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ECONOMY AND SOCIETY

AN OUTLINE OF INTERPRETIVE SOCIOLOGY

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CHAPTER I

THE ECONOMY AND SOCIAL NORMS

1. *Legal Order and Economic Order*

A. THE SOCIOLOGICAL CONCEPT OF LAW. When we speak of "law," "legal order," or "legal proposition" (*Rechtssatz*), close attention must be paid to the distinction between the legal and the sociological points of view. Taking the former, we ask: What is intrinsically valid as law? That is to say: What significance or, in other words, what *normative* meaning ought to be attributed in correct logic to a verbal pattern having the form of a legal proposition. But if we take the latter point of view, we ask: What *actually* happens in a group owing to the *probability* that persons engaged in social action (*Gemeinschaftshandeln*), especially those exerting a socially relevant amount of power, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms? This distinction also determines, in principle, the relationship between *law* and *economy*.

The juridical point of view, or, more precisely, that of legal dogmatics[1] aims at the correct meaning of propositions the content of which constitutes an order supposedly determinative for the conduct of a defined group of persons: in other words, it tries to define the facts to which this order applies and the way in which it bears upon them. Toward this end, the jurist, taking for granted the empirical validity of the legal propositions, examines each of them and tries to determine its logically correct meaning in such a way that all of them can be combined in a system which is logically coherent, i.e., free from internal contradictions. This system is the "legal order" in the juridical sense of the word.

Sociological economics (*Sozialökonomie*), on the other hand, con-

siders actual human activities as they are conditioned by the necessity to take into acount the facts of economic life. We shall apply the term *economic order* to the distribution of the actual control over goods and services, the distribution arising in each case from the particular mode of balancing interests consensually; moreover, the term shall apply to the manner in which goods and services are indeed used by virtue of these powers of disposition, which are based on *de facto* recognition (*Einverständnis*).

It is obvious that these two approaches deal with entirely different problems and that their subjects cannot come directly into contact with one another. The ideal "legal order" of legal theory has nothing directly to do with the world of real economic conduct, since both exist on different levels. One exists in the realm of the "ought," while the other deals with the world of the "is." If it is nevertheless said that the economic and the legal order are intimately related to one another, the latter is understood, not in the legal, but in the sociological sense, i.e., as being *empirically* valid. In this context "legal order" thus assumes a totally different meaning. It refers not to a set of norms of logically demonstrable correctness, but rather to a complex of actual determinants (*Bestimmungsgründe*) of human conduct. This point requires further elaboration.

The fact that some persons act in a certain way because they regard it as prescribed by legal propositions (*Rechtssätze*) is, of course, an essential element in the actual emergence and continued operation of a "legal order." But, as we have seen already in discussing the significance of the "existence" of rational norms,[2] it is by no means necessary that all, or even a majority, of those who engage in such conduct, do so from this motivation. As a matter of fact, such a situation has never occurred. The broad mass of the participants act in a way corresponding to legal norms, not out of obedience regarded as a legal obligation, but either because the environment approves of the conduct and disapproves of its opposite, or merely as a result of unreflective habituation to a regularity of life that has engraved itself as a custom. If the latter attitude were universal, the law would no longer "subjectively" be regarded as such, but would be observed as custom. As long as there is a chance that a coercive apparatus will enforce, in a given situation, compliance with those norms, we nevertheless must consider them as "law." Neither is it necessary—according to what was said above—that all those who share a belief in certain norms of behavior, actually live in accordance with that belief at all times. Such a situation, likewise, has never obtained, nor need it obtain, since, according to our general definition, it is the "orientation" of an action toward a norm, rather than the "success" of that norm that

is decisive for its validity. "Law," as understood by us, is simply an "order" endowed with certain specific guarantees of the probability of its empirical validity.

The term "guaranteed law" shall be understood to mean that there exists a "coercive apparatus" (in the sense defined earlier),[3] that is, that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement. The means of coercion may be physical or psychological, they may be direct or indirect in their operation, and they may be directed, as the case may require, against the participants in the consensual group (*Einverständnisgemeinschaft*) or the association (*Vergesellschaftung*), the organization (*Verband*) or the institution (*Anstalt*), within which the order is (empirically) valid; or they may be aimed at those outside. These means are the "legal regulations" of the group in question.

By no means all norms which are consensually valid in a group—as we shall see later—are "legal norms." Nor are all official functions of the persons constituting the coercive apparatus of a community concerned with legal coercion; we shall rather consider as legal coercion only those actions whose intention is the enforcement of conformity to a norm as such, i.e., because of its being formally accepted as binding. The term will not be applied, however, where conformity of conduct to a norm is sought because of considerations of expediency or other material circumstances. It is obvious that the effectuation of the validity of a norm may in fact be pursued for the most diverse motives. However, we shall designate it as "guaranteed law" only in those cases where there exists the probability that coercion will be applied for the norm's sake. As we shall have opportunity to see, not all law is guaranteed law. We shall speak of law—albeit in the sense of "indirectly guaranteed" or "unguaranteed" law—also in all those cases where the validity of a norm consists in the fact that the mode of orientation of an action toward it has some "legal consequences"; i.e., that there are other norms which associate with the "observance" or "infringement" of the primary norm certain probabilities of consensual action guaranteed, in their turn, by legal coercion. We shall have occasion to illustrate this case which occurs in a large area of legal life. However, in order to avoid further complication, whenever we shall use the term "law" without qualification, we shall mean norms which are directly guaranteed by legal coercion.

Such "guaranteed law" is by no means in all cases guaranteed by "violence" (*Gewalt*) in the sense of the prospect of physical coercion. In our terminology, law, including "guaranteed law" is not characterized by violence or, even less, by that modern technique of effectuating claims

of private law through bringing "suit" in a "court," followed by coercive execution of the judgment obtained. The sphere of "public" law, i.e., the norms governing the conduct of the organs of the state and other state-oriented activities, recognizes numerous rights and legal norms, upon the infringement of which a coercive apparatus can be set in motion only through "complaint" or through "remonstance" by members of a limited group of persons, and often without any means of physical coercion. Sociologically, the question of whether or not guaranteed law exists in such a situation depends on the availability of an organized coercive apparatus for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion.

Today legal coercion by violence is the monopoly of the state. All other groups applying legal coercion by violence are today considered as heteronomous and mostly also as heterocephalous. This is the outcome, however, of certain stages of development. We shall speak of "state" law, i.e., of law guaranteed by the state, only when legal coercion is exercised through the specific, i.e., normally directly *physical*, means of coercion of the political community. Thus, the existence of a "legal norm" in the sense of "state law" means that the following situation obtains: In the case of certain events occurring there is general agreement that certain organs of the community can be expected to go into official action, and the very expectation of such action is apt to induce conformity with the commands derived from the generally accepted interpretation of that legal norm; or, where such conformity has become unattainable, at least to effect reparation or indemnification. The event inducing this consequence, the legal coercion by the state, may consist in certain human acts, for instance, the conclusion or the breach of a contract, or the commission of a tort. But this type of occurence constitutes only a special instance, since, upon the basis of some empirically valid legal proposition, the coercive instruments of the political powers against persons and things may also be applied where, for example, a river has risen above a certain level. It is in no way inherent, however, in the validity of a legal norm as normally conceived, that those who obey do so, predominantly or in any way, because of the availability of such a coercive apparatus as defined above. The motives for obedience may rather be of many different kinds. In the majority of cases, they are predominantly utilitarian or ethical or subjectively conventional, i.e., consisting of the fear of disapproval by the environment. The nature of these motives is highly relevant in determining the kind and the degree of validity of the law itself. But in so far as the formal sociological concept of guaranteed law,

as we intend to use it, is concerned, these psychological facts are irrelevant. In this connection nothing matters except that there be a sufficiently high probability of intervention on the part of a specially designated group of persons, even in those cases where nothing has occurred but the sheer fact of a norm infringement, i.e., on purely formal grounds.

The empirical validity of a norm as a legal norm affects the interests of an individual in many respects. In particular, it may convey to an individual certain calculable chances of having eonomic goods available or of acquiring them under certain conditions in the future. Obviously, the creation or protection of such chances is normally one of the aims of law enactment by those who agree upon a norm or impose it upon others. There are two ways in which such a "chance" may be attributed. The attribution may be a mere by-product of the empirical validity of the norm; in that case the norm is not *meant* to guarantee to an individual the chance which happens to fall to him. It may also be, however, that the norm is specifically meant to provide to the individual such a guaranty, in other words, to grant him a "right." Sociologically, the statement that someone has a right by virtue of the legal order of the state thus normally means the following: He has a chance, factually guaranteed to him by the consensually accepted interpretation of a legal norm, of invoking in favor of his ideal or material interests the aid of a "coercive apparatus" which is in special readiness for this purpose. This aid consists, at least normally, in the readiness of certain persons to come to his support in the event that they are approached in the proper way, and that it is shown that the recourse to such aid is actually guaranteed to him by a "legal norm." Such guaranty is based simply upon the "validity" of the legal proposition, and does not depend upon questions of expediency, discretion, grace, or arbitrary pleasure.

A law, thus, is valid wherever legal help in this sense can be obtained in a relevant measure, even though without recourse to physical or other drastic coercive means. A law can also be said to be valid, viz., in the case of unguaranteed law, if its violation, as, for instance, that of an electoral law, induces, on the ground of some empirically valid norm, legal consequences, for instance, the invalidation of the election, for the execution of which an agency with coercive powers has been established.

For purposes of simplification we shall pass by those "chances" which are produced as mere "by-products." A "right," in the context of the "state," is guaranteed by the coercive power of the political authorities. Wherever the means of coercion which constitute the guaranty of a "right" belong to some authority other than the political, for instance, a hierocracy, we shall speak of "extra-state law."

B. STATE LAW AND EXTRA-STATE LAW. A discussion of the various categories of such extra-state law would be out of place in the present context. All we need to recall is that there exist nonviolent means of coercion which may have the same or, under certain conditions, even greater effectiveness than the violent ones. Frequently, and in fairly large areas even regularly, the threat of such measures as the exclusion from an organization, or a boycott, or the prospect of magically conditioned advantages or disadvantages in this world, or of reward and punishment in the next, are under certain cultural conditions more effective in producing a certain behavior than a political apparatus whose coercive functioning is not always predictable with certainty. Legal forcible coercion exercised by the coercive apparatus of the political community has often come off badly as compared with the coercive power of other, e.g., religious, authorities. In general, the actual scope of its efficiency depends on the circumstances of each concrete case. Within the realm of sociological reality, legal coercion continues to exist, however, as long as some socially *relevant* effects are produced by its power machinery.

The assumption that a state "exists" only if the coercive means of the political community are superior to *all* other communities, is not sociological. "Ecclesiastical law" is still law even where it comes into conflict with "state" law, as it has happened many times and as it is bound to happen again in the case of the relations between the modern state and certain churches, for instance, the Roman-Catholic. In imperial Austria, the Slavic *Zadruga* not only lacked any kind of legal guaranty by the state, but some of its norms were outright contradictory to the official law. Since the consensual action constituting a *Zadruga* has at its disposal its own coercive apparatus for the enforcement of its norms, these norms are to be considered as "law." Only the state, if invoked, would refuse recognition and proceed, through its coercive power, to break it up.

Outside the sphere of the European-Continental legal system, it is no rare occurrence at all that modern state law explicitly treats as "valid" the norms of other organizations and reviews their concrete decisions. American law thus protects labor union labels or regulates the conditions under which a candidate is to be regarded as validly nominated by a party. English judges intervene, on appeal, in the judicial proceedings of a club. Even on the Continent German judges investigate, in defamation cases, the propriety of the rejection of a challenge to a duel, even though duelling is forbidden by law. We shall not enter into a casuistic inquiry of the extent to which such norms thus become "state law." For all the reasons given above and, in particular, for the sake of terminological consistency, we categorically deny that "law" exists only where legal coercion is guaranteed by the political authority. For us, there is no

practical reason for such a terminology. A "legal order" shall rather be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of "legal coercion." The possession of such an apparatus for the exercise of physical coercion has not always been the monopoly of the political community. As far as psychological coercion is concerned, there is no such monopoly even today, as demonstrated by the importance of law guaranteed only by the church.

We have also indicated already that direct guaranty of law and of rights by a coercive apparatus constitutes only one instance of the existence of "law" and of "rights." Even within this limited sphere the coercive apparatus can take on a great variety of forms. In marginal cases, it may consist in the consensually valid chance of coercive intervention by *all* the members of the community in the event of an infringement of a valid norm. However, in that case one cannot properly speak of a "coercive apparatus" unless the conditions under which participation in such coercive intervention is to be obligatory, are firmly fixed. In those cases where the protection of rights is guaranteed by the organs of the political authority, the coercive apparatus may be reinforced by pressure groups: the strict regulations of associations of creditors and landlords, especially their blacklists of unreliable debtors or tenants, often operate more effectively than the prospect of a lawsuit. It goes without saying that this kind of coercion may be extended to claims which the state does not guarantee at all; such claims are nevertheless based on *rights* even though they are guaranteed by authorities other than the state. The law of the state often tries to obstruct the coercive means of other associations; the English Libel Act thus tries to preclude blacklisting by excluding the defense of truth. But the state is not always successful. There are groups stronger than the state in this respect, for instance, those status groups which rely on the "honor code" of the duel as the means of resolving conflicts. With courts of honor and boycott as the coercive means at their disposal, they usually succeed in compelling the fulfillment of obligations as "debts of honor," for instance, gambling debts or the duty to engage in a duel; such debts are intrinsically connected with the specific purposes of the group in question, but, as far as the state is concerned, they are not recognized, or are even proscribed. But the state has been forced, as least partially, to trim its sails.

It would indeed be distorted legal reasoning to demand that such a specific delict as duelling be punished as "attempted murder" or assault and battery. Those crimes are of a quite different character. But it re-

mains a fact that in Germany the readiness to participate in a duel is still a *legal* obligation imposed by the state upon its army officers even though the duel is expressly forbidden by the Criminal Code. The state itself has connected legal consequences with an officer's failure to comply with the honor code. Outside of the status group of army officers the situation is different, however. The typical means of statutory coercion applied by "private" organizations against refractory members is exclusion from the corporate body and its tangible or intangible advantages. In the professional organizations of physicians and lawyers as well as in social or political clubs, it is the *ultima ratio*. The modern political organization has to a large extent usurped the application of these measures of coercion. Thus, recourse to them has been denied to the physicians and lawyers in Germany; in England the state courts have been given jurisdiction to review, on appeal, exclusions from clubs; and in America the courts have power over political parties as well as the right of reviewing, on appeal, the legality of the use of a union label.

This conflict between the means of coercion of various organizations is as old as the law itself. In the past it has not always ended with the triumph of the coercive means of the political body, and even today this has not always been the outcome. A businessman, for instance, who has violated a cartel agreement, has no remedy against a systematic attempt to drive him out of business by underselling. Similarly, there is no protection against being blacklisted for having availed oneself of the plea of illegality of a contract in futures. In the Middle Ages the prohibitions of resorting to the ecclesiastical court contained in the statutes of certain merchants' guilds were clearly invalid from the point of view of canon law, but they persisted nonetheless.[4]

To a considerable extent the state must tolerate the coercive power of organizations even in cases where it is directed not only against members, but also against outsiders on whom the organization tries to impose its own norms. Illustrations are afforded by the efforts of cartels to force outsiders into membership, or by the measures taken by creditors' associations against debtors and tenants.

An important marginal case of coercively guaranteed law, in the sociological sense, is presented by that situation which may be regarded as the very opposite of that which is presented by the modern political communities as well as by those religious communities which apply their own "laws." In the modern communities the law is guaranteed by a "judge" or some other "organ" who is an impartial and disinterested umpire rather than a person who would be characterized by a special relationship with one or the other of the parties. In the situation which we have in mind the means of coercion are provided by those very per-

sons who are linked to the party by close personal relationship, for example, as members of his kinship group. Just as war under modern international law, so under these conditions "vengeance" and "feud" are the only, or at least, the normal, forms of law enforcement. In this case, the "right" of the individual consists, sociologically seen, in the mere probability that the members of his kinship group will respond to their obligation of supporting his feud and blood vengeance (an obligation originally guaranteed by fear of the wrath of supernatural authorities) and that they will possess strength sufficient to support the right claimed by him even though not necessarily to achieve its final triumph.

The term "legal relationship" will be applied to designate that situation in which the content of a right is constituted by a relationship, i.e., the actual or potential actions of concrete persons or of persons to be identified by concrete criteria. The rights contained in a legal relationship may vary in accordance with the actually occurring actions. In this sense a state can be designated as a legal relationship, even in the hypothetical marginal case in which the ruler alone is regarded as endowed with rights (the right to give orders) and where, accordingly, the opportunities of all the other individuals are reduced to reflexes of his regulations.

2. *Law, Convention, and Custom*[5]

A. SIGNIFICANCE OF CUSTOM IN THE FORMATION OF LAW. Law, convention, and custom belong to the same continuum with imperceptible transitions leading from one to the other. We shall define *custom* (*Sitte*) to mean a typically uniform activity which is kept on the beaten track simply because men are "accustomed" to it and persist in it by unreflective imitation. It is a collective way of acting (*Massenhandeln*), the perpetuation of which by the individual is not "required" in any sense by anyone.

Convention, on the other hand, shall be said to exist wherever a certain conduct is sought to be induced without, however, any coercion, physical or psychological, and, at least under normal circumstances, without any direct reaction other than the expression of approval or disapproval on the part of those persons who constitute the environment of the actor.

"Convention" must be strictly distinguished from *customary law*. We shall abstain here from criticizing this not very useful concept.[6] According to the usual terminology, the validity of a norm as customary law consists in the very likelihood that a coercive apparatus will go into action

for its enforcement although it derives from mere consensus rather than from enactment. Convention, on the contrary, is characterized by the very absence of any coercive apparatus, i.e., of any, at least relatively clearly delimited, group of persons who would continuously hold themselves ready for the special task of legal coercion through physical or psychological means.

The existence of a mere custom, even unaccompanied by convention, can be of far-reaching economic signifiance. The level of economic need, which constitutes the basis of all "economic activity," is comprehensively conditioned by mere custom. The individual might free himself of it without arousing the slightest disapproval. In fact, however, he cannot escape from it except with the greatest difficulty, and it does not change except where it comes gradually to give way to the imitation of the different custom of some other social group.

We shall see[7] that the uniformity of mere usages can be of importance in the formation of social groups and in facilitating intermarriage. It may also give a certain, though rather intangible, impetus toward the formation of feelings of "ethnic" identification and, in that way, contribute to the creation of community. At any rate, adherence to what has as such become customary is such a strong component of all conduct and, consequently, of all social action, that legal coercion, where it transforms a custom into a legal obligation (by invocation of the "usual") often adds practically nothing to its effectiveness, and, where it opposes custom, frequently fails in the attempt to influence actual conduct. Convention is equally effective, if not even more. In countless situations the individual depends on his environment for a spontaneous response not guaranteed by any earthly or transcendental authority. The existence of a "convention" may thus be far more determinative of his conduct than the existence of legal enforcement machinery.

Obviously, the borderline between custom and convention is fluid. The further we go back in history, the more we find that conduct, and particularly social action, is determined in an ever more comprehensive sphere exclusively by orientation to what is customary. The more this is so, the more disquieting are the effects of any deviation from the customary. In this situation, any such deviation seems to act on the psyche of the average individual like the disturbance of an organic function. This, in turn, seems to reinforce custom.

Present ethnological literature does not allow us to determine very clearly the point of transition from the stage of mere custom to the, at first vaguely and dimly experienced, "consensual" character of social action, or, in other words, to the conception of the binding nature of certain accustomed modes of conduct. Even less can we trace the changes

of the scope of activities with respect to which this transition took place. We shall thus by-pass this problem. It is entirely a question of terminology and convenience at which point of this continuum one shall assume the existence of the subjective conception of a "legal obligation." Objectively the chance of the factual occurrence of a violent reaction against certain types of conduct has always been present among human beings as well as among animals. It would be far-fetched, however, to assume in every such case the existence of a consensually valid norm, or that the action in question would be directed by a clearly conceived conscious purpose. Perhaps, a rudimentary conception of "duty" may be determinative in the behavior of some domestic animals to a greater extent than may be found in aboriginal man, if we may use this highly ambiguous concept in what is in this context a clearly intelligible sense. We have no access, however, to the "subjective" experiences of the first *homo sapiens* and such concepts as the allegedly primordial, or even *a priori*, character of law or convention are of no use whatsoever to empirical sociology. It is not due to the assumed binding force of some rule or norm that the conduct of primitive man manifests certain external factual regularities, especially in his relation to his fellows. On the contrary, those organically conditioned regularities which we have to accept as psychophysical reality, are primary. It is from them that the concept of "natural norms" arises. The inner orientation towards such regularities contains in itself very tangible inhibitions against "innovations," a fact which can be observed even today by everyone in his daily experiences, and it constitutes a strong support for the belief in such binding norms.

B. CHANGE THROUGH INSPIRATION AND EMPATHY. In view of such observation we must ask how anything new can ever arise in this world, oriented as it is toward the regular as the empirically valid. No doubt innovations have been induced from the outside, i.e., by changes in the external conditions of life. But the response evoked by external change may be the extinction of life as well as its reorientation; there is no way of foretelling. Furthermore, external change is by no means a necessary precondition for innovation: in some of the most significant cases, it has not even been a contributing factor in the establishment of a new order. The evidence of ethnology seems rather to show that the most important source of innovation has been the influence of individuals who have experienced certain "abnormal" states (which are frequently, but not always, regarded by present-day psychiatry as pathological) and hence have been capable of exercising a special influence on others. We are not discussing here the origin of these experiences which appear to be "new" as a consequence of their "abnormality," but rather their effects. These influences which overcome the inertia of the customary may

originate from a variety of psychological occurrences. To Hellpach[8] we owe the distinction between two categories which, despite the possibility of intermediate forms, nonetheless appear as polar types. The first, inspiration, consists in the sudden awakening, through drastic means, of the awareness that a certain action "ought" to be done by him who has this experience. In the other form, that of empathy or identification, the influencing person's attitude is emphathically experienced by one or more others. The types of action which are produced in these ways may vary greatly. Very often, however, a collective action (*massenhaftes Gemeinschaftshandeln*) is induced which is oriented toward the influencing person and his experience and from which, in turn, certain kinds of consensus with corresponding contents may be developed. If they are "adapted" to the external environment, they will survive. The effects of "empathy" and, even more so, of "inspiration" (usually lumped together under the ambiguous term "suggestion") constitute the major sources for the realization of actual innovations whose establishment as regularities will, in turn, reinforce the sense of "oughtness," by which they may possibly be accompanied. The feeling of oughtness—as soon as it has developed any conceptual meaning—may undoubtedly appear as something primary and original even in the case of innovation. Particularly in the case of "inspiration" it may constitute a psychological component. It is confusing, however, when imitation of new conduct is regarded as the basic and primary element in its diffusion. Undoubtedly, imitation is of extraordinary importance, but as a general rule it is secondary and constitutes only a special case. If the conduct of a dog, man's oldest companion, is "inspired" by man, such conduct, obviously, cannot be described as "imitation of man by dog." In a very large number of cases, the relation between the persons influencing and those influenced is exactly of this kind. In some cases, it may approximate "empathy," in others, "imitation," conditioned either by rational purpose or in the ways of "mass psychology."

In any case, however, the emerging innovation is most likely to produce consensus and ultimately law, when it derives from a strong inspiration or an intensive identification. In such cases a convention will result or, under certain circumstances, even consensual coercive action against deviants. As long as religious faith is strong, convention, the approval or disapproval by the environment, engenders, as historical experience shows, the hope and faith that the supernatural powers too will reward or punish those actions which are approved or disapproved in this world. Convention, under appropriate conditions, may also produce the further belief that not only the actor himself but also those around him may have to suffer from the wrath of those supernatural

powers, and that, therefore, reaction is incumbent upon all, acting either individually or through the coercive apparatus of some organization. In consequence of the constant recurrence of a certain pattern of conduct, the idea may arise in the minds of the guarantors of a particular norm, that they are confronted no longer with mere custom or convention, but with a legal obligation requiring enforcement. A norm which has attained such practical validity is called customary law. Eventually, the interests involved may engender a rationally considered desire to secure the convention, or the obligation of customary law, against subversion, and to place it explicitly under the guarantee of an enforcement machinery, i.e., to transform it into enacted law. Particularly in the field of the internal distribution of power among the organs of an institutional order experience reveals a continuous scale of transitions from norms of conduct guaranteed by mere convention to those which are regarded as binding and guaranteed by law. A striking example is presented by the development of the British "constitution."

C. BORDERLINE ZONES BETWEEN CONVENTION, CUSTOM AND LAW. Finally, any rebellion against convention may lead the environment to make use of its coercively guaranteed rights in a manner detrimental to the rebel; for instance, the host uses his right as master of the house against the guest who has merely infringed upon the conventional rules of social amenity; or a war lord uses his legal power of dismissal against the officer who has infringed upon the code of honor. In such cases the conventional rule is, in fact, indirectly supported by coercive means. The situation differs from that of "unguaranteed" law insofar as the initiation of the coercive measures is a factual, but not a legal, consequence of the infringement of the convention, although the legal right to exclude anyone from his house belongs to the master as such. But a directly unguaranteed legal proposition draws its validity from the fact that its violation engenders consequences somehow *via* a guaranteed legal norm. Where, on the other hand, a legal norm refers to "good morals" (*die guten Sitten*),[9] i.e., conventions worthy of approval, the fulfillment of the conventional obligations has also become a legal obligation and we have a case of indirectly guaranteed law.

There are also numerous instances of intermediate types, as, for example, the courts of love of the Troubadours of Provence which had "jurisdiction" in matters of love;[10] or the "judge" in his original role as arbitrator seeking to procure a settlement between feuding antagonists, perhaps also rendering a verdict, but lacking coercive powers of his own; or, finally, modern international courts of arbitration. In such cases, the amorphous approval or disapproval of the environment has crystallized into a set of commands, prohibitions, and permissions authoritatively

promulgated, i.e., a concretely organized pattern of psychic coercion. Excepting situations of mere play, as, for instance, the courts of love, such cases may be classified as "law" provided the judgment is normally backed not only by the personal, and therefore irrelevant, opinion of the judge, but by, at least, some boycott as self-help of the kinship group, the state, or some other group of persons whose right has been violated, as in the last two of the illustrations above.

According to our definition, the fact that some type of conduct is "approved" or "disapproved" by ever so many persons is insufficient to constitute it as a "convention"; it is essential that such attitudes are likely to find expression in a specific environment. This latter term is, of course, not meant in any geographical sense. But there must be some test for defining that group of persons which constitutes the environment of the person in question. It does not matter in this context whether the test is constituted by profession, kinship, neighborhood, status group, ethnic group, religion, political allegiance, or anything else. Nor does it matter that the membership is changeable or unstable. For the existence of a convention in our sense it is not required that the environment be constituted by an organization (as we understand that term). The very opposite is frequently the case. But the validity of law, presupposing, as we have seen, the existence of an enforcement machinery, is necessarily a corollary of organizational action. (Of course, this does not mean that only organizational action—or even mere social action—is legally regulated by organization.) In this sense the organization may be said to be the "sustainer" of the law.

On the other hand, we are far from asserting that legal rules, in the sense here used, would offer the only standard of subjective orientation for social, consensual, rationally controlled, organizational or institutional action, which, we must remember, is nothing but a segment of sociologically relevant conduct in general. If the order of an organization is understood to be characteristic of, or indispensable to, the actual course of social action, then this order is only to a small extent the result of an orientation toward legal rules. To the extent that the regularities are consciously oriented towards rules at all and do not merely spring from unreflective habituation, they are of the nature of "custom" and "convention"; often they are predominantly rational maxims of purposeful self-interested action, on the effective operation of which each participant is counting for his own conduct as well as that of all others. This expectation is, indeed, justified objectively, especially since the maxim, though lacking legal guaranties, often constitutes the subject matter of some association or consensus. The chance of legal coercion which, as already mentioned, motivates even "legal" conduct only to a slight extent, is also

objectively an ultimate guaranty for no more than a fraction of the actual course of consensually oriented conduct.

It should thus be clear that, from the point of view of sociology, the transitions from mere usage to convention and from it to law are fluid.

3. Excursus *in Response to Rudolf Stammler*

Even from a non-sociological point of view it is wrong to distinguish between law and ethics by asserting that legal norms regulate mere external conduct, while moral norms regulate only matters of conscience. The law, it is true, does not always regard the intention of an action as relevant, and there have been legal propositions and legal systems in which legal consequences, including even punishment, are merely determined by external events. But this situation is not the normal one. Legal consequences attach to *bona* or *mala fides,* or intention, or moral turpitude, and a good many other purely subjective factors. Moral commandments, on the other hand, are aiming at overcoming in external conduct those anti-normative impulses which form part of the "mental attitude."

From the normative point of view we should thus distinguish between the two phenomena not as external and subjective, but as representing different degrees of normativeness.

From the sociological point of view, however, ethical validity is normally identical with validity "on religious grounds" or "by virtue of convention." Only an abstract standard of conduct subjectively conceived as derived from ultimate axioms could be regarded as an exclusively ethical norm, and this only in so far as this conception would acquire practical significance in conduct. Such conceptions have in fact often had real significance. But wherever this has been the case, they have been a relatively late product of philosophical reflection. In the past, as well as in the present, "moral commandments" in contrast to legal commands are, from a sociological point of view, normally either religiously or conventionally conditioned maxims of conduct. They are not distinguished from law by hard and fast criteria. There is no socially important moral commandment which has not been a legal command at one time or another.

Stammler's distinction between convention and legal norm according to whether or not the fulfillment of the norm is dependent upon the free will of the individual[11] is of no use whatsoever. It is incorrect to say that the fulfillment of conventional "obligations," for instance of a rule of social etiquette, is not "imposed" on the individual, and that its non-

fulfillment would simply result in, or coincide with, the free and voluntary separation from a voluntary consociation. It may be admitted that there are norms of this kind, but they exist not only in the sphere of convention, but equally in that of law. The *clausula rebus sic stantibus* in fact often lends itself to such use. At any rate, the distinction between conventional rule and legal norm in Stammler's own sociology is not centered on this test. Not only the theoretically constructed anarchical society, the "theory" and "critique" of which Stammler has elaborated with the aid of his scholastic concepts, but also a good number of consociations existing in the real world have dispensed with the legal character of their conventional norms. They have done so on the assumption that the mere fact of the social disapproval of norm infringement with its, often very real, indirect consequences will suffice as a sanction. From the sociological point of view, legal order and conventional order do thus not constitute any basic contrast, since, quite apart from obvious cases of transition, convention, too, is sustained by psychological as well as (at least indirectly) physical coercion. It is only with regard to the sociological *structure* of coercion that they differ: The conventional order lacks specialized personnel for the implementation of coercive power (enforcement machinery: priests, judges, police, the military, etc.).

Above all, Stammler confuses the ideal validity of a norm with the assumed validity of a norm in its actual influence on empirical action. The former can be deduced systematically by legal theorists and moral philosophers; the latter, instead, ought to be the subject of empirical observation. Furthermore, Stammler confuses the normative regulation of conduct by rules whose "oughtness" is factually accepted by a sizable number of persons, with the factual regularities of human conduct. These two concepts are to be strictly separated, however.

It is by way of conventional rules that merely factual regularities of action, i.e., usages, are frequently transformed into binding norms, guaranteed primarily by psychological coercion. Convention thus makes tradition. The mere fact of the regular recurrence of certain events somehow confers on them the dignity of oughtness. This is true with regard to natural events as well as to action conditioned organically or by unreflective imitation of, or adaptation to, external conditions of life. It applies to the accustomed course of the stars as ordained by the divine powers, as well as to the seasonal floods of the Nile or the accustomed way of remunerating slave laborers, who by the law are unconditionally surrendered to the power of their masters.

Whenever the regularities of action have become conventionalized, i.e., whenever a statistically frequent action (*Massenhandeln*) has become a consensually oriented action (*Einverständnishandeln*)—this is, in

our terminology, the real meaning of this development—we shall speak of "tradition."

It cannot be overstressed that the mere habituation to a mode of action, the inclination to preserve this habituation, and, much more so, tradition, have a formidable influence in favor of a habituated legal order, even where such an order originally derives from legal enactment. This influence is more powerful than any reflection on impending means of coercion or other consequences, considering also the fact that at least some of those who act according to the "norms" are totally unaware of them.

The transition from the merely unreflective formation of a habit to the conscious acceptance of the maxim that action should be in accordance with a norm is always fluid. The mere statistical regularity of an action leads to the emergence of moral and legal convictions with corresponding contents. The threat of physical and psychologial coercion, on the other hand, imposes a certain mode of action and thus produces habituation and thereby regularity of action.

Law and convention are intertwined as cause and effect in the actions of men, with, against, and beside, one another. It is grossly misleading to consider law and convention as the "forms" of conduct in contrast with its "substance" as Stammler does. The belief in the legal or conventional oughtness of a certain action is, from a sociological point of view, merely a superadditum increasing the degree of probability with which an acting person can calculate certain *consequences* of his action. Economic theory therefore properly disregards the character of the norms to some extent. For the economist the fact that someone "possesses" something simply means that he can count on other persons not to interfere with his disposition over the object. This mutual respect of the right of disposition may be based on a variety of considerations. It may derive from deference to conventional or legal norms, or from considerations of self-interest on the part of each participant. Whatever the reason, it is of no primary concern to economic theory. The fact that a person "owes" something to another can be translated, sociologically, into the following terms: a certain commitment (through promise, tort, or other cause) of one person to another; the expectation, based thereon, that in due course the former will yield to the latter his right of disposition over the goods concerned; the existence of a chance that this expectation will be fulfilled. The psychological motives involved are of no primary interest to the economist.

An exchange of goods means: the transfer of an object, according to an agreement, from the factual control of one person to that of another, this transfer being based on the assumption that another object is to be

transferred from the factual control of the second to that of the first. Of those who take part in a debtor-creditor relationship or in a barter, each one expects that the other will conform to his own intentions. It is not necessary, however, to assume conceptually any "order" outside or above the two parties to guarantee, command, or enforce compliance by means of coercive machinery or social disapproval. Nor is it necessary to assume the subjetive belief of either or both parties in any "binding" norm. For the partner to an exchange can depend on the other partner's *egoistic interest* in the future continuation of exchange relationships or other similar motives to offset his inclination to break his promise—a fact which appears tangibly in the so-called "silent trade" among primitive peoples as well as in modern business, especially on the stock exchange.

Assuming purely expediential rationality, each participant can and does, in fact, depend on the probability that under normal circumstances the other party will act "as if" he accepted as "binding" the norm that one has to fulfill his promises. Conceptually this is quite sufficient. But it goes without saying that it makes a difference whether the partner's expectation in this respect is supported by one or both of the following guaranties: 1. the factually wide currency, in the environment, of the subjective belief in the objective validity of such a norm (consensus); 2. even more so, the creation of a conventional guaranty through regard for social approval or disapproval, or of a legal guaranty through the existence of enforcement machinery.

Can it be said that a stable private economic system of the modern type would be "unthinkable" without legal guaranties? As a matter of fact we see that in most business transactions it never occurs to anyone even to think of taking legal action. Agreements on the stock exchange, for example, take place between professional traders in such forms as in the vast majority of cases exclude "proof" in cases of bad faith: the contracts are oral, or are recorded by marks and notations in the trader's own notebook. Nevertheless, a dispute practically never occurs. Likewise, there are organizations pursuing purely economic ends the rules of which nonetheless dispense entirely, or almost entirely, with legal protection from the state. Certain types of "cartels" were illustrative of this class of organization. It often happened also that agreements which had been concluded and were valid according to private law were rendered inoperative through the dissolution of the organization, as there was no longer a formally legitimated plaintiff. In these instances, the organization with its own coercive apparatus had a system of "law" which was totally lacking in the power of forcible legal coercion. Such coercion, at any rate, was available only so long as the organization was in existence. As a result of the peculiar subjective attitude of the participants, cartel

contracts often had not even any effective conventional guarantee. However, they often functioned nonetheless for a long time and quite efficiently in consequence of the convergent interests of all the participants.

Despite all such facts, it is obvious that forcible legal guarantee, especially where exercised by the state, is not a matter of indifference to such organizations. Today economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion. The normal intention in an act of exchange is to acquire certain subjective "rights," i.e., in sociological terms, the probability of support of one's power of disposition by the coercive apparatus of the state. Economic goods today are normally at the same time *legitimately acquired rights*; they are the very building material for the universe of the economic order. Nonetheless, even today they do not constitute the total range of objects of exchange.

Economic opportunities which are not guaranteed by the legal order, or the guaranty of which is even refused on grounds of policy by the legal order, can and do constitute objects of exchange transactions which are not only not illegitimate but perfectly legitimate. They include, for instance, the transfer, against compensation, of the goodwill of a business. The sale of a goodwill today normally engenders certain private law claims of the purchaser against the seller, namely, that he will refrain from certain actions and will perform certain others, for instance, "introduce" the purchaser to the customers. But the legal order does not enforce the claims against third parties. Yet, there have been and still are cases in which the coercive apparatus of the political authority is available for the exercise of direct coercion in favor of the owner or purchaser of a "market," as for instance in the case of a guild monopoly or some other legally protected monopoly. It is well known that Fichte[12] considered it as the essential characteristic of modern legal development that, in contrast to such cases, the modern state guarantees only claims on concrete usable goods or labor services. Besides, so-called "free competition" finds its legal expression in this very fact. Yet, although such "opportunities" have remained objects of economic exchange even without legal protection against third parties, the absence of legal guaranties has nevertheless far-reaching economic consequences. But from the point of view of economics and sociology it remains a fact that, on general principle, at least, the interference of legal guaranties merely increases the degree of certainty with which an economically relevant action can be calculated in advance.

The legal regulation of a subject matter has never been carried out in all its implications anywhere. This would require the availability of some human agency which in every case of the kind in question would be regarded as being capable of determining, in accordance with some conceived norm, what ought to be done "by law." We shall by-pass here

the interaction between consociation and legal order: as we have seen elsewhere, any rational consociation, and therefore, any order of social and consensual action is posterior in this respect. Nor shall we discuss here the proposition that the development of social and consensual action continually creates entirely new situations and raises problems which can be solved by the accepted norms or by the usual logic of jurisprudence only in appearance or by spurious reasoning (cf. in this respect the thesis of the "free-law" movement).

We are concerned here with a more basic problem: It is a fact that the most "fundamental" questions often are left unregulated by law even in legal orders which are otherwise thoroughly rationalized. Let us illustrate two specific types of this phenomenon:

(1) A "constitutional" monarch dismisses his responsible minister and fails to replace him by any new appointee so that there is no one to countersign his acts. What is to be done "by law" in such a situation? This question is not regulated in any constitution anywhere in the world. What is clear is no more than that certain acts of the government cannot be "validly" taken.

(2) Most constitutions equally omit consideration of the following question: What is to be done when those parties whose agreement is necessary for the adoption of the budget are unable to reach an agreement?

The first problem is described by Jellinek as "moot" for all practical purposes.[13] He is right. What is of interest to us is just to know why it is "moot." The second type of "constitutional gap," on the other hand, has become very practical, as is well known.[14] If we understand "constitution," in the sociological sense, as the modus of distribution of power which determines the possibility of regulating social action, we may, indeed, venture the proposition that any community's constitution *in the sociological sense* is determined by the fact of where and how its constitution *in the juridical sense* contains such "gaps," especially with regard to basic questions. At times such gaps of the second type have been left intentionally where a constitution was rationally enacted by consensus or imposition. This was done simply because the interested party or parties who exercised the decisive influence on the drafting of the constitution in question expected that he or they would ultimately have sufficient power to control, in accordance with their own desires, that portion of social action which, while lacking a basis in any enacted norm, yet had to be carried on somehow. Returning to our illustration: they expected to govern without a budget.

Gaps of the first type mentioned above, on the other hand, usually remain open for another reason: Experience seems to teach convincingly that the self-interest of the party or parties concerned (in our example,

of the monarch) will at all times suffice so to condition his way of acting that the "absurd" though legally possible situation (in our example, the lack of a responsible minister) will never occur. Despite the "gap," general consensus considers it as the unquestionable "duty" of the monarch to appoint a minister. As there are legal consequences attached to this duty, it is to be considered as an "indirectly guaranteed legal obligation." Such ensuing legal consequences are: the impossibility of executing certain acts in a valid manner, i.e., of attaining the possibility of having them guaranteed through the coercive apparatus. But for the rest, it is not established, either by law or convention, what is to be done to carry on the administration of the state in case the ruler should not fulfill this duty; and since this case has never occurred thus far, there is no custom either which could become the source for a decision. This situation constitutes a striking illustration of the fact that law, convention, and custom are by no means the only forces to be counted on as guarantee for such conduct of another person as is expected of, promised by, or otherwise regarded as due from, him. Beside and above these, there is another force to be reckoned with: the other person's self-interest in the continuation of a certain consensual action as such. The certainty with which the monarch's compliance with an assumedly binding duty can be anticipated is no doubt greater, but only by a matter of degree, than the certainty—if we may return now to our previous example—with which a partner to an exchange counts, and in the case of continued intercourse, may continue to count, upon the other party's conduct to conform with his own expectations. This certainty exists even though the transaction in question may lack any normative regulation or coercive guaranty.

What is relevant here is merely the observation that the legal as well as the conventional regulation of consensual or rationally regulated action may be, as a matter of principle, incomplete and, under certain circumstances, will be so quite consciously. While the orientation of social action to a norm is constitutive of consociation in any and every case, the coercive apparatus does not have this function with regard to the totality of all stable and institutionally organizational action. If the absurd case of illustration (1) were to occur, it would certainly set legal speculation to work immediately and then perhaps,.a conventional, or even legal, regulation would come into existence. But in the meantime the problem would already have been actually solved by some social or consensual or rationally regulated action the details of which would depend upon the nature of the concrete situation. Normative regulation is one important causal component of consensual action, but it is not, as claimed by Stammler, its universal "form."

For a discipline such as sociology, which searches for empirical

regularities and types, the legal guarantees and their underlying normative conceptions are of interest both as consequences and as causes or concomitant causes of certain regularities of human action which are as such directly relevant to sociology, or of regularities of natural occurrences engendered by human action which as such are indirectly relevant to sociology.

Factual regularities *of* conduct ("customs") can, as we have seen, become the source of rules *for* conduct ("conventions," "law"). The reverse, however, may be equally true. Regularities may be produced by legal norms, acting by themselves or in combination with other factors. This applies not only to those regularities which directly realize the content of the legal norm in question, but equally to regularities of a different kind. The fact that an official, for example, goes to his office regularly every day is a direct consequence of the order contained in a legal norm which is accepted as "valid" in practice. On the other hand, the fact that a traveling salesman of a factory visits the retailers regularly each year for the solicitation of orders is only an indirect effect of legal norms, viz., of those which permit free competition for customers and thus necessitate that they be wooed. The fact that fewer children die when nursing mothers abstain from work as a result of a legal or conventional "norm" is certainly a consequence of the validity of that norm. Where it is an enacted legal norm, this result has certainly been one of the rationally conceived ends of the creators of that norm; but it is obvious that they can decree only the abstention from work and not the lower death rate. Even with regard to directly commanded or prohibited conduct, the practical effectiveness of the validity of a coercive norm is obviously problematic. Observance follows to an "adequate" degree, but never without exceptions. Powerful interests may indeed induce a situation in which a legal norm is violated, without ensuing punishment, not only in isolated instances, but prevalently and permanently, in spite of the coercive apparatus on which the "validity" of the norm is founded. When such a situation has become stabilized and when, accordingly, prevailing practice rather than the pretense of the written law has become normative of conduct in the conviction of the participants, the guaranteeing coercive power will ultimately cease to compel conduct to conform to the latter. In such case, the legal theorist speaks of "derogation through customary law."

"Valid" legal norms, which are guaranteed by the coercive apparatus of the political authority, and conventional rules may also coexist, however, in a state of chronic conflict. We have observed such a situation in the case of the duel, where private revenge has been transformed by convention. And while it is not at all unusual that legal norms are ra-

tionally enacted with the purpose of changing existing "customs" and conventions, the normal development is more usually as follows: a legal order is empirically "valid" owing not so much to the availability of coercive guaranties as to its habituation as "usage" and its "routinization." To this should be added the pressure of convention which, in most cases, disapproves any flagrant deviation from conduct corresponding to that order.

For the legal theorist the (ideological) validity of a legal norm is conceptually the *prius*. Conduct which is not directly regulated by law is regarded by him as legally "permitted" and thus equally affected by the legal order, at least ideologically. For the sociologist, on the other hand, the legal, and particularly the rationally enacted, regulation of conduct is empirically only one of the factors motivating social action; moreover, it is a factor which usually appears late in history and whose effectiveness varies greatly. The beginnings of actual regularity and "usage," shrouded in darkness everywhere, are attributed by the sociologist, as we have seen, to the instinctive habituation of a pattern of conduct which was "adapted" to given necessities. At least initially, this pattern of conduct was neither conditioned nor changed by an enacted norm. The increasing intervention of enacted norms is, from our point of view, only one of the components, however characteristic, of that process of rationalization and association whose growing penetration into all spheres of social action we shall have to trace as a most essential dynamic factor in development.

4. *Summary of the Most General Relations Between Law and Economy*

In sum, we can say about the most general relationships between law and economy, which alone concern us here, the following:

(1) Law (in the sociological sense) guarantees by no means only economic interests but rather the most diverse interests ranging from the most elementary one of protection of personal security to such purely ideal goods as personal honor or the honor of the divine powers. Above all, it guarantees political, ecclesiastical, familial, and other positions of authority as well as positions of social preëminence of any kind which may indeed be economically conditioned or economically relevant in the most diverse ways, but which are neither economic in themselves nor sought for preponderantly economic ends.

(2) Under certain conditions a "legal order" can remain unchanged

while economic relations are undergoing a radical transformation. In theory, a socialist system of production could be brought about without the change of even a single paragraph of our laws, simply by the gradual, free contractual acquisition of all the means of production by the political authority. This example is extreme; but, for the purpose of theoretical speculation, extreme examples are most useful. Should such a situation ever come about—which is most unlikely, though theoretically not unthinkable—the legal order would still be bound to apply its coercive machinery in case its aid were invoked for the enforcement of those obligations which are characteristic of a productive system based on private property. Only, this case would never occur in fact.[15]

(3) The legal status of a matter may be basically different according to the point of view of the legal system from which it is considered. But such differences [of legal classification] need not have any relevant economic consequences provided only that on those points which generally are relevant economically, the *practical* effects are the same for the interested parties. This not only is possible, but it actually happens widely, although it must be conceded that any variation of legal classification may engender some economic consequences somewhere. Thus totally different forms of action would have been applicable in Rome depending on whether the "lease" of a mine were to be regarded legally as a lease in the strict sense of the term, or as a purchase. But the practical effects of the difference for economic life would certainly have been very slight.[16]

(4) Obviously, legal guaranties are directly at the service of economic interests to a very large extent. Even where this does not seem to be, or actually is not, the case, economic interests are among the strongest factors influencing the creation of law. For, any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive social groups, and the formation of social groups depends, to a large extent, upon constellations of material interests.

(5) Only a limited measure of success can be attained through the threat of coercion supporting the legal order. This applies especially to the economic sphere, owing to a number of external circumstances as well as to its own peculiar nature. It would be quibbling, however, to assert that law cannot "enforce" any particular economic conduct, on the ground that we would have to say, with regard to all its means of coercion, that *coactus tamen voluit* ("Although coerced, it was still his will.") For this is true, without exception, of all coercion which does not treat the person to be coerced simply as an inanimate object. Even the most drastic means of coercion and punishment are bound to fail where the subjects remain recalcitrant. In many spheres such a situation would always mean that the participants have not been educated to

acquiescence. Such education to acquiescence in the law of the time and place has, as a general rule, increased with growing pacification. Thus it should seem that the chances of enforcing economic conduct would have increased, too. Yet, the power of law over economic conduct has in many respects grown weaker rather than stronger as compared with earlier conditions. The effectiveness of maximum price regulations, for example, has always been precarious, but under present-day conditions they have an even smaller chance of success than ever before.

Thus the measure of possible influence on economic activity is not simply a function of the general level of acquiescence towards legal coercion. The limits of the actual success of legal coercion in the economic sphere rather arise from two main sources. One is constituted by the limitations of the economic capacity of the persons affected. There are limits not only to the stock itself of available goods, but also to the way in which that stock can possibly be used. For the patterns of use and of relationship among the various economic units are determined by habit and can be adjusted to heteronomous norms, if at all, only by difficult reorientations of all economic dispositions, and hardly without losses, which means, never without frictions. These difficulties increase with the degree of development and universality of a particular form of consensual action, namely, the interdependence of the individual economic units in the market, and, consequently, the dependence of every one upon the conduct of others. The second source of the limitation of successful legal coercion in the economic sphere lies in the relative proportion of strength of private economic interests on the one hand and interests promoting conformance to the rules of law on the other. The inclination to forego economic opportunity simply in order to act legally is obviously slight, unless circumvention of the formal law is strongly disapproved by a powerful convention, and such a situation is not likely to arise where the interests affected by a legal innovation are widespread. Besides, it is often not difficult to disguise the circumvention of a law in the economic sphere. Quite particularly insensitive to legal influence are, as experience has shown, those effects which derive directly from the ultimate sources of economic action, such as the estimates of economic value and the formation of prices. This applies particularly to those situations where the determinants in production and consumption do not lie within a completely transparent and directly manageable complex of consensual conduct. It is obvious, besides, that those who continuously operate in the market have a far greater rational knowledge of the market and interest situation than the legislators and enforcement officers whose interest is only formal. In an economy based on all-embracing interdependence on the market the possible and unintended repercussions of a legal measure

must to a large extent escape the foresight of the legislator simply because they depend upon private interested parties. It is those private interested parties who are in a position to distort the intended meaning of a legal norm to the point of turning it into its very opposite, as has often happened in the past. In view of these difficulties, the extent of factual impact of the law on economic conduct cannot be determined generally, but must be calculated for each particular case. It belongs thus to the field of case studies in social economics. In general, no more can be asserted than that, from a purely theoretical point of view, the complete monopolization of a market, which entails a far greater perspicuity of the situation, technically facilitates the control by law of that particular sector of the economy. If it, nevertheless, does not always in fact increase the opportunities for such control, this result is usually due either to legal particularism arising from the existence of competing political associations, or to the power of the private interests amenable to the monopolistic control and thus resisting the enforcement of the law.

(6) From the purely theoretical point of view, legal guaranty *by the state* is not indispensable to any basic economic phenomenon. The protection of property, for example, can be provided by the mutual aid system of kinship groups. Creditors' rights have sometimes been protected more efficiently by a religious community's threat of excommunication than by political bodies. "Money," too, has existed in almost all of its forms, without the state's guaranty of its acceptability as a means of payment. Even "chartal" money, i.e., money which derives its character as means of payment from the marking of pieces rather than from their substantive content, is conceivable without the guaranty by the state. Occasionally chartal money of non-state origin appeared even in spite of the existence of an apparatus of legal coercion by the state: the ancient Babylonians, for instance, did not have "coins" in the sense of a means of payment constituting legal tender by proclamation of the political authority, but contracts were apparently in use under which payment was to be made in pieces of a fifth of a shekel designated as such by the stamp of a certain "firm" (as we would say).[17] There was thus lacking any guaranty "proclaimed" by the state; the chosen unit of value was derived, not from the state, but from private contract. Yet the means of payment was "chartal" in character, and the state guaranteed coercively the concrete deal.

Conceptually the "state" thus is not indispensable to any economic activity. But an economic system, especially of the modern type, could certainly not exist without a legal order with very special features which could not develop except in the frame of a public legal order. Present-day economic life rests on opportunities acquired through contracts. It is true, the private interests in the obligations of contract, and the common

interest of all property holders in the mutual protection of property are still considerable, and individuals are still markedly influenced by convention and custom even today. Yet, the influence of these factors has declined due to the disintegration of tradition, i.e., of the tradition-determined relationships as well as of the belief in their sacredness. Furthermore, class interests have come to diverge more sharply from one another than ever before. The tempo of modern business communication requires a promptly and predictably functioning legal system, i.e., one which is guaranteed by the strongest coercive power. Finally, modern economic life by its very nature has destroyed those other associations which used to be the bearers of law and thus of legal guaranties. This has been the result of the development of the market. The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is *calculable* in accordance with rational rules. On the other hand, the constant expansion of the market, which we shall get to know as an inherent tendency of the market consociation, has favored the monopolization and regulation of all "legitimate" coercive power by *one* universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies.

NOTES

Unless otherwise indicated, notes are by Rheinstein. For full references of works mentioned, see Sociology of Law, ch. VIII:*i*, n. 1.

1. Legal dogmatics (*dogmatische Rechtswissenschaft*)—the term frequently used in German to mean the legal science of the law itself as distinguished from such ways of looking upon law from the outside as philosophy, history, or sociology of law.

2. See now Part One, ch. I:5, but the reference is presumably to "Some Categories of Interpretive Sociology," *GAzW* 443. (R)

3. See *op. cit.*, 445, 447f., 466. (R)

4. Cf. below, ch. VIII:*v*:8.

5. This is an early formulation of the relationship between usage, custom, interest constellation, law and convention, repeated in Part I, sec. 4–6. (R)

6. Cf. below, ch. VIII:*iii*:1.

7. Cf. Part Two, ch. IV:2. (W)

8. Willy Hellpach (1877–1955), professor of medicine, known by his highly original investigations on the influence of meteorological and geographic phenomena upon the mind. See his "Die geistigen Epidemien," *Die Gesellschaft*, XI, 1906.

9. Cf. German Civil Code, Sec. 138: "A transaction which is contrary to good morals is void"; Sec. 826: "One who causes harm to another intentionally and in a manner which is against good morals, has to compensate the other for such harm."

10. The "courts of love" (*cours d'amour*) belonged to the amusements of polite society at the high period of chivalry and the troubadours (twelfth to thir-

teenth century). They are reported to have consisted of circles of ladies who were organized in the way of courts and rendered judgments and opinions in matters of courtly love and manners. They flourished in southern France, especially Provence, where they came to an end with the collapse of Provençal society in the "crusade" against the Albigensian heretics. In the late Middle Ages, a brilliant court of love is reported to have flourished for some years at the Burgundian court; cf. HUIZINGA, WANING OF THE MIDDLE AGES (1924), c. 8, p. 103. On the courts of love in general, see CAPEFIGUE, LES COURS D'AMOUR (1863); RAJNA, LE CORTI D'AMORE (1890); and the article by F. Bonnardot in 2 LA GRANDE ENCYCLOPÉDIE 805, with further literature.

11. Rudolf Stammler, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* (1896), 12.

12. Joh. Gottlieb Fichte, *Der geschlossene Handelsstaat* (1800), Bk. I, c. 7.

13. GESETZ UND VERORDNUNG (1887) 295; VERFASSUNGSÄNDERUNG UND VERFASSUNGSWANDEL (1906) 43.

14. The situation arose in Prussia when the predominantly liberal Diet early in 1860 refused to pass Bismarck's budget because of its disapproval of his policy of armaments (so-called Era of Conflict or *Konfliktsperiode*). In Austria, too, Parliament (*Reichsrat*) repeatedly was unable to reach agreement on a budget during that period of conflict between the several ethnic groups of the Monarchy which preceded the outbreak of World War I.

15. The norms of the legal order existing before the total socialization took place could also be applied after its occurrence, if legal title to the various means of production were to be ascribed not to one single, central public authority but to formally autonomous public institutions or corporations which are to regulate their relationships to each other by contractual transactions, subject to the directions of, and control by, the central planning authority. Such a situation does indeed exist in the Soviet Union. Cf. H. J. BERMAN, JUSTICE IN RUSSIA (1950), and review by Rheinstein (1951) 64 HARV. L. REV. 1387.

16. Cf. in American law the controversy as to the correct legal classification of a mining or oil and gas lease: does the transaction create a profit a prendre, or does it give to the "lessee" the title to the minerals, or does it result in the creation of a leasehold interest in the strict sense of the term? As in Rome, the "proper" classification may be relevant in some practical respect as, for instance, with regard to the question of whether, in the case of the death of the lessee—if he should ever be an individual!—his interest descends as real, or is to be distributed as personal, property. In the former case it would, ordinarily, not be touched for the payment of debts of the deceased until all the personal property has been exhausted; in the latter, the "lease" would be immediately available for the creditors along with the other "personal" assets of the decedent. But, by and large, the economic situation is one and the same whichever of the various legal classifications is applied.

17. No reference to a practice of the kind mentioned could be located except the following passage in B. MAISSNER, BABYLONIEN UND ASSYRIEN (1920) 356: "As one could not generally rely upon the weight and fineness of the silver and thus had to check (*xâtu*), one preferred to receive silver bearing a stamp (*kanku*) by which the weight and fineness would be guaranteed. In contracts from the period of the first Babylonian dynasty we find shekels mentioned 'with a stamp'(?) of Babylon (Vorderasiatische Bibliothek VI, No. 217, 15) or shekels 'from the city of Zahan' or 'from Grossippar' (Brit. Mus. Cuneiform Tablets IV, 47, 19a)."