HANS KELSEN: GENERAL THEORY OF LAW, New York, Russel & Russel, 1961

Questions to the text:

2. Kelsen: Law as a specific social technique (p. 15-29)

1. What is the difference between direct and indirect motivation?
2. How Kelsen distinguishes law from morality and religion?
3. What Kelsen means when defining law as a coercive order?
4. What is Kelsen's definition of law?
5. What is the difference between Kelsen's and the sociological understanding of law of Eugen Ehrlich, founder of the sociology of law?

Hans Kelsen: General Theory of Law and State. New York: Russell and Russell, 1961

B. The Criterion of Law (Law as a Specific Social Technique)

If we confine our investigation to positive law, and if we compare all those social orders, past and present, that are generally called "law," we shall find that they have one characteristic in common which no social orders of another kind present. This characteristic constitutes a fact of supreme importance for social life and its scientific study. And this characteristic is the only criterion by which we may clearly distinguish law from other social phenomena such as morals and religion. What is this criterion?

a. Direct and Indirect Motivation

It is the function of every social order, of every society — because society is nothing but a social order — to bring about a certain reciprocal behavior of human beings: to make them refrain from certain acts which, for some reason, are deemed detrimental to society, and to make them perform others which, for some reason, are considered useful to society.

According to the manner in which the socially desired behavior is brought about, various types of social orders can be distinguished. These types — it is ideal types that are to be presented here — are characterized by the specific motivation resorted to by the social order to induce individuals to behave as desired. The motivation may be indirect or direct. The order may attach certain advantages to its observance and certain disadvantages to its non-observance, and, hence, make desire for the promised advantage or fear of the threatened disadvantage a motive for behavior. Behavior conforming to the established order is achieved by a sanction provided in the order itself. The principle of reward and punishment — the principle of retribution — fundamental for social life, consists in associating conduct in accordance with the established order and conduct contrary to the order with a promised advantage or a threatened disadvantage respectively, as sanctions.

The social order can, however, even without promise of an advantage in case of obedience, and without threat of a disadvantage in case of disobedience, i.e. without decreeing sanctions, require conduct that appeals directly to the individuals as advantageous, so that the mere idea of a norm decreeing this behavior suffices as a motive for conduct conforming to the norm. This type of direct motivation in its full purity is seldom to be met with in social reality.

In the first place, there are hardly any norms whose purport appeals directly to the individuals whose conduct they regulate so that the mere idea of them suffices for motivation. Moreover, the social behavior of

individuals is always accompanied by a judgment of value, namely, the idea that conduct in accordance with the order is "good," whereas that contrary to the order is "bad." Hence, conformity to the order is usually connected with the approval of one's fellow men; non-conformity, with their disapproval. The effect of this reaction of the group to the conduct of individuals in accordance or at variance with the order, is that of a sanction of the order. From a realistic point of view the decisive difference is not between social orders whose efficacy rests on sanctions and those whose efficacy is not based on sanctions. Every social order is somehow "sanctioned" by the specific reaction of the community to conduct of its members corresponding to or at variance with the order. This is also true of highly developed moral systems, which most closely approach the type of direct motivation by sanctionless norms. The only difference is that certain social orders themselves provide definite sanctions, whereas, in others, the sanctions consist in the automatic reaction of the community not expressly provided by the order.

b. Transcendental and Socially Organized Sanctions

The sanctions provided by the social order itself may have a transcendental, that is, a religious, or a social-immanent character.

In the first place, the sanctions provided by the order consist in advantages or disadvantages that are to be applied to the individuals by a superhuman authority, a being characterized more or less as godlike. According to the idea that individuals have of superhuman beings, in the beginnings of the religious development, they exist, not in a hereafter different from the here, but closely connected with men in the nature surrounding them. The dualism of the here and the hereafter is still unknown to primitive man.* His first gods probably are the souls of the dead, particularly dead ancestors, that live in trees, rivers, rocks, and especially in certain animals. It is they who guarantee the maintenance of the primitive social order by punishing its violation with death, sickness, unluckiness in hunting and in similar ways, and by rewarding its observance with health, long life, and luck in hunting. Retribution does indeed emanate from divinity but it is realized in the here. For nature is explained by primitive man according to the principle of retribution. He regards natural events only with respect to the advantage or disadvantage connected with them, and he interprets the advantageous events as reward, the disadvantageous as punishment inflicted upon him by the personal and superhuman beings whom he imagines as existing within or behind the natural phenomena. The

* Cf. my SOCIETY AND NATURE (1943), pp. 24ff.

earliest social order has a completely religious character. Originally, it knows no sanctions other than religious ones, that is, those emanating from a superhuman authority. Only later, at least within the narrower group itself, do there appear, side by side with the transcendental sanctions, sanctions that are socially immanent, that is to say, organized, sanctions to be executed by an individual determined by the social order according to the provisions of this order. In relations between different groups, blood revenge appears very early as a socially organized reaction against an injury considered unjustified and due to a member of a foreign group.

The group from which this reaction issues is a community based on blood relationship. The reaction is induced by fear of the soul of the murdered person. It seems that the latter cannot revenge himself upon his murderer, if he belongs to a foreign group. Hence, he compels his relatives to carry out the revenge. The sanction thus socially organized is itself guaranteed by a transcendental sanction. Those who fail to revenge the death of their relative upon the foreign murderer and his group are threatened with sickness and death by the soul of the murdered man. It seems that blood revenge is the earliest socially organized sanction. It is worthy of note that originally it had an inter-tribal character. Only when the social community comprises several groups based on blood relationship does blood revenge become an intra-tribal institution.

In the further course of religious development, the divinity is conceived of as appertaining to a realm very different from the here, and far removed from it, and the realization of divine retribution is put off to the hereafter. Very often this hereafter is divided — corresponding to the two-fold character of retribution — into a heaven and a hell. In this stage, the social order has lost its religious character. The religious order functions only as a supplement and support to the social order. The sanctions of the latter are exclusively acts of human individuals regulated by the social order itself.

c. Punishment and Reward

It is a fact well worth noting that of the two sanctions here presented as typical — the disadvantage threatened in case of disobedience (punishment, in the broadest sense of the term), and the advantage promised in case of obedience (the reward), in social reality the first plays a far more important role than the second. That the technique of punishment is preferred to that of reward is seen with especial clarity where the social order still has a distinctly religious character, i.e., is guaranteed by transcendental sanctions. Primitive peoples' behavior conform-

ing to the social order, especially the observance of the numerous prohibitions called "taboos," is determined principally by the fear that dominates the life of such peoples. It is fear of the grievous evil with which the superhuman authority reacts against every violation of traditional customs. If violations of the social norms are much less frequent in primitive societies than in civilized societies, as some ethnologists report to be the case, it is chiefly this fear of the revenge of the spirits, fear of a punishment that is of divine origin but takes place here, that is responsible for this effect of preserving social order. The hope of reward has only a secondary significance. And even in more highly developed religions, where divine retribution is no longer or not only realized here, but in the hereafter, the idea of a punishment to be expected after death holds first place. In the actual beliefs of mankind, fear of hell is much more alive, and the picture of a place of punishment is much more concrete, than the usually very vague hope of a future paradise where our virtue shall find its reward. Even when the wish-fulfilling phantasy of individuals is not limited by any restrictions, it imagines a transcendental order the technique of which is not entirely different from the technique of the empirical society.

This may be due to the fact that religious ideology always more or less mirrors actual social reality. And in this, as far as the organization of the group is concerned, essentially only one method of bringing about socially desired behavior is taken into account: the threat and the application of an evil in case of contrary behavior — the technique of punishment. The technique of reward plays a significant role only in the private relations of individuals.

d. Law as a Coercive Order

The evil applied to the violator of the order when the sanction is socially organized consists in a deprivation of possessions — life, health, freedom, or property. As the possessions are taken from him against his will, this sanction has the character of a measure of coercion. This does not mean that in carrying out the sanction physical force must be applied. This is necessary only if resistance is encountered in applying the sanction. This is only exceptionally the case, where the authority applying the sanction possesses adequate power. A social order that seeks to bring about the desired behavior of individuals by the enactment of such measures of coercion is called a coercive order. Such it is because it threatens socially harmful deeds with measures of coercion, decrees such measures of coercion. As such it presents a contrast to all other possible social orders — those that provide reward rather than punishment as sanctions, and especially those that enact no sanctions at

all, relying on the technique of direct motivation. In contrast to the orders that enact coercive measures as sanctions, the efficacy of the others rests not on coercion but on voluntary obedience. Yet this contrast is not so distinct as it might at first sight appear. This follows from the fact that the technique of reward, as a technique of indirect motivation, has its place between the technique of indirect motivation through punishment, as a technique of coercion, and the technique of direct motivation, the technique of voluntary obedience. Voluntary obedience is itself a form of motivation, that is, of coercion, and hence is not freedom, but it is coercion in the psychological sense. If coercive orders are contrasted with those that have no coercive character, that rest on voluntary obedience, this is possible only in the sense that one provides measures of coercion as sanctions whereas the other does not. And these sanctions are only coercive measures in the sense that certain possessions are taken from the individuals in question against their will, if necessary by the employment of physical force.

In this sense, the law is a coercive order.

If the social orders, so extraordinarily different in their tenors, which have prevailed at different times and among the most different peoples, are all called legal orders, it might be supposed that one is using an expression almost devoid of meaning. What could the so-called law of ancient Babylonians have in common with the law that prevails today in the United States? What could the social order of a negro tribe under the leadership of a despotic chieftain — an order likewise called "law" — have in common with the constitution of the Swiss Republic? Yet there is a common element, that fully justifies this terminology, and enables the word "law" to appear as the expression of a concept with a socially highly significant meaning. For the word refers to that specific social technique of a coercive order which, despite the vast differences existing between the law of ancient Babylon and that of the United States of today, between the law of the Ashantis in West Africa and that of the Swiss in Europe, is yet essentially the same for all these peoples differing so much in time, in place, and in culture: the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct. What the social conditions are that necessitate this technique, is an important sociological question. I do not know whether we can answer it satisfactorily. Neither do I know whether it is possible for mankind to emancipate itself totally from this social technique. But if the social order should in the future no longer have the character of a coercive order, if society should exist without "law," then the difference between this society of the future

and that of the present day would be immeasurably greater than the difference between the United States and ancient Babylon, or Switzerland and the Ashanti tribe.

e. Law, Morality, Religion

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

It is, however, not the effectiveness of the sanctions that is here in question, but only whether and how they are provided for by the social order. The socially organized sanction is an act of coercion which an individual determined by the social order directs, in a manner determined by the social order, against the individual responsible for conduct contrary to that order. This conduct we call "delict." Both the delict and the sanction are determined by the legal order. The sanction is the reaction of the legal order against the delict, or, what amounts to the same thing, the reaction of the community, constituted by the legal order, to the evil-doer, the delinquent. The individual who carries out the sanction acts as an agent of the legal order. This is equivalent to saying that the individual who carries out the sanction acts as an organ of the community, constituted by the legal order. A social community is nothing but a social order regulating the mutual behavior of the individuals subject to the order. To say that individuals belong to a certain community, or form a certain community, means only that the individuals are subject to a common order regulating their mutual behavior. The legal sanction is thus interpreted as an act of the legal community; while the transcendental sanction — the illness or death of the sinner or punishment in another world — is never interpreted as a reaction of the social group, but always as an act of the superhuman, and therefore super-social, authority.

f. Monopolization of the Use of Force

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

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

g. Law and Peace

Peace is a condition in which there is no use of force. In this sense of the word, law provides for only relative, not absolute peace, in that it deprives individuals of the right to employ force but reserves it for the community. The peace of the law is not a condition of absolute absence of force, a state of anarchy; it is a condition of monopoly of force, a force monopoly of the community.

A community, in the long run, is possible only if each individual respects certain interests — life, health, freedom, and property of everyone else, that is to say, if each refrains from forcibly interfering in these spheres of interest of the others. The social technique that we call "law" consists in inducing the individual to refrain from forcible interference in the sphere of interests of others by specific means: in case of such interference, the legal community itself reacts with a like interference in the sphere of interests of the individual responsible for the previous interference. Like for like. It is the idea of retribution which lies at the base of this social technique. Only in a relatively late stage of evolution is the idea of retribution replaced by that of prevention. But then it is a change only of the ideology justifying the specific technique of the law. The technique itself remains the same.

Thus forcible interference in the sphere of interests of another constitutes on the one hand an illegal act, the delict, and on the other hand, a sanction. Law is an order according to which the use of force is generally forbidden but exceptionally, under certain circumstances and for certain individuals, permitted as a sanction. In the rule of law, the employment of force appears either as a delict, i.e. the condition for the sanction, or as a sanction, i.e. the reaction of the legal community against the delict.

Inasmuch as forcible interference in the sphere of interests of individuals is permitted only as a reaction of the community against prohibited conduct of the individual, inasmuch as forcible interference in the sphere of interests of the individual is made a monopoly of the community, a definite sphere of interests of the individuals is protected. As long as there exists no monopoly of the community in forcible interference in the sphere of interests of the individual, that is to say, as long as the social order does not stipulate that forcible interference in the sphere of interests of the individual may be resorted to only under very definite conditions (namely, as a reaction against illegal interference in the sphere of interests of the individuals, and then only by stipulated individuals), so long is there no sphere of interests of the individuals protected by the social order. In other words, there is no state of law which, in the sense developed here, is essentially a state of peace.

h. Psychic Compulsion

The view that coercion is an essential element of law is often falsely interpreted to mean that the effectiveness of the legal sanction is part of the concept of law. The sanction is said to be effective if the individuals subjected to the law — in order to avoid the evil of the sanction — behave "lawfully," or if the sanction is executed in case its condition, the delict, has been fulfilled. An expression of this view is the frequently heard statement that law is an "enforcible" rule or, even, a rule which is actually "enforced" by a certain authority. Typical is the well-known definition given by Holland: "A law in the proper sense of the term is . . . a general rule of external human action enforced by a sovereign political authority." * That is to say, it is of the essence of a legal rule that the sanction it prescribes is executed by the proper organ. But such is the case only if an individual does not behave lawfully, if he "violates" the legal rule. In other words, the sanction to be executed by the organ is provided for only in those concrete cases where the conduct which the legal order tries to bring about has not been "enforced" and, thus, has proved not to be "enforcible." It is only for this case that the sanction is provided.

Let us use the term "subject" to denote the individual who does or does not obey the law, the term "organ" to denote the individual who executes the sanction and by so doing applies the law. If one describes the law as an "enforcible" or "enforced" rule of human behavior, then a distinction must be made between the behavior of the subject, and the behavior of the organ. In his definition, Holland seems to refer to the behavior of the organ. However, those who speak of the "enforcement" of law usually have in mind rather the behavior of the subject: the fact that the subject is compelled to obey the rule of law. They are referring, not to the coercive measure which the organ actually executes, but to the subject's fear that the measure will be taken in case of non-obedience, of unlawful conduct. The "coercion" which they have in mind is thus a psychic compulsion, resulting from the idea men have of the legal order. This idea is "coercive" if it furnishes a motive for the behavior desired by the legal order. So far as this psychic compulsion goes, the law does not differ from moral or religious norms. For moral and religious norms, too, are coercive insofar as our ideas of them make us behave in accordance to them.

* Sir Thomas Erskine Holland, The Elements of Jurisprudence (13th ed. 1924) 42f.

i. The Motives of Lawful Behavior

The attempt to make this "psychic compulsion" an essential element of the concept of law is open to a further serious objection. We do not know exactly what motives induce men to comply with the rules of law. No positive legal order has ever been investigated in a satisfactory scientific manner with a view to answering this question. At present, we do not even have at our disposal any methods which would enable us to treat this sociologically and politically highly important problem in a scientific way. All we can do is to make more or less plausible conjectures. In all probability, however, the motives of lawful behavior are by no means only the fear of legal sanctions or even the belief in the binding force of the legal rules. When the moral and religious ideas of an individual run parallel to the legal order to which he is subject, his lawful behavior is often due to those moral and religious ideas. Benefits which are in no way determined by the legal order but in fact connected with lawful behavior may also be a motive for conduct conforming to the law. A man fulfills his legal duty to pay his debts very often not because he wishes to avoid the sanction provided by the law against an individual who does not pay his debts, but because he knows that if he carefully pays his debts his credit will increase; whereas if he does not pay his debts, he will lose his credit. The advantage of credit is not provided by the legal order as a reward for fulfilling one's duties. It is a benefit connected in fact with lawful behavior; and it is very often the wish to have such benefit which is the motive of lawful behavior. From the fact that people, by and large, behave in accordance with the rules of law, it would be gratuitous to conclude that this is caused by the psychic compulsion which the idea of the legal order, the fear of its sanctions, exercises. That a legal order is "efficacious," strictly means only that people's conduct conforms with the legal order. No specific information is thereby given about the motives of this conduct and, in particular, about the "psychic compulsion" emanating from the legal order.

j. Arguments against the Definition of Law as Coercive Order

1. Eugen Ehrlich's Theory

The doctrine according to which coercion is an essential element of law is very often disputed, especially from a sociological point of view. The typical argument is a reference to the fact that men obey the legal order, fulfill their legal duties in many cases — if not mostly — not because of fear of the sanctions provided for by the legal order, but for

other reasons. Thus, for instance, Eugen Ehrlich, one of the founders of the sociology of law, says:

> It is quite obvious that a man lives in innumerable legal relations, and that, with few exceptions, he quite voluntarily performs the duties incumbent upon him because of these relations. One performs one's duties as father or son, as husband or wife, does not interfere with one's neighbor's enjoyment of his property, pays one's debts, delivers that which one has sold, and renders to one's employer the performance to render which one has obligated oneself. The jurist, of course, is ready with the objection that all men perform their duties only because they know that the courts could eventually compel them to perform them. If he should take the pains, to which, indeed, he is not accustomed, to observe what men do and leave undone, he would soon be convinced of the fact that, as a rule, the thought of compulsion by the courts does not even enter the minds of men. Insofar as they do not simply act instinctively, as indeed is usually the case, their conduct is determined by quite different motives: they might otherwise have quarrels with their relatives, lose their positions, lose custom, get the reputation of being quarrelsome, dishonest, irresponsible persons. The jurist ought to be the last person of all to overlook the fact that that which men do or leave undone as a legal duty in this sense often is something quite different from, occasionally is much more than, that which the authorities could ever compel them to do or leave undone. The rule of conduct, not infrequently, is quite different from the rule that is obeyed because of compulsion (*Zwangsnorm*).*

The statement that the individuals subject to the legal order conform their behavior to this order not merely because they wish to avoid the disagreeable effects of the sanctions provided for by the order, is undoubtedly correct. But this statement is not at all irreconcilable with the doctrine that coercion is an essential element of law. This doctrine does not refer to the actual motives of the behavior of the individuals subjected to the legal order, but to its content, to the specific means used by the legal order to bring about a certain behavior of the individuals, to the specific technique of this social order. The doctrine that coercion is an essential element of law does not refer to the actual behavior of the individuals subjected to the legal order, but to the legal order itself, to the fact that the legal order provides for sanctions and that by this very fact and only by this fact, that is, by this specific social technique, is it distinguished from other social orders. If an individual — against his instinctive impulse — refrains from murder, adultery, theft, because he believes in God and feels himself bound by the Ten Commandments, and

* Eugen Ehrlich, Grundlegung der Soziologie des Rechts (1913); quotation from English translation, Fundamental Principles of the Sociology of Law (1936) 21.

not because he fears the punishment which certain legal norms attach to these crimes, the legal norms are — as far as this individual is concerned — completely superfluous; having no effect, they are, from a socio-psychological point of view, even not existent in relation to this individual. If we characterize human behavior from the point of view of its motives, the behavior of the individual in question is a religious, not a legal phenomenon, is a subject-matter of the sociology of religion, not of the sociology of law. If the legal order provides for punishment in case a man commits murder, theft, adultery, it is because the legislator supposes — rightly or wrongly — that the belief in God and His Ten Commandments, that other motives than fear of the legal punishment, do not suffice to induce men to refrain from murder, theft, and adultery. If there exists any legal order providing its specific sanctions, it is precisely because the men who create and execute this legal order suppose — rightly or wrongly — that other social orders providing no sanctions or other sanctions are not effective enough to bring about the behavior which the creators and executors of the legal order consider to be desirable.

What distinguishes the legal order from all other social orders is the fact that it regulates human behavior by means of a specific technique. If we ignore this specific element of the law, if we do not conceive of the law as a specific social technique, if we define law simply as order or organization, and not as a coercive order (or organization), then we lose the possibility of differentiating law from other social phenomena; then we identify law with society, and the sociology of law with general sociology.

This is a typical mistake of many legal sociologists, and especially of Eugen Ehrlich's sociology of law. His main thesis runs as follows: Law is a coercive order only if we identify the law with the rules according to which the courts have to decide the legal disputes that are brought before them. But the law is not, or is not only, the rule according to which the courts decide or have to decide, disputes; the law is the rule according to which men actually behave:

> The rule of human conduct and the rule according to which the judges decide legal disputes may be two quite distinct things; for men do not always act according to the rules that will be applied in settling their disputes. No doubt the legal historian conceives of law as a rule of human conduct; he states the rules according to which, in antiquity or in the Middle Ages, marriages were entered into, husband and wife, parents and children lived together in the family; he tells whether property was held individually or in common, whether the soil was tilled by the owner or by a lessee paying rent or by a serf rendering services; how contracts were entered into, and how property

> descended. One would hear the same thing if one should ask a traveler returning from foreign lands to give an account of the law of the peoples he has become acquainted with. He will tell of marriage customs, of family life, of the manner of entering into contracts; but he will have little to say about the rules according to which law-suits are being decided.
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> This concept of law, which the jurist adopts quite instinctively when he is studying the law of a foreign nation or of remote times for a purely scientific purpose, he will give up at once when he turns to the positive law of his own country and of his own time. Without his becoming aware of it, secretly as it were, the rule according to which men act becomes the rule according to which their acts are being adjudged by courts and other tribunals. The latter, indeed, is also a rule of conduct, but it is such but for a small part of the people, i.e. for the authorities, entrusted with the application of the law; but not like the former, for the generality of the people. The scientific view has given way to the practical view, adapted to the requirements of the judicial official, who, to be sure, is interested in knowing the rule according to which he must proceed. It is true, jurists look upon these rules as rules of conduct as well, but they arrive at this view by a jump in their thinking. They mean to say that the rules according to which courts decide are the rules according to which men ought to regulate their conduct. To this is added a vague notion that in the course of time men will actually regulate their conduct in accordance with the rules according to which the courts render their decisions. Now it is true that a rule of conduct is not only a rule according to which men customarily regulate their conduct, but also a rule according to which they ought to do so; but it is an altogether inadmissible assumption that this "ought" is determined either exclusively or even preponderantly by the courts. Daily experience teaches the contrary. Surely no one denies that judicial decisions influence the conduct of men, but we must first of all inquire to what extent this is true and upon what circumstances it depends.*

Ehrlich's answer to this question is that judicial decisions influence the conduct of men only to a very limited extent. The rules according to which the courts and other organs of the community decide disputes, and that means the rules providing for coercive acts as sanctions, are only a part, and not even an essential part, of the law which is the rule or the complex of rules according to which men — including the men who are not organs of the community — actually behave. But not every rule according to which men actually behave is a legal rule. What is the specific difference between legal rules and other rules of human behavior? This means: what is the criterion of law, what is the specific object of a sociology of law in contradistinction to the object of general sociology? To this, Ehrlich has only the following answer:

> Three elements, therefore, must under all circumstances be excluded from the concept of law as a compulsory order maintained by the state — a concept

* Ehrlich, Sociology of Law 10–11.

to which the traditional juristic science has clung tenaciously in substance, though not always in form. It is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i.e. the law is an ordering. . . . We may consider it established that, within the scope of the concept of the association, the law is an organization, that is to say, a rule which assigns to each and every member of the association his position in the community, whether it be of domination or of subjection (*Ueberordnung, Unterordnung*), and his duties; and that it is now quite impossible to assume that law exists within these associations chiefly for the purpose of deciding controversies that arise out of the communal relation. The legal norm according to which legal disputes are being decided, the norm for decision, is merely a species of legal norm with limited functions and purposes.*

The result of Ehrlich's attempt to emancipate the definition of law from the element of coercion is the definition: the law is an ordering of human behavior. But this is a definition of society, not of law. Every complex of rules regulating the mutual behavior of men is an order or organization which constitutes a community or association and which "assigns to each and every member of the association his position in the community and his duties." There are many such orders which have no legal character. Even if we limit the concept of order or organization to relatively centralized orders which institute special organs for the creation and application of the order, the law is not sufficiently determined by the concept of order. The law is an order which assigns to every member of the community his duties and thereby his position in the community by means of a specific technique, by providing for an act of coercion, a sanction directed against the member of the community who does not fulfill his duty. If we ignore this element, we are not able to differentiate the legal order from other social orders.

2. The Never-ending Series of Sanctions

Another argument against the doctrine that coercion is an essential element of law, or that sanctions form a necessary element within the legal structure, runs as follows: if it is necessary to guarantee the efficacy of a norm prescribing a certain behavior by another norm prescribing a sanction in the case the former is not obeyed, a never-ending series of sanctions, a *regressus ad infinitum*, is inevitable. For "in order to secure the efficacy of a rule of the *n*th degree, a rule of the $n + 1$ degree is necessary." † Since the legal order can be composed only by a definite

* Ehrlich, Sociology of Law 23–24.

† N. S. Timasheff, An Introduction to the Sociology of Law (1939) 264.

number of rules, the norms prescribing sanctions presuppose norms which prescribe no sanctions. Coercion is not a necessary but only a possible element of law.

The assertion that in order to secure the efficacy of a rule of the *n*th degree, a rule of the $n + 1$th degree is necessary, and that therefore it is impossible to secure the efficacy of all legal rules by rules providing for sanctions, is correct; but the rule of law is not a rule the efficacy of which is secured by another rule providing for a sanction, even if the efficacy of this rule is not secured by another rule. A rule is a legal rule not because its efficacy is secured by another rule providing for a sanction; a rule is a legal rule because it provides for a sanction. The problem of coercion (constraint, sanction) is not the problem of securing the efficacy of rules, but the problem of the content of the rules. The fact that it is impossible to secure the efficacy of all rules of a legal order by rules providing for sanctions does not exclude the possibility of considering only rules providing for sanctions as legal rules. All the norms of a legal order are coercive norms, i.e. norms providing for sanctions; but among these norms there are norms the efficacy of which is not secured by other coercive norms. Norm *n*, e.g., runs as follows: If an individual steals, another individual, an organ of the community, shall punish him. The efficacy of this norm is secured by the norm $n + 1$: If the organ does not punish a thief, another organ shall punish the organ who violates his duty of punishing the thief. There is no norm $n + 2$, securing the efficacy of the norm $n + 1$. The coercive norm $n + 1$: If the organ does not punish the thief, another organ shall punish the law-violating organ, is not guaranteed by a norm of the $n + 2$nd degree. But all the norms of this legal order are coercive norms.*

Finally, one objects to the doctrine that coercion is an essential element of law by alleging that among the norms of a legal order there are many rules which provide for no sanctions at all. The norms of the constitution are frequently pointed out as legal norms although they provide for no sanctions. We shall deal with this argument in a later chapter.†

C. Validity and Efficacy

The element of "coercion" which is essential to law thus consists, not in the so-called "psychic compulsion," but in the fact that specific acts

according to L. Petrazhitsky, Theory of Law and State (in Russian: 2d ed. 1909) 273–285.

* This does not mean that the execution of the sanction stipulated in a legal norm has always the character of a legal duty. Cf. *infra*, pp. 59 ff.

† Cf. *infra*, pp. 143 ff.