

THE COMMUNAL CONCEPT OF LAW

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THE FUNCTION OF LEGAL PHILOSOPHY

ALTHOUGH legal theory in a substantive sense is ever changing, reliance upon legal theory as a device in the creation of sound law has been permanent throughout the ages. Great lawyers have always seen the need for inquiry beyond the realm of mere rules of thumb. The great judges of history did not grope blindly in the dark for some peg upon which to hang their cases when precedent failed them. They turned to the theory of the law for the source of their inspiration, and have been honored for it ever since. It is not necessary, and perhaps not desirable, that every lawyer possess the same theory of law. But it is imperative that each should have some theory. As a building cannot long endure without a firm foundation, so a structure of the law cannot rise upon the base of whim. Legal theory is the only foundation for imposing justice.

It may be difficult to understand how different legal theories tend to produce a beneficial result in the practice of law. It might appear more reasonable to expect that they would work at cross-purposes and retard the legal growth. But history seems to vindicate the multiplicity of theories which have been evolved. Each philosopher, to the extent of his capacity, observes conditions of the society in which he lives. The resulting analysis necessarily contains some elements of practical value. The various theories which have been propounded cover a wide range within two well recognized extremes. The natural law philosophers emphasize the underlying uniformity of all law and assert the existence of eternal truths from which all law derives.¹ The Sophists, on the other hand, noting truly that laws "differ from city to city and from country to country," seek to upset the notion that law has any natural basis and substitute instead the concept of law as an artificial convention.² To Socrates the fallacy of the Sophist view lay in its failure to distinguish between "decrees," which may be good or evil depending on the wisdom of the ruler who ordains them, and "laws," which are by definition good; only the decree ordained by a wise ruler can properly be denominated law.³ He drew a helpful analogy by pointing out that in looking at a bar of gold men cannot discern the true gold from the impurities which are mixed with it, and so they call

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1. McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 326 *cf seq.* (1932).

2. *Id.* at 14.

3. *Id.* at 18.

the entire bar "gold."⁴ Similarly, men call both just and unjust decrees "law" because they cannot distinguish the true from the false.

The natural law theory developed a concept of the judge as a kind of Sherlock Holmes whose task it was to find the law as it existed throughout eternity,⁵ rather than to make it. Observation, however, revealed that this did not accord strictly with the facts, and the heretical notion that judges actually partake in making law soon became prevalent.⁶ These, and countless other theories which vacillated between the two extremes, all possessed the common virtue of abstracting certain fundamental facts from human society. There *is* something abiding about the law; yet certainly there is a lack of uniformity in the law. Judges *do* seem to "find the law"; yet they also make it. And, as Socrates pointed out, people do lack the ability to make fine distinctions, so that much of what appears to them to be a single quality is really a combination of the pure and the impure.

Each philosopher, of course, emphasizes his own discovery to the exclusion of all the others. This has the virtue of focusing sharp attention upon each observation in its turn. At the same time, the blind enthusiasm of each philosopher for his own concept gives a distorted picture of the factual situation. Such a result appears inevitable, however, in the slow development of human understanding. It is not perversity which prevents a thinker from integrating his own valuable contribution with that of others, but rather an occupational paralysis brought about by the specialized thinking which alone makes progress possible. The eclectic philosophies which combine the best qualities of all the others are usually disparaged as unproductive, but it seems wiser to credit the proper ordering of truths which others have unearthed as an independent creation in itself. Proper perspective is the final reality which must be given expression in any worthwhile analysis. In the perfection of ideas the end result is never the product of any single workman. As each adds his deft touch, the subject shapes up gradually. It is as though a dozen sculptors, each at a different point in time, worked upon the same object without a common knowledge of their goal. The first must work with a misshapen mass of clay. He sets out in his own mind to mold a human figure and reduces the mass to an elongated form. But before he can do anything more the work is turned over to a second sculptor. In his mind the unfinished

4. *Ibid.*

5. *Id.* at 189 *et seq.*

6. GRAY, THE NATURE AND SOURCES OF THE LAW 98-103 (1909). The observation by Bishop Hoadley that the one who interprets the law is the real law-maker is true only if the law itself has no vitality; but if failure to interpret accurately results in turmoil, it is the original law-maker and not the one who interprets who is the real as well as the nominal law-maker. See the discussion of "The Relation of Government to Law" *infra* p. 72.

form suggests that it might best be molded into a vase, and he adds a few curves to the nearly shapeless clay. A third artist then takes over the object and decides that he can best develop it into a graceful animal. This continues until in time the object takes on such distinct form that the end result is clearly discernible and the final workman no longer has any freedom of choice, but uses his artistry only to give final shape and beauty to the product of their common effort.

So in the field of legal theory the contribution of each philosopher helps to give form to the actual content of the law. Each theory provides a point of departure for the next philosopher, and he in turn for those who follow. By this slow process errors are discovered and corrected. In this manner the mass of ideas finally takes shape so that ultimately there remains only the task of giving polish and precision to the clear picture which has been evolved. As in the evolution of man himself, the slightest aberration may change the entire nature of the subject. Since there is no *necessary* course for the law to take, the multitude of legal theories which have been evolved have all contributed in some measure to the growth of the law. Each has lent purpose and direction to the thinking of those who believed in it. No one can say how different our present system of law might be if one of these theories had been sooner or later in point of time, or completely unknown. Legal practice, developing according to the current concepts of legal theory, provides the factual vantage point from which to proceed in further development of theory. Therefore, although the end result of the law may not be that which is presently anticipated, the practicing lawyer cannot contribute to the future development of the law unless he has a clear picture of the result which is outlined by the thinking of legal philosophers. In molding the clay the first sculptor confidently expected that it would ultimately take the shape of a man. He was mistaken, but without this concept in mind he could never have contributed the few touches which suggested to the second sculptor that it should be a vase, or to the third that it should be an animal. Conceptual devices are valuable for the progress to which they point rather than for anything inherent within themselves.

No significance adverse to the cause of philosophy should be attached to the fact that each theory is propounded as an authoritative representation of the "truth". For centuries it has been human nature to acclaim as absolute truth that which experience and learning have led men to believe. Philosophers are no different from the rest of humanity. Although much is believed that is later disbelieved, it would serve no purpose to wait modestly for the future. Mankind has no external pattern with which to compare his beliefs, and it is a matter, therefore, of practical necessity that he accept experience as his guide, however unreliable it may be. It is because men are bold enough to assert as the "truth" that which they believe that great plans are formulated

and great things accomplished. Somewhere a stand must be taken, even though all the facts are not at hand, in order that society may have a point from which to move forward. Dogmatism, if based upon a modicum of learning and logic, is the unwitting handmaid of progress. Because "truths" maintain themselves in human society only as long as men believe in them, there is no real harm, and more often much good, in expressing one's belief with all the force of one's conviction. It may be that truth in the abstract has eternal life, but truth on earth is mortal like the rest of us. As a guide for human activity no truth can outlive the men who believe in it. This, it seems to me, is the greatest truth of all.

Belief, then, is the keystone upon which my own philosophy, the communal concept of law, is established. The notion that men will give effectiveness to their beliefs is, to my mind, the notion which underlies and explains the whole of legal history. It is justification in itself for any legal theory which honestly represents the belief of its creator. The effectiveness of such a theory can be measured only by the extent of the belief which it inspires. If its logic captures the imagination of mankind, nothing can prevail against it; and if it fails to inspire widespread belief, no virtue, however great, will save it from oblivion. In essence, law is only that which men *believe* to be law and treat as law. This may seem to be an oversimplification of the complex socio-legal structure which we have come to know as law, but it is, in fact, the best means of understanding "how law comes into being, how it grows, and whither it tends."⁷

LAW, JUSTICE AND SOCIAL REALITY

To understand the nature of law we must first understand the nature of man and his society. Hans Kelsen, one of the most stimulating legal theorists of our day, has led a movement away from this sociological approach to the study of law. In his "pure" theory of law he seeks to focus attention upon "positive law" while excluding all other elements.⁸ He purports to distinguish between law, justice and social reality.⁹ I do not believe that law can be studied and understood apart from the concepts which are developed through a study of justice and social reality. Kelsen considers it unfortunate that law and justice have been

7. CARDOZO, *THE GROWTH OF THE LAW* 24 (1924): "A philosophy of law will tell us how law comes into being, how it grows, and whither it tends. Genesis and development and end or function, these things, if no others, will be dealt with in its pages."

8. The latest English compilation of Hans Kelsen under the title *GENERAL THEORY OF LAW AND STATE* was published in 1945 by the Harvard University Press. The best compact presentation of his theory, however, is to be found in *The Pure Theory of Law and Analytical Jurisprudence*, 55 *HARV. L. REV.* 44 (1941). This article will be cited hereafter as "Kelsen."

9. Kelsen, 44.

confused with one another in the popular mind.¹⁰ Although denying any intention of dismissing the requirement that positive law should be just, he considers it impossible to determine whether or not a particular law is just, or to know the content of justice in the abstract.¹¹ Expressing his belief that justice is a purely subjective evaluation he says: "The fact that there are certain values generally accepted in a certain society can have no effect upon their subjective and relative character. . . ." ¹² In all of this it seems to me that Kelsen has overlooked the real significance of the factual data which he has set forth. If it is true that justice is a subjective evaluation, the fact that "there are certain values generally accepted in a certain society" has great probative value in the establishment of an objective theory of law. And if values of law and justice are habitually associated with one another, it is a fact which should figure prominently in any objective study of the legal system. Although one may distinguish generally between a philosophy of law and a philosophy of justice, a point can be reached where the distinction is tenuous, and beyond which none can be made. Certainly all elements of law will not be examined in a philosophy of justice nor will all elements of justice pertain to a study of law, but neither study can wholly neglect elements of the other if it is to present a picture with true perspective. And what is true of justice and law is true also of law and social reality. The sociologist does not study the whole history of law, nor does the legal philosopher examine the entire field of sociology, but the informed sociologist is conversant with legal history just as the legal philosopher is aware of sociological influences in the development of law. An attempt to derive a factual understanding of the origin and content of law by looking only to positive law itself may be compared with an attempt to understand the origin and nature of a disease by looking only to the ailment itself. When a physician or psychiatrist looks for the cause of his patient's ailment he does not reject a likely cause simply because it demonstrates sociological rather than medical characteristics. He examines into all of the facts of a particular case. If those facts take him into a field normally relegated to the sociologist he follows them there nevertheless, for his primary concern is with the welfare of his patient. It would be a simple matter for the physician to hypothecate a probable cause for his patient's ailment limited to the field of medicine. But if, in fact, the cause in this particular instance arises out of the patient's home life or other physical surroundings, the doctor's hypothesis, although categorically "pure" and within the general range of probability, has no practical value as a curative aid. If the facts of a case—whether in medicine or

10. *Id.* at 44-5.

11. *Id.* at 45.

12. *Id.* at 47.

law—clearly indicate a logical connection it is not unscientific to follow the facts wherever they may lead. In this case the facts seem to indicate that law, justice and social reality are inextricably bound up with one another.¹³ A relationship which exists so strongly in fact cannot be explained away satisfactorily. Admittedly a consideration of justice and social reality in a study of law calls for intelligent selection of only the most pertinent elements. But the fact that only a few elements need be consulted in no way opens the possibility that all may be eliminated. If we are to be realistic we must conclude that there cannot be a "pure" theory of law. The study of law has significance only to the extent of its effect upon human society, and to that extent it cannot be understood intelligently apart from human society.

Before attempting to relate justice and social reality to law, however, it would be wise to determine the general method by which we may accomplish this. It would be nice if we could define law at this point and relate justice and social reality to it in its own terms. But a definition of law is itself the goal of any legal theory, and cannot be relied upon at the outset to assist in a development of the general thesis. Kelsen and other positivists start out with a group of rules which they term "positive law," and then attempt to abstract a definition of "law" from the common characteristics which the so-called positive law demonstrates. But this is obviously begging the question. How does one know at the outset that what is termed "positive law" is "law" at all? It would be more fitting to call such rules "positive norms." The very purpose of the philosopher's inquiry is to find out if they are or are not "law." To begin with that proposition would be like taking the first ten people one encounters and labelling them "Americans" because they happen to be in America. If then one tried to abstract their common characteristics one would have a definition of an American as "anyone who lives in America." But some of these ten might be Englishmen or Norwegians. Obviously it is impossible to find a satisfactory definition of Americans by calling them that to start with. Justice, similarly, is incapable of definition at the outset, since, as Kelsen has pointed out, it is habitually confused with law itself, and if we were to distinguish it sufficiently to separate it from law we would have accomplished by indirection that which is the paramount object of our study. Ultimately, of course, we hope to make these distinctions, but initially it is social reality which must serve as the sole object of our concern.

The following section will deal with the substantive details of social reality, but the relation of law and justice to social reality in its pro-

13. This is amply demonstrated by Kelsen himself when he devotes several pages to a discussion of justice and social reality in order to explain why he excludes them from consideration. *Id.* at 44-54.

cedural aspects can profitably be explored now. Kelsen has observed that justice in the abstract can never be determined. To my way of thinking the same holds true of law in the abstract. Fortunately, however, we do not have to be concerned with abstractions. Neither law nor justice has any significance apart from the society in which it functions.¹⁴ My concern, therefore, is with law at a given time and place.

If, as a citizen of the United States, I can comprehend the nature of law as it exists in the United States, and, as a citizen of the world, the nature of law as it exists among civilized nations, it is immaterial to me that I might fail to comprehend it in its "pure" form apart from this reality. As a member of a given community—whether that community be the United States or the world—I am concerned with the law of that community and with no other. I speak not of the substantive body of law, but rather of the general nature of law as it exists in those communities. It is to the community, therefore, with all of its social, political and economic influences, that I direct my attention.

A community arises whenever two or more persons have interests in common. Although human beings make up the community, the nature of the community depends upon the character of the interests which the several individuals share. The importance of a community depends upon the importance which society attaches to the particular interests which identify it. All of the passengers coming together by chance in a common conveyance, for example, share in the interest of reaching their destination, but this community of interest is of much less importance than others to which the same persons may also belong. The same group of passengers are members of the national community, whose interests are quantitatively and qualitatively superior to those of most other communities. And just as this group of persons may jointly comprise in whole or in part the membership of a number of different communities, they may individually be members of several communities. For example, one carload of passengers may represent a dozen different religious communities, or as many different cultural communities (clubs, societies, etc.). This may help to explain why, with as many communities in the world as there are groups of persons having interests in common, and with any single individual a member of numerous communities, it becomes important to know something of the mechanics by which the varying and oftentimes conflicting interests of the several communities can be made to exist in comparative harmony with one another. If law is the device, as Kelsen suggests,

14. Kelsen expresses an ambitious desire "to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples." *Id.* at 44. It seems to me more important to discover the nature of law as it exists at the present time among the people of the civilized world. And this can best be accomplished by studying in a general way "the changing content which it exhibits at different times and among different peoples."

by which conflicting interests are controlled in the cause of peace,¹⁵ a thorough comprehension of this device calls for an examination of the communal phenomena which, make it possible for law to function in this manner.

We do not have to examine the whole range of human communities in order to arrive at an understanding of the interrelation between law and communal existence. We may note in a general way that law is the creature of the *political* community. Although the controls exercised by religious and other communities may parallel that of the political community, law is the preeminent and final arbiter in any dispute between communities (short, of course, of violence which is the negation of law), and as such has its origin in the political community. The distinction between law and those controls which may be found within other human communities is really a matter going to the purpose for which the controls are utilized. This depends upon the interests which characterize one community or another. This distinction can best be drawn through a study of communities in general and of the political community in particular.

In order to study the political community we must know in a general way what distinguishes it from any other community. Law, of course, is a distinguishing element, but since we are as yet unable to define law we must look for a feature of identification which is even more basic. The political community, like any other, is identified by the interests which its members share in common. In the political community those interests are chiefly if not exclusively concerned with the maintenance of order and the promotion of harmony by the most favorable adjustment of *all* of the interests within a defined geographical area. All communities of interest within the area are subsumed under the political community whose only interest is to reconcile the interests of these other communities. Law, therefore, is simply the means by which the political community endeavors to realize its paramount interest in maintaining the peace and order of the area.

The lesson in realism which we seek through a study of the community centers around the employment of law as a community device for the satisfaction of this community interest. If the political community (*e.g.*, city, state, nation) owes its existence to the common interest of its members in arranging their affairs to keep peace within the geographical borders, and if law is the device by which that interest is realized, law must be a creature of the community. As such it should exhibit varying content among the different political communities of the world. Varying conditions of life will require adjustments peculiar to the locale in order to produce the optimum of harmony for a given community. We know that historically the general pattern of sub-

15. *Id.* at 49.

stantive law has demonstrated this varying content. But this lack of uniformity is strictly limited to substantive law. Because the basic structure of every political community is the same (human beings within a geographical area having a common interest in the ordering of their society) there is a common evolution of law, regardless of its peculiar local characteristics. This is not due to any universal character inherent in the law itself, but rather to the uniform character of human communities out of which law arises.

LAW, FIAT AND COMMUNAL BELIEF

The common denominator in science, art, literature and in every other human pursuit is man himself. Science can progress only as fast as man can interpret and apply the offerings of nature. Art is in vogue only as long as man appreciates the concepts which appear in its name. Literature invariably reflects the cultural development of man and prospers or spoils according to man's own success or failure. Call this nature, predestination, chance or evolution; attribute it to God, the stars, the fates or the eternal seed of growth; it matters not by what name it goes nor from whatever source derived, it is the one great reality of life. For centuries men have debated pro and con the subjective nature of human experience. Whether human values are derived from eternal forms, whether human thoughts are free or predestined, whether man can ever "know" the truth—all of these have been the concern of philosophers since man first began to think about himself. Men have looked always for some objective measurement beyond themselves, thus providing the metaphysician with a chance to earn his living. I have no wish to increase unemployment, but it seems to me that man has been looking in the wrong direction for his objectivism. If there is an objective world beyond himself, mere speculation can never secure it for him, since he is incapable of experiencing it. Finite man can never know infinity. Infinity is the past, the present and the future all rolled into one. Man *experiences* only the present; his world of reality is a finite world; the objective truth for him is the subjective truth which he is capable of understanding. If by some process man were able to penetrate the veil which divides infinity from finite reality he would look upon the truths of eternity as utterly unreal. He could not employ them in his daily living; he could not refer to them in his daily speech; he could not compare them with anything within his experience. Perhaps it would be a source of supreme satisfaction for a philosopher to make the discovery, but to the great mass of mankind the achievement would be meaningless. If man would find that objective measure by which to guide his life, by which to comprehend all the wonders that are about him, he must look to himself; within the awesome caverns of his vast, uncharted mind lie the subjective values

which are the only objective patterns of his experience. He may never know from whence he came or why he thinks the thoughts which inspire him, but such thoughts he does have, and their expression with all the force and vehemence of man's being is the objective fact which has produced all that is worthy in human history.

Law and justice are but the communal manifestation of these subjective expressions of the human mind. Their effect in community life is but the sum total of that force which each individual man musters on behalf of his own belief. Why does a man believe one way rather than another? That is something which the psychologist or the theologian may attempt to answer—not the legal philosopher. But when a man does believe one way or another—for whatever reason—the consequences of that belief are matters of human experience which any member of society is able to observe and interpret. Action, much extolled as the arm of human greatness, is but the outgrowth of the body of belief which mankind possesses. Why did Columbus sail on his epoch-making voyage? Because he *believed* the world was round. Why did Lister persist against the opposition of such great surgeons as Simpson to extoll the virtues of antiseptic treatment? Because he *believed* that he was justified. Some may say that he *knew* rather than believed, but such an observation has little meaning for me. Knowledge and learning may often be at the base of a man's belief, but just as often he may have no conscious basis beyond a lucky hunch. It is belief and not knowledge which is the invariable inspiration for human action. Whether for good or for evil mankind acts on the basis of his belief. It was belief in the fountain of youth which sent Ponce de Leon on a journey to Florida. Had he absolute knowledge of the existence of such a fountain he could not have pursued his voyage with any greater determination. On the other hand, had he actual knowledge that such a fountain did *not* exist, and had this knowledge influenced his belief, history would not record the romantic expedition which he led. None can say whether a man's belief is "right" or "wrong," but human affairs are ordered according to man's belief—right or wrong; this much we can observe and take into account in our effort to understand some of the by-products of that human action.

When philosophers observe that justice is a subjective evaluation, I fully agree, but the fact that human belief in something as "just" or "unjust" is purely subjective is not without special significance of its own. Although there is no objective pattern outside of one's belief by which to affirm or disaffirm the *absolute* nature of the justice in which one believes, there is something by which to measure the value of that belief in terms of daily living. That measuring rod is the belief of the community in which one lives.

As an abstract principle no one can say that "day" is better than "dias" or "jour." But in an English community "day" is certainly

the best of the three words, because it expresses an idea and serves as a means of communication. It has a special value within that community. Truth, it seems to me, is of this character in so far as mankind knows it. No one can say what is true or untrue for all time, because no one lives throughout eternity; the most that can be affirmed with certainty is what is true for a given time and place. No man can testify beyond his lifetime, or for other than the community in which he lives. It is true, for example, that penicillin is curative; yet no one can say that it will be such for all time, since the composition of the human body may so change as to make the use of penicillin fatal. But it is sufficient for the present that penicillin responds to our needs in a favorable manner, and any generalization we make about it from our experience is presently "true." This "truth," nevertheless, is subjective. An evaluation of something as true or false is not raised to the dignity of an absolute merely because it is based upon a so-called objective fact, such as the curative effect of penicillin. This "fact" is nothing but the experience of human beings at a given time and place, and conjecture alone carries it forward into eternity. For centuries men thought it was *true* that the sun revolved around the earth, and their entire religious and scientific lives were ordered in conformity with their belief; the *fact* that the earth revolved around the sun was of no significance until men came to *believe* that it did so. Undoubtedly this belief was inspired by the demonstrative weight of varied experiences which suggested to the informed mind the greater likelihood of "truth" in the Copernican system. But it is significant that it was the belief which influenced human action; "facts" have no life of their own until they become incorporated in human belief, and the pages of history amply testify that the "facts" thus incorporated follow no particular pattern. "Truth," then, is what man believes, for there is no other measure.

Justice, like truth, is a subjective evaluation, which can be determined objectively only at a given time and place. The objective measure is the community in which the subjective evaluation arises. Every human being endowed with normal intelligence has some concept of justice. This concept may be peculiar to himself or it may correspond to that which is held by numerous of his fellows. If the individual concept of justice corresponds to that of the community in which the individual lives, the concept has "value" because it is capable of practical application. If a man believes something to be just which the community believes to be unjust, he will invoke the censure of the community when he attempts to apply his particular justice. On the other hand, if his sense of justice corresponds to that of the community he will receive the approbation of the community. That which the community considers to be "just" it also considers to be "true" and "best", since those are the terms by which values are generally accepted. It

may be argued that acceptance by the community "does not make it so," but this is a fallacy, since there is no other measure or proof in human society.

When a scientist conducts an experiment and "experiences" certain results, he does not announce them to the world until other scientists similarly endowed *confirm* his observation. Unless the *scientific community* as a whole experiences the same "objective" fact, the individual scientist has no "proof" that his discovery is anything more than a figment of his imagination. Since all facts must be experienced through human senses, it is not the fact which establishes the proof of its existence, but the testimony of the individual who experienced it; and it is only the experience of an entire community which can give a measure of objectivity to the subjective experience of each individual. Thus, when one experiences the sensation of light coming from the sun he may jump to the conclusion that the sun exists as an external object. But this may be purely a figment of his imagination. When the entire community bears witness to the same experience, however, one's own experience, though purely subjective when isolated, takes on new weight. One's conviction that the sun exists seems to have new justification when everyone else thinks so; one's own experience is strengthened by the experience of others. The fact that the entire community has witnessed the same thing, although amounting to nothing more than an aggregate of individual subjective experience, is objective to the extent that it arises outside of one's *own* experience, and this fact carries conviction with it. On the basis of this *community* experience one may confidently assert that the existence of the sun has been objectively demonstrated. Yet, the basis of one's assurance is simply the assurance of his fellow men that his own senses can be trusted. If now one concludes that "it is just to give a man his due," and the entire community agrees with this, why should one consider this "fact" any less objective than the other? One has the community assurance that his sense of justice can be trusted. It is the same kind of assurance that serves to confirm his sense of perception. One might, of course, believe in his sense of justice or perception even if the community did not confirm it, but in such a case the basis for the belief would be purely subjective, since there would be nothing external with which to compare it. The objective demonstration of one's belief is its prevalence in the community, and this is true whether the belief concerns a physical fact or a moral evaluation. It may be that one's belief in the accuracy of a physical perception is stronger than his belief in the accuracy of an expressed value, but this is due to greater confidence in one's physical senses, and such confidence, until related to that of the community, is likewise purely subjective. It is not, therefore, the *strength* of one's belief which makes it objective, but rather its independent existence in the general pattern of the community. It may be that one will prefer his own sub-

jective evaluation to the objective determination of the community, just as the insane prefer their delusions to the realities of life, but the community evaluation is the only one which we can call "true" and "best" in any objective sense. If, therefore, that is "just" for the community which the community believes, and if law and justice are habitually associated, as Kelsen testifies, it follows that law must be something in which the community believes. That in which the community does not believe cannot be law because it is not just. Moreover, since justice is the subjective evaluation of individuals objectively denoted by the community, law must be of the same nature.

The difference between law and justice is in its expression. Justice is expressed in terms of what is or is not. That *is* just or that *is not* just according to the community belief. But although law is just according to the community belief, law itself is an expression of what "ought" to be rather than an expression of what is. In other words, law is what ought to be, and what ought to be is just.¹⁶ Since law is a device employed by the political community to bring about order within a given geographical area, it is composed of rules of conduct which the community believes men "ought" to observe in order to bring about the desired order. This "ought-statement" Kelsen terms a "norm."¹⁷

Obviously, since anyone can prescribe what "ought" to be, it does not follow that every norm is law, even though every law may be a norm. There must be some way of distinguishing between those norms which are not law and those which are. Kelsen distinguishes them in terms of "delict"¹⁸ and "sanction."¹⁹ It is at this point that I take decided exception to Kelsen's theory. I do not think the sanction is essential to the legal norm. I do not believe that might can make law any more than it can make right. The purpose of law is to abolish force in the ordering of human interests, not to introduce it. The ultimate in legal concepts, of course, is a code of conduct so perfectly devised that *all* interests are harmoniously ordered to the satisfaction of everyone; in such a case coercion would have no place in the human community, but the absence of coercion would not mean the absence of law, since it would be the perfection of the law which obviated the use of force. Admittedly this is a utopian formula, but conceptually it is the sole object of political communities and the avowed purpose for which law is created. A theory of law in which the principal concept is coer-

16. This "ought" notion of law has been developed with excellent clarity and precision by Kelsen, although his conclusions seem not to follow. *Id.* at 50-4.

17. *Ibid.*

18. "[C]onduct of the individual . . . which is the opposite of the conduct that the law prescribes." *Id.* at 58.

19. "[T]he law sets up coercive measures as sanctions that are to be directed under definite conditions against definite individuals." *Id.* at 57-8. "To say that an individual is legally obligated to observe certain conduct means that a legal norm provides a sanction for contrary behavior. . . ." *Id.* at 59.

cion seems to me to be antithetical to the only justification for the existence of law. And if it be argued that a distinction can be drawn between the proper and improper use of force, there is no difficulty in admitting this and in maintaining nevertheless that the ultimate goal of law is the complete banishment of force from human affairs. It seems to me highly fallacious to conclude that effectiveness is the identifying feature of law merely because it is the usual concomitant. Like meat and potatoes, corn beef and cabbage, and salt and pepper, law and the effective ordering of society are natural companions. Order is the result of law, but it can also be the result of force; the whole point being that society institutes law so that it can escape the kind of order which force creates. To say that law exists simply because order exists is to ignore the possibility that order may exist without law. One does not identify meat by the presence of potatoes, and one does not identify the law by the presence of an effective system of order. The two are fit companions, but they may occasionally be separated, and it is their occasional separation which must warn us against any false generalization. The concept, therefore, that the presence of effective order is sufficient to identify law (conceding that the norms involved are "validly created" in the sense in which Kelsen uses the phrase²⁰), seems to me to be a dangerous one. The notion that nothing succeeds like success, and that law is only what coercion makes it, has given comfort to all of the conquerors of history. But it is not for this reason that I oppose such a concept, since aggressors have demonstrated that they need little comfort for their nefarious operations. My opposition is aroused because such a concept serves to obscure the natural origin of law, which is the communal norm, thereby retarding its orderly development, upon which, as Kelsen rightly observes, the peace of the world depends.

It is a simple matter to abstract from the human community the reason why law and order are habitually associated with one another. It is human nature, rather than force, which explains the effectiveness of law. Suppose *X* to be one of those superstitious persons who believes that it is bad luck to pass beneath a ladder. We have already noted that human beings act in accordance with their beliefs. Applying this we would naturally expect that *X* would refrain from passing under ladders. If Congress were to enact a "law" that no man "ought" to pass under a ladder and that he "ought" to go to jail if he does, Kelsen would recognize this as law, providing, of course, that the sanction were generally applied. Overlooking nice constitutional objections, it might be admitted that the enactment would constitute law, and certainly it would be efficacious as to *X*. But its efficacy would be due to the fact that *X* *believed* that he ought not to pass under a ladder, and

20. See note 31 *infra*.

not to the fact that Congress threatened him with jail if he did. If this act of Congress reflected the prevalent belief of the entire community, the norm would be effective throughout because it corresponded to that belief, and not because force was available to make it effective. Conversely, if the enactment of Congress failed to reflect the community belief, the amount of force which would be necessary to make the norm effective would be enormous, and its effectiveness would be short-lived, as witness the Volstead Act. But whether the enactment is law or not depends upon whether or not it corresponds with the community belief, rather than upon any artificial measure of its effectiveness.

Force, of course, has its place in the present-day system of law, but it is not the identifying feature which Kelsen considers it to be. It is a creature of law itself, introduced to supplement rather than to bring about the effectiveness of the legal norm. The legal norm is generally effective because the community believes in it and acts in accordance with that belief. But there is always a segment of the community, insignificant in comparison with the greater portion, which does not believe in the legal norm. Force is employed to bring about compliance on the part of this segment of the community whenever the community *believes* that such compliance is necessary to effectuate the initial purpose of the law, which was the peaceful ordering of that society. But this strict compliance by the minority through use of force is not characteristic. The purpose of law is to bring about the maximum of order within a community *without* the disordering and disrupting element of force. The best ordered community is that in which the least force is necessary in bringing about compliance with the rules of conduct. When the rules of conduct correspond fully to the belief of the community this desirable situation is present, since compliance is natural to those who share the belief, and is enforced only as to the few who do not. Kelsen believes that it is the element of coercion which makes law effective. I believe, on the contrary, that effective law relegates coercion to a minor role, since it is only in a comparatively few instances that it is helpful to the ordering of society, and even then its use is an admission that the law has failed in some respect.

Because law and justice are habitually associated together, and because justice is an evaluation of the community, there can be no such thing as an unjust law. That is "just" which the community believes, and law is simply the normative expression of the community belief. To identify law, therefore, we must be able to recognize the normative expression of the community when we see it, and we must also be able to distinguish it from that normative expression which seeks to pass for law by bringing about temporary order through the medium of force.

A norm, whether it is legal or not, is the product of the human mind. It is an expression of human thought. The mind first resolves what

"ought" to be, and the norm then gives expression to that resolution. The human mind, therefore, is the primary source of all norms.

In any given community the population may be divided between those who articulate their thoughts and those who do not; individuals may be articulate with respect to one matter and inarticulate with respect to another. Articulation may manifest itself through action as well as words. Obviously, we can determine the belief of an individual only when he is articulate. In the political community, therefore, we are concerned at any given time only with those who compose the articulate community. They are the ones who create the norms which are the object of our study. With respect to any given problem the community may be divided roughly into the articulate majority and the articulate minority. The articulate majority is that segment of the population which is most representative of the community belief. The articulate minority is least representative. For all practical purposes, therefore, the belief of the articulate majority is the belief of the community.

It is a matter of simple observation to note that the inarticulate portion of the population will generally follow the norms of the articulate majority. Having no strong convictions one way or the other relevant to the particular interest, they conform to the prevalent belief of the community. The articulate minority will, in most instances, also conform to the norms of the articulate majority. This is explained by the fact that individuals who are members of the minority on one matter are members of the majority on another. Consequently they concede, as a general rule, that the minority "ought" to follow the precepts of the majority. It is only occasionally that they do not subscribe to such a salutary belief, and in such a case they constitute what is generally referred to as the "intransigent minority." It is only against the intransigent minority that the majority must employ force to bring about compliance with its belief, and it is only rarely that a community will encounter an intransigent minority of any size.

From the discussion so far, it is obvious that the communal concept envisages law as that body of norms which expresses the thought or belief of the articulate majority of any political community. Law is what the community believes ought to be done in order for peace and harmony to exist within that community. Such a norm is invariably considered "just" by the community which creates it. I have already suggested that force is associated with law only as a device by which the intransigent minority is made to conform to the community norm. When force is employed against the community itself as distinguished from the intransigent minority, it is no longer a lawful force. Such force lacks the approbation of the community and is not considered "just" according to the definition we have evolved. Since law and justice are habitually associated with one another, an unjust force cannot

be lawful. Force is "unjust" and "unlawful" when it is employed by the articulate minority in an effort to compel the majority to conform to the norms of the minority. Norms which are enforced by the minority in this manner will be termed "fiat" to distinguish them from "law." Fiat, unlike law, cannot be effective in the absence of force. The majority do not conform willingly to norms of fiat as they do to legal norms; this is because human belief normally controls human action, and their belief does not correspond to these expressions of the minority. Moreover, they do not believe in a general way that the majority "ought" to conform to the belief of the minority, as do the minority with respect to the majority. As a consequence of these social or psychological factors, which need not be analysed further for the purpose of this study, the majority is invariably intransigent in the face of fiat. Force alone can produce compliance with such norms, since only force or its concomitant of fear can deter the natural acts of human beings. That is why tyranny and dictatorship must always possess superior force to succeed. The norms which dictators seek to enforce do not represent the belief of the articulate majority. They are norms of fiat, and consequently do not inspire a natural compliance on the part of the majority, as do the legal norms.

Kelsen, in the development of his theory, neglected to make this crucial distinction between law and fiat. Apparently he did not take Socrates' admonition to heart. Kelsen observed that law was made up of norms and that some norms which he called "law" were enforced by sanctions. From this he concluded that all norms which are enforced by sanctions must be law. This, however, does not follow. Force is habitually associated with fiat—only occasionally with law. It is the distinguishing feature of neither. Law is the norm of the articulate majority of any political community—whether enforced or not. Fiat is the norm of the articulate minority of the political community. Law is an ordering factor in human society because the great mass of the community follow it naturally, thereby obviating the employment of force except in the rare instance of an intransigent minority. Fiat, on the other hand, is a disordering factor in human society, since it necessitates the employment of excessive force, and invariably creates an intransigent majority which strives unceasingly to upset the "order" which the minority creates artificially through force.

This rationale of majority rule is much more than a device to justify the democratic society in which we live. It is an explanation of the course of history. It abstracts from human nature the conduct which has steadily transformed the type of government by which men have lived. The evolution of political society along democratic lines is inherent in the nature of mankind. Because men act in accordance with their beliefs no structure of society can long endure which does not conform to the prevalent belief of the community. The significance of

this fact in world affairs and the promise which it holds for the future ordering and peace of the world are subjects which merit consideration in the following sections of this article.

THE RELATION OF GOVERNMENT TO LAW

If law is the norm of the articulate majority, it becomes important to learn how that norm is identified in modern society. The articulate majority, although a very real force in society, is a nebulous concept at best. It changes with each new interest and is spread over the length and breadth of the geographical community. At any given time within a given political community, the articulate majority is a precise group, but the society of man has not yet developed measurements fine enough to locate and register this moving force in the body politic. The fault, of course, is not with the concept, but with the meager intellect of man which is as yet incapable of capturing the firm impression which the articulate majority makes upon the communal terrain. It is to be hoped that some day man will be able to tally instantly every shade of belief which the articulate majority registers on problems of importance, just as the modern voting machines register the wishes of the electorate. But until that time, society must be satisfied to approximate the belief of the articulate majority with as much accuracy as possible. It is in the perfection of means by which this may be accomplished that progress in the development of law and order will be best assured.

At times it may seem that the articulate majority is extremely inarticulate, but it would be nearer the truth to say that society is simply hard of hearing. For the power of speech to have any meaning there must be ears with which to hear. The articulate majority is the voice of the community; the organs of government are its ears. From the articulate majority come those rules of conduct which can assure the greatest order with the least force. But it is the government which must identify these rules and administer them. It is not enough to know that law is the norm of the articulate majority, any more than it is enough to know after an election that the winning candidate is designated in the ballots. The ballots must be tallied and the result must be announced. Nor can everyone share in the responsibility of counting the ballots. The responsibility must be centered somewhere in order that an efficient system can be developed and a final count reached. The decision, of course, has already been made by the electorate; the counting of the ballots does not change that decision (at least not in an honest election), but merely determines it, so that all may abide by it. And if dishonesty results in a false return, the fact that a candidate is *imposed* on a community in no way alters the fact that he was not *elected* by it.

Organs of government play much the same role with respect to law

(created by the articulate majority) as is played by those who count the ballots after an election. In order for the minority to sublimate their norms to those of the majority it is necessary that an authoritative determination of the majority norms be made known. Occasionally this is manifest at once without very much difficulty, just as the outcome of an election may be evident in advance, but the official returns must still be made. Government is saddled with the responsibility of determining the law as it is made by the articulate majority. It does not, of course, consciously go about looking for the norms of the articulate majority, but unless the rules of conduct which it announces for the community are approximately those of the majority, it has simply bypassed the law to create fiat. In so doing the government provides the occasion for widespread unrest and ultimate disorder, since the force which is centered in its hands is directed against the greater part of the community in opposition to its beliefs. The function of government is not so much to enforce law as it is to prevent selfish groups of individuals from using the force of the community to impose fiat. Fiat, by definition, favors the interests of the few over the many; the purpose of law is to harmonize the interests of all; fiat, therefore, although it has the superficial normative characteristic of law, defeats the purpose of law and harms the interest of the community.

When the organs of government have determined what the belief of the community is, they formulate that belief in normative terms so that each individual, who initially knows only his own belief, can also know the community belief. This is commonly referred to as "legislation." It consists of "saying the law," a duty which Bodin observed had passed in ancient days from the king to the legislature.²¹ It is a process both of finding the law (in that it requires a determination of what the articulate majority has already expressed) and of making the law (in that it requires a translation of the law into specific normative terms). The organs which thus "say the law" have been designated by political and legal philosophers as the "sovereign" of the community. Sovereignty, therefore, is simply the power to "say the law."

We know that, viewed in these terms, the organs of government which are thus designated as the "sovereign" of the political community are really only the *apparent* sovereign. Their power to "say the law" is dependent upon their power to hear the law as it is first said by the articulate majority. It is the articulate majority, therefore, which is the *actual* sovereign. If the apparent sovereign does not honestly reflect the belief of the actual sovereign in the norms which it creates, there are numerous means by which the actual sovereign can, in due time, demonstrate its belief. It may remove the apparent sovereign by means of the franchise or revolution. It may repudiate the particular act of

21. McILWAIN, *op. cit. supra* note 1, at 286

the apparent sovereign through other organs which it has set up to act for it, such as the courts. Thus, in a conceptual as well as in a practical sense, the organs of government derive their just power from the community. By means of constitutions and fundamental law the articulate majority has provided guides for the organs of government in fulfilling their responsibility, which is to formulate a normative order incorporating the true belief of the community.

Government, then, is nothing more than a convenient instrument which gives form to the substance of the law which the community has created. Law itself is the spontaneous creation of that aggregate of individual minds which is the community. As such it is completely free; it varies as human belief varies; it is subject to all of the manifold influences which press and strain upon the human mind; the course it takes is unpredictable, since it depends upon the resistance, the predilections, and the culture of the multitude of minds in which it is given birth. There is no law to govern the creation of law, save human nature, which is itself a vague term covering the physical and mental characteristics which typify homo sapiens. To the extent that law follows a set pattern because it is derived from human nature, to that extent there is "natural law" which owes its form to the eternal pattern within man himself. But to the extent that each community molds men in its own pattern, there is conventional law, which is the product of the peculiar life of that community. And to the extent that man's thinking follows no pattern at all—natural or conventional—there is the law of chance. But whether law be natural, conventional, or occasional, it is the product always of the human mind and can be given uniform expression only through an authoritative promulgation of community norms.

In order that the government, which is composed of men and subject to the frailties of mankind, may accurately express the law of the community through the norms which it promulgates, the fundamental law of the community lays down a guide for governmental conduct.²² As long as the government creates its normative system in accordance with the fundamental law of the community it will more than likely reflect the community belief. But if it should deviate from the procedure which the community has declared to be desirable it will find itself out of touch with the community belief. Thus, for example, where the fundamental law of a people states that norms should be promulgated by the elected representatives of the community, it is a violation of that fundamental law for the norms to be formulated instead by appointed office holders. But it is more than the initial violation of the law which is to be regretted; for the norms which are thus created in

22. This notion of fundamental law is expressed by Kelsen in terms of the valid creation of law. See note 31 *infra*.

violation of the fundamental law are more than likely to be norms of fiat rather than norms of law. It is elementary that one can not be out of touch with the fundamental spirit and belief of a community and yet express the incidental belief of that community with respect to any given interest. The presumption, of course, is always that the government will follow the law which the community has established, and that, as a consequence, the normative expression of the government will correspond to the normative expression of the community. It is only in the face of unmistakable articulation by the community that the presumption which favors the legality of government is rebutted. But it must always be remembered that the law originates in the community itself rather than in the government of the community, and even when the normative system of the government expresses fiat, the law nevertheless remains in the community as a creature of the community, and awaits only its normative expression.

Because of their common use the terms "state" and "sovereign" may be of some service in clarifying the concepts which have just been introduced. Without defining it, Austin conceived the state as simply the political community expressed in terms of its human population.²³ Kelsen objects to such a conception, arguing that a community is not the mere sum of its individual members but rather "the order which regulates their mutual behavior."²⁴ Moreover, this "coercive order which constitutes the political community we call a state, is a legal order."²⁵ Thus Kelsen conceives of the law and the state as one and the same thing.²⁶ I have considerable difficulty with this definition of Kelsen's. If we wish to say arbitrarily that "law" and the "state" are the same thing, I have no objection, since this would merely be a matter of definition. But if one means by the "state," the political community, as Kelsen does, it is impossible to conclude that the political community is the legal order. Order is admittedly the interest which individuals share in the creation of any political community, but it is simply the excuse for the community and not the community itself. Even if I were to admit that coercion is essential to order—which I do not—I could not make of it anything more than a device of the community designed to bring about that order. To transform this coercive device into the community itself, which can only be the sum total of the human beings who employ the device, is both unrealistic and conceptually inadequate.

Defining the term "sovereign" is no less troublesome than defining the term "state." Austin thought the sovereign to be that segment of

23. AUSTIN, *The Province of Jurisprudence Determined*, in *LECTURES ON JURISPRUDENCE* 220 (1885); Kelsen, 63.

24. Kelsen, 64.

25. *Ibid.*

26. *Id.* at 64-5.

the community which creates the law and is not itself subject to the law or "habitually obedient to a determinate human superior."²⁷ To this definition Kelsen takes exception as being "sociological or political, but not juristic."²⁸ Since in Kelsen's view, the legal order and the state are the same thing, the sovereign as the creator of law must also be an organ of the legal order and therefore subject to it.²⁹ This, of course, presupposes that the legal order and the state are one and the same—a supposition which cannot be conceded. Kelsen also argues that law governs its own creation, and since the sovereign creates law, the sovereign must be governed by law.³⁰ But here again is a play on words which depends for its validity upon the major premise which cannot be conceded. Law does not govern its own creation.³¹ Law governs its normative expression, since it establishes a guide for the government in creating the normative system, but nothing except the human mind governs the creation of law. Austin, of course, meant his definition of "sovereign" to apply to the organs of government which have been designated herein as the "apparent sovereign." Law *appears* to emanate from the government, and so it is perfectly natural to be misled into thinking that it actually emanates from that source. But we have already noted the distinction between the apparent and actual sovereigns, and with this distinction in mind the difficulty which besets both Austin and Kelsen is readily explained. Austin was justified in concluding that the creator of the law could not itself be subject to the law, since it is an empty limitation to say that one who makes the law at will is bound to abide by it. But he erred in thinking that

27. AUSTIN, *op. cit. supra* note 23, at 224; Kelsen, 64.

28. Kelsen, 64.

29. *Id.* at 65.

30. *Ibid.*

31. According to Kelsen, "a legal norm is valid because it has come into being in the way prescribed by another norm. This is the principle of validity peculiar to positive law." *Id.* at 62-3. "Thus the much-mooted question whether the state creates the law is answered by saying that men create the law, on the basis of its own definite norms. The individuals who create the law are organs of the legal order, or, what amounts to the same thing, organs of the state." *Id.* at 65. The notion that the law regulates its own creation is like cancelling God out of the story of creation and beginning with Adam. I am willing to admit that Adam may have fathered the whole human race, but I am not yet prepared to admit that he fathered himself. When Kelsen says that men create the law, but do so according to the fundamental law, it is like admitting that God created Adam, but insisting that He did so according to instructions received from Adam! The whole difficulty is resolved by observing that norms which individuals may create as members of the government, do not create the law, but merely give expression to that law which was already created by the community as a whole. Legal norms, therefore, are formulated according to fundamental law, but their substantive content arose out of the communal belief which was itself subject to no control. The notion that the formulation of norms has any vitality of its own in the creation of law is entirely misleading. The formulation of norms may be likened to Bishop Hoadley's interpretation function (see note 6 *supra*), but the creation of law itself may be traced to the community as the *real* law-maker.

his "sovereign" actually made the law. His sovereign, by which he meant the government, merely enunciated the law. It is proper to say, therefore, that the apparent sovereign is subject to the law. But when we refer to the actual sovereign it is meaningless to say that the actual sovereign is subject to the law. Law serves as a guide for individuals; it emanates from the group as a whole; the group as a whole is made up of individuals. One can say, therefore, that the individual observes the law, or one can say that the community observes the law. It makes no practical difference how the relationship is stated as long as it is understood that when one speaks of the community in this sense one has reference only to the individuals within the community and not to the community as a functional group. As a functional group the community is the sovereign, and as the sovereign it creates law at will. To say that the creator of law is subject to that law is a fatuous limitation at best. To say, however, that the *apparent* sovereign, *i. e.* the government, is subject to law, is quite another matter, since it is only through observance of the law that the apparent sovereign is able to tell others what that law is and thereby create the impression that the law emanates from it.

Although the apparent sovereign is subject to the law, it may sometimes violate that law. And such violation is not easily detected. The means of knowing what the actual sovereign believes, and hence what the law really provides, are all centered in the hands of the apparent sovereign. Likewise the force of the community is also in the hands of the apparent sovereign and may be used as readily to impose fiat as to enforce the law by suppressing fiat. It is only in the face of unmistakable repudiation by the articulate majority that the acts of the apparent sovereign may be clearly established as fiat. The apparent sovereign may be aware that it is deviating from the community norm when it imposes fiat by force, or it may do so innocently, not having properly interpreted the expression of the actual sovereign. In either case, however, its conduct is unlawful. The factual relationship which exists between the actual and apparent sovereigns is not altered by the fact that the apparent sovereign sometimes misinterprets the expressions of the actual sovereign, any more than the difficulty of measuring an infinitesimal area, or the errors resulting from such measurement, can alter the actual dimensions of the area itself. In short, law is a reality which exists apart from the acts of government, and, although it is dependent upon government for that expression which makes it comprehensible to individuals, it is nevertheless present in an objective sense and may be distinguished from fiat.

MULTINATIONAL JURISPRUDENCE

The dual system of law—the existence side by side of separate standards for domestic and international law—is the tacit admission of legal theorists that they are incapable of reconciling the apparent differences

which law manifests in these two fields. Monistic theories which conceive of domestic and international law as identical in nature and origin are much more satisfying conceptually, since a theory which fits law equally well wherever it is found seems to have greater validity than one which gives law a split personality. It is no service, however, to transform a fundamentally dualistic theory into a monistic theory by main force alone.³² The subtlety and ingenuity of minds which torture dualism into monism cannot be denied, but the exhausting mental gymnastics by which the feat is accomplished usually result in conceptual anemia. The communal concept can at least claim that considerable credit due a theory which is truly monistic and which requires no act of torture to fit equally well the province of domestic and international law.

The origin of all law is the community. This is true whether that community is bounded by national or multinational borders. Kelsen conceives of international law as superior to domestic law;³³ this must be, he argues, because the theory of a community of equal states requires one to posit a superior legal order which defines "their mutual spheres of validity."³⁴ But I prefer to define their "mutual spheres of validity" in terms of their physical structure. The mere fact that national communities occupy separate geographical areas is sufficient to explain their relationship to one another. Within a given geographical area there can be only *one* political community, and hence the law of that community is sufficient to regulate its affairs. States are equal and exercise authority over the national territory because the law of each community is exercised with respect to the territory concerned. It is not some superior law which marks out the limits of this authority, but rather the natural exercise of law within the only sphere in which it can possibly function—the community in which it arises. I cannot conceive of law existing *over* or *between* two or more political communities. Certainly such a concept is foreign to the definition of law here

32. Kelsen, demonstrating his usual breadth of vision, achieves a monistic status for his theory by the interesting device of the normative stepladder. Since each norm is derived from another and higher norm the procedure terminates in a norm which is derived from no other and is the fountain head of all. See note 31 *supra*. This gradation (*Stufenbau*) of norms has been carefully worked out by MERKL, *DIE LEHRE VON DER RECHTSKRAFT ENTWICKELT AUS DEM RECHTSBEGRIFF* (1923), but Kelsen, although relying on the concept of gradation, does not believe that it leads to an objective determination of the highest norm. In his opinion the basic norm can be reached only by means of an arbitrary abstraction from the law, motivated by the individual's *Weltanschauung*. For reasons of his own, Kelsen selects the highest international law as the basic norm from which all law—domestic and international—derives. KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* 103 (1920). Verdross (with Kunz), on the other hand, contends that the primacy of international law is a necessary conclusion. VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* 17 (1926).

33. Kelsen, 68.

34. *Ibid.*

evolved; it would more properly correspond to fiat. Law arises out of the political community and therefore exists *within* that community. Such being the case, it is inaccurate to speak of "international law." The law to which that term has reference might more properly be called "multinational law," since it arises out of, and is applicable within, a single community composed of many nations.

The multinational community is nothing more than the sum total of those individuals who comprise the human society within a geographical area occupied by two or more nations. For example, in so far as the people of the United States and the people of Canada are interested in ordering their mutual affairs as harmoniously as possible, they are members of a single community extending from the southern limits of the United States to the northern borders of Canada. The rules of conduct which can best order this society arise out of that multinational community, just as the rules of conduct which can best order society within the United States arise out of that national community. The source of law in either case is the articulate majority of the community. We think of the unfortified border between the United States and Canada as a product of agreement between the two national governments, but before any such agreement could be reached the millions of individuals who compose the multinational state of "the United States and Canada" had to decide in the first instance that this was the best thing for the harmonious ordering of their common interests. Without such a conviction on their part the agreement of their governments would have been meaningless. The governments were merely articulating the policy in normative terms which the common community had already created.

Just as there are different national states so there are different multinational states. The number depends upon that combination of interests which impel certain peoples to associate together for the harmonious ordering of their common society. The largest multinational community, measured in terms of that geographical area which identifies any political community, is the world. The nature of the world community is no different from that of the tiniest village community. It is composed of human beings within a well-defined geographical area whose common interest is the ordering of their society. The apparent difference between domestic and multinational law is to be found in the developmental difference between the national and multinational state. This difference, however, is not controlling. It is merely an expression of the transition which takes place between the early and later stages of community development. The difference results from the fact that in a national community there is both an actual and an apparent sovereign, whereas in a multinational community there is, to date, only the actual sovereign. Since the apparent sovereign is a creature of the community, its existence depends upon

the volition of the community, and volition of this nature is an expression of the highly developed "self" consciousness. Until a community develops this acute awareness of itself, therefore, the orderly and persistent government necessary for the best expression of its desires and wishes is never instituted. But this in no way affects the status of the law which springs from the community, whether or not the community is aware of its own existence. The apparent sovereign (the government) is nothing more than a convenient device by which the law is enunciated and administered, but the law itself derives from the actual sovereign, which is the community itself, regardless of its stage of development. When a community becomes fully aware of its existence as such, and of the complex nature of its problems, it establishes a government as the means by which its society can best be ordered. But the world community, and most multinational communities of lesser area, have not yet considered their society sufficiently complex to call for the establishment of a common government. They have conceived of their common interests as occasional and isolated interests which can be dealt with by ad hoc machinery. The law which they have created for the harmonious development of the multinational society must be interpreted as best it may without the aid of any common governmental devices. Historically this has led to continuous international misunderstanding and to intermittent war. The common interests of these multinational communities are much more frequent and numerous than the communities have come to realize. As a consequence, the law embodying them cannot be determined by the independent action of various national governments—however well intentioned. Without an authoritative expression the community has no practical guide in the way of legal norms. There must be some permanent governmental organ to give expression to the law through a well established normative system, just as in the national communities. The realization of this need is slowly dawning upon the world, and there are indications that the establishment of apparent sovereigns within the several multinational states will eventually take place. "Quasi" apparent sovereigns already exist in the Pan-American Union and the United Nations, as well as in other lesser multinational states of this nature.

Since every community must have some means of identifying the norms of the actual sovereign—however primitive that means may be—the multinational communities today rely upon the expressions of the national governments. But harmony can result from this system only as long as all of the governments "say the law" in the same way. When there is a difference of opinion there is no means by which conflicting statements of the law can be reconciled. The imposition of fiat is made possible under these circumstances, since the force of the community is as much at the disposal of one group as another. There is, in short,

no aggregation of force which can be used to resist the imposition of fiat, even where there is a clear distinction between that which is law and that which is fiat. The governments themselves have attempted to set up a guide in their "saying of the law," but this guide—the maxim "pacta sunt servanda"—is entirely inadequate. The notion that treaties ought to be observed because they embody the law is not entirely accurate. A treaty *may* embody the law of a particular multinational community, but it should be obvious that treaties can be imposed upon a community just as any other norm can be imposed. And if, in fact, it does not represent the belief of the articulate majority of that community it is fiat rather than law, no matter how solemn the occasion of its promulgation. Where governments write fiat into treaties—whether knowingly or unknowingly—it is impossible to give them the dignity of law. While it is true that the presumption of legality is always in favor of the acts of government, history has rebutted that presumption too often in the multinational community to justify much reliance on it. This is because instead of "government" there are "governments," and the norms they express are more apt to be a compromise than the honest reflection of community belief. Throughout the centuries countless norms of fiat have been written into treaties, and their attempted enforcement has been the source of great unrest. Governments continue to honor this type of fiat out of their respect for the misleading generality contained in the phrase "pacta sunt servanda." I do not argue for the wholesale disregard of treaties, but simply for an intelligent appraisal of their contents. No nation should attempt to hold another nation to the terms of a treaty when it is obvious that such treaty does not embody the law of the multinational community. Fiat should not be preferred to law merely because of blind adherence to a Latin phrase.

Kelsen tells us that international law is a true legal order because it employs sanctions for disobedience to the law.³⁵ These sanctions are reprisals and war. I have a little difficulty becoming jubilant over such an evidence of legality. However one may rationalize the *bellum justum*, war is to my mind an evidence of the breakdown of law rather than a shining example of its enforcement. I concede that there is such a thing as a just war, since war is sometimes the last, best means of instilling an element of essential decency in human affairs, but when the affairs of mankind reach such a state it is evident that the law of the multinational community has broken down. The various contenders have, at that point, no interest in determining the law. Their object is to enforce the norms in which they believe, whether those norms be law or fiat in the community concerned. In order, therefore, to avoid the impasse which such conduct brings, it is necessary to avoid the

35. *Id.* at 66.

occasion for it. This can be achieved only by common agreement beforehand as to the legal norms of the community. If the normative system is purified so that it contains only legal norms, the enforcement of such norms will be no insuperable problem, and the relations within the multinational communities of the world will be upon a firm footing.

The greatest progress in purifying the normative system must be made through the medium of government.³⁶ Only when the multinational community establishes a government which is authorized to "say the law," will the text-writers and the national governments cease to perform that function. Only then will confusion be dissipated and uniformity established. There can, of course, be no absolute assurance that the multinational government will always "say the law" in preference to fiat, but it will at least have the means of doing so, and an intelligent selection of its members may insure the faithful performance of its duty. Life never comes with a guarantee, and neither does the law, which is but the product of intelligent living. Yet man has it within himself to provide the nearest thing to a guarantee by remaining ever vigilant in the pursuit of those things on which he has founded his belief. Having knowledge of the true nature of law, man should strive consciously to purify the normative system of the political community in which he lives, thus repudiating fiat and the illegal force which gives it strength.

36. See Bergman, *A World Legislature*, in *FEDERATION, THE COMING STRUCTURE OF WORLD GOVERNMENT* 133 (Eaton ed. 1944).