoritative code is the aggregate of all such bodies of rules, and its unity is rooted in the unity of the structure of authority.

### III. LAW AS QUEST FOR POLITICAL STABILITY

#### A. LAW AND LEGITIMATION OF REGIMES

##### 1. The quest for consensus

Political rule, we have said, rests on consensus and coercion. Consensus provides stability and is, therefore, sought after. But it cannot always be had, especially by a regime which is both new and unwelcome. With consensus absent and the prospect of its final emergence problematical, a regime is forced to rely on a maximum of coercion as the means to survival. A precarious peace may be maintained, with periods of truce alternating with periods of hostility and resistance. A regime required in the interest of its own survival to devote a maximum concern to the maintenance of order will usually be limited to a minimum of achievement. This in turn will breed further discontent, greater disquiet, deeper hostility, and will call into question the capacity of the regime to survive. The alternative to precarious existence is for the regime to build a consensus in its support. This requires no less than that the regime should become an instrument of the community in the protection, advancement and realization of its dominant values, whatever these may be, and in the process legitimize its authority.

##### a. *Stability through coercion*

Law, of course, is not the only medium for attaining and maintaining legitimacy. All measures which contribute to the acceptability of the regime, in terms of approval, cooperation, and support, may be considered in varying degrees as instruments of legitimation. Nor is law indispensable in the exercise of political power. It is possible, especially in every small political

communities, to govern without the benefit of a legal order. History shows instances of political rule in which the phenomenon of law as the modern world knows it was not visible. Public order can be achieved and maintained through the repression, violence, and terror. Striking examples are provided by regimes installed by military conquest or successful revolution. In such regimes, power is manifested through physical force, seldom according to law. But history also teaches that such regimes, if they are at all successful, are successful only in the short run. They are notoriously unstable. In the long run, they are either overthrown, or transformed into legitimate regimes.

b. *Stability through law*

In the process of such transformation, law plays a key role. For the process of legitimizing a political rule is the process of eventually subjecting its power to a constitutional order. Power, hitherto, apparently without check, is subjected to public commitments, with corresponding constraints and obligations. Thus, the quest for legitimacy implies transformation towards a regime of more or less limited authority. It is limited because power is exercised on a rational basis, that is, it is exercised in furtherance of general ends according to a system of rules. Such regime may be attained even without a formal constitution. It is enough that a system of customary checks on power is finally institutionalized. Examples are provided by many of the limited monarchies of Europe. Theirs were constitutional regimes, even before the adoption of their respective constitutions. The written constitutions merely formalized power arrangements that had already been institutionalized through customary and traditional practices.

2. Society based on common value-system

The evolution of a regime based on force to a regime of law derives its impetus from the very nature of society. People are bound together in society only by their common adherence to a system of general values. Without a common value system, there would be a population but not society. In a particular society, therefore, a regime based on a conquest or upon a successful seizure of power is likely to encounter serious resistance. Overthrow of their government is seldom welcome by its citizenry. Once such resistance is widespread and organized, the very existence of the new regime would be threatened. Even if no organized resistance develops, the effectiveness of the regime would be greatly reduced, perhaps to the minimum. To be sure, with sufficient forces, it would be able to maintain public order, but its efforts in connection with the more positive concerns of government would be blunted by passivity, if not covert hostility.

In pursuing a program of legitimation, several approaches are open. One course is to substantially incorporate the prevailing system of values

in its program of government. In this way, the dominant interests in the society would be brought over to its side. The other course would be to inculcate in the population a new system of values, which the regime is pledged to uphold and realize. This would entail a lengthy period of repression, while the regime is orienting the population to the new system of values through education and propaganda. A third course is to pursue both the above approaches simultaneously. The regime upholds and maintains the existing value system, with the exception of the most objectionable, purely as an interim measure, even as it is inculcating the new value system among the younger elements of the population. As soon as assimilation of the new value system is sufficiently widespread, the regime can phase out its support of the values of the old order, retaining only the values fully compatible with new. Each of these alternatives involve varying requirements for success, before the regime can finally obtain active cooperation among the major segments of the population. To be sure, even then, fragments of the former opposition may remain, and perhaps there will always be opposition to the regime in some form or other. But the support of the majority of the population, even if not overwhelming, is generally sufficient to assure its stability. Legitimacy does not require that the favorable evaluation of the regime should be unanimous or nearly so.

### 3. Emergence of a constitutional order

In incorporating a value system in its program of government, whether the values be old or new or an admixture of both, as a means to ultimate acquisition of legitimacy, the regime obtains large commitments, which collectively provide the impetus towards the emergence of a constitutional order. A program of realizing and maintaining values fundamental to a social order entails definite obligations and imposes specific constraints. On the negative side, the power of the regime may not be employed so as to impair, diminish or in any way detract from these values. On the positive side, the power and resources of the regime must be utilized to protect, enhance and realize these values. This latter obligation entails basic requirements of an effective program, namely, a suitable organization and a system of regulation. Considered together, these obligations and requirements, which flow from the commitment of a regime to a system of values, correspond to the minimum requirements of a constitutional order. Logically, therefore, every legitimate government as well as every regime which seriously aspires to be legitimate is impelled towards constitutionalism. The quest for legitimacy is a transforming process, is a movement towards a regime of law. Ideally, a legitimate regime is a constitutional regime, that is to say, a regime based upon and oriented to a constitutional order. Of course, there is the ever-present gap between commitment and action, between obligation and fulfillment, between promise and performance. The extent

of compliance with or adherence to fundamental obligations embodied in such order, differs widely, ranging from minor deviation to substantial disregard. In this sense, we may speak of effective, or developing, and nascent constitutional orders.

#### 4. Legitimation through a written constitution

Of the various methods of legitimizing a newly installed regime, the most significant is to establish the regime's title to authority, in accordance with the traditional mode of acquiring power from its source. During the hey-day of the divine right of kings in Europe, the coronation of a successful pretender or usurper by the highest authority of the Church was a mandatory procedure for investing him with the right to rule. Even the great Napoleon, backed by the initial invincibility of his armies, felt it necessary to get himself a crown. In the present day, when the right to rule is deemed founded on popular consent, the established method is the organization of a regime according to a democratic constitution adopted or approved by the people. Thus, a regime seeking a more stable basis for its authority than sheer physical might is under terrific constraints, under present circumstances, to get a constitution enacted and to govern according to its precepts. However great may be the gap between word and deed, this step is crucial in the establishment and maintenance of a legitimate regime.

As an instrument of legitimization, the written constitution offers distinct advantages which cannot be had otherwise. First of all, it puts in definitive black and white the commitments and obligations assumed by the regime. The whole population can see for themselves that their values are also the values of the regime. Second, a wide range of values can be incorporated, thereby maximizing the approval and support of the population. Through its constitution, a regime may express its commitment to the political values of democracy, popular sovereignty, republicanism, national independence, and local autonomy; to social values of justice, equality, liberty, general enlightenment, and general welfare; and to economic values of free enterprise or public ownership, business opportunity, or right to work. Third, apart from its commitment to a wide range of values, the constitution may provide specific guarantees or advantages to sectoral interests, such as just compensation for expropriation of private property or enterprise, religious liberty and tax exemptions for religious organizations, autonomy for labor organizations and other associations, etc. The facility with which a written constitution can enlist approval and obtain support of large segments of the population by appealing to their needs, interests, and aspirations, accounts in large part for its widespread contemporary popularity, particularly among the emergent nations.

### 3. Compliance with constitutional commitments

While substantial legitimacy may accrue to a regime upon its adoption of a constitution, popular approval and support consequent thereto is only probationary. If the regime disregards or ignores the constitution, to the detriment of the common values, the population may react with hostility or resistance, thereby imperilling the stability of the regime. To consolidate and enhance the legitimacy it has so far gained, the regime must abide substantially by its obligations under the constitution. On the negative side, it must not violate or disregard the constitution. On the positive side, it must act energetically to achieve or realize the goals announced in the constitution. Each program, each measure, each undertaking of government must be aligned with its constitutional commitments and obligations, in order that they can contribute to the maintenance and enhancement of the regime's legitimacy. It is thus seen that the quest for legitimacy requires persistent and continuing effort. Like a barometer, the legitimacy of a regime may rise or fall according to the perceived or felt level of its performance in relation to its constitutional commitments. The greater the achievement, in terms of constitutional goals, the greater is the acceptability of the regime. In this context, particular government programs and activities are instruments of legitimation to the degree that they strengthen or reinforce popular acceptance and approval of the regime. Similarly, such governmental functions, as legislation, adjudication, and administration, are aspects of a collective organizational effort to maintain a high level of legitimacy. On the whole, the thrust and direction of a regime subject to a written constitution is towards a rule of law.

## B. LAW AND INSTITUTIONALIZATION OF AUTHORITY

### 1. Structure and organizational rules

If in furtherance of its own legitimacy, a regime is to carry out its constitutional obligations (whether in writing or not), it must have a suitable organization and a system of regulation. In meeting these requirements, such regime will find, as every other regime governing a society has found, that law is an indispensable technique. On the one hand, both organization and regulation require institutionalization, that is to say, some permanence of whatever arrangements are set up. On the other hand, rules are the most efficacious medium of institutionalization. Whatever they prescribe can be highly particular, permanent, and public, i.e. known or capable of being known by all interested persons.

The importance of rules in organization is not difficult to see. Organization involves specification of essential functions, the scope of authority

essential to each function, such special powers as may be necessary, the fundamental limitations to be observed, specific conditions to be complied with, definite procedures to be followed, the place of each functionary within a chain of command, the method of assigning offices to particular persons, and specific objectives to be attained. Specification of such details for purposes of record and communication can only be done through rules.

The requirements of organization we have mentioned apply to every type of regime that seeks to carry out an effective program of government, whether the regime be of one man, of a few men, or of many. They also apply not only to each government as a whole, but to every subdivision of government as well, whether it is the machinery set up by a written constitution, or a judiciary established by statute, or a department set up by administrative order. Thus, institutionalization of authority through the medium of rules occurs at all levels of the government structure.

## 2. Structure through constitutional rules

Such process is seen most clearly in the organization of government set forth in a written constitution. Specific functions to be performed by individual persons are prescribed, with the functions frequently stated in terms of the power to be exercised. Such functions are attached to offices, such as the office of elector or voter, of president, of senator, of representative, or of judge. Particular offices or groups of offices are assigned a sphere of authority for the performance of binding acts. Such offices or groups of offices are organs, and the sphere of authority of each is its jurisdiction. A completed exercise of jurisdiction in a particular instance is an act. Thus, the office of president may at the same time be an organ, because he is vested with executive power. This is his jurisdiction, and a completed exercise of such jurisdiction in a particular instance is an executive act. Examples are recognition of a foreign state, conclusion of an executive agreement, and removal of executive officials for cause. In contrast, a voter has a constitutional function, which is precisely his office, but he has no jurisdiction. Electoral power (hence jurisdiction) pertains to the body of voters as whole, as electoral organ, because it is the collective exercise of the voting function which constitutes the official act, and therefore has authority to bind. When the voting is completed, the resulting official act is an election. But it is the act of the electoral organ, not of any particular voter. Similarly, a senator or representative in the legislature has a function with its attendant authority (which is his office), but he has by himself no legislative power. The jurisdiction to make laws pertains to the legislative organ, and it is the exercise of such jurisdiction which results, upon completion, in a legislative act. In some constitutions, jurisdiction may be vested in two or more official bodies, in which case the organ is composite. Thus, legislative power may

be vested in a Congress but the President is given authority to veto any measure enacted by Congress. Or the appointments made by the President are subject to confirmation by the legislature or of a body within the legislature.

Jurisdiction may embrace a wide range of matters, in which case it is general, or it may cover only specific matters, in which case it is special. Thus, the jurisdiction of the principal organs—the executive, legislative, judicial—is general, while the jurisdiction of the electoral organ is special. Sometimes, in addition to general jurisdiction, special jurisdiction may be vested in an organ. Thus, in some constitutions, the executive organ has special jurisdiction to pardon offenders, while the legislative organ or a body within such organ has jurisdiction over impeachment proceedings against high officials.

### C. LAW AND LEGITIMATION OF PRIVATE INSTITUTIONS

#### 1. Institutionalization of private interests

We have seen how law is instrumental in maintaining a level of legitimacy adequate to a particular regime's stability. This, however, is but one side of the exchange. For the very means of legitimizing political rule entails legitimation of private interests. Precisely a regime gains acceptability through recognition, protection and enhancement of common values through the law. These values are essentially abstractions of specific interests shared by individuals and groups within the society.

As in the case of political power, private interests are legitimized in part through institutionalization in law. For law has a mystique of its own. Impersonal, abstract and permanent, law commands deference and respect, partly through social conditioning and partly through a widely shared belief, not wholly unjustified, that it is the expression as well as guardian of the common interests. Thus, apart from their intrinsic worth, particular interests find greater acceptance and approval in society upon their embodiment in law. What the law has ordained is accepted because the law is authoritative.

Then, there is the imputation of social approval. For the law is the instrument of society for the common good. What the law recognizes must, therefore, be for the common good. Such attitude is reinforced if the regime commands widespread approval and support from the population. What a legitimate regime recognizes and protects must by that token be legitimate. At the same time, there is awareness that back of legal recognition lies the awesome power of the regime. Recognition in law is an institutionalized commitment that, in appropriate situations, claims in be-

half of the interests recognized will receive the aid of the public force. It is law, therefore, that transforms private interests into social interests.

## 2. Regulation as ordering of private interests

The legitimizing effect of embodiment in law is intensified by the fact that while some private interests are recognized and protected, others are not. Because of the great number of such interests in society, which often compete and conflict with one another, not all can be legitimized. Even among those that can be legitimized, the extent of recognition and protection will vary. This means sacrifice of certain interests, some wholly and many others to a substantial degree. Those adversely affected would naturally react with hostility, even resistance. Thus, the very process of legitimizing private interests entails the risk of disaffection of some elements or sectors of the population. Controversy and conflict is inescapable, for the ordering of interests involves value judgments. It is a truism that social values, like all other objects of human desire, are incommensurable. What interests are to be preferred, which interests are to be sacrificed, and to what extent the sacrifice will be exacted, are thus eternal problems of the social order. They are the stuff of recurring issues concerning justice and equality in human society.

The resolution of such conflicts and controversies, which is entailed in the ordering of interests, is the province of the polity. The competition and struggle among private interests to win legitimation by the regime is the propulsive force underlying politics. The method by which such legitimation is gained is the political process. Decisions of the regime concerning such legitimation are policy decisions. Embodied in official enactments, they are integrated into the legal order. For even as the endless process of accommodation and adjustment of interests goes on, and regardless of raucous protest and debate among partisans of contending interests, the governing of society cannot be postponed. Every regime must make hard and harsh decisions concerning the interests to be upheld by law for the time being and the extent to which they will receive recognition, protection and enhancement. Hence, at all time, a system of regulation of private interests must be a going concern. This is the heart of government, and its reason for being.

## 3. Regulation of conduct through social institutions

Such system of regulation is essentially concerned with directing human behavior in the society along the patterns or channels provided by recognized social institutions. Social institutions are socially approved relationships with a definite set of reciprocal obligations and privileges. Such institutions develop and persist because they satisfy, sustain or stabilize in-

dividual or group interests. Certain social institutions are designed for communal life on a more or less permanent basis, such as marriage or the family, while others serve highly specific ends or purposes, such as voluntary association or exchange. Thus, reciprocal obligations in marriage or in the family are general and extend to virtually every contingency that may befall the members of the community. In contrast, the reciprocal obligations that are entailed in a partnership or in a contract of lease are specific and positively defined, and must relate to the particular purpose of the relationship.

In channeling human conduct within society along the patterns of recognized social institutions, a regime generally avails of a combination of the following techniques or methods. First, the institutions acceptable to the regime because consistent with the value system to which it is committed, are extended express or implied recognition in the law. More often than not, such recognition is implied from provisions of law institutionalizing the relationships underlying such institutions. A social institution becomes a legal institution if the underlying relationship is recognized as a legal relationship, with definite consequences. Second, for purposes of law, such relationships are deemed to exist only when the conditions imposed by law are fulfilled. Thus, private acts or transactions operate to establish such relationships only if all the requirements for their validity as defined in the law are satisfied. Such requirement may touch on a great variety of matters, such as qualification of the parties, subject matters involved, object or purpose of the undertaking or transaction, and prescribed procedures, forms and solemnities. If such requirements are not met, either the relationship is not deemed to exist, or it is recognized only for limited purposes. Third, the law defines the duration as well as the consequences attached to such relationships in terms of reciprocal rights and duties. This has the effect of stabilizing the relationship because every person contemplating to enter such relationships can be fairly certain of what he can expect and what is expected of him. Fourth, the law prohibits conduct, normally incidental to such relationships, which occur outside of such relationships or in their absence. Such prohibitions, with their corresponding sanctions, serve to channel social conduct within patterns of recognized institutions. Thus, in all societies, penalties are prescribed generally for carnal knowledge of a woman outside of marriage, or for the taking of property outside the recognized modes of exchange. Fifth, the law encourages certain relationships by attaching to them special rewards and other incentives, such as subsidies to families, tax exemptions to religious organizations, and free transportation, lunches and other aid to school children.

#### 4. Social institutions and public policy

Generally, recognition extends to all dominant and deeply entrenched social institutions found in a particular society. These institutions are not creations of law, although they may be heavily regulated by law. Through such regulation, the law may exert great influence on the direction of their future development. Thus, marriage, family, voluntary association, property, and exchange are universal institutions, but their concrete manifestations vary considerably in different societies, doubtless due in part to the constraints imposed on them by the corresponding legal orders. The degree or scope of recognition extended to social institutions is a question of public policy, determined in large part by the system of values to which the regime is committed. To the extent that such institutions are expressive of the values of the regime, they will be recognized, protected, and enhanced; on the other hand, to the extent that they impede, impair or are otherwise incompatible with such values, they will be repressed, curtailed, or discouraged. In the latter case, unwelcome social institutions may be remade or reworked into forms more congenial to certain preferred values of the regime. Attempts have also been made to establish new types of social institutions to supplant or replace existing institutions deemed undesirable.

Generally, the scope of recognition may vary with types of social institutions. In the case of marriage, recognition is limited for the most part to monogamy, although in many countries polygamy is still permitted. In the case of the family, it is the nuclear form that is recognized in most developed countries, while the extended family is recognized in most traditional societies. In most societies, family relationships do not apply to illegitimates, although increasingly, provision is being made for their sharing to a limited extent the rights of legitimates. In the case of voluntary associations, recognition of virtually all forms is widespread, with the exception of political associations. In the liberal regimes, radical political associations, such as communist, syndicalist or anarchist organizations, are outlawed; in most of the others, only one political party is recognized; all others are banned. In the case of property, there is considerable variance. Virtually all societies place certain types of property beyond the commerce of men, such as air space, navigable rivers, public shrines, holy places, etc. Short of these, capitalist societies recognize private ownership of virtually all types of property, subject to exceptions and restrictions in the case of natural resources. In socialist countries, private ownership is limited to consumer goods; all economic goods, or means of production, are of the public domain.

Many institutions recognized are clearly adjuncts of primary institutions. Thus, marriage, legitimacy, filiation, illegitimacy, adoption, succes-

sion and inheritance, are subsidiary institutions which sustain, support or maintain the family. The institution of exchange and to a certain extent, the institution of voluntary association in its economic forms are adjuncts of the institution of property. Thus, contract in virtually all its forms involves acquisition or transfer of property. Corporations, partnerships, joint ventures and similar associations are concerned with the enhancement or increase of property through methods of exchange.

#### 5. The constitutive act and the creation of legal relations

In the regulation of social institutions, the key element is the constitutive act. The term "act" refers to a course of conduct described in pertinent rules of law. It is the constitutive act that "institutionalizes" i.e., that brings persons into legal relationships to which corresponding rights and duties are attached. The constitutive act may be unilateral, or associational. It is unilateral, when the act prescribed creates legal relations, although performed by a single person. Obvious examples are occupation as a basis of ownership of property, and renunciation of citizenship. An associational act is an agreement or conduct constituting an agreement of two or more persons which in law has the effect of establishing a particular relationship between two or more persons. An associational act may appear to be the act of a single person. Thus, a will is an associational act, because acceptance is required for the institution of the heir. This is true of a donation and adoption. On the other hand, the recognition of a natural child is a unilateral act because it is generally sufficient in law to establish the relationship between two persons of parent and child. In some cases, an associational act requires explicit agreement of two or more persons. Thus, marriage in many countries requires the formal expression of mutual consent through prescribed ceremonies or solemnities. Certain contracts, as for example, sale of land or a gift of realty, must be made in written form. Most transactions, on the other hand, require no particular form of agreement, and agreement may be inferred from a particular course of conduct of the persons involved.

Where the relationship established by the associational act is stable and enduring, as in the case of citizenship, marriage, or paternity and filiation, the position of particular persons within the relationship is a status. Thus, the male of a married pair is a husband, the female, a wife; the male parent is a father, and female, a mother.

### D. LEGITIMATION AND THE RULE OF LAW

#### 1. Public power and its constraints

We have seen how a regime in quest of legitimacy makes use of law in institutionalizing the social bargain, by which the regime expects approval

and support of the dominant sectors of the population, in exchange for its commitments towards the maintenance, protection and enhancement of their common as well as particular interests. From this basic arrangement flow powerful constraints which collectively make possible the maintenance of the constitutional order, and the development of a regime of law. On the part of the rulers, the stability of the regime is a paramount concern, since with the fall of the regime, they would cease to be rulers, with many resultant disadvantages. Such stability demands adherence to and compliance with its commitments and obligations as embodied in the law. Thus, rulers are impelled to observe and uphold the law, much as they would wish to be rid of its restraints and limitations. The law is the precipitate of community expectations, and palpable disregard or violation of its ordinances may provoke disenchantment, hostility, even resistance. Conformity with law is thus compelled as the price of legitimacy. There may, of course, be more appropriate motives for the observance of the law, particularly on the part of individual officials, but maintaining the regime's acceptability, hence its viability, is obviously the most powerful.

## 2. Adherence or obedience to law

On the part of the ruled, the recognition, maintenance and protection of their common interests in an overriding concern. As the means to such social goals, law becomes a focus for community loyalty and sentiment. Being the embodiment of community values, it becomes invested with the reverence, or even sanctity, evoked by such values. Being the guardian of general as well as particular interests, the entire community has a stake in its primacy and efficacy. The community, therefore, demands that the law be obeyed not only by the regime and its officials but by the community itself as well. Every member of the community comes under social pressure to observe and uphold the law. The logical consequence is that, in addition to official sanctions, the general mechanisms of social control are brought to bear in support of conformity to law. This becomes evident in the case of offenses injurious to preferred social values. Thus, in case of murder or rape, the community applies pressure on public officials to get the culprit or culprits punished. In addition, social sanctions are applied to the offenders even prior to their conviction and official punishment. The community may even express shock or outrage in case the culprits are acquitted on the ground of some legal technicality. Such community reactions spring, not from any generalized sentiment that the law is the law and should be enforced, but from the community's attachment to its value system as expressed in the law, the breach of which ought to be punished if the injury to the community is to be vindicated.

#### IV. THE VALIDITY OF LAW

##### A. INTERACTIONS OF POLITY AND LAW

###### 1. The polity as a complex of systems

###### a. *Action system*

A polity is a population within a territory under an independent government. The prime functions of the government is to bring about, attain or realize the goals or ends of the community, whatever these may be. To this end, those in charge of policy in the government adopt appropriate rules to govern the conduct of the population, who, along with the officials, conform their conduct to that prescribed in the rules. There is compliance because the rules are for the enhancement and protection of interests common to them, and at any rate, they are accepted as legitimate. Of course, deviation from the rules occur, such as failure to conform to requirements for valid action, commission of prohibited acts, or failure to perform specific obligations. Administrative officials in the government then act on these deviations, according to the consequences prescribed in the rules. Invalid acts are so declared, and expected legal relations do not arise. Violations of prohibitions, such as crimes or other wrongs, are subjected to sanctions. Unfulfilled obligations are enforced, either by having them performed or by exacting damages as substitute performance. Because the processes and interactions participated in by its components constitute social action in the physical sense, the polity is an *action or behavioral system*.

###### b. *Cultural system*

A necessary component of a stable polity is the legal order. In the discharge of their functions, the organs and offices of government enact and promulgate statutes, decrees, ordinances, regulations, and innumerable judgments, decisions and orders. These acts contain norms, which prescribe behavior which ought to be. These norms prescribe the structure of authority, that is, the offices and organs of government, and define their functions, including their powers and limits as well as conditions thereto. The definite social roles or statuses, such as husband and wife, parent and children, vendor and vendee, and the like, and the rights and duties pertaining to recognized social relations. Finally, they describe anti-social conduct, for which they prescribe sanctions, as well as desirable conduct, with its consequent rewards. Because the legal order for all the complexity of the affairs and processes that it describes, consists of rules, i.e. norms expressed in language, and is therefore non-dimensional, it is a *culture system*.

### c. *Basic relationships*

The legal order consist of norms flowing from acts of government, i.e. organs and offices. It is a normative precipitate of processes within the polity. As culture system, it is embedded within the political system. It is, therefore a sub-system of the larger system, which is an action system. An interchange occurs between the systems in regard to acts of government, i.e. organs and offices. Power holders are individual persons in the action system; they are organs or offices in the culture system. Acts in the sense of physical behavior occur in the action system. They are described in the culture system. If the actual behavior (with the material elements) corresponds to the behavior described, thereby meeting the requirements and conditions prescribed, there is a valid act for purposes of the action system. If the act contains norms, it in an enactment and the norms become part of the culture system. Then, the culture system is valid (i.e. exists as a legal order) because it is created by and applied in the political process; on the other hand, the validity of official acts in the political system is determined by conformity with what is prescribed in the legal order.

However, it is in a constitutional regime that we find the political system and the legal order in truly systemic conjunction. The legal order is a product of the political process, but the political process is itself regulated by the legal order. The political system creates the legal order as a normative framework to govern and direct the activity within the system. The validity of behavior within the political system is determined by the legal order, even as the validity of the legal order stems from its being a created component of such political system. Behavior within a political system acquires validity as acts for purposes of the system if they conform to the requirements of the legal order; on the other hand, norms enacted through such acts become part of the legal order, and in their turn regulate behavior seeking validation as acts.

## 2. Political action as norm creation

### a. *Norm creation and the legal order*

In the harsh world of fact, constitutional regimes do not prevail everywhere nor endure all the time. Thus, while norms flow from official acts, official acts do not necessarily conform to norms. This is most evident in a regime of fiat. When a military ruler enjoying overwhelming coercive capability orders his generals to maintain peace and order at all costs, resulting in dreadful carnage and wanton destruction, the acts of his men are based or founded upon a norm, i.e., his order; on the other hand, his own act of issuing such an order flows from no explicit norm but rests

upon his will and wish to preserve his power and his regime. Thus, his act is not legal, but purely political, that is, based on the fact of domination. Similarly, in a regime of incomplete legality, the acts of the king's officers and agents are legal, being founded upon the codes he has ordained, but his own act of ordaining or promulgating such codes is not legal but political, simply because there is not specific norm in the existing legal order that authorizes their enactment. This is likewise the case with his enactment of a constitution and his transfer of the powers of government to the organs established thereby. The transformation of a regime with unlimited power to a regime with limited power is a political phenomenon, not a juridical imperative.

But once a constitutional regime is established, whether by concession or by revolution, all official acts must conform to the constitutional norms. Hence, a two-way flow is established. Norms flow from official acts, which in turn conform to pre-existing norms. It is in the special case then when a constitutional regime obtains that the creation of new norms takes place according to the legal order. In such a situation, to use the phrase of Kelsen, law governs its own creation,

#### b. *Types of organs*

Every authority structure in charge of governing an association consists of organs that may be grouped according to functions. Those who make or lay down policy are the policy organs, those that implement existing policy are the administrative organs. Particular occasions for the exercise of such functions constitute acts. An *act* is behavior significant for the authoritative code, in that it creates norms or it is behavior described in a norm. Thus a papal bull is an act because it creates norms. On the other hand, a murder does not create any norm, but it is an act because it is behavior described in a legal norm. Or behavior constitutes an act because it is described in a norm and at the same time it creates other norms. An example is a statute adopted pursuant to a constitutional norm authorizing legislation.

#### c. *Enactments*

Where an act creates norms, it is an enactment. The enactment is public if it proceeds from an organ of state; it is private if the source is an organ of a private association. Public organs are power holders, that is individuals or groups exercising public authority, i.e. their acts are binding on the coercive apparatus. In a constitutional regime, every public organ is constituted or established by law, with authority proceeding from a specific norm of jurisdiction. On the other hand, in a regime of fiat or incomplete legality, the authority of public organs may proceed from law,

but this is only true at the administrative level. The ultimate power of policy whether pertaining to an absolute monarch, emperor, or some other category of despot, is founded on the fact of domination, that is coercive capability resulting from command or control over the coercive apparatus within the society.

*d. Types of enactments*

The norms in an enactment may be general, in which case they are rules, or particular, in which case they are orders. A norm is general and therefore a rule if many persons, usually an indefinite number, are bound by such norm. On the other hand, a norm is particular and therefore an order if it binds particular persons specified therein and no other. Thus, the norms in a statute are rules, while the norms in a judgment or in an award are orders.

*e. Enactment of rules*

Generally, policy organs enact rules, while administrative organs issue or hand down orders. This is so because policy organs are constituted of power holders whose exercise of authority is subject to only a few norms or to none. Thus, the chief of a tribe administering a regime of fiat, or a king administering a regime of incomplete legality is not subject to any particular norm in the legal order of their respective polities. Both are then free to frame policy decisions (rules) most conducive to the attainment of the goals of their communities. In a constitutional regime, of course, the organs of policy have to act within the constraints of constitutional prescriptions. Thus, such organs have to act in accordance with the norms defining their jurisdiction, and the norms governing the validity of their acts. By and large, however, policy organs even under a constitutional regime enjoy a wide range of choice and discretion in framing particular policy decisions. In matters within their jurisdiction, they are generally not obliged to act in a particular way. In contrast, administrative organs have to apply the law, hence, they are under constraints of applicable norms. While policy organs are frequently under no legal duty to act at all, administrative organs must act and come to a decision and their decisions must be in accord with the applicable norms. The duty to apply the law imposes the duty to conform their acts to such norms.

While generally, a policy organ promulgates rules, it may exceptionally enact particular norms. Thus, it is the practice common among legislatures to pass private bills which benefit particular persons identified therein, as in the case of laws conferring citizenship or granting franchises. Or a predominantly administrative organ may incidentally enact policy decisions. In constitutional regimes generally, the highest judicial body, while adjudicating

particular cases and therefore laying down particular norms, sometimes legislates interstitially by propounding new doctrines or rules in the course of interpreting a statute or the constitution. Or the same organ may be conferred both types of functions. Thus, in constitutional regimes of the presidential type, the chief executive is given the privilege to make policy decisions by promulgating general rules under certain conditions. At the same time, he enjoys specific authority to enact particular norms, through appointments, or pardons. Or a policy organ may enact one type of norm exclusively, as in the case of the constituent organ which lays down constitutional rules, or in the case of the electoral organ, which hands down particular norms only, i.e., election of particular persons to particular offices.

#### 4. Administration as norm creation

##### a. *Enactment of particular norms*

Administration is the application of norms to specific situations, and in the process of such application, particular norms are enacted. An illustration will make this clear. Let us say that a statute on forest uses provides for timber concessions to citizens with specific qualifications, including financial capability, and entrusts its administration to the director of forestry, a public officer in the department of natural resources. Let us further say that X is a citizen who desires to obtain a timber concession. He fills up a form application, giving the data indicated therein, and files it with the office of the director, together with payment of fees.

The application is then processed by the subordinates of the director. This means, first, that the required data is furnished, and that the same is true and correct. If some particulars have not been given, X is told to supply the deficiencies. If the requisite items are all supplied, an inquiry or check may be made to determine their veracity or accuracy. X may even be required to submit evidence on disputed items. Administration then includes a determination of the existence of the particular conditions, personal and material, prescribed by a norm for the performance of an act, in this case, the grant of a timber concession. If after all these proceedings, the director is satisfied that X has met all the conditions, he will grant the application, issuing for this purpose a license duly executed by him and specifying the scope and terms of the concession. Such license constitutes a particular norm, in that it binds only X to particular duties and vests in him particular rights. Such grant is authorized, because a legal rule empowers the director to make such grant upon a showing of the statutory conditions. At the same time, the director was also under a legal duty to make the grant, because if it is true that the conditions required by law have been met, then the grant ought to be made. ♦

b. *Administrative appeal as enactment*

Let us further suppose that, notwithstanding this legal duty, the director denies the application. Such denial is also a particular norm, in that it binds X to a mandatory course of conduct, i.e., he may not hold and operate a timber concession. Because X is not satisfied with the action taken on his application, he invokes the administrative remedy provided in the statute and appeals the matter to the department head, who is the administrative superior of the director. In effect, X is asking the department head to review the facts of record, to annul the norm denying the application, and to promulgate another norm granting him the concession. If after examining the facts of record, the department head finds that the conditions prescribed by law are met by X, he then comes to the conclusion that the director was under a legal duty to grant the concession and that the denial was erroneous, i.e., it was behavior contrary to such legal duty. The department head then issues a particular norm annulling the norm under review, and granting the timber concession. Pursuant to such superior norm, the director of forestry issues the license evidencing the grant.

c. *Administrative enforcement as norm creation*

Let us suppose further that after X had gotten the concession and had begun to operate it, his first shipment of logs was intercepted by the district forester and his men. Under the statute on forest uses, the district forester is charged with the duty, among others, to prevent illegal cutting of timber, and authorizes him to arrest those so engaged, and to seize the cut timber. Upon seeing the employees of X with the logs, the district forester approaches them and ask for pertinent papers. The papers are produced, but the district forester finds them unsatisfactory. He asks the employees of X to turn over the logs to his men. The employees comply, and the district forester and his men take possession of the logs. In legal terms, the request for surrender of the logs was a particular norm, issuing from a public officer and binding on particular individuals, the employees of X. Such norm is based on a general norm in the statute, which authorizes the district forester to perform specific acts. Whether such particular norm is valid or not will depend on whether or not the act performed is one of the authorized acts, and the conditions prescribed therefor have been met. The subsequent take-over of the logs by the district forester and his men is another act, the act of possession. This act creates another and different particular norm, i.e., the State becomes possessor of the logs, with correlative duties upon all (including X and his employees) to refrain from disturbing or usurping such possession. Its validity is also determined by the existence of the conditions prescribed by the statute.

d. *Judicial enforcement as norm creation*

From the viewpoint of X, the foregoing acts of dispossession and seizure are unlawful, i.e., contrary to behavior imposed by applicable norms, hence, the corresponding particular norms are invalid and not binding on him. This is, however, only his opinion; against it are acts of a public officer, with corresponding norms. By their putative existence, such norms have to be obeyed, even if believed not to be valid and therefore non-existent in a purely legal sense. A ground rule underlying legal orders is that a colorable act, i.e. act performed by a public organ or officer in apparent discharge of its or his legal duty, that is, behavior imposed by a norm, gives the corresponding particular norm a putative existence; and anyone subject to such particular norm must conform to it, until its invalidity (that is, non-existence) is authoritatively declared, as provided for in general norms. In the particular case of X, this may be done by administrative appeal to the superior officer of the district officer, or by a proceeding in court. Let us say that X decides to file a judicial suit, because he feels this remedy to be more adequate and expeditious in preventing further injury to his interests. He files a complaint for this purpose against the district officer. In the complaint, asks that a writ issue commanding the district officer to restore possession of the logs to X. He bases such relief on the following grounds. The license issued to X to operate the timber concession establishes his status as licensee and vests in his particular rights, including the right to cut and fell timber, and remove the logs for sale or other disposition. Such rights create correlative duties on all other persons not to interfere with such rights, including the district forester.

The general duty of the district forester under statute to prevent cutting, felling and removal of logs is not applicable to X simply for lack of basis; he is not cutting, felling and removing logs illegally because as licensee, he has a right to do such acts with respect to timber in his concession. That the logs in question were cut from timber within the concession is borne out by the scaling marks made by the government scaler assigned to the concession. In thus dispossessing X of his logs and taking possession thereof, the acts of the district forester were in direct violation of his particular duty, which is to refrain from acts of interference or disturbance of X's right to remove the logs. Such acts, being in contravention of a valid particular norm, are illegal and in fact did not create any norms binding on X or his employees.

For his part, the district forester asks for an order denying the writ sought, i.e., a particular norm upholding the validity of the acts complained of, finding the corresponding norms duly existing, and in effect enjoining X to respect the State's possession of the logs. He bases this belief on the following grounds. He concedes that X is a licensee of a timber concession.

He claims, however, that his men saw fresh tree stumps in an adjacent watershed area, which is not within any concession, including that of X's; that upon receipt of such information, he rushed to the area; that the only logs being moved within the area inspected were those in the possession of X's employees; that while said logs bore authenticating marks indicating them as having come from X's concession, he believed such marks are not genuine but fabricated.

The fundamental task before the court is to apply the law, that is, to determine the specific norm that will govern the case and pursuant to which the court will render judgment, that is, to enact a particular norm prescribing the duties and stating the rights of the parties. This task, however, must be preceded by other if lesser tasks. Before the court can determine the applicable norm, the court must first determine the true facts. Thus, a trial is held and the parties submit evidence in support of their respective allegations. On the basis of such evidence, the court will proceed to make its findings of fact. These findings will determine which norm will apply to the case. The test of applicability is the correspondence between the specific conditions of a norm, i.e. requirements for its operation, and the specific facts as found. In the case of X, if the judge finds that the logs in question were cut and felled from the concession, the applicable norms are those stated in the timber license, and the writ will issue in favor of X. This, in legal terms, is a superior norm applying the particular norm in the license of X, declaring the norms putatively arising from the acts of the district forester as invalid, hence, in-existent, and directing the district forester to restore possession of the logs to X.

Supposing the district forester does not restore the logs to X as directed, a violation occurs and upon a showing of such violation by X, the court, on the one hand, will hold the district forester in contempt and impose sanctions on him, and on the other, will direct the sheriff or other public functionary to take possession of the logs and deliver them to X. An order of contempt is also a particular norm directing that a penalty, say imprisonment, be imposed on the district forester. Specifically, there is a command to a specific public officer requiring him to take the district officer into his custody and put him in prison for the period stated. Pursuant to such norm, the public officer arrests the district forester, using such reasonable force as may be necessary to make him submit to his custody. Similarly, the sheriff acting pursuant to the order of execution will take possession of the logs and restore them to X. If the district forester resists, he may again be adjudged in contempt, and subjected to sanctions. The acts of arrest and incarceration, as well as the act of repossession and delivery, are valid acts because they are undertaken pursuant to valid norms. As acts of execution, they do not involve norm-creation. The duty of the forester to submit to

arrest and to remain in prison is imposed by the order of contempt. His duty to surrender possession of the logs is imposed by the writ of mandatory injunction issued by the court, which correlatively, establishes the right of X to repossess the logs.

#### 4. Social action and the legal order

##### a. *Social action and its components*

It should be stressed that a political system is a system of social action involving a number of elements, including as earlier mentioned, a population, a dominant value system, an authority structure (including its coercive apparatus) and its legal order, even if merely nascent or emergent. Behavior occurs within such system in space and in time, participated in by the power holders or members of the population or both. Within a given society, actual physical behavior, including purposive activity, is ceaseless; every minute of each day sees people acting, whether individually or collectively, to meet their wants and their needs, giving birth, feeding, sleeping, mating together, conversing, working alone or together, associating for some purpose or other, transacting business involving countless articles and services, engaging in conflict, individually or collectively, or otherwise involved in the myriad of activities that constitute the collective or communal life. In any given community, most activity is purposive because oriented to values (goals or ends) and regulated by a culture web of normative patterns. Such patterns include many of those described as folkways, including customs, traditions, mores, etc. In primitive society, folkways are the dominant patterns in the culture web that regulates tribal or other collective activity. Once the community is also politically organized, the dominant sector of the cultural web is the legal order. Other normative patterns survive and new ones may develop, such as the authoritative codes of associations and groups, but from the viewpoint of the political system, such non-legal normative patterns are only secondary and are recognized or given effect only interstitially, that is, they may supplement legal rules, although they may not be inconsistent with such rules. The legal order is deemed dominant because its observance is backed by the coercive apparatus of the community, even if it may be less efficacious than the other normative patterns (such as custom or tradition), as where it clashes with values still entertained by the community.

##### b. *Scope of the legal order*

It is thus obvious that the legal order does not encompass all behavior within the community. Its regulatory scope is confined to behavior affecting or otherwise related to the dominant value system, that is, the values underlying the regime, which are not necessarily shared by all the community, or

particular sectors thereof. Behavior which would realize or concretize such values are promoted or encouraged through protection and rewards, while behavior which would thwart or defeat such values are discouraged and repressed with sanctions and penalties. Marriage provides a good illustration. Individual life and happiness is rooted profoundly in the family, hence, marriage is regulated in all societies. People, of course, marry—with or without the law. Marriage as a course of mutual conduct is a social relation, even in the absence of law or when it occurs outside the law. But when it is contracted in conformity with law, the marital relation is not only a social relation, it becomes a legal relation which receives elaborate protection in virtually all present-days societies. Positively, it is protected by barriers to its dissolution; in many jurisdictions, it remains indissoluble until death. Then, the relation gives rise to mutual claims and duties, including support, cohabitation, co-ownership of gains, inheritance, etc. On the negative side, the parties are under a duty to abstain from conduct injurious or hurtful to the relation, and stiff sanctions are provided for bigamy, adultery, concubinage, etc.

*c. Dimensional character of social action*

As the normative framework of social action within the political system, the legal order must necessarily describe the components of such action, namely, the participants or actors, the desirable acts and their consequent relations and obligations, and the undesirable acts and their consequences in terms of sanctions or penalties. In relation to actual behavior, such description has imperative or prescriptive effect. In the case of desirable behavior, the legal order holds out protection and rewards. In the case of undesirable behavior, the legal order threatens sanctions. In either case, there is inducement to conformity, with consequent channelling effect on social conduct.

While the legal order describes social action that ought to occur within the political system, with prescriptive effect, it should not be forgotten that actual behavior occurs within a different sphere. A description of what ought to be done, whether by the citizen or by his government, is one thing; compliance or conformity with a norm is an altogether different matter. For description occurs at a purely verbal level; the physical existence of norms is confined to their linguistic expression. Norms being purely culture objects, a legal order is a symbolic order. Social acts, however, constitute a complex of physical phenomena, involving as they do human beings as actors, things in the environment as the material element, and their relations in terms of space and time. Every act, if purposive, involves external movements within the spatio-temporal sphere oriented to some subjective purpose or goal in an individual mind. Acts then are rooted in physical phenomena which take place outside the legal order, which is purely a symbolic system.

d. *Validity of social action*

In the typical situation, there would be substantial correspondence between actual behavior and prescribed behavior, i.e. behavior described in the legal norms. Acts actually performed are those acts which ought to be. To the extent of such congruence the acts performed are valid for the political system. Where the discrepancy between what is done and what is prescribed is substantial, such acts are not valid for the system. On the whole then, the legal order functions as a measure of validity of social action. In the language of Kelsen, it operates as a scheme of interpretation of actual behavior in regard to its validity, and appropriate consequences. Thus, the validity of social action is translated into efficacy of the legal order. Conformity of action to law means that the first is valid and the second is effective.

e. *Conditions of efficacy*

Within a political system, social action is influenced by the legal order in two ways: desirable action is elicited through a promise of protection and rewards, while undesirable action is deterred or repressed through a threat of sanctions and penalties. The existence of such influence is premised on the efficacy of the system as a whole. This assumes that the rules in the legal order have been communicated both to the population and to the administrative organs and offices in the authority structure, that the population accepts the threats and the rewards as sufficient incentives towards the desired course of action indicated in the norms, that the administrative organs will provide the rewards and apply the sanctions in conformity with the norms, and that the population considers it highly probable that such enforcement will take place.

f. *Determination of efficacy*

It is immediately clear that the question of efficacy is to be resolved within a larger framework in which the legal order is but one of the components. Efficacy expresses a relationship involving measurement. There must be evaluation of the thing measured against a standard of measurement. In the case of the legal order, the measure of efficacy is the level of conformity or congruence of social action to the behavior described in the norms. A comparison must be made between what ought to be done and what is actually done. This involves inquiry into social behavior as it occurs in space and time, quite beyond and outside the legal order as culture system.

Evaluation in any case is complicated by the fact that in every legal order, two general duties are imposed. First is the duty of compliance, which is imposed on the population, that is to say, the citizenry or inhabitants. The second is the duty of enforcement, which is imposed on the

administrative organs and officials of the government. The duty in either case is prescribed in the legal norms, which specifies the particular behavior which ought to occur upon the happenings of certain conditions. The duty of enforcement is prescribed in norms which contain as a basic condition the deviation from or violation of another norm, which we shall call secondary norms. The duty of compliance is prescribed in norms not containing such condition, which we shall call primary norms. The duty to support one's spouse, or to fulfill one's contracts, or to refrain from crime, is prescribed in primary norms for citizens and inhabitants. The duty to collect taxes, or to issue a business permit, or to deliver mail to the proper addressee, or register documents, is prescribed in primary norms concerning public officials. On the other hand, the duty of a policeman to arrest one who has committed theft, or the duty of a judge to prescribe a penalty for one found guilty of murder, or the duty of a licensing officer to revoke a permit upon proof of a violation thereof, issues from or is prescribed in secondary norms. It is to be stressed that under secondary norms, official duty arises only upon the existence of unlawful conduct, that is, breach of a norm.

*g. Kinds of efficacy*

Let us now examine two contrasting situations. In a highly integrated society, the level of compliance would be very high. In this situation, there would be virtual congruence of social behavior with the behavior prescribed in the primary norms. Correspondingly, violations of law are rare and enforcement proceedings are at a minimum. In this situation, there is no question that the efficacy of the legal order is at its optimum.

On the other hand, consider a population consisting of tribes with disparate and conflicting cultures. Because many legal rules are at war with tribal customs or traditions, the level of compliance would be low. There would be widespread disregard and violation of the primary norms, such as that for example, prohibiting polygamy, or forbidding child marriage, or requiring attendance of children at school. But let us say the administrative apparatus is very efficient, and virtually all violations of primary norms are proceeded upon, convictions are handed down, and penalties imposed — in discharge of the duties imposed by the secondary norms. In this situation, there is a high level of enforcement due to the efficiency and dedication of the officials. Where there is a high degree of conformity, there is congruence between official behavior as it actually occurs and official behavior as prescribed in the secondary norms. In terms of results, virtually every violation of law is dealt with according to the legal order, although the incidence of violation (of primary norms) is very high. In this situation, we can also say that the level of efficacy is very high. Yet because compliance with the primary norms is low, the dominant values of the regime are not being enhanced or realized.

We must then distinguish between the efficacy of the political system from the efficacy of the legal order. The first implies a high level of compliance with primary norms in the legal order. This is so because, for purposes of the system, social action must be oriented substantially to the value component, that is, the goals or ends to which the regime is committed. The measure of the success of the system is goal-attainment, which requires a high level of conformity by the citizenry with their legal duties. Where violations of such duties are widespread and persistent, goal-attainment by the system is low and so is its efficacy, notwithstanding that because of administrative efficiency, there is a high level of enforcement of law. Thus, the efficacy of the political system as a whole may be low, although the efficacy of the legal order itself is high. On the other hand, the reverse may be true. Where society is well integrated and compliance with primary norms is at a high level, performance in the matter of law enforcement may nevertheless be inferior. Due to bureaucratic inefficiency, corruption, or other causes of maladministration, the few violations that occur may not be proceeded upon and penalized according to law. There is here a combination of efficacy in the political system and lack of it in the legal order.

#### 5. Validity of the legal order

An order of rules has the status of a legal order if it is a culture system within a political system, that is to say, it is a sub-system of a polity. It is this precise link with the polity that is the criterion of validity. Under this criterion, it cannot be said off-hand that a given order of rules is a legal order. By itself, an order of rules may not be determined with any certainty as a legal order. There may be indications of its legal character by the character of its norms, as where they provide for coercive sanctions. The Twelve Tables, for example, has all the earmarks of legality in this respect, but it is not part of any legal order, although *it used* to be part of the Roman legal order in classical times. To establish legal validity, i.e., existence as a legal order, it must be shown, first, there is a particular political system in existence, and second, that the order of rules in question is a culture system within such political system. Thus, the quality of legality is *emergent*, that is, it does not attach to an order of rules as a visible inherent quality, but arises or "emerges" only upon showing of its link to a particular polity. A legal order does not exist as such, it is a legal order of a particular political system.

##### a. *Validity distinguished from efficacy*

The legal order is a sub-system of a polity because it is a product or precipitate of political action, consisting as it does of the norms flowing from the acts of public organs and officers. The link is between the culture system and the structure of authority, with the latter as the *source of origin* and the

former as the product. In the case of efficacy of a legal order, the test is the degree of conformity of social action in general, i.e. population and government, with the legal norms. The link is between the culture system and the whole population, with the behavior of the latter as the variable. Validity is a fixed quality — the culture system remains a legal order, as long as its polity endures. Efficacy however, is highly variable, and may be high or low depending upon the factors that affect obedience. Thus, a legal order may continue to exist as such, although for various reasons its efficacy is low.

b. *Historical legal orders*

The efficacy of a legal order must be distinguished from the question of its existence. So long as a legal order is operative or functioning, it exists, although its efficacy may be very low. But the point may be reached, where the legal system ceases to be operative as a whole, that is, it is no longer obeyed by the population or enforced by the officials. In such a situation, the culture system loses its validity as a legal order and is transformed into a historical legal order.

Where the legal order abruptly ceases as a whole to be applied, i.e., it is no longer used as a criterion of validity of social action, the general cause is the extinction of the political system of which it is a part. Such extinction generally results from the overthrow of the existing government by conquest or by revolution. In terms of the legal order, the situation is that power-holders not corresponding to the political organs described in the legal order are now exercising functions of government, and that such power-holders did not attain power in accordance with the norms of legitimacy. In a much less likely case, the extinction of the political system may result from a wholesale and abrupt disregard of the legal order by the existing legitimate power-holders, i.e. those holding the key public offices. This presupposes a concerted refusal of key officials in the government to apply the law. Specifically, this means massive and wholesale nonconformity of official action with prescribed official behavior and concerted recognition of acts violative of the legal order as valid and legitimate. The effect is also a revolution, but a revolution in which the participants are themselves the legitimate power-holders. Through their assumption of new power roles in disregard of the existing legal order, a new regime emerges displacing the current legitimate regime, which is consequently extinguished. This is the basic pattern of the palace revolution, or *coup d'etat*.

When a political system is destroyed with the overthrow of its government through conquest or revolution, the legal order of the system also perishes as such. It ceases to be valid, i.e. existing, legal order. As culture component of the defunct political system, it is transformed from

an existing legal order into a historical legal order. It survives purely as a cultural artifact. This is so, notwithstanding assimilation of many of its elements into the emerging legal order of the successor political system. Prior to incorporation, such elements do not have the status of valid legal rules; it is through enactment (adoption) by the successor system that once more, they acquire validity as legal rules — and not as rules of the defunct legal order but as rules of the new and existing legal order. Philippine experience provides excellent illustrations. With the overthrow of the Spanish colonial government at the turn of the century, the colonial legal order ceased to exist as such, i.e., it was transformed into a historical legal order. Elements of such historical legal order included the Spanish Civil Code and the Spanish Penal Code. With the establishment of the American military, then civil, colonial regime in the Islands, a wholly new legal order began to develop and emerge. This new colonial government incorporated those two codes into the legal order by adopting them in toto. From cultural artifacts, they become once more legal rules but of the existing American colonial government, not of the defunct Spanish colonial regime, although both codes continued to be referred by their original names. Thus, historical legal orders are frequently sources of rules for developing legal orders. Perhaps the most influential in this respect is the legal order of the Roman Empire as embodied in the *Corpus Juris*, which has served as model and source of materials for many codes, including the French Civil Code and the German Civil Code.

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