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## THE NORMATIVE THEORY OF LAW

GEORGE E. GLOS\*

The normative theory of law came into existence early in the twentieth century. Its purpose is to purify the traditional science of law by removing from it the many foreign elements which have found their way into it, and thus to establish a pure method of legal cognition. Its chief feature, therefore, is methodological and critical. The normative theory set out to build a system of generally valid notions which presuppose the normative contents of the various legal orders. The theoretical equations which refer to these generally valid notions are not subject to change. They are found exclusively in the theory of law and it is only for the theory of law to define them. They are especially beyond the reach of empirical normgivers, such as legislatures and judiciatures. These empirical normgivers, however, have the exclusive authority to make norms, *i.e.*, to stipulate that which ought to be.

The traditional science of law has never been equipped with any uniform methodology. This explains why the normative theory does not object to or criticize any existing legal methodology but points to, and complains of, the utter lack of methodology in the traditional science of law. The normative theory has not, therefore, supplanted any existing doctrine or method of legal cognition, but has merely filled a gap found in the existing science of law. Until the formulation of the normative theory, the traditional science of law, and consequently, the study of law in general, lacked any systematic method of cognition. The reason lies in the fact that both theoretical and practical legal thinking in most of the world was influenced by the theory and *praxis* of the Roman law. Yet the Romans are known to posterity as men of practical ability rather than of theoretical excellence, and it is well known that they never achieved any significant success in the theory of law. The theory of law they built is primitive, and the esteem it acquired in the science of law of many nations is due only to the fact

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that at the time Roman law was introduced, no theory of law existed within the legal structure of these nations.<sup>1</sup>

The original proponents of the normative theory of law are Hans Kelsen<sup>2</sup> and Frantisek Weyr.<sup>3</sup> Both authors gave an exhaustive exposition of the theory in several major treatises.<sup>4</sup> It is the object of this article to give an outline of the normative theory of law as expounded by Frantisek Weyr, who can be regarded as a representative of its philosophical foundation.<sup>5</sup>

1. In expounding the canons of their law, the Romans made no distinction between theory and *praxis* and were in the habit of confounding the notions of theoretical and practical knowledge. They never made it clear whether they referred to the normative contents of the Roman law or to the general, formal notions created by the theory of Roman law.

2. b. 1881, professor of law. The doctrine of pure theory of law which he founded and developed in Vienna is also called the "Vienna School of Jurisprudence." (The Vienna School preferred the name of "pure theory of law" to "normative theory"). It was constituted by Kelsen and his Austrian disciples and followers. Since Kelsen's departure from Vienna in 1930 it has virtually ceased to exist.

3. 1879-1951, professor of law. The doctrine of normative theory which he founded and developed in Brno is also called the "Brno School of Jurisprudence." (The Brno School used the name of "normative theory.") It ceased to exist upon its founder's death in 1951. The fact that these two schools ceased to exist in the sense of law schools where the theory is systematically developed and cultivated does not affect the existence or importance of the theory.

Frantisek Weyr was also the founder of the "Revue internationale de la théorie du droit" which was published in Brno between World Wars I and II and which had Frantisek Weyr, Hans Kelsen, Leon Duguit, Gaston Jèze, and Louis le Fur on the editorial board.

4. Major works on the normative theory (pure theory of law) by the above authors are as follows:

Hans Kelsen:

- a. HAUPTPROBLEME DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VON RECHTSSATZE (1911).
- b. ALLGEMEINE STAATSLEHRE (1925).
- c. REINE RECHTSLEHRE (1934) [PURE THEORY OF LAW (M. Knight transl. 1967)].
- d. GENERAL THEORY OF LAW AND STATE (1945).

Frantisek Weyr:

- a. ZUM PROBLEM EINES EINHEITLICHEN RECHTSSYSTEMS (THE UNITARY SYSTEM OF LAW), (1908).
- b. PRISPEVKYK TEORII NUCENYCH SVAZKU (ON THE THEORY OF STATE) (1908).
- c. ZAKLADY FILOSOFIE PRAVNI (PHILOSOPHY OF LAW) (1920).
- d. TEORIE PRAVA (THEORY OF LAW) (1936).
- e. NORMATIVNI TEORIE (NORMATIVE THEORY) (1946).

5. WILLIAM EBENSTEIN, DIE RECHTSPHILOSOPHISCHE SCHULE DER REINEN RECHTSLEHRE (1938). This work may also be consulted for the followers of Hans Kelsen and Frantisek Weyr. The English version of the work appeared under the name *The Pure Theory of Law*, in 1945.

## PHILOSOPHICAL BACKGROUND OF THE NORMATIVE THEORY

The philosophical background of the normative theory is provided by legal philosophy which is concerned with legal cognition and the attending noetic problems. It deals with matters of form only, to the exclusion of the actual contents of legal norms.<sup>6</sup> The subject matter of this philosophical approach is cognition in general and the relation of the cognizing subject to the object which is being cognized in particular.<sup>7</sup> Noetic problems of this kind appear in the philosophy of Plato (idealistic philosophy) and in that of Immanuel Kant (critical idealism). Kant makes a fundamental distinction between cognition and volition, between intellect and will. As a consequence of this distinction, science is separated from all other activity and appears as the function of pure intellect, which wills nothing but cognition and according to Schopenhauer,<sup>8</sup> possesses, therefore, the quality of absolute objectivity. As far as ontological (causal) cognition is concerned, the part of the subject in the process of cognition was determined by Kant. It is space, time, and the law of causation which reveal to us the object of cognition as it is. Without these forms of cognition, the object remains fundamentally uncognizable as the "thing-in-itself."<sup>9</sup>

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6. Legal philosophy in the formal sense may be contrasted with the traditional legal philosophy which may be called legal philosophy in the material sense. Legal philosophy in the material sense concerns itself with the problem of what contents statutes and legal norms should have to achieve the purposes sought to be realized. Legal philosophy in the material sense thus deals with the forms of government, forms of production and distribution of goods (*e.g.*, individualistic, socialistic), and the general scheme of law and order.

7. The science of cognition—noetics—is not a method in the current meaning of the word. A method can be characterized as a technique of cognition. A method of cognition in this sense is inductive, deductive, etc., whereas noetics is causal, normative, or teleological.

8. 1788-1860. *DIE WELT ALS WILLE UND VORSTELLUNG* (1819). [THE WORLD AS WILL AND IDEA (R. Haldane & J. Kemp transl. 1896)].

9. Kant's critical idealism realizes that in order to cognize the physical universe or nature we have to use a method which employs the principle of space, time, and the law of causation as its means of cognition.

Applying the principle of space, time, and the law of causation we arrive at another fundamental concept, namely, the concept of reality or existence in the ontological or causal sense. "Real" in that sense is only that which as effect was brought about by a given cause and was so "realized." Since the concepts of space, time, and the law of causation are brought in the process of cognition by the subject of cognition, a reality "in itself," *i.e.*, without the subject of cognition is inconceivable. The object of cognition which remains after having removed the subject of cognition together with its method of cognition is termed by Kant the "thing-in-itself." This "thing-in-itself" is therefore basically uncognizable, *i.e.*, it cannot form the object of cognition.

Yet the causal method of cognition is not the only known method of cognition. Apart from the principle of cause and effect, which explains all happening in nature by means of causation, the human intellect is conversant with other, equally fundamental concepts which, although important in the area of normative cognition, are meaningless in the system of causal cognition. The subject of cognition may visualize its object of cognition either as real (existent), as obligated, or as willed. This construction represents the contribution of the subject to the process of cognition. If we dispense with it, what remains is the "thing-in-itself," an object fundamentally uncognizable. Notwithstanding its uncognizability, the "thing-in-itself" is the object of cognition in the noetic sense. The only quality we can attribute to it is its "givenness," *i.e.*, the quality of being the object of cognition. This givenness has nothing to do with the concept of existence in the causal sense since to be existent means to be the object of cognition in the causal sense only, and not to be the object of cognition in general.<sup>10</sup>

The counterpart of the causal concept of existence within the system of the normative theory is validity. In other words, givenness appears from the causal point of view as existence, and from the normative point of view as validity. This cannot, however, be demonstrated, just as it is impossible to demonstrate that the "thing-in-itself" is a "given" object of cognition. This quality of the object of cognition, namely, the general givenness of the "thing-in-itself," the existence of the physical world, and the validity of the norm, appear as the hypotheses of the subject of cognition. One may say, therefore, that the object of

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10. The concept of existence in the causal sense must be distinguished from the general concept of "givenness." Givenness is a quality of every object of cognition irrespective of the method of cognition employed, and it is thus wider than existence.

Critical idealism realizes that the causal method of cognition which is applied to cognize the outside physical world and the happenings therein is not and cannot be the only method of cognition since it applies only to the cognition of that which "exists" in the causal sense and to the process of change which takes place in the existent physical universe. The causal method proceeds by discovering or formulating the various laws of nature according to which certain causes are always necessarily and inevitably followed by certain effects. It follows that the physical universe and all happenings therein fall within the bounds of absolute necessity since everything therein occurring happens according to the law of causation necessarily, *i.e.*, it inevitably must so happen.

It is expressly to be noted that the normative method of cognition is just as innate to the human intellect as the causal method of cognition and that it was, especially in the early time, better appreciated by the human intellect than the causal method. That may be concluded from the fact that the causal method uses the word "law" to express its most fundamental concept, namely the relation of cause and effect.

causal cognition is the physical world; that of normative cognition, the norm (that which ought to be); and that of teleological cognition, the postulate (that which is willed).<sup>11</sup>

There are sciences, however, to which the Kantian concept of the "thing-in-itself" as the object of cognition cannot be applied. These are sciences to which the method of cognition or the forms of cognition appear to be at the same time the objects of cognition: logic and mathematics. To these two sciences one may add normology if it is taken as the science of the abstract forms of normative thought. The relation of normology to concrete normative sciences, like ethics or the science of law, resembles the relation of pure mathematics to applied mathematics. Just as the mathematical notions cannot contradict the notions of pure mathematics, the notions of the concrete normative sciences cannot contradict the general normological notions and vice versa.

The noetic trends which originate from critical idealism are characterized by their application of the theory of relativity of thought, which leads them to the construction of relative notions. The trends invariably adopt the antinomy of the subject and the object of cognition as the starting point of their exposition. Yet, they also differentiate between the form and the contents. There is as well an awareness that the subject of cognition, *i.e.*, its mind, is necessarily a part of

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11. The objects of normative cognition are norms. The norm cannot, however, be taken only as the expression of that which ought to be, but also as the expression of that which is willed. It is the normgiver who, in the norm he himself makes, declares his will that whatsoever he lays down as duty be actually done. The normgiver takes his norm as the means to attain a certain end which he intends to attain. Teleology thus approaches the matter from the standpoint of the normgiver who in the area of law is the lawgiver, whereas normology approaches the matter from the standpoint of the subject for whom the norm lays down an obligation. Consequently, that which appears to the obligated subject as a norm (expression of that which ought to be), appears to the norm-forming subject as a postulate (expression of that which is willed). These two subjects, the obligated and the norm-forming subject, must be kept apart from the subject whose function is cognition. This subject of cognition does not will anything except cognition and is not obligated to do anything. He must be strictly aware, however, of the noetic method of cognition. He must especially realize that apart from the normative and teleological methods of cognition there is also the causal or ontological method of cognition which envisages its object of cognition as that which exists. Normology, teleology, and ontology are thus three independent sciences. Normology and teleology, however, are much more closely related to each other than to ontology. While the normative method is employed in the science of law, and the causal method in the natural sciences, the teleological method is used chiefly in the science of economics.

the object of cognition—the physical world—since we all form a part of this physical world.<sup>12</sup>

Since critical idealism builds on the antinomy of the subject and the object of cognition, it makes the antinomy between the intellect and the will the starting point of its examination.<sup>13</sup> Taken in this sense, cognition is not regarded as a physiological function (which it undoubtedly is in the ontological sense) but as a function *sui generis*, fundamentally different from all other functions. A person who acts purposely must will something, but in order to act purposely he has to use the function of his intellect. In this context, the intellect appears as an instrument of the will. This is the area of practical cognition. Only the theoretical separation of the intellect from the will makes possible pure cognition which has no other purpose, but is itself the purpose. The intellect, so cognizing, wills nothing except cognition.<sup>14</sup>

Since a purposely willed function may be said to create something, the concepts of the creating subject and that of the object being created arise. Their relation, however, is fundamentally different from that of the subject and the object of cognition, for even if one were to assume that what he does not know does not exist, still he may not say that by cognizing the object he has created it. Such an idea would run contrary to the basic thesis that there can be no subject of cognition without the existence of its object being presupposed. So in the area of causal cognition, the physical world must be presupposed. Similarly, in the area of normative cognition, one must presuppose the validity of the norm if he wishes to cognize it. Just as the ontological cognition does not create the physical world, the normative

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12. The noetic trends originating from critical idealism may be contrasted with positivism which is determined to arrive at absolutely valid notions. In the sphere of causal cognition, positivism is not content with the cognition of the physical world as it appears to the subject of cognition but attempts to cognize the physical world as it is in fact. In the sphere of normative cognition, positivism strives after absolute values, *i.e.*, after the contents of norms which would be valid without the existence of another norm being presupposed. It is especially striving after an absolutely valid concept of justice; it attempts to find out what can always, everywhere, and under all circumstances be considered absolutely just without any presuppositions or conditions.

13. In the physical world which is cognized by the causal method, there is no antinomy between intellect and will. From the causal point of view, the function of cognition appears always as the property of individuals who, at the same time, possess the faculty of volition. The science of cognition, noetics, on the other hand, cannot dispense with the theoretical separation of the functions of cognition and volition and must build on the fundamental distinction between them.

14. The above construction of the intellect which would will nothing but cognition, enters, however, the sphere of physiology and is not noetically indispensable.

cognition does not create the norm. The idea of creation is used in the transcendental sense in both areas of cognition.<sup>15</sup> Adhering to the dualistic construction of a strict separation of the intellect from the will, we become conscious of the limits which are imposed on noetic cognition.<sup>16</sup>

Contrary to the area of causal cognition where the likelihood of confounding the functions of cognition and creation is not great,<sup>17</sup> there is a constant danger of such syncretism in the sphere of normative cognition. Such syncretism must, however, be avoided because science, since it embodies cognition, can only cognize and not create, and especially cannot create the object of its own cognition.

In order to bring the idea of the norm into ontological existence, it is necessary for the obligated subject to know its contents. This act of cognition may be the cause of, or the reason for, the ontological existence of the idea of the norm. It may thus be said that cognition of the norm presupposes its existence; or that the norm is brought into being by being cognized by the obligated subject. The fact that the idea of the norm may be formed and extinguished according to the law of causation, and may form the object of ontological cognition, leads to an erroneous assumption that even the subject of cognition, as contrasted with the norm-forming and obligated subjects, by the exercise of its function of cognition, may form its own object of cognition. It will be noted, however, that that which is cognized by the subject are not ideas of norms in the human mind but the norms themselves, and these norms cannot be formed and extinguished according to the law of causation but only according to the rules of normative cognition. Consequently, the whole idea of creation and change has a different meaning here than in the area of causal cognition. It must be appreciated that the assumption that the cognizing subject in the exercise of his cognizing function actually creates norms, amounts to the abandonment of the fundamental thesis of the antinomy between the subject and the object of cognition. The object must be presupposed if there

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15. What is meant here is the creation of something out of nothing, an idea which runs contrary even to the law of causation.

16. Some trends of thought which originated from critical idealism disregarded the limits imposed on noetic cognition.

17. Ontological or causal cognition does not hold that by cognizing nature, the object of cognition—the nature—would be created. The law of causation cognizes only changes in a given object and the question of its creation falls within the sphere of metaphysics, so the idea that that which we cognize exists, and that which we do not cognize does not exist, is not recognized in ontology.



is a subject, and conversely, the concept of the cognizing subject becomes meaningless if an existent object to be cognized is not presupposed.

It will further be noted that since the object of normative cognition, in contrast to ontological cognition, is composed of logical judgments which are to be cognized, the danger arises that normative noetics may narrow the scope of function of the cognizing subject in favor of the function of the norm-forming subject. It may therefore appear that the normgiver, in addition to the contents of norms, is in control of the very forms of normative cognition as well. To avoid this erroneous impression, it is necessary to differentiate between the form and the contents of normative cognition. The contents are an obligation. The formation of these contents is an exclusive function of the normgiver. The cognizing subject cannot add to it, correct or criticize it.<sup>18</sup> The use of forms and means of normative cognition, on the other hand, is the exclusive function of the cognizing subject. He is bound by the normgiver only with respect to that which ought to be; he cannot normatively determine (make valid, create) any concepts and authoritatively define them, for this is the province of the normgiver. But such concepts and their definitions may be defective, incorrect, or inconsequential and need not, therefore, be respected by the cognizing subject. The same is, however, not true of the ideas of norms which cannot be imagined as defective, incorrect, or inconsequential, and therefore invalid. To allow it would amount to the confounding of the function of the theoretical normgiver with that of the practical normgiver; it would amount to criticism of the normgiver which is not permissible since the function of the cognizing subject is to cognize the work of the normgiver and not to criticize it.

#### THE FUNDAMENTAL PREMISE OF THE NORMATIVE THEORY

The objects of normative cognition are norms. To cognize norms means to cognize their contents. Such contents may be infinitely varied. It follows that only the form in which the contents appear determines the method of cognition to be used. The normative method of cognition is applied whenever the contents appear in a norm. Since everything may form the contents of norms, all that which ontologically is

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18. The same holds true in the area of causal cognition where the cognizing subject cannot add to nor criticize nature so long as he is immanent, *i.e.*, stays within physics and does not venture into metaphysics.

in being and all that which ontologically is not in being may form such contents.

If the contents of the norm concern that which is not in being, it is unimportant whether it ever was or ever will be in being. All this makes no difference in the area of normative cognition since normative cognition is methodologically separated from the area of causal cognition. It must also be appreciated that the element of time which is indispensable to causal cognition, since it deals with consecutive causes and effects, has no meaning in the area of normative cognition. Both these areas, the ontological and the normative, stand on their own. The ontological deals with the world as it is according to the law of causation, and the normative with that as it ought to be according to the norm.

An analysis of the concept of the norm reveals that it is composed of two elements. In addition to the concept of that which ought to be, the concept of an obligation or duty arises in the norm, the idea that that which ought to be imposes an obligation on someone. Both of these concepts, the norm and the obligation, are logically united. The two concepts of norm and obligation are thus the fundamental notions of normative cognition just as cause and effect are the fundamental notions of ontological cognition. They are also similar in that they are not susceptible to further definition although everyone knows quite clearly their meaning.<sup>19</sup> Just as it is impossible to demonstrate the existence of nature by the ontological method, it is equally impossible to demonstrate the validity of the original norm by the normative method, and thus the validity of an obligation cannot be normatively demonstrated but must merely be presupposed. Therefore, normative cognition does not differ substantially from ontological cognition. Both are equally subjectivistic and hypothetical.

The obligation or duty may be taken in its objective or subjective sense. Taken in its objective sense, it is coextensive with the contents of the norm; the contents appear then as an obligation. When taken in its subjective sense, the concept of someone who has to bring about the contents of the norm or who has to comply with such contents, is added. This factor may aptly be termed the "obligated subject." The obligated subject is bound in the subjective sense. Taken in this sense, the obligation then appears as a relation between the obligated subject and the norm. This relation is a purely normative concept and may be

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19. It may be said that the definition of the norm as the expression of that which ought to be describes only the concept of the norm without defining it.

termed "imputability" or "accountability." The obligated subject is accountable when the norm may be imputed to him. To be not accountable means that he is not an obligated subject with respect to a given norm; if a norm is not imputable, it means that a given subject is not obligated with respect to this particular norm although he may well be obligated with respect to another norm.

Imputability or accountability must be determined in a norm. It presupposes that there is no causal relation between the obligated subject and the contents of the norm.<sup>20</sup> This quality of normative and teleological thought which distinguishes these two methods of thought from causal thought may be termed "polarization." We can distinguish two poles. The positive pole points to that which is willed by the norm; the negative pole to its antinomy which, however, need not be its mere logical negation.

With respect to the concept of obligation in the subjective sense, imputability becomes guilt insofar as that which is not willed by the norm is concerned, but only the obligated subject may be guilty. In the physical world observed by the ontological method there can be no guilt since no such negative pole exists: no freedom of choice exists in nature, only necessity. Since obligation precedes guilt, it follows that where there is no obligation, there cannot be any guilt.

The concept of normativity is connected with that of the will since that which ought to be may be visualized as a postulate, as that which is willed by someone. Yet the concept of the will is not indispensable and need not be present in the area of normative cognition, for if one cognizes norms, he need not take into account who the entity is that wills the realization of their contents. If we so desire, however, we may point to the entity whose will determines the validity of the norms, and the concept of the norm-forming subject thus arises. Only that which such a norm-forming subject wills and determines is that which ought to be and may be termed a norm.

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20. Every norm admits, at least in logic, the possibility of an antinomy to the state which according to the norm ought to be. If we say that roses ought to blossom, we logically admit the possibility of the opposite, that they are not in blossom or that they are not going to blossom. If we do not allow for it and presuppose that roses must blossom, we transpose ourselves into the area of causal cognition. For we thus say that there is a cause which must necessarily bring about the state required by the norm not as the contents of the norm but as an effect. We have thus done away with the normative character of the judgment "roses ought to blossom," even if we left it grammatically in its normative form.

### *The Concept of Validity of Norms*

Since the object of normative cognition is the world of norms, the purpose of normative cognition will then consist in the cognition of the contents of such norms. The necessary assumption is that the norm to be cognized is given to us as the object of our cognition. In the area of normative thought, a norm as an object of our cognition cannot be said to "exist" in the same way as do objects of causal cognition. A norm can be only valid or invalid. Thus, in the area of normative cognition, the concept of validity and invalidity corresponds to the concept of existence and nonexistence in the area of ontological cognition.

Yet, only that which "exists" in the ontological sense can be effective. On the other hand, that which is "valid" can never be effective in the same meaning of the word. What actually is meant when we say that a norm is effective is that the concept or idea of a norm which arises in the human mind may function as a motive for human conduct.

The theoretical cognition of that which ought to be is quite unconcerned with whether the idea of a certain object of cognition produced in the human mind is, or is not, effective as a cause or motive for human conduct. The entity interested in such subject-matter would not concern itself with theoretical cognition, but it would manifest its will. The empirical normgiver is such an entity. By laying down norms for human conduct, he elicits ideas in human minds and makes them function as motives for human conduct. He lays down norms only to make them "effective," *i.e.*, in order that the ideas of such norms elicited in human minds function as motives for human conduct.<sup>21</sup>

### *Norm and Obligation*

A norm, as the object of normative cognition, may be defined as the expression of that which ought to be. To cognize a norm means to cognize its contents. Such contents appear generally as an obligation. The obligation and the norm are the central points of normative

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21. Since he acts in the outside physical world, the empirical normgiver may fix the beginning, and if so desired, also the end of the norm's validity, but he cannot normatively determine its effectiveness. He may, however, determine the effectiveness of the motives which flow from the idea of the norm in human minds by laying down another norm (providing for execution or punishment) which would deal with the effect which according to it ought to result, should the idea of the first norm be ineffective as a motive for human conduct.

cognition.<sup>22</sup> They are also connected with the concepts of the obligated and the norm-forming subject.

The obligated subject is the factor on whom the obligation is imposed. It need not be immediately apparent from every norm who is to be regarded as the obligated subject.<sup>23</sup> In contrast to normative cognition, the concepts of obligation and of the obligated subject do not appear in the area of causal cognition because in the sphere of causal cognition everything occurs according to the law of causation.

### *Norm and Judgment in Logic*

A norm is not a judgment within the meaning of general logic. A judgment in the logical sense always contains a notion which may be true or false. A norm cannot be a judgment in the logical sense, because a norm, contrary to a judgment, cannot be negated.<sup>24</sup> Secondly, a judgment in logic always denotes a function of the intellect, whereas the norm is an expression of the normgiver's will. Thirdly, since every judgment contains a notion, it follows that it may always be taken as an answer to a question, but a norm never answers questions.<sup>25</sup> Fourthly, a judgment may be true or false, but a norm can only be valid or invalid.

### *Norm and Value*

The normative concept of value is attributed to that of which we approve and which, according to our view, ought to be. A similar valuation does not occur in the area of causal cognition.

The normative theory recognizes only relative values, it does not deal with absolutes. The concept that anything can have an absolute value runs contrary to the fundamental premise of critical idealism.<sup>26</sup>

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22. The concepts of obligation and norm do not appear in the area of causal cognition, only causes and effects. Normative cognition is thus entirely independent of causal cognition.

23. In a norm such as "people ought to be law-abiding," the obligated subject are the people but there may be another obligated subject or subjects, those who are supposed to educate the people to be law-abiding.

24. The norm "it ought not to rain" is not a negation of the norm "it ought to rain," whereas a judgment "it is not raining" is a negation of the judgment "it is raining."

25. The answer to a question is a judgment in the sense of general logic. On the other hand, the statement that A is bound to pay B \$100 may be taken as an answer to a question and therefore a judgment only if it means that according to a certain norm, e.g., a contract made by A and B, A is so bound. It follows that the object of normative cognition are norms and not notions of the contents of norms.

26. Normative valuation, being relativistic, precludes the concept of absolute value

### *The Static and the Dynamic Aspect of Normative Cognition*

The object of normative cognition may be examined from the static or the dynamic viewpoint. From the static point of view the norm is visualized as a completely determined static object of our cognition, and we inquire what is valid according to it, and who has the subjective obligation to bring it about. We thus cognize the contents of the norm.

The dynamic approach, on the other hand, visualizes the object of its cognition as one which is being formed, which evolves and changes, and which may be extinguished. The entire normative system is considered to be in a state of continuous evolution and change. Yet, this process is not regulated by the rules applicable to the area of ontological cognition, but proceeds according to principles imposed upon it by norms which themselves belong to, and form part of, the normative system.<sup>27</sup> Whereas the static approach of normative cognition visualizes the norms as if standing side by side, the dynamic approach envisages them as following one another in point of time, and also as one standing above or below the other. Consequently, we may call the static approach one-dimensional and the dynamic multi-dimensional.

The norm-forming activity of all normgivers within a given system may be visualized as a pyramid which comprises not only all the norms formed by them, but all those normgivers themselves. At the top of the pyramid we can visualize the sovereign normgiver whose original norm gives norm-forming capacity to all the other normgivers as well as validity to all norms made by them. We can as well visualize the original norm rather than the original normgiver at the top of the pyramid. In such a case, the system is headed by a norm, *i.e.*, ob-

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and absolute justice. An act, fact or transaction may be just or good only with respect to another norm, or a norm may be just or good only by comparison with another norm. An assertion that norms may be absolutely cognized would amount in noetics to the admission of proof of the validity of norms what in the area of causal cognition would amount to the proof of existence of the physical world, *i.e.* the proof of creation of the world out of nothing. Normative cognition which would attempt to prove the existence of absolute values would then be tantamount to metaphysics within the meaning of causal cognition. In both cases the boundaries of human intellect would be transcended. In jurisprudence, such legal trends which disregard these boundaries are known as trends of natural legal thought or of natural law.

27. There exists an analogy with the happenings which occur in the physical world according to the law of causation but it is only an analogy. The norms are made, amended, or abrogated purely and exclusively according to principles given by norms and contained within a given normative system. They are not subject to the law of causation.

jectively, and not by a normgiver, *i.e.*, subjectively. This construction is to be preferred since the object of normative cognition are norms and not normgivers.

This dynamic approach of normative cognition enables us to distinguish norms of a given system not only according to their contents, but also according to their form. The concept of normative relevance or formal dependence leads to, and is in fact equivalent to, the concept of a hierarchy of norms, which is based on the idea that a hierarchically lower norm or normgiver derives its validity or normative capacity from a hierarchically higher normgiver. The concept is discussed below.

### *Types of Norms*

From the viewpoint of their form rather than their contents, norms may be autonomous or heteronomous, absolute or hypothetical, abstract or concrete, and original or secondary.<sup>28</sup>

### *Units of Norms*

The objects of normative cognition are norms. They may be either

28. Autonomous norms presuppose the identity of the norm-forming and obligated subjects. In an autonomous norm, the norm-forming subject by virtue of the norm he stipulates, imposes an obligation upon himself and thus becomes an obligated subject. Autonomous norms appear mainly in ethics. In jurisprudence, autonomous norms are indicative of that type of lawmaking whereby a nation gives itself laws. The dichotomy autonomy-heteronomy serves the purpose of differentiation between the various forms of government, autonomy indicating democracy and heteronomy autocracy.

Heteronomous norms are norms in which the norm-forming and the obligated subjects remain two independent factors. The first manifests his will and gives commands, and that which is so stipulated becomes an obligation imposed on the latter.

Absolute norms are norms in which the command contained therein is not made subject to any limitation or qualification.

Hypothetical norms are norms in which the command is conditional: if there is B, A ought to be. Apart from the conditioned substance A, there appears the conditioning substance B. An unperformed obligation may form the contents of the conditioning substance. The function of the obligated subject Y faces then the subject X who has not performed his duty, and such function then appears as punishment.

Abstract norms affect a variable number of obligated subjects and subject matters which may arise many times. Concrete norms affect only one obligated subject and a subject matter which may arise only once. This antinomy is necessarily relative and the same norm may appear as abstract in relation to another more concrete norm, and as concrete in relation to another more abstract norm.

Original norms do not derive their validity from another norm; secondary norms, on the other hand, derive their validity from another norm. This concept is necessarily correlative, *i.e.*, the same norm may appear as original (primary) in relation to another, lower, relatively secondary norm, and as secondary in relation to another, higher, relatively primary norm. This concept leads to the further concept of hierarchy of norms.

individual norms or groups of norms. Groups of norms are formed by a varying number of individual norms which, looked upon as a whole, constitute a unit or system. Examples of such units are the totality of valid norms within a given religion, or the totality of norms pertaining to ethics, or the entire legal system of a state. In all these cases there must be a criterion according to which individual norms are grouped together so as to form a unit. Basically there are two such criteria, the formal and the material.

According to the formal criterion, all norms that are related as to form are grouped together. All norms given by a particular normgiver may form a unit regardless of their contents. Contents may be infinitely varied, but the unit cannot contain norms which would contradict each other, such as "X ought to be" and "non X ought to be," since no norm-giver can at the same time will X and its antinomy, non X.

According to the material criterion, all norms which are related as to their contents form a unit. All norms, the contents of which are in accordance with the Christian love, for example, form a unit of Christian ethics. On the other hand, any norm which would contradict this principle, or not be in accordance with it, would not belong to such unit.

### *Hierarchy of Norms*

The mutual relation of norms within a given normative unit may be such that the validity of one is derived from another. The first norm may then be called primary, and the other secondary. A whole chain of norms deriving their validity from one original norm may be envisaged.<sup>29</sup> The validity of the first, highest, or basic norm within a normative system cannot be proved by reference to any other yet higher norm, but its validity must merely be presupposed. The highest norm, which invests all the lower norms within the same normative system with legal relevance, may also be termed the focus of that hierarchically arranged normative system.

In addition to the distinction between original and secondary norms, the distinction between the abstract and the concrete norms also leads

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29. If we ask why norm A is valid, the answer is—because norm B is valid. We can so proceed until we reach the first, original norm which we presuppose as valid. In practice the constitution of a country is finally reached as the original, fundamental norm from which the validity of all other norms within the chain is derived, but the validity of the constitution cannot further be proved by reference to any other higher-norm and its validity must merely be presupposed.



to the hierarchical structure in a normative system because a norm which is relatively more concrete is, as to its contents, fully represented in a relatively more abstract norm. A hierarchical arrangement within the normative system necessarily follows.

### *The Practical Function of Norms*

By the practical function of norms is meant the causal function of ideas of that which ought to be in the outside physical world.<sup>30</sup> Such practical function is exercised by empirical normgivers. They lay down norms which are calculated to function as motives for conduct in the minds of the obligated subjects. All empirical legal orders are so structured, and their component parts, the individual legal norms, have the practical function of being effective motives for human conduct. In order to ensure that the norms so laid down actually perform the expected practical function, the empirical normgivers, in addition to the obligation, also incorporate within the norms a threat of punishment. Punishment is a purely normative concept; it does not exist in the area of causal cognition. Similarly, the concept of guilt is purely normative. Empirical normgivers impose a sanction because they do not have confidence in the function of a non-sanctioned norm. They can, however, provide for a reward to be given to the obligated subject for the performance of the obligation in place of, or in addition to, a sanction.

### THE ESSENCE AND NATURE OF THE NORMATIVE THEORY

The normative theory concerns itself with the study of legal norms, but not with the study of their contents. It does not study the reasons or motives of the lawgiver for the enactment of norms, nor does it concern itself with the effect of these norms in the outside world. It may thus be contrasted with the science of law as understood in the empirical sense, which deals with the cognition of the contents of empirically given normative systems. The normative theory, however, deals exclusively with the form and method of normative cognition.

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30. The obligated subject who realizes that there is a norm and that he is under a duty to bring it about, is likely to act in a certain way. The realization operates in his mind as a motive for his conduct. Such motive is a special type of cause, a mechanical cause, since it can produce an effect only through the intervention of the human mind. A distinction between the concept of a norm as such and its idea in the human mind must thus be made. A norm as such can never act as a cause, as a motive for human conduct, and has no relation to the physical world. Only the ideas of such norms in the human mind may be so related and may act as motives for human conduct.

All attempts to define legal norms with reference to their contents have failed because they may have any given contents. Since the criterion of the contents cannot provide an adequate definition of legal norms, it is necessary to base such definition on the formal criterion and say that legal norms are all norms which originate from a certain lawgiver. The state, which is the creator of legal norms, is always a significant part of this world and is, therefore, an empirical normgiver. It follows that legal norms are empirical norms. These definitions are in fact nothing but regulative principles which mark the boundaries of the various objects of normative cognition. They are not and cannot take the place of explicative definitions.

It is plain that from the point of view of causal cognition, these definitions lead to a vicious circle, because the norm is delimited as against other norms by reference to its creator, and the creator is defined by reference to the norm. From the point of view of normative cognition, however, these definitions are valid since, from the normative standpoint, it is enough to define the state as the creator of certain systems of norms.

The full scope of the normative theory appears from a comparison made between it and the other methodological trends in the science of law. These trends are influenced by and are connected with ethics (moral norms), the natural sciences (natural law), sociology (sociological trends), and history (historical trends).

### *Law and Ethics*

The mutual relation of law and ethics can profitably be investigated only if ethics is understood as a normative science.<sup>31</sup> If we compare legal norms with ethical norms, it appears that the contents of ethical norms are in agreement with a given concept or principle, whereas legal norms originate from a certain lawgiver regardless of contents. It follows that legal and ethical norms may be likened to two circles which cover the

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31. Ethics may be so construed that the object of its cognition is formed by consideration of why certain acts are regarded ethical. The search is thus conducted to discover the very foundation of ethical conduct. This means that we do not take the criterion of ethical conduct as being in agreement with a presupposed ethical norm, nor that such conduct is undertaken by the obligated subject because an ethical norm so provides, but we search for the foundation of ethical conduct. We may distinguish two modes of understanding ethics: explicative and normative. It must be noted, however, that only normatively construed ethics may be contrasted with the science of law if it is itself normatively construed.

same area: legal and ethical norms may coincide, and the same norm may at the same time be both a legal and an ethical norm; but there are legal norms the contents of which have no relevance in ethics (norms regulating highway traffic), and there are legal norms which may contradict ethical norms (norms according to which a soldier is bound to fight and kill).

### *Law and the Natural Sciences*

The concept of natural law is broadly based on the assumption that the true, perfect, or just law has been given by a supernatural authority, and that it has been instilled in the human nature. The *ius naturale*, the *ius naturae*, and the *ius divinum* of the ancient world may be taken in this sense. It is understood that the natural law is unchanging as far as its contents are concerned, because nature itself does not change, and because the creator, as a law-giving authority, does not change his law.

Natural law may be contrasted with the positive law, which is a human-made empirical law with variable contents. Since it is given by human agencies its contents are necessarily subject to change.

A fundamental problem exists as a result of the relationship of the natural law to the positive law: which law governs if the contents of these two laws are not in agreement. According to natural law theories, the natural law is preferred since it is deemed to be the true and absolutely proper law, whereas the positive law may act improperly or unjustly. A critique of this concept of natural law follows:

1. The concept of absolutely true and valid norms is logically impossible since the absolute validity of norms derived from nothing, nor dependent on anything, cannot be demonstrated because in the process of cognition, the cognizing subject must begin with a hypothesis on the strength of which the norms have validity.

2. The concrete contents of natural law or divine law defy scientific proof. Consequently, the supposedly objective principles on which natural law is founded are nothing but the subjective hypotheses of those who concern themselves with the contents of natural law.

3. The view that natural law is a higher law, which, in the case of conflict must prevail over the positive law, runs contrary to the fundamental principle that the process of cognition can be directed only to one independent system of norms at a time. It is, thus, impossible to cognize what ought to be according to one legal order and to correct

the findings so made by findings made in another legal order, because both are independent normative systems. If, however, the natural law is envisaged as a higher law superimposed on the positive law, then the positive law loses its independence and becomes a part of the natural law. This would mean that the natural law, and not the positive law, was in power in America. Since no theory of natural law would admit such a consequence, the basic problem of conflict remains unsolved.

### *Law and Sociology*

Sociology, as a science which deals with the human association, development, forms, and function, is and can only be causal science. The object of its cognition is the human association.

Mutual relations of people within a society may be ordered in many different ways, but the leading pattern consists of an ordering by means of legal norms. Should such legal ordering attain adequate intensity, a legal order—the state—becomes a reality. At this point sociology steps in. Its task is to determine what influence is exercised by the ideas of legal norms in the minds of people on the formation of human association, and how far and how much the physical and psychical properties of a nation are reflected in the formation of the contents of the legal order, since it is quite plain that it is not just by accident that different nations establish widely divergent legal systems.

The distinction between the normative theory and the causal science of sociology consists in the fact that the object of cognition of the normative theory is that which orders the social life of people (the legal norms) whereas the object of cognition of sociology is that which is thereby ordered. This distinction has not always been sufficiently appreciated, and so the traditional concept of law has been based on the assumption that the task of the science of law was not only to study the normative system which regulates the social life of people but also, and primarily so, the social life itself. This is how the belief arose that the science of law was and should be a part of some general social science. Hand in hand with this belief originated the concept of a sociological science of law or sociological jurisprudence.<sup>32</sup>

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32. Sociology as an independent science of human association was founded by Auguste Comte (1798-1857) in the nineteenth century. It immediately exercised considerable influence on the science of law mainly because the science of law did not possess and apply at that time any generally recognized method of cognition of its own. Sociology was conceived by its founder as a natural science, designed to exercise the function of some social physics, its object of cognition being the human society taken as a social

It is possible to construe the object of cognition of the science of law so as to include notions without due regard to their methodological features, such as the sociological, historical, psychological, and causal notions which a practising lawyer uses in the exercise of his profession. But in so doing, the science of law would become, from the point of view of methodology, a haphazard conglomeration of various notions without any theoretical merit. This is why the normative theory holds that the object of cognition of the several sciences must be so delimited that each one would form a separate system of methodologically homogeneous notions. The fundamental division of sciences into causal on the one hand, and normative and teleological on the other, is based on this principle.

### *Law and History*

Any happening or occurrence in time may be made the object of systematic study and may eventually form the political, cultural, or religious history of nations. Using the historical method, it is possible to study the evolution of the empirical contents of the several legal orders as they succeeded one another and determine the origin of these contents, together with the causes leading to the reception of these contents from one legal order into a succeeding one. The fundamental noetic basis of the historical method differs most distinctly from the normative method. It is to be noted that the normative method does not answer the question why and under what circumstances the norm was laid down, and to what extent it acted as motive for human conduct. The historical method, including the legal-historical method, is thus a causal method. The object of its cognition are occurrences which took place in the past.

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fact and its task being to uncover the laws which govern the social relations of human beings.

The influence exercised by sociology on the science of law which found its expression in the sociological school of jurisprudence strips the science of law exactly of its most salient feature, namely, of its normative method. The science of law thus becomes only a subordinate part of some general sociology. It must be pointed out, however, that the object of cognition of the science of law taken and understood in the sense of sociological jurisprudence is the human society itself, *i.e.*, that which is regulated by a given legal order. It thus differs fundamentally from the normative science of law which has for its object of cognition the legal order which governs human society. A science of law in the sense of sociological jurisprudence is thus unable to solve any of the normative problems and does not offer a substitute for the normative method of legal cognition.

The normative method, on the other hand, is not concerned with the element of time.<sup>33</sup>

Thus, it appears that the historical method stands much closer to the sociological method than to the normative method. Should, however, the scope of the science of law be delimited too widely, so as to include the sociological examination of the origin, change, and end of the several legal orders, then it must also include the historical method. The traditional concept of the science of law (as contrasted with the normative concept of law) is wide enough to include both the sociological and the historical school of jurisprudence.

### THE NORMATIVE LEGAL ORDER

As norms and their contents are the only possible object of normative cognition, it follows that the state, as it is understood by the sociologically oriented science of law, cannot be the object of normative cognition. The state, however, becomes the object of normative cognition if it is taken to mean the legal order which it itself creates. Taken in this sense, the state as a legal entity can then be analyzed normatively

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33. The historical method considers how the ideas of norms with given contents influenced, have been influencing, and are still influencing human society, and why it is that norms of certain contents and not of other contents proved effective. It thus attempts to discover the motives which prompted the lawgiver to enact certain norms and not other norms, but apart from such motives it will also look for other causes such as the intellectual qualities and inclinations of a nation which contribute to the formation of the particular legal order. In this sense both the historical and the normative method may appear to direct their attention to the same object, the contents of norms.

The approach adopted by the historical method may, however, be contrasted with that used by the normative method. The static normative method concerns itself with the examination of that which according to the examined normative system ought to be, and the time period is completely irrelevant. The method of cognition is the same whether the system examined is no longer in operation, or whether it is presently in operation, or whether it is intended to operate at a future date, or whether it has never been in operation and in all likelihood never will be. The historical method, on the other hand, concerns itself with only the practical aspect of a given normative system and limits its efforts to the systems which were functional in the past to the exclusion of those operating at present and in the future.

In contrast to the static normative method, the dynamic normative method attempts to find why a given norm exists within a definite normative system. The same question tackled by the historical method is understood as a question concerning the cause of a given fact or event.

Since the historical method and the normative method have a different object of cognition it follows that notions of normative cognition cannot be supplemented or otherwise enriched with those of the historical method.

from both the dynamic and the static point of view. Looked upon from the dynamic point of view, the state appears as the norm-forming subject of the legal order. Viewed from the static viewpoint, it is synonymous with the legal order. We can then say that in order to juridically cognize X state, we have to cognize the X legal order, because from the legal point of view a state is nothing but its legal order.

From the realization of the identity of the state with its legal order, it further follows that all law must necessarily be state law in the sense that the state is directly or indirectly responsible for its creation because legal norms, in contrast to non-legal norms, are defined with reference to their maker, the state.

The realization that the state is identical with its legal order contributes to the solution of another problem which frequently presents itself in the philosophy of law, namely, who was here first—the state or the law. It is evident that there can be only one answer to this question: both must appear simultaneously. There can be neither state without a legal order nor law without a state.

The realization that the state and its legal order are one solves yet another problem which arises in connection with the construction of the coming into existence and the extinction of the state. Since both the state and its legal order must come into existence simultaneously, the state may be said to come into existence whenever it sets up its legal order and it comes to an end when its legal order is extinguished.

### *The Concepts of Law and Legal Order*

Traditional jurisprudence defines law as a body of rules for human conduct. In this context it appears that the concept of a rule suggests its generality of application to individual acts. If we take a rule to mean a norm (the expression of that which ought to be), it coincides with the meaning of a general norm and the legal order then appears as a body of general legal norms. Since there is no reason why the concept of legal norm and that of legal order should be limited to general legal norms, the normative theory also includes in the legal order all specific legal norms such as apply only to one or a few subjects or to one or a few cases. It follows that the distinction between general and specific legal norms is relative.

The prototype of a general legal norm in the traditional sense is a statute or a rule of law, that is, a norm made by the properly constituted state authority and applicable to an unlimited number of obligated sub-

jects. The prototype of a specific legal norm is a judgment or decision given on the basis of a general legal norm which determines what, in a specific case and in relation to a specific obligated subject, ought to be. The existing legal orders are composed of general and specific legal norms.<sup>34</sup>

The legal order thus appears as a hierarchy of legal norms both original and secondary, general and specific. As far as original and secondary legal norms are concerned, the legal order appears as a pyramid at the top of which is the highest norm, the constitution, and underneath the statutes and the established rules of law, and further below the secondary legal norms, such as the judgments of courts, and finally, the private non-authoritative norms, such as contracts and wills.

### *The Sources of Law*

The concept of the source of law is susceptible of several meanings. In its original sense it relates to a place, fact, or event from which emanate the specific contents of the several legal norms which, in turn, form the legal order. In this sense human reason (*ius rationale*) human nature (*ius naturale*), or custom may be taken as sources of law. The concept of the source of law may also be understood to mean collections, both official and private, of the existing rules of law such as statutes, governmental decrees, or judge-made law.

From the point of view of the normative theory, the focal point of a given legal order may be taken as the source from which the specific contents of the legal order emanate. It is, of course, a purely formal point of view since it does not give any indication of the nature of these contents. The traditional concept of the source of law, on the other hand, proceeds from the material point of view; it deals with the specific contents of the legal order or with the question of where these contents originated.<sup>35</sup>

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34. This may be illustrated as follows: A statute or a general norm provides that the debtor should refund the subject matter of a loan to the creditor. Valid specific legal norms may be created by the citizens themselves. A prototype of a specific legal norm is a private contract which appears as an application of the proper general legal norm to specific cases. The citizens themselves are then normgivers and not the courts. The courts may, however, at the request of a contracting party, review the contract as to its validity.

35. Distinction must be made between sources of law in the material and the formal sense. As above indicated, the very concept of a source of law is meaningful only in the material sense, for a source of law in the material sense is a fact or event which determines the contents of a given legal order. Social conditions, historical events,



Whatever the sources of law, if we admit of several sources of law, such as statute, custom, judge-made law, we have to regard one of them as the primary source and the remaining as secondary sources because a norm cannot be recognized as a valid legal norm if it contradicts its primary source. This is necessary in the interest of unity of the legal order.

### *The Concept of Focus of the Legal Order*

In order to form a systematic unit, all individual particles of a legal order—all legal norms within the system—must be connected with one another in a definite manner. This connection or relation may be formal, that all the norms must be directly or indirectly deducible from one definite normgiver, or material, that all the norms must, as to their contents, comply with a definite principle or concept. We have seen that the connection of norms within a legal order is based on the formal principle.<sup>36</sup> This structure may be envisaged even without the norm-giving element, which may be replaced by the concept of the fundamental norm of a particular legal order from which all other norms derive their validity.<sup>37</sup> Every system of norms and every legal order may figuratively be envisaged as a pyramid of norms, the top of which is formed by the fundamental norm. The normative validity of all norms deducible from the fundamental norm must be demonstrated with reference to it. The normative validity of the fundamental norm cannot be thus demonstrated, and its validity must, therefore, be presupposed by the cognizing subject as a hypothesis of normative cognition.

The norm which we envisage at the top of the pyramid is necessarily immutable since its amendment or replacement by another norm would result in a new and different object of normative cognition.<sup>38</sup>

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customs, and class interests may thus be taken as sources of law. All these phenomena act as causes in the formation of a given legal order. The legal source understood in the above sense is sociologically oriented since the source means the cause of the origin of law. The causal approach is frequently supplemented by an ethical approach, especially when a justification of the contents of the legal order is desired. Both the school of natural law and the historical school proceed along these lines. They refer to, and draw support from, the tenets of the immutable natural law, or the natural inclination of a given nation in an attempt to give reasons for, and to justify the formation of the specific contents of a given legal order. Similarly, the theocratic school when it refers to the will of God as the source of all law, attempts to give a reason for the existence of law.

36. This is the dynamic construction of the legal order.

37. This is the static construction of the legal order.

38. The effect of a change in the fundamental norm or its replacement by another norm amounts to a new legal order being made the object of normative cognition.

This fundamental norm may also be called the focus of the particular legal order since the normative validity of all the other norms within that legal order emanates or radiates from it. It must not only be immutable, but must be the only focus within the entire system; otherwise, unity of the system would be lacking.

If we thus envisage the focus of the normative system as the top norm within the pyramid and as an integral part thereof, then the concept of the focus comes close to the concept of the constitution of that system. The focus is thus the unifying element of the system which is being cognized.

### *The Concept of Continuity of the Legal Order*

Whenever new norms are added to the legal order or some existing norms are abrogated or amended in accordance with the rules which were previously established by that legal order, the focus of the legal order is not affected, *i.e.*, the continuity of the legal order in the formal sense is unaffected. In the course of such process, the entire contents of the legal order may be replaced by norms of substantially different contents without affecting the original focus of the legal order and, consequently, the legal continuity of that order, in the formal sense, is maintained.

If, however, such changes occur within the legal order by force, without regard to the provisions of that legal order as to how the contents of its legal norms may be modified, and if the great majority of the obligated subjects act in accordance with such newly introduced norms, then a break in the legal continuity in the formal sense has occurred. Such forcible interference with the existing legal order amounts to a revolution in the normative sense as contrasted with a revolution in the political sense.

The concept of continuity in the formal sense must be distinguished from the concept of continuity in the material sense. There is continuity in the material sense where the legal order develops in such a way that the principles and institutions set up and existing within the legal order remain unaffected even though some minor changes actually take place. The history and fortunes of such legal institutions may, of course, be studied even without reference to the particular legal order within which they existed or exist. These institutions exist simultaneously in many legal orders and outlive them, unaffected by revolutions which inter-

rupted legal continuity in the formal sense, and are carried over from one legal order into the succeeding legal order.

Political revolutionaries who have successfully interrupted legal continuity in the formal sense, are always keenly interested in having their revolutionary achievements placed on firm normative grounds. They attempt to shorten as much as possible the period of a normative vacuum which is produced by every revolution, but since it is not feasible to fill immediately the newly established legal order with new contents, they quite habitually resort to a reception of the contents from the previously existing legal order into the new one with only the exception of such of its norms which run contrary to the fundamental postulates of the revolution. It thus frequently happens that a break in the legal continuity in the formal sense is immediately followed by a mass reception of the contents from the previously existing legal order, and, therefore, it can be said that the interruption of legal continuity in the formal sense is intimately connected with the maintenance of legal continuity in the material sense.

### *The Concept of Legal Personality*

By legal personality the traditional science of law understands an entity which appears to be the embodiment of rights and obligations. Not every physical person possesses legal personality and, conversely, physical persons are not the only entities endowed with legal personality. Legal personality is a quality which is conferred upon a physical or a juristic person by the legal order. Although some legal orders denied legal personality to large sections of the general public (for example the Roman state denied legal personality to slaves), the science of law under the influence of the school of natural law seemed to assume that legal personality of all physical persons was an accomplished fact and needed not to be specifically conferred. This approach generated the view that juristic persons (corporations), as contrasted with physical persons, are artificial legal creations which do not in fact exist. Although they have legal personality, it is engrafted on a group of physical persons who form the corporation.

The methodological error committed in all these constructions of fictitious juristic persons consists in the uncritical syncretism of the causal and normative methods which is followed by the inadmissible identification of the normative concept of legal subject with the ontological concept of a person in the psychophysical sense.

The correct methodological approach to the problem is as follows: No persons or subjects in the normative sense exist in nature as entities which the normative system would regard as embodiments of rights and duties. It follows that there is no distinction between natural and juristic persons because both are, from the causal point of view, entities of purely artificial and fictitious construction. Viewed from the normative point of view, there again is no distinction between legal personality of physical and juristic persons. In the first case, the legal order confers legal personality on an individual physical person, and in the second case, on a group of physical persons or on some other entity. In contrast to the causal point of view, the normative concept of legal personality is not artificial nor fictitious because the very concept of artificiality can operate and be meaningfully applied only within the area of ontological, natural, causal cognition.

Therefore, it appears that the concept of a person in the psychophysical sense must be kept apart from and not confounded with the concept of legal personality. Legal personality of a physical person as well as that of a juristic person is not an accomplished fact or an automatically present feature but must be conferred on them by the legal order, *i.e.*, be deducible from that legal order.

### *Analysis of the Legal Order*

A legal order may be analysed from two different points of view: *De lege lata* and *de lege ferenda*. The subject who desires to cognize the legal order adopts the approach *de lege lata*: he attempts to find out what, according to the legal order, ought to be, irrespective of whether what he finds meets with his approval. His approach is thus not critical with respect to the contents of the norms being cognized, but one of meticulous impartiality. The only critical function he may exercise goes to the norm-forming ability of the normgiver and is a critique of the form and not of the contents of the norms cognized.

The approach *de lege ferenda*, on the other hand, concerns itself with a critique of the contents of the norms being cognized. This approach evaluates the normative treatment of a definite legal subject according to principles and criteria which it considers proper. The approach *de lege ferenda* is thus the approach of an empirical normgiver, as contrasted with that of a cognizing subject who desires to cognize the contents of the given legal order as they are in fact, *i.e.*, *de lege lata*. The meticu-

lous separation of these two methods of approach is fundamental in normative cognition.<sup>39</sup>

It is, of course, true that the state and its legal order is the object of theoretical and practical political function as well as the object of the theoretical and practical function of the science of law since the relation of members of a given social entity toward that social entity constitutes the foundation of all political activity as well as the object of normative thought. The science of law must, however, strictly differentiate between the methods *de lege lata* and *de lege ferenda*. Only the method *de lege ferenda* has a close contact with purely political thought. The normgiver, especially the maker of original norms such as statutes is naturally a politician. Before and while he engages in the norm-forming activity, he must concern himself with the normative approach *de lege ferenda* and direct his norm-forming function accordingly. The science of law as the science of normative cognition, however, must always keep in mind that its function in the narrow sense is restricted only to the area of the *lex lata*.

### *The Concept of Legal Sanction*

The normgiver, in order to ensure that the contents of legal norms operate as motives for conduct of obligated subjects, may provide for punishment which would follow noncompliance with such norms. The punishment consists in penalties and/or the carrying out by legal authorities of that which the obligated subject was under a duty to do. The normgiver may also enhance the effectiveness of legal norms by providing for rewards for compliance with the norms.<sup>40</sup>

The problem then arises of whether norms which are not followed by a sanction may be considered legal norms. The better opinion is that they may. It must be noted that a great many norms which undoubtedly are legal norms but which are not followed by a sanction would cease to form part of the legal order.<sup>41</sup> Even in instances in which the obligated subject does not comply with the duty imposed on him and a subsequent legal duty is imposed on the proper authorities to impose the sanction,

39. The syncretism of methods *de lege lata* and *de lege ferenda* is further apparent in the relationship of law and political science. It is sometimes asserted that these two sciences should be related as closely as possible but such methodological syncretism should be avoided.

40. The norms which are followed by a threat of punishment are termed *leges perfectae*, and those which are not so followed are termed *leges imperfectae*.

41. An example of nonsanctioned legal norms are those in the Constitution dealing with the duties of the President.

the chain of such legal norms finally ends with a norm which does not carry any sanction. This problem is aptly characterized in the maxim "*Quis custodiet custodem?*" It must also be assumed that even where the normgiver does not provide for a sanction, he always considers the contents of the norm as willed, and its antinomy as not willed. The normgiver certainly wills that the courts or the president carry out their functions, and the stipulation to this effect must be regarded as a duty even though such stipulation is not followed by a sanction.

### *Legal Procedure and the Interpretation and Application of Legal Norms*

By legal procedure is meant the process which according to the precepts of the legal order must be adhered to in the formation of legal norms. The body of these rules is then called the law of procedure. The traditional science of law, however, employs the term of legal procedure in a too narrow sense embracing in it only the norm-forming activity of the courts of law and the administrative authorities. This limitation is not justified since both in the process of formation of statutes as well as in that of contracts or testamentary dispositions, for example, the proper precepts instituted by the legal order for the formation of such norms must be followed.

By interpretation is meant the cognition of the contents of legal norms. It is the task of interpretation to extract from the norms their normative contents, the expression of that which according to them ought to be.<sup>42</sup> Interpretation is, therefore, a function of the intellect and a theoretical function. If it is carried on systematically, it becomes a scientific function and the subject matter of the science of law.

Interpretation understood in this sense presupposes the application of law, that is, the application of a norm to a definite case. It follows that application necessarily presupposes that the norm to be applied has already been cognized.

The interpretation and application of a norm usually appears as one

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42. Every independent legal norm must impose a duty, *i.e.*, it must declare that something ought or ought not to be. It must be noted in this connection that not every statement, every sentence or group of sentences made or pronounced by the normgiver is an independent legal norm. For example, the declaration that a person attains majority at the age of twenty-one years is only a dependent legal norm since it does not stipulate what ought or ought not to be. Only in conjunction with other manifestations of the normgiver's will does it form an independent norm or norms: in conjunction with a norm that persons who have not attained majority ought not to hold public office.

act and results in a new norm. It may be noted that the application combines thus the function of the intellect with the norm-forming function. The placing of the factual case within the framework of the general norm is undoubtedly a function of the intellect whereas the result of the application is a norm-forming function. Application leads to the formation of a new concrete norm (a judgment) which may be characterized as secondary in comparison with the norm which has been applied (a statute).<sup>43</sup>

General legal norms are sometimes unclearly formulated, and consequently, it may prove difficult to interpret them because of their vagueness, or they may be susceptible of two or more interpretations, all of which may appear equally correct. In such a situation, the traditional science of law takes the position that only one interpretation may be taken as correct and all others are rejected as incorrect. The normative theory, however, here makes a distinction between interpretation and secondary authoritative application. The normative theory agrees with the traditional point of view with respect to authoritative application since only one authoritative application may become a part of the legal order, but it holds that the secondary normgiver, while applying the norm, may choose between the several interpretations, provided they are equally permissible. The normative theory disagrees, thus, with the traditional science of law as far as interpretation is concerned, since the view taken by the traditional science of law, namely, that only one interpretation may be considered correct, cannot logically be supported.<sup>44</sup>

### *Abrogation and Immutability of Legal Norms*

Abrogation of legal norms occurs by their being removed from the legal order.<sup>45</sup> Such removal may be accomplished by several methods,

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43. Not every secondary norm so formed becomes part of the normative system. Only those secondary norms which are formed by a properly constituted authority form part of the normative order. Secondary norms may be formed by any person who is properly authorized by the legal order to make such norms. So all persons of full age and capacity are authorized to enter into contracts and make wills. The norms so formed are only secondary norms but being norms, they are the expression of that which ought to be, *i.e.*, they are instances of the application of general norms.

44. Statutory interpretation of unclear or vague legal norms may provide the desirable solution. In such a case, the original normgiver himself takes over the interpretative function.

45. The concept of abrogation or extinction of legal norms appears only in the dynamic approach to law. From the static point of view, the concept of abrogation is meaningless since the entire legal order appears static and motionless.

the most usual consisting of a direct action of the normgiver which deprives the norm of its validity. It is generally believed that the entity which is authorized to make legal norms is equally competent to change, amend, or abrogate them. Consequently, the normgiver who has the power to make norms may also deprive them of validity. This view is, however, not held by the normative theory which requires a direct authorization to that effect.

In addition to a direct removal, a norm may also be removed from the existing legal order by an indirect manifestation of the normgiver's will. Since the principle of unity of the legal order forbids the inclusion in it of norms with contents which are contradictory, a later manifestation of the normgiver's normative will abrogates a prior inconsistent legal norm.<sup>46</sup> A norm may also be ousted from the legal order without the intervention of the normgiver if the obligated subject or subjects perform the obligation imposed on them by the norm.<sup>47</sup>

The problem of immutability of norms arises in connection with the question of whether there may be norms which are not subject to amendment or repeal in the future. A norm would appear immutable if its maker would expressly so declare, if he makes a norm and declares it not subject to amendment or repeal. A normgiver cannot validly commit himself in this matter, however, since he can always, by his later pronouncement, abrogate the norm which provided for immutability and after its abrogation amend the particular subject matter. Notwithstanding this difficulty of construction, actual attempts were made in the past to pronounce a particular norm immutable. An example of such a measure is afforded by a constitutional provision declaring the republican form of government not subject to change by any later constitutional amendment. Thus, it appears that immutable norms are difficult to construe. Yet apart from this problem, there is one truly

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46. This is manifested in the legal maxim: *lex posterior derogat legi priori*. It is based on the assumption that a normgiver cannot at the same time will X and non X, *i.e.*, he cannot will a logical impossibility. It does not necessarily follow, however, that the later norm must abrogate the earlier one in point of time. It may be that the later norm will be regarded as ineffective in view of the validity of an earlier norm. This raises the problem whether a norm may be viewed so as not to be subject to any future amendment. The above maxim has also a submaxim, namely: *lex posterior specialis non derogat legi generali priori*, in that a later, relatively narrower norm does not abrogate an earlier, relatively wider norm.

47. This is the case of the execution of the obligation imposed by the norm. It deals chiefly with special, as contrasted with general norms: the repayment of a loan will extinguish the norm which imposed an obligation on the debtor to repay the amount of time loan to the creditor.



immutable norm in existence in every legal order, the focus of that legal order taken in the normological sense.<sup>48</sup>

Although the traditional science of law deals with the problem of immutability of norms only in connection with statutes, the same problem arises in connection with authoritative secondary norms of specific application such as decisions of courts and administrative authorities. In any controversy litigated before the courts of law, an entire hierarchy of constitutionally empowered tribunals may in turn consider the matter and render their respective decisions. But once the case reaches the highest court from which no further appeal lies, the controversy is finally adjudicated and becomes *res judicata*.

As far as secondary norms of specific application which originate from private normgivers, such as contracts or wills are concerned, the question of their possible immutability never arises in practice since they are, as a rule, never declared immutable by any legal order. Such legal norms may then always be modified, amended, or abrogated by a later expression of the will of the parties concerned.

#### CONCLUSION

The normative theory as expounded by Frantisek Weyr does not concern itself with the specific contents of norms. It is, therefore, a general theory. It significantly affects the contents of the various legal norms and orders; it does not follow, however, that it views such contents with contempt or regards them as insignificant. The normative theory, although it is a general theory concerning itself with generally valid concepts which do not depend on the specific contents of that which ought to be, nonetheless takes into consideration the specific legal mechanisms of the existing legal systems. Such legal mechanisms become the object of normative cognition, and by cognizing the form of normative cognition, we indirectly cognize its object, that which ought to be. It also follows that the method of formal arrangement of the contents of cognition determines the form of cognition. This method of arrangement of legal norms and orders differs from that of other normative subjects, such as ethics or theology, and is characteristic of the concept of the legal norm. This method of arrangement may form the object of the general theory of law. Yet, notwithstanding its generality, the normative theory of law is an empirical science, since it

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48. See the discussion of the concept of focus of the legal order, *supra*.

provides the means to the cognition of empirical systems of norms, such as the entire legal orders.

Thus, the task of the normative theory of law does not substantially differ from that of the traditional science of law. The difference between the two consists in the fact that the traditional science of law does not make a distinction between the cognition of norms, which is a theoretical function, and the making of norms, which is a practical function. The task of the normative theory is, therefore, not the re-statement or re-arrangement of that which according to the contents of the norms ought to be, but the method, the form, and the means of how to grasp and systematically deal with such contents.

The normative theory of law is also a critical science. It critically examines the above-mentioned method, form, and means applied by empirical normgivers in their treatment of the contents of norms. It does not, however, enter the area of the specific contents of such norms. The empirical normgiver is the supreme authority in this respect. *Vis-à-vis* the contents of the norms, the normative theory refrains from any critique but applies its interpretative function to them. This critical orientation of the normative theory prevents it from arriving at any absolutes. It does not recognize any absolutely valid norms, *i.e.*, norms the normative existence of which would not depend on the hypothesis of the cognizing subject. Therefore, it cannot recognize the concept of absolute justice which would be valid without any conditions and hypotheses, since such a concept would necessarily tend to be antinomic and tautological.

The natural sciences have long abandoned their quest for the absolute because they realized that our ignorance in this respect is not due to a defect which could be remedied by firm will and conscientious study, but that it is due to the bounds and limits imposed on the function of cognition of the human intellect, and that it amounts to a direct impossibility of cognition which can be demonstrated. Notwithstanding such a realization in the natural sciences, attempts are still being made in the area of the normatively oriented sciences to determine the absolute good and the objective justice by scientific methods. It is especially ethics and the traditional science of law which engage in this kind of speculation.

It is a fundamental feature of the critical philosophy (which provides the foundation of the normative theory) to admit the insolvability of the problem. The normative theory, thus, holds that the absolute

validity of norms whether legal or ethical, cannot scientifically be demonstrated but that their validity must only be presupposed. The normative theory makes, thus, its cognition relative but, at the same time, rationalizes its cognition since it makes such cognition noetically equivalent to that of the natural sciences which is itself relative. Thus, it adopts the Archimedean principle of the firm place. Such Archimedean firm place within the normative theory is the norm which the normative theory cognizes, but which it cannot create by cognizing it. The function of the normative theory is thus very modest. It does not take upon itself any creative function.

In a pronounced contrast to the normative theory, the traditional science of law is generally credited with an extensive demiurgical function which it displays in the broad area of politics. It frequently presents its subjective desires and aspirations in the guise of allegedly objective truths and cognitions and it attempts to demonstrate the absolute correctness of its assertions. All such attempts are, however, quite futile. They do not prove anything except that the human nature will never willingly accept the narrow limits which the human intellect had to impose upon itself. The normative theory of law, on the other hand, true to its Archimedean approach, does nothing of the kind. It does not take any demiurgical function upon itself, but holds firmly to the concept of relativity of thought. And this is one of its chief merits.