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Chapter 9: Exploring the Boundaries of Law: On the Is-Ought Distinction in Jellinek and Kelsen [last draft version]

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1. Facts and Norms

Of the three dominant strands in legal philosophy – natural law theory, interactionism and positivism –, legal positivism at least in its normative variant,[1] is the least inclined to establish interconnections between the spheres of Is and Ought. That, of course, raises questions about the autonomy of law and the relation between law and other social domains and, as a consequence, about the relation between the science of law and other scientific disciplines. According to many legal positivists, it is the law, and the law only, that determines what counts as a valid legal norm and what is prescribed by this legal norm, not some

[1] In contrast to descriptive legal positivism, normative legal positivism (as advocated by, for instance, Hart and Kelsen) does not reduce law to a social fact but takes account of the normativity of law (see Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26(4) Oxford Journal of Legal Studies 683).

regularity or reasonable expectation in interactional patterns among people, or some dictate of reason. Vice versa, legal norms do not tell us anything about how things are in nature or in social reality; they solely prescribe what ought to be the case from a legal point of view. The law pictures a world wished for, not the world as it is. Indeed, it is the actual, or at least potential, discrepancy between law and reality that enables law to uphold a normative stance towards reality and to demand conformity to its norms.

In German and Germanophone legal theory, Kelsen's normative legal positivism has been very influential. Both on methodological and ideology-critical grounds, Hans Kelsen defends a rigorous Is-Ought distinction. 'This opposition between "Is" and "Ought" is a fundamental element of the methods used in the humanities in general and of the scientific study of state and law in particular.'[2] According to him, the spheres of Is and Ought have to be separated strictly because otherwise the science of law would have no distinct and distinctive object of research. By focusing on the formal aspects of law and the structure of the legal system, he attempts to 'purify' his theory of law from all external, non-legal influences as much as possible. Kelsen acknowledges that law can be studied both from a normative-legal and an empirical perspective, but denies that these things can be done *at the same time*, that is from a unified perspective. In his view, the science of law constitutes an autonomous discipline that does not need to incorporate insights from other disciplines. On the contrary, the combination of

[2] Hans Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (Mohr Siebeck 1922) 75; our translation.

methods from various disciplines would, he fears, result in a confusion of what has to be studied: law as a collection of norms or as a part of social reality. Moreover, if these spheres would be conflated, the law would lose its critical distance from reality and would become a mere tool in the hands of the powerful. Interestingly, one of Kelsen's well-respected, but largely forgotten, predecessors, the Austrian legal scholar Georg Jellinek, saw no evil in connecting facts and norms. Indeed, in his notion of the normative he tried to capture the normative force of the factual ('die normative Kraft des Faktischen'). He believed the factual state of affairs could give rise to legitimate and legally relevant normative expectations. Because of the interconnection between facts and norms in law, he argued, contrary to Kelsen, that the state can only be understood meaningfully, if other, extra-legal, but still legally relevant perspectives are taken into account in addition to the legal perspective.

In our contribution we intend to get a better grasp on the relation between Is and Ought in law and its implications for the autonomy of law and the possibility (or even necessity) of interdisciplinary research. We focus on the debate between Jellinek and Kelsen because both scholars have attempted, each in their own way, to secure the autonomy of law as an autonomous discipline. Their respective theories constitute strong positions in the legal-philosophical literature on the scientific foundation of the study of law.[3] The search for such a foundation may

[3] In our chapter we do not discuss contemporary positivist theories, such as those of Hart and Raz, which already have received a lot of scholarly attention (see, for instance, Gerald J Postuma, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 11: Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) 261-399). Moreover, where Kelsen has laid out a normative account of

seem to be, to some contemporary legal scholars, outdated, but in our view it still remains relevant to ask what makes the study of law scientific and how it relates to other disciplines. We take Jellinek's general theory of the state as a starting point, because it offers a good basis to reflect on the interrelationship of the factual and normative side of political order and the role law plays in connecting these two sides. Thus, Jellinek holds an exceptional position within normative legal positivism that is in line with the contemporary trend toward interdisciplinary research.[4] However attractive it may be in this respect, is it a strong position, or is it a threat to the autonomy of law from the perspective of legal science as Kelsen claims? And, if so, would that necessarily be a bad thing? With Kelsen, we believe that some kind of 'border control' between scientific disciplines is necessary. Otherwise the specific access to reality which a discipline offers gets lost, together with the specific methods used in order to verify its truth claims. An unregulated 'mashup' of perspectives may result in a set of truth claims which are not necessarily compatible and cannot be verified in consistent way.[5] However, we consider Kelsen's attempt to purify the science of law to be too rigid and ultimately

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law that more radically departs from empirical considerations than, for instance, Hart's notion of the rule of recognition (HLA Hart, *The Concept of Law* (3th edn, Clarendon Press 2012)) and Raz's sources thesis (Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979)), Jellinek has developed a unique 'psychological' approach that attempts to reconcile the is-ought distinction.

[4] Sanne Taekema and Bart van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research' in Bart van Klink and Sanne Taekema (eds), *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011) 7.

[5] Ibid 31.

not convincing. We think it is worthwhile, therefore, to revisit the work of Jellinek, which has been standing in the shadow of his illustrious successor for too long, both in Germany and elsewhere. Kelsen's criticism, in turn, helps us to identify weak points and challenges in Jellinek's theory, such as its exclusive focus on the nation state.

Firstly, we will describe Jellinek's 'two-sided theory of the state' and we will elucidate his notion of the normative force of the factual as an example of Jellinek's attempt to transcend the Is-Ought distinction (section 2).[6] Secondly, we will discuss Kelsen's criticism of Jellinek's multilayered conception of the state, which, according to Kelsen, is based on an impermissible conflation of Is and Ought (section 3). Thirdly, we will compare and evaluate the two opposing views on the relation between facts and norms in law (section 4). Finally, after comparing the two approaches, we will indicate how interdisciplinary research can be helpful in addressing the problems and questions the two approaches are faced with (section 5).

2. The Two Sides of the State

In the architecture of Jellinek's *General Theory of the State (Allgemeine Staatslehre*), the so-called 'two-sided theory of the state' ('Zwei-Seiten-Lehre') plays a constitutive role. In his view, the state has to be analysed from two

[6] This section is to a large extent derived from Oliver W Lembcke, 'Staats(rechts)lehre oder Rechts(staats)lehre? Zum Rechtspositivismus bei Jellinek und Kelsen' in Rainer Schmidt (ed), *Rechtspositivismus: Ursprung und Kritik* (Nomos 2014) 98 ff.

perspectives in conjunction. Firstly, from the perspective of social theory, the state is studied as an organized state of affairs ('status') in society.[7] Secondly, from the perspective of the general constitutional law doctrine ('allgemeine Staatsrechtslehre'), the state is conceived as a legal institution.[8] Both perspectives are necessary, because through the use of their own research methods they each capture the state in one of its manifestations. According to Jellinek, the state is a complex research object that calls for an equally complex approach in which various perspectives are combined.[9] This perspectivist approach has to be in accordance with modern methodological requirements and has to respect, for instance, the distinction between Is-statements and Ought-statements – albeit, not in the rigorous fashion of neo-Kantian theory (as advocated by Kelsen, see section 3). In neo-Kantian theory, it is the research method chosen by the researchers in line with their subjective knowledge interests, that constitutes the object of research.[10] Jellinek, on the other hand, holds on to the objective existence of the

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[7] Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, Dr. Max Gehlen Verlag 1966) 129-379.

[8] Ibid 383-795.

[9] Ibid 74.

[10] For an analysis of contemporary neo-Kantian theory and its relevance for the humaniora, see Gangolf Hübinger, 'Staatstheorie und Politik als Wissenschaft im Kaiserreich: Georg Jellinek, Otto Hintze, Max Weber' in Hans Maier et al. (eds), *Politik, Philosophie, Praxis: Festschrift für Wilhelm Hennis zum 65. Geburtstag* (Klett-Cotta 1988) 143. On Jellinek's methodology in particular, see Oliver Lepsius, 'Georg Jellineks Methodenlehre im Spiegel der zeitgenössischen Erkenntnistheorie' in Stanley L Paulson and Martin Schulte (eds), *Georg Jellinek* (Mohr Siebeck 2000) 329 ff. and Oliver Lepsius, 'Die Zwei-Seiten-Lehre des

object, which gives way to a multitude of perspectives that have to be taken into account by the researcher.[11]

Building on the objective existence of the state, Jellinek distinguishes two different functions that are fulfilled by the state and that, even though they depend on each other, are incommensurable, namely the creation and maintenance of both the social order and the legal order. However, due to the methodological dualism of his two-sided theory, he does not consider the state to be simply the unity of these functions.[12] Jellinek strongly warns against a fusion of perspectives, because that would neglect the specific character of these domains:

> The denial and obliteration of the distinction explained here is the cause of the most fatal errors that persist to the present day. The legal nature of the state and its institutions is constantly confused with its social reality. Indeed,

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Staates' in Andreas Anter (ed), *Die normative Kraft des Faktischen: Das Staatsverständnis Georg Jellineks* (Nomos 2004) 78 ff.

[11] As Kersten writes: 'The object of knowledge determines in advance the knowledge perspective, the consciousness aiming for knowledge just follows the object' (Jens Kersten, 'Georg Jellineks System: Eine Einleitung' in Jens Kersten (ed), *Georg Jellinek: System der subjektiven öffentlichen Rechte* (reprint 2nd edn, first published 1905, Mohr Siebeck 2011) 25; our translation) 7.

[12] In today's vocabulary of Systems Theory, one could say that the state is not so much the unity of the social and the legal order, but the unity of their difference. A system-theoretical reconstruction of Jellinek's two-sided theory of the state can be found in André Brodocz, 'Georg Jellinek und die zwei Seiten der Verfassung' in Andreas Anter (ed), *Die normative Kraft des Faktische: Das Staatsverständnis Georg Jellineks* (Nomos 2004) 153.

> that there are various ways of acquiring knowledge about the state so far has not been clearly understood at all.[13]

Consequently, the unity of state does not, according to Jellinek, follow directly from the object itself. There is no immediate access to the thing called state. Moreover, the state, as an object of knowledge, has no unitary structure, either as an empirical phenomenon or as a theoretical construction. The point is to grasp 'the internal connection between the disciplines that both represent the general theory of the state' and to avoid 'the subsequent error' that you could capture the complexity of state with only one side of the theory while ignoring the other side.[14]

Seen from the perspective of social science, the political order – or in a continental European perspective: 'the state' – springs like every association from an agreement of wills or, in other words, from the perception and acceptance of the order it is able to establish. Contrary to every other association, this agreement of wills applies to the sovereign order of society. The state constitutes a sovereign order, according to Jellinek, because it can enforce its will against every other social organization, even unconditionally. It is an 'original' power that, legally speaking, cannot be derived from any other power.[15] As an instutionalized power,

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[13] Jellinek, *Allgemeine Staatslehre* (n 7) 138-39 (see also 74); our translation.

[14] Ibid 12; our translation.

[15] Ibid 180.

the state demonstrates its sovereign character by imposing a hierarchical structure on society.[16] Jellinek defines the social side of the state as follows:

> The state is the unitary association of resident persons with original sovereign power.[17]

He contrasts this social conception of the state with the legal conception:

> As a legal conception, the state is (…) the corporation of a resident people with original sovereign power.[18]

These definitions seem very similar. In what respect exactly does the legal conception of the state differ from the social conception? Constitutive for the subjective dimension of the agreement of wills are the elements 'unitary association' ('Verbandseinheit') and 'persons' ('Menschen'), and these are replaced by elements necessary for the objective dimension of legal attribution: 'corporation' ('Körperschaft') and 'people' ('Volk') respectively. The empirical category of efficacy, which concerns the effects of law in reality, is turned into the legal concept of validity on which basis legal consequences can be attached to

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[16] A comparison between the related concepts of power and sovereignty in Jellinek and Weber can be found in Andreas Anter, 'Max Weber und Georg Jellinek: Wissenschaftliche Beziehung, Affinitäten und Divergenzen' in Stanley L Paulson and Martin Schulte (eds), *Georg Jellinek* (Mohr Siebeck 2000) 67.

[17] Jellinek, *Allgemeine Staatslehre* (n 7) 180 ff, our translation. Original text: 'Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit seßhafter Menschen.'

[18] Our translation, orginal text: 'Als Rechtsbegriff ist der Staat (…) die mit ursprünglicher Herrschermacht ausgerüstete Körperschaft eines seßhaften Volkes.' More specifically, it concerns 'the regional corperation equipped with original sovereign power' ('die mit ursprünglicher Herrschermacht ausgestattete Gebietskörperschaft'; Jellinek, *Allgemeine Staatslehre* (n 7) 183).

factual occurences. A decision ‘on behalf of the people’ usually has nothing to do with the people as an empirical entity, but derives its legitimacy in a mediated way from ‘the people’ as an object of attribution, so that social conflicts can be solved by means of legally binding decisions. Although the losing party in court proceedings won’t be inclined to agree with the concrete outcome of the case it will, generally speaking, be convinced that courts decide in accordance with the law and that therefore their decisions have to be complied with. Convictions of this kind have to be presupposed by the legal concept of the state – and, as a consequence, by the law – and legal validity is founded on them: ‘(…) the law must always proceed from the actual state of affairs, because it – however it may be drafted – has the goal of being applied to actual state of affairs.’[19] In the application of norms to facts, the law is able to to create the internal connection between the social and the legal conception of the state.[20]

According to Jellinek, law is the concrete expression of the interrelation between facticity and normativity that characterizes the state in general. Therefore, he approaches law in his *General Theory of the State* from both a legal and social scientific point of view. In his view, legal norms cannot be understood properly when they are reduced to their ought-capacity: ‘They owe their continued existence over time, their efficacy and their concrete shape and form to causes which cannot only be ascribed to the normative sphere.’[21] As a product of the

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[19] Jellinek, *Allgemeine Staatslehre* (n 7) 162; our translation.

[20] Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Mohr Siebeck 2000) 266-301.

[21] Lepsius, ‘Die Zwei-Seiten-Lehre des Staates’ (n 10) 73; our translation.

human will, law will remain dependent on the shared conviction that what we are dealing with is law. However, where does that conviction come from? In his notion of the 'normative force of the factual', which plays a central role in his theory of law, Jellinek tries to find an answer to this question.[22]

The phrase 'normative force of the factual' is ambiguous. Does the factual have the power to create law? Or, vice versa, is the normative capable of establishing facts? Writing about the development of law, Jellinek offers both interpretations. Thus, the 'normative force of the factual' is a statement not so much about the validity as about the genesis of law,[23] which nonetheless affects its validity. Normative expectations arise from factual relationships in a similar way as customary law, in which a certain custom, habit or established practice (*usus*) in due time is accompanied by the opinion, widely held in the legal community, that what is usually done, ought to be done legally speaking (*opinio iuris*). Jellinek attributes to custom or habit ('Gewohnheit') the transformative potential to elevate the factual to the level of the normal.[24] The force of habit is a normative force that eventually turns normality into normativity. What is done normally becomes, in

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[22] Jellinek, *Allgemeine Staatslehre* (n 7) 337-44. On the social dimension of his theory of law, see also Andreas Anter, 'Georg Jellineks wissenschaftliche Politik. Positionen, Kontexte, Wirkungslinien' (1998) PVS 39(3) 503, 520-23, Kersten, *Georg Jellinek und die klassische Staatslehre* (n 21) 364-375, and Peter Landau, 'Rechtsgeltung bei Georg Jellinek' in Stanley L Paulson and Martin Schulte (eds), *Georg Jellinek* (Mohr Siebeck 2000) 299.

[23] Landau (n 22) 302.

[24] Jellinek, *Allgemeine Staatslehre* (n 7) 338 refers in this context to the development of children and the phenomenon of fashion, and also specifically to customary law (Jellinek, *Allgemeine Staatslehre* (n 7) 339).

daily life and in the minds of people, the norm. It is therefore perfectly possible, as Jellinek argues, that a certain distribution of power in society which is seen as oppressive and unjust at some later point in history, once had a legal character, not so much because it was enforced through power, but because it was recognized as law also by those who were oppressed by it.[25]

Law is what is considered to be appropriate, or acceptable, in the social context of the time. Appropriateness or acceptability ('Angemessenheit') is promoted by processes of institutionalization that consolidate or stabilize various cultural patterns, ideas or templates.[26] These processes cannot be consciously controlled or influenced by people. They emerge in social interaction in daily life. From this perspective the normativity of law neither follows from its rightness nor from its rationality. It is the other way around: the long-winded and complex process of transforming normality into normativity leads eventually – through the normative force of the factual – to the recognition that what is accepted as the norm is not only normal but also right and rational.[27] Because of the duration of this transformation process, the validity of law is secured for a certain period of time. However, for the same reason, the law may be challenged, since convictions

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[25] Ibid 343.

[26] See James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (The Free Press 1989) chapter 2, who give an analysis of how rules are internalised through institutionalization, which on many points is very similar to Jellinek's description.

[27] This transformation process is not limited to individual norms or separate areas of law but includes basically the whole legal order (Jellinek, *Allgemeine Staatslehre* (n 7) 340).

on normality and normativity may change. No legal order is resistant to change, sometimes even radical change.

The interrelationship between the origin and the validity of law, established through the normative force of the factual, can also be turned around in a 'factual force of the normative.'[28] According to Jellinek, the normative exerts its factual force when legal subjects believe that there is a higher normativity, contained in natural law, that transcends the enacted law and that may amend and improve it.[29] Through the conviction that what is, ought to be, a stable order is created, much in the same way as customary law described above. The counterpart of this process is the human capability to imagine how the political order should be constituted legally. It is the achievement of the natural law tradition to have developed a rich collection of principles for the design of a just legal constitution.[30]

3. The State as a Legal Order

In the introduction to his early work *Fundamental Problems of the Statutory Law Doctrine* Kelsen[31] pays tribute to his respected predecessor Jellinek by referring to him as his 'unparalleled master' ('unerreichter Meister'). In what follows, however,

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[28] Kersten, *Georg Jellinek und die klassische Staatslehre* (n 20) 372.

[29] Jellinek, *Allgemeine Staatslehre* (n 7) 344 ff.

[30] Landau (n 22) 303.

[31] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre*: *entwickelt aus der Lehre vom Rechtssatze* (2nd edn, Scientia 1960) XIII; our translation.

Kelsen does not build on the teachings of his predecessor in a friendly hermeneutic way; instead he offers, in this and subsequent works, a frontal attack on what he considers to be the dominant theory of the state and constitutional law in his time.[32] One could say that Kelsen uses Jellinek as an avil upon which he could hammer and shape his own theory, the pure theory of law (*Reine Rechtslehre*).[33] Kelsen critizes, firstly, Jellinek's concept of the State as the unity of the social and the legal dimension, which are connected but at the same time irreducible to each other and, secondly, the connection that he establishes between a legal and a sociological understanding of the state and, by implication, between law and society.[34] Below we will try to deal with these points separately as much as possible. Even though they all are raise questions about the methodological and ideological presuppositions of Jellinek's theory.

As a matter of principle, Kelsen claims that if an object is approached from two different perspectives, it does not constitute the same object. So when Jellinek distinguishes two different sides of the state, the social and the legal, these two sides cannot possibly refer to the same thing, since they are studied by means of two different disciplines. Using the conceptual and methodological tools specific to

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[32] Kersten, *Georg Jellinek und die klassische Staatslehre* (n 20) 170 speaks of an 'anti-reception'.

[33] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 115; our translation, is quite explicit about his aim when he writes: 'Together with Jellinek's theory [that is, his two-sided theory of the state] the legal doctrine should go down.'

[34] Moreover, Kelsen critizes Jellinek's theory of self-commitment which assumes that the state restricts its power voluntarily by means of law. For a discussion of Kelsen's criticism of Jellinek, see Kersten, *Georg Jellinek und die klassische Staatslehre* (n 20) 171 ff.

each discipline, social theory and legal doctrine construe different objects of knowledge that confusingly in common parlance fly under the same flag of the state.[35] According to Kelsen, Jellinek's two-sided theory of the state eventually boils down to a univocal, consistently legal theory since Jellinek is not able to distinguish the two conceptions of the state in a convincing way. They can only be differentiated, as Kelsen argues, if it can be demonstrated that they serve different purposes. However, the two definitions of the state provided by Jellinek (see section 2) differ only in minor respects. How exactly should one differentiate between the state as a 'unitary association' and the state as a 'corporation' and between 'persons' and 'people' residing in the state? In both definitions Jellinek appeals to an 'original sovereign power'. Only from a legal perspective, the state can be attributed this kind of power, provided that one is willing to acknowledge it as the highest legal order by accepting its basic norm.[36] As a social instutition, the state cannot seriously claim to have power 'from origin' and to have control over all other social associations.

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[35] In section 3, this point is elaborated in more detail.

[36] In earlier works, Kelsen (Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Mohr Siebeck 1920) 94 and Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 94 ff) referred to the 'originary norm' ('Ursprungsnorm'), what later became known as the 'basic norm' ('Grundnorm', which notion was already used by Kelsen (Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 100)).

In Kelsen's pure theory of law, state and law are identified.[37] As Kelsen argues, the state is 'the personification of a legal order.'[38] Irrespective of how they are created and by whom they are created, legal norms owe their validity to the state and not to society. Kelsen considers the state to be a 'special form of society', 'social unity' or a 'legal organization' to which all legal norms can be traced back, whether they are produced by state officials or by members of an association. Taken together, the legal norms of a given legal order build a hierarchical structure (or 'Stufenbau'), consisting of different levels of norms and norm applications, starting from the basic norm, moving down to statutes, governmental regulations, court decisions, contracts, and so on, and ending in the factual execution of a legal command (e.g., the imprisonment of a criminal by a police officer).[39] Because the norms belonging to a given legal order owe their validity ultimately to the basic norm, the basic norm brings unity in the diversity of existing norms. This unity makes it possible to describe the legal order at hand as a coherent set of legal sentences that do not contradict each other.[40]

Seen from a legal perspective, sovereign power is not a capacity that the state possesses independently from, outside or above the legal order: 'Sovereignty cannot transcend the legal order, because it is only a feature of the

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[37] For a more detailed description of Kelsen's theory, see Lembcke (n 6) 103 ff.

[38] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg (tr), Russell & Russell 1973) 197.

[39] Hans Kelsen, *The Pure Theory of Law* (Max Knight (tr), translated from the second (revised and enlarged) German edition, University of California Press 1970) 221 ff.

[40] Kelsen, *The Pure Theory of Law* (n 39) 205-08.

legal order.'[41] The state exists only to the extent that it expresses its will through the form of law, which derives its content from society. From a social perspective, the state has no 'originary' power to dominate all other social associations. Yet, by attributing omnipotence to the state Jellinek's two-sided theory serves an ideological purpose, which, according to Kelsen, is typical for constitutional law doctrine in general and one which it shares with theology:

> [B]y doing so, the power of the state is increased; and this constitutional law doctrine has always considered to be its main task – though it is no theoretical but a practical-political function–, like it is indeed the task of theology not so much to acquire knowledge about God, but rather to increase his power.'[42]

A second recurring theme in his critique is what Kelsen considers to be Jellinek's methodological syncretism. In his two-sided theory of the state, Jellinek offers two different perspectives on the state that, though separated in the way they have to be studied, are connected on crucial moments, in particular in his account of the validity of law, the revolutionary breakdown or creation of legal order, and the limitations to state power. In Kelsen's view, the social and the legal perspective can never be connected because they make use of different research methods

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[41] Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (n 36) 36; our translation.

[42] Hans Kelsen, *Allgemeine Staatslehre* (2nd edn reprint, Verlag Dr. Max Gehlen 1966) 100-01; our translation.

and, as a consequence, deal with different objects of knowledge.[43] On the one hand, the state is studied as an empirical phenomenon (or social institution) and, on other hand, the state is conceived of as a legal construction (that is, a set of norms). Kelsen denies that there is such a thing as the state 'as such'. The state has no objective existence independent of our research methods, but is construed differently from different scientific perspectives. By conflating a legal and a social perspective on the state a scientific hybrid is created or, as Kelsen puts it, a 'grotesque mythical creature: half legal order, half natural being.' [44] In his view, Jellinek's cardinal sin is that he fuses and confuses the domains of Is and Ought and, as a result, unscientific political preferences are smuggled into his theory.

In his pure theory of law, Kelsen tries to construe a critical-scientific conception of law which, because it is cleansed from metaphysical and empirical references, safeguards the autonomy of law.[45] He seeks to provide a solid scientific foundation for the science of law in order to secure its position among other sciences, in particular the natural sciences which threaten to become the dominant and only acceptable form of 'true' science. For that purpose, the question has to be answered what is typical or unique about the way the science of law understands its object and how it differs from other understandings. Building

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[43] As Kelsen (Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 116; our translation) firmly states: 'The identity of the object of knowledge is conditioned by the idendity of the research method!'

[44] Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (n 36) 210; our translation.

[45] For a more detailed description of Kelsen's methodological views, see Lembcke (n 6) 109 ff.

on the neo-Kantian axiom that, in the humanities in general Is and Ought are strictly separated,[46] Kelsen argues that the phenomenon of law can be studied from two different perspectives: either how it Ought to be (*Sollen*) or how it Is (*Sein*). These two perspectives correspond with two different disciplines from which law can be studied: respectively, a *normative* science of law that establishes deductively which rules are valid, and an *explanatory* sociology of law that determines inductively a certain regularity for which it tries to find a causal explanation. Thus, in Kelsen's view, the science of law is a normative and deductive science of value, like ethics and logic. However, as a normative science, the science of law does not prescribe what ought to be law, but only describes what, according to the conditions set in the law itself, has to count as law. In other words, it is only concerned with the 'the Is of Ought' (or 'Sein des Sollens'). [47] On the other hand, the sociology of law, like other branches of sociology is a science of reality, and conforms more generally to the methodological practices of the natural sciences. It is equally possible and legitimate to study law from both perspectives, but not at the same time. According to Kelsen, it is the aim of the science of law to describe the set of valid legal norms in a certain territory at a certain time, irrespective of their ethical value and empirical effects.

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[46] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 75. On the influence of the neo-Kantian epistemology on Kelsen, see Horst Dreier, *Rechtslehre, Staatsoziologie und Demokratietheorie bei Hans Kelsen* (2nd edn, Nomos 1990) 56-90.

[47] Lembcke (n 6) 103 ff.

Following the dichotomy of facts and norms, he argues that the validity of law can only be established on normative grounds. In his view, as indicated earlier, a norm is a valid legal norm, if it can be demonstrated that a higher legal norm has authorized the creation of this norm on a lower level in the hierarchy of norms that builds the legal system. Ultimately, all legal norms belonging to the same legal system can be traced back to the basic norm. The basic norm holds that all norms that follow from the historically first constitution of a legal order are legal norms. It is a 'hypothesis'[48] or 'assumption'[49] which makes the scientific description of law in the form of legal sentences possible. Kelsen does not deny that the law may draw its norms from various non-legal sources, such as morality, religion or custom. However, these norms are not legal norms because religion, morality, or custom prescribe them, but because they can be validated by reference to other, and higher, legal norms and, ultimately to the basic norm. From a legal perspective, as Kelsen claims, it does not matter at all where the law derives its content from.[50] He considers Jellinek's concept of the 'normative force of the factual' to be a purely 'historical-psychological notion' without any legal relevance.[51] It merely provides an empirical explanation of how certain norms

[48] Hans Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit* (2nd edn reprint, Mohr Siebeck 1976) 47 and Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd edn, Mohr Siebeck 1928) 97.

[49] Dreier (n 46) 45.

[50] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 100.

[51] Kelsen, *Hauptprobleme der Staatsrechtslehre*: *entwickelt aus der Lehre vom Rechtssatze* (n 31) 9.

have become accepted in social interaction, in a similar way to customs, and does not explain why these norms have to be considered valid legal norms. From the fact that something used to be done (or is expected to be done), it does not follow logically that this should be done.

Kelsen accuses Jellinek of mixing up the validity of law and its effectiveness: 'Jellinek tries to find the specific existence of the norms, their validity, in their efficacy!' [52] In Kelsen's view, legal norms are valid *as long as* the legal system to which they belong is, by and large, effective, but *not because* of its effectiveness. In other words, the efficacy of the legal system is a *conditio per quam* and no *conditio sine qua non* for the law's validity.[53] If one makes the validity of law dependent on the social acceptance of the norms by the majority of people in society, as Jellinek seems to do, one could only establish retroactively that a norm is a legal norm. It is very difficult, if not impossible, to prove scientifically that a norm has been accepted by the majority. In fact, as Kelsen argues, the presumption of social acceptance is a fiction, which, in its turn, is based on the fiction that people know the law, which in most cases is obviously not the case.[54] If the validity of law would depend on social acceptance, the science of law could no longer fulfil its task of describing the legal system as a unified whole, because the various legal norms may be accepted to different degrees by different people.

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[52] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 119; our translation.

[53] See also Dreier (n 46) 122.

[54] Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit* (n 48) 363.

Moreover, actors in legal practice, such as judges, must have an objective criterion to identify the law, not some subjective psychological notion.

By combining normative and factual perspectives in his general theory of the state Jellinek has, according to Kelsen, abondoned the legal-scientific method.[55] One has to accept, as Simmel stated, that science is necessarily limited and can never encompass the whole of reality.[56] If one wants to acquire consistent, that is non-contradictory knowledge of the law, one can accept only one system of norms as valid. Everytime an appeal is made to social, or '"real-life" knowledge', Kelsen suspects that the legal perspective is traded in for the political perspective.[57] In particular, he is concerned that Jellinek's two-sided theory of the state would give way to a 'double constitutional law' ('Doppelstaatsrecht') which in fact would constitute a constitutional law for the most powerful. [58] With reference to extraordinary circumstances, the ruler could decide to overrule the rule of law at any time and put his will in its place.[59] In his view, science should not engage itself

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[55] Kelsen, *Hauptprobleme der Staatsrechtslehre*: *entwickelt aus der Lehre vom Rechtssatze* (n 31) 490.

[56] Quoted in Kelsen, *Allgemeine Staatslehre* (n 42) 104.

[57] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 140. A similar criticism was raised against Eugen Ehrlich (see Bart van Klink, 'Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen' in Marc Hertogh (ed), *Living Law: Rediscovering Eugen Ehrlich* (Hart Publishing 2008) 239. On many points, Kelsen's polemic with Jellinek resembles his discussion with Ehrlich.

[58] Kelsen, *Hauptprobleme der Staatsrechtslehre*: *entwickelt aus der Lehre vom Rechtssatze* (n 31) 434.

[59] For that reason, Kelsen (Kelsen, *Allgemeine Staatslehre* (n 42) 157) rejected the notion of 'constitutional emergency law' ('Staatsnotrecht').

with metaphysics and should therefore abandon the theological method of 'double truth'. [60] Instead, science should aim for unity in the system it describes, in correspondence with the logical ideal of one truth. Accordingly, contemporary positivist science of law has to give up the concept of a meta-legal state. It should no longer operate with two perspectives on the state that, in Kelsen's view, are entirely unrelated. That is not only a logical-epistemological requirement, as Kelsen stresses, but also an 'ethical necessity'.[61]

4. The Autonomy of Legal Science

As scholars of constitutional law, Jellinek and Kelsen both tried to construe a scientific theory of law and state that could secure the autonomy of legal science. However, as will be apparent by now, they did so in very different, and in some respects even opposite ways. In this section we will sum up some of the main differences between these two theories. Jellinek's and Kelsen's theory of law and state differ from one another on the following five points: (1) the concept of the state; (2) the relation between law and state; (3) the validity of law; (4) the Is-Ought distinction; and (5) the possibility of interdisciplinary research. Firstly, their concept of the state differs fundamentally. Jellinek considers the state to be a

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[60] Kelsen (Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 247) draws an anology to the religious beliefs in miracles.

[61] Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (n 2) 252.

specific institution which supersedes all other social institutions. In his view, it fulfils a double function: it provides society both with social and legal order. Correspondingly, the state, as an organisation of power, can be studied from two different perspectives: a social and a legal perspective. According to Jellinek both perspectives are needed to get a full grip on the state, but they can never be united in one all-compasing perspective because the methods used are not compatible. By applying norms to facts, law is capable of connecting the two sides of the state. Kelsen denies that the state, as a unified object of knowledge, can have two sides. According to him, the state only has one side from a legal perspective: the legal side, which coincides with the legal order. From this perspective, the state is nothing but a hierarchical structure of norms which owe their legal character to the presupposition of a highest norm, the basic, historically first norm. If one would try to take into account the other, social side of the state within the science of law, one would, in Kelsen's view, jeopardize the unity of scientific knowledge. So, for Kelsen, law and the state are identical. Strictly speaking, he has no need for the concept of state at all.

Secondly, whereas Kelsen posits an identity between law and state (which renders the concept of state superfluous), Jellinek keeps these concepts separate. According to Jellinek, the state as a social institution invested with sovereign power precedes and has precedence over the legal order. In Kelsen's 'pure' theory of law, however, law has primacy. Law is not necessarily connected to the state, since law can also exist outside of the confines of the nation-state, within the international sphere; Kelsen did not rule out the possibility of global law. Moreover, in his view, law takes care of its own creation, not some political entity above or

outside the legal order. Kelsen dismisses Jellinek's dualism of law and state, not only on methodological grounds – as was noted before, the unity of scientific knowledge is at stake, – but also on ideological grounds: a 'double' constitutional law would give the powerful a permit to ignore the law whenever it is convenient.

Thirdly, opinions differ fundamentally on the question what constitutes the validity of law. Building on a strict separation between Is and Ought, Kelsen claims that only a higher legal norm can validate a legal norm on a lower level in the hierarchy of norms, making up the legal system. In this normativist account of legal validity, there always has to be a higher norm that authorizes the creation of the lower norm. It is the higher norm that decides on the validity of the lower norm; the lower norm has to be in accordance with the higher norm, that is, its application has to fall within the range of possible interpretations of the higher norm; if not, the lower norm has to be considered invalid. In the end, to prevent an infinite regress, one has to presuppose a highest norm, the basic norm, which, when accepted, validates all norms following from it. Facts cannot touch law's validity; again, it is the law, and the law only, that takes care of its own creation. Jellinek, on the other hand, acknowledges that facts may be relevant in determining whether a legal norm is valid. With his notion of the normative force of the factual he captures the idea that an established practice may generate legal norms. If the majority of people accept a certain pattern of behaviour as normatively binding, the law cannot ignore that. Vice versa, a lack of acceptance may cause a legal norm to become obsolete. Kelsen is skeptical about the ability of science to establish whether a legal norm is accepted or not. Most people do not even know the law, he claims, so acceptance cannot be the ground of law's validity. More principally,

the sheer acceptance of a norm, or a perceived regularity in behaviour, can never in itself render a norm legally valid, because that would involve an impermissible leap from Is to Ought. Consequently, Jellinek and Kelsen also give radically different accounts of fundamental changes in the law. For Jellinek, revolutionary ruptures in the law are a result of changed perceptions of legitimacy in society, whereas for Kelsen it is just a matter of exchanging one basic norm, which validated the old system of norms, for another basic norm, that gives legal status to new norms.

At the root of the debate between Jellinek and Kelsen lies, fourthly, a fundamental difference in epistemology or even ontology. As a logical precondition of knowledge in general and a 'pure' theory of law in particular, Kelsen posits a categorical distinction between Is and Ought. Following this distinction, a rough division in science can be made between scientific disciplines that describe how things are (the natural and the social sciences) and disciplines that establish what ought to be (the normative sciences). According to Kelsen, the science of law should restrict itself to describing the set of valid legal norms belonging to a certain (national or international) system of law. The description of the law – the 'Is of Ought' – should be purified from all empirical references, otherwise it would end up in contradictions. In Kelsen's view, it is the research method that determines the object of research. So there is no 'thing as such', that exists independently from how we acquire knowledge of it. By using different methods, scholars produce different and incompatible bodies of knowledge and, as a consequence, different objects (e.g., the human body is not the same object for a doctor and an anthropologist). Jellinek does acknowledge that Is and Ought have to be

distinguished. He also recognizes that different scientific disciplines are using different methods and that therefore their outcomes cannot be exchanged. However, in his general theory of the state, he tries to establish connections between the social world and the legal world and the disciplines that study them. As a complex unity of differences, the state needs to be studied from both the social and the legal perspective. In his account of legal validity, Jellinek shows how the factual – as it manifests itself in an established practice, in a growing acceptance of certain norms, in mutual expectations and so on – can be normatively relevant. Conversely, the normative can have factual consequences, as in times of revolution, when the belief in the legitimacy of certain norms turns them into valid legal norms. Jellinek considers the state to be an object, a 'thing in itself', that has to be be studied from different perspectives.

Finally, contrary to Kelsen, Jellinek believes that interdisciplinary research is necessary in order to acquire a complete understanding of the state. What exactly is the nature of this interdisciplinary research? In terms of the dynamic model of interdisciplinarity,[62] Jellinek's theory seems to be perspectivist, since he stresses that the two sides of the state have to be studied separately from two different, incompatible, yet complementary perspectives. However, within the context of his general theory of the state, it is clear that the legal perspective has priority over the social perspective. From the legal perspective questions are raised that it cannot answer on its own and for which it needs assistance from the social perspective. In his account of legal validity, for instance, Jellinek draws on empirical (sociological

[62] Taekema and Van Klink (n 4) 8-13.

and psychological) facts concerning the origin and development of habits and customs, but he does not engage in empirical research himself. Because of his focus on legal questions and legal research, the contribution of the social perspective can be characterized as predominantly auxiliary. In Kelsen's pure theory of law there is no room for interdisciplinary exchange whatsoever. According to him, the science of law is fully autonomous in the sense that it uses its own methods and thereby it produces its own object of research. When describing the content of a legal system it does not need any help from other disciplines. Other disciplines (such as sociology, psychology, or economics) may be engaged with law too, but because they approach it in different ways, using the conceptual and methodological tools typical for the discipline at hand, they create their own object of knowledge. Therefore, insights acquired in one discipline cannot be transferred to another. Kelsen does acknowledge that the law functions in a social context, but this context is only relevant for its factual survival over time (by and large the legal norms have to be complied with in society), not for its normative existence as a legal system (or validity).

5. Border Control

In this final section, we will indicate how interdisciplinary research could be carried out when dealing with the problems these two theories are confronted with when controlling the borders between legal science and other disciplines. Although we do not favour a strict border control and deem exchanges between different disciplines potentially fruitful, we do think that every discipline needs some general

idea of its main concepts and the methods to be used in order to produce knowledge in a consistent, systematic and verifiable way.

With regard to both theories, the question can be raised whether they succeed in drawing the boundary between the science of law and other disciplines, rigorously in Kelsen and less strictly in Jellinek. When connections are made, as in Jellinek, how are they managed? In short, Kelsen's 'pure' normative theory portrays law as an autonomous and self-referential system that possesses self-determination, the power to make the distinction between what is 'inside' and 'outside' of the legal world. One of the main theoretical challenges of today is to understand law outside of the confines of the nation state. Kelsen's perspective has anticipated the systems-theory approach to law which allows you to understand the powerful expansion of law – usually dubbed 'juridification' – not only at the national level but also at the transnational and international level.[63] However, Kelsen fails in his attempt to purify the science of law from non-legal influences, because the acceptance of the basic norm is a subjective, political choice. By making this foundational choice, the legal scholar loses his or her status of neutral observer and becomes a participant of this particular political-legal order. As a consequence, the two roles are conflated: the legal scholar becomes a participant in the legal system that is the subject of his or her scientific research. Moreover, by conflating these two roles, the potential critical stance toward the system is reduced to a mere consistency check. If the starting point of

[63] For a description of current developments within the system theory approach to law, see Lyana Francot's chapter in this volume.

legal research is by definition impure, it may lead to giving legal recognition to morally very dubious or corrupt sytems of norms (for instance, if one would describe the Nazi regime as a legal system). Yet, Kelsen's strict objective conception of science is a matter of choice.[64] Of course, Kelsen, has provided reasons for his choice to reduce legal science to a purely descriptive and context-independent enterprise. Yet, these are not convincing, either on a factual or on a normative level. On the one hand, it can be disputed that legal facts can be established without normative evaluation. In his theory of legal interpretation, Kelsen acknowledges that in every application of the law, the legal official has to rely on non-legal values, since legal norms offer a 'scheme of interpretation' that allows for multiple meanings.[65] However, for the same reason, it can be argued that a scientific description of the content of a legal system cannot be made without evaluating the law (as hermeneutic theories of interpretation claim; see for instance, Dworkin).[66] On the other hand, the normativity of a political order is not simply a matter of subjective choice, since it is based on intersubjectively shared and contested understandings of the values involved. On the basis of this double criticism, and contrary to Kelsen, interdisciplinary research is helpful in two ways. Firstly, empirical research within the sociology of law and other social-scientific

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[64] Colin Hay, 'Political Ontology' in Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford University Press 2008) 78.

[65] Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit* (n 48) 94-95. See also Dreier (n 46) chapter 3.

[66] Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press 1986).

disciplines is able to provide information, for instance on the character of the political order, the conflicts within the society, the distribution of power and the efficacy of law. Secondly, normative theory (in particular, legal and political theory and ethics) can provide insights into the rules and principles of the legal order, their justification, interpretation, and contestation from a philosophical point of view. Taken together, these disciplines are helpful in making a deliberate and well-informed choice, particularly in the case of Kelsen, whether or not the legal scholar has to accept the basic norm of a given order.

Moreover, as Jellinek rightfully pointed out, the factual may affect the validity of legal norms. Kelsen acknowledges that the law's effectiveness is a precondition for legal validity, but denies that the law's efficacy is a reason for its validity. In case of customary law, the general acceptance of certain norms as legally binding offers a good reason for legal officials to recognize them. Kelsen would agree with this assumption, but he would still demand that the legal recognition of a custom requires the existence of a higher legal norm that authorizes its inclusion in the legal system. That does not seem to apply to cases of 'negative' custom (*desuetudo*), though. If legal norms are largely ignored in a certain society and no efforts are made to enforce these norms, it becomes very difficult to hold on to their legally binding character in practice. Kelsen acknowledges that norms can become obsolete when they are neglegted for an 'enduring period of time.'[67] That means that certain facts, in this case the fact of a non-observance of rules for a longer period of time, decide upon the validity of law.

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[67] Kelsen, *General Theory of Law and State* (n 38) 119.

So, even in Kelsen's theory, there is a necessary connection between effectiveness and validity which evidently brings back the haunting question of the relation between Is and Ought.

By contrast, Jellinek's concept of the normative force of the factual connnects the spheres of Is and Ought. In his view, law is, and should be, receptive to the transformative power that stems from the underlying historical and societal forces driving change. For this reason legal science has to be able to cope with the emergence and development of law over time. According to Jellinek, however, these societal forces do not only shape the legal order, but they also presuppose themselves a political regime ('the state') in order to create a unified legal authority. But what does constitute the unity of legal authority? Jellinek's approach lacks a convincing answer to this question, as Kelsen already argued. Jellinek fails to show how the two sides of the state can be integrated into one encompassing theory of the state. He is clear about the asymmtery between the state as a political actor and the state as a legal actor: the former is superior over the latter. This holds true, according to Jellinek, at least in a historical sense, since it is in the state's capacity as a political actor that it constitutes the legal order, to which it subsequently may decide to subject itself voluntarily.[68] However, this assessment begs the following questions: how are the two different sides of the state related to each other? And how can they be united in one scientific approach? Is it possible to conceive of the state as a political authority without presupposing its legal authority? In order to capture the complexity as well as the

[68] According to Jellinek's theory of self-limitation, see Lembcke (n 6) 98-102.

unity of the state's authority, political science can be useful: it can help to identify, among other things, the various actors, arena and levels as much as the different modes of regulation that are involved and that need to be considered for a full picture of the state's authority.[69] This governmental approach also provides more insights into the relationship between (state) regulators and (interest) groups which plays an important role in Jellinek's integrative approach to the social side, but which has not been conceptionalized adequately within the framework of his 'two-sided theory of the state.' If one assumes, with Jellinek, that the acceptance of legal norms in society is not merely a pre-condition but a constitutive element of validity, it is important to be able to establish whether legal norms are indeed accepted by the norm addressees and to what extent. For that purpose, social-scientific studies are relevant. Moreover, empirical research contributes to our understanding of the instruments with which the acceptance of legal norms can be enhanced. In addition, normative-philosopical research can help to reflect on the best or most legitimate legislative approach, either top-down as in the traditional instrumental approach or bottom-up as in the communicative or interactive approach.[70]

In conclusion, it seems that the two theories, each in their own way, try to secure the autonomy of the science of law, and are forced to take insights from

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[69] A rich field of research has been established in the wake of the discussion about 'bringing the state back in' (Peter B Evans, Dietrich Rueschemeyer and Theda Skocpol, *Bringing the State Back In* (Cambridge University Press 1985)).

[70] These approaches are discussed in Nicole Zeegers, Willem Witteveen and Bart van Klink (eds), *Social and Symbolic Effects of Legislation under the Rule of Law* (The Edwin Mellem Press 2005).

other disciplines – including those from social-scientific and normative-philosophical research – into account. In order to control the border, one has to, every now and then, cross the border. Standing on the other side, one will get a better view of how boundaries between the target discipline and neighbouring disciplines are established conventionally, and one may even be challenged to move and expand existing boundaries by importing insights from other disciplines.