



The dialectic of real and ideal in the phenomenology of the normative

OÑATI SOCIO-LEGAL SERIES VOLUME 16, ISSUE 2 (2026), 581-605: A COLLOQUIUM AT THE INTERSECTION OF LAW, SOCIETY, AND COGNITION: INTEGRATING SOCIOLOGICAL AND PHILOSOPHICAL PARADIGMS WITH THE COGNITIVE SCIENCES

DOI LINK: [HTTPS://DOI.ORG/10.35295/OSLS.IISL.2317](https://doi.org/10.35295/OSLS.IISL.2317)

RECEIVED 1 APRIL 2025, ACCEPTED 3 MARCH 2026, VERSION OF RECORD PUBLISHED 1 APRIL 2026

PAOLO DI LUCIA* 

LORENZO PASSERINI GLAZEL* 

Abstract

Despite being so relevant in our lives, norms are not material objects that can be perceived through our senses and directly interact with the physical world. This raises some questions: Do norms really exist? What is their mode of existence? Are they mere mental objects? If they are mental objects, can we still say that they are real? This paper distinguishes two possible ways of understanding norms as mental objects: (i) as merely *psychological* phenomena exclusively existing within individuals' minds, or (ii) as *ideal* entities, i.e., intentional objects or mental contents that can be the correlates of psychic experiences, whose reality is not reducible, though, to such experiences. These two ways of understanding norms as mental objects provide two complementary methodological approaches, that are both necessary for a comprehensive understanding of the complex reality of legal norms.

Key words

Norms; psychologistic conception of norms; ideal entities; validity; efficacy

The present paper has been conceived and discussed in all its parts by both authors; however, Paolo Di Lucia is the author of sections 1. and 3. Lorenzo Passerini Glazel is the author of sections 2., 4. and 5. This paper presents preliminary findings from a larger, ongoing research initiative.

* Paolo Di Lucia, Università degli Studi di Milano, Dipartimento di Scienze giuridiche "Cesare Beccaria", via Festa del Perdono, 3/7, I-20122, Milano, Italia. Email: paolo.dilucia@unimi.it ORCID <https://orcid.org/0000-0002-3911-3526>

* Lorenzo Passerini Glazel, Università degli Studi di Milano-Bicocca, Dipartimento di Giurisprudenza (School of Law), piazza dell'Ateneo Nuovo 1, I-20126, Milano, Italia. Email: lorenzo.passerini@unimib.it <https://orcid.org/0000-0002-1607-8203>

Resumen

A pesar de ser tan relevantes en nuestras vidas, las normas no son objetos materiales que puedan ser percibidos a través de los sentidos e interactuar directamente con el mundo físico. Esto plantea algunas preguntas: ¿Existen realmente las normas? ¿Cuál es su modo de existencia? ¿Son meros objetos mentales? Si son objetos mentales, ¿podemos seguir diciendo que son reales? Este artículo distingue dos formas posibles de entender las normas como objetos mentales: (i) como fenómenos meramente psicológicos que existen exclusivamente en la mente de los individuos, o (ii) como entidades ideales, es decir, objetos intencionales o contenidos mentales que pueden ser correlatos de experiencias psíquicas, pero cuya realidad no es reducible a tales experiencias. Estas dos formas de entender las normas como objetos mentales proporcionan dos enfoques metodológicos complementarios, ambos necesarios para una comprensión integral de la compleja realidad de las normas jurídicas.

Palabras clave

Norma; concepción psicologista de la norma; entidad ideal; validez; eficacia

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1. Are norms real or merely mental entities?

1.1. Norms as part of the world we live in

As human beings, we act with reference to norms on a daily basis: a large part of our behaviour, our interpersonal relationships, even our thoughts, are determined or at least influenced to some extent by a variety of rules and norms.

We live, indeed, in a world that is permeated by norms and we move through a plurality of “normative landscapes”, such as the landscape of moral norms, that of rules of courtesy and good manners, that of local and global customs, that of the rules of the various games we like to play and, of course, that of the legal systems that are in force in the places where we happen to live and that we happen to visit.

Norms seem to play also an essential role in the construction and creation of the *social reality* in which we live: as many social ontologists have pointed out, nation-states, schools, universities, banks, money, corporations, football matches, the Olympic Games, and so on, are all elements of a peculiar kind of reality that cannot be explained solely in terms of the causal relations studied by natural sciences.¹ The existence and functioning of such entities are made possible by complex sets of norms and normative relations that determine the constitutive features of each of these phenomena, as well as the conditions under which they exist and cease to exist.

Norms, though, despite being so relevant in our lives and in the world in which we live, are not material objects that we can touch, see or generally perceive through our senses, nor can they directly, causally interact with the matter of which our physical world is made. Nonetheless, we experience norms in different contexts in many different ways, ranging from the purely subjective experience of the norms we impose on ourselves individually to the experience of legal norms that seem to have an existence which, within certain contexts, is experienced as an objective existence. Such a complex and multifarious phenomenology of the normative² raises some important philosophical questions: Can we say that norms actually *exist*? And if they do, in what sense they do? What is their *mode of existence*? Are they mere *mental objects*? And if they are, can we still say that they are *real* — and consequently that the social entities whose existence they make possible are likewise real?

¹ For an introductory overview of lines of research in social ontology see Epstein (2023).

² The expression ‘the phenomenology of the normative’, appearing also in the title of the present paper, makes reference here to the different ways in which certain phenomena manifest themselves in experience, not to a specific philosophical method for investigating them – namely, the phenomenological method elaborated by Edmund Husserl. The phenomenological method is indeed one of the most fruitful methods for investigating the phenomenology of the normative; but it is not the only one. In the present paper, whose purpose is to suggest that a thorough comprehension of the many ways in which normative phenomena manifest themselves requires the adoption of different methodological approaches, we refer, among others, to the contributions of Adolf Reinach, Ota Weinberger and Paul Amserek, who expressly draw inspiration from Husserl’s phenomenology. Also, the conceptualisation of norms as de-psychologized mental objects proposed by Hans Kelsen is partly inspired by Husserl’s de-psychologization of logic in his *Logical Investigations* (see Husserl 1913; Kelsen 1922/1928, p. 81n). For recent developments in the phenomenological approach to the investigation of law and normativity, see Theodorou *et al.* (2024).

1.2. *A false dilemma?*

One of the first things that become apparent when studying the mode of existence of norms is that some of the norms that determine or influence our behaviour — such as the norm that one imposes to oneself to eat only green food — seem to depend on purely *subjective* attitudes and personal choices,³ whereas other norms — such as legal norms — seem to have a more *objective* mode of existence, at least within the context of the legal system to which they belong.

Nonetheless, even in the case of legal norms, norms are not material entities of the external world that can be perceived directly or indirectly through the senses. As the French legal philosopher Paul Amselek observes, norms “completely escape our perceptual apparatus”:

No matter how much we improve our means of perception, no matter how much we improve our microscopes [...], we will never “see” rules, any more than we will “see” ideas or other mental objects. (Amselek 1993, p. 315)⁴

Amselek suggests, in fact, that norms, despite appearing to be part of the *reality* in which we live, seem nonetheless to be merely *mental objects*.

This seems to lead to a dilemma: on the one hand, if norms are merely *mental* objects, one could suppose that they are devoid of a proper *reality* and the product of merely subjective thoughts, feelings, emotions or attitudes; on the other hand, if norms have an impact on our behaviour and make possible the existence of entities like nation-states, universities, money, *etc.*, norms seem to be, at least in certain cases, constitutive elements of the *reality* in which we live.

Is this a real dilemma? Amselek suggests that it is not. Drawing inspiration from Edmund Husserl’s phenomenology and Karl Popper’s Three Worlds theory (1972), he maintains that “anything that is capable of acting on physical things, or on which physical things can act, can be called real”. This includes mental objects. Amselek notably emphasizes that

rules of conduct, and especially legal rules on the basis of which human societies are governed and function, are very ‘real’, despite their particular ontology, and it’s not for nothing that we fight for them, to elaborate them, enforce them, reform them, *etc.*; they interfere with our behaviour, our way of life, our social relations. (Amselek 1993, p. 315)

But how can norms, if they are to be understood as mental objects, have an impact on the physical reality and more in general on our life and the world in which we live?

1.3. *Two ways of understanding the reality of norms as mental objects*

In order to investigate in what sense we can say that norms exist, what is their mode of existence and in what sense they may have an impact on the world in which we live, we propose to distinguish, in sections 2. and 3. respectively, two possible ways of understanding norms as mental objects. The *first* way consists in understanding norms

³ Another example can be a norm such as “Always give alms to beggars”, which has been investigated by Burton M. Leiser (1969, p. 21) under the notion of “maxim” or “principle”.

⁴ Amselek employs the French word “*règle*”. For the purpose of this paper, we consider “norm” and “rule” (in French “*norme*” and “*règle*”, in Italian “*norma*” and “*regola*”) to be synonyms.

as merely *psychological* phenomena, that is, as phenomena exclusively existing within the minds of individuals: from this standpoint, the reality of norms amounts to the reality of certain subjective normative psychic experiences actually occurring in one's mind. The *second* way consists in understanding norms as *ideal* entities, that is, as intentional objects, or mental contents, that *can* be the correlate of actual psychic experiences, but whose reality is *not reducible* to that of such experiences and whose existence lasts beyond the ephemeral occurrence of psychic states or processes. Our purpose is not to take a stance in favour of either way: we rather intend to distinguish the two ways and to elucidate some of their respective presuppositions and implications. Our hypothesis is that each of these two ways of understanding norms as mental objects makes it possible to grasp and investigate one specific aspect of normative phenomena and the reality of norms: they are in fact the result of two complementary methodological approaches, both of which are necessary for a comprehensive understanding of the phenomenon of legal norms.

2. Norms as *psychological* phenomena

2.1. A *psychologistic* conception of norms

A first way of understanding the idea that norms are mental objects consists in understanding norms as merely *psychological* realities, that is, as phenomena the reality of which amounts to the reality of certain subjective normative psychic experiences actually occurring in one's mind. In this perspective, normativity is a strictly psychological phenomenon consisting in a normative psychic state or experience of some kind, and a norm is *real* only inasmuch as a normative psychic state or experience of this kind actually occurs within the mind of a given *individual*.

This first way of understanding norms as mental objects is typical of the psychologistic approach adopted by some legal realists, such as Leon Petrażycki, Axel Hägerström and Karl Olivecrona. We will briefly consider here some of the main tenets of the paradigmatic formulation of a psychologistic conception of normative phenomena as proposed by the Russo-Polish philosopher of law Leon Petrażycki. Petrażycki expressly maintains that

[n]orms and legal and moral obligations are nothing actually and effectively existing outside the minds of people asserting or denying their existence. They are mere reflections or projections of the psychical states of such people. (Petrażycki 1909-1910/2011, p. 112)

When one believes that a norm exists in the world outside his mind, he or she is reflecting or projecting onto the outer world a subjective psychic state or normative experience of his own, a psychic state or experience which is in fact exclusively occurring in his own mind. Petrażycki stresses that human beings have a tendency to *project* their normative experiences or emotions onto the outer world and to think that norms and normative phenomena have an independent existence in the outer world. This is typically manifested in the attribution of normative properties to a conduct or a person. If one believes, for instance, that "lying is shameful", or that "the subject X has a certain right", one is in fact projecting onto the outer world nothing more than an "emotional phantasm" generated by a merely subjective, internal normative experience. Petrażycki compares this tendency to that of projecting on a roast the property of being *appetizing*:

it is obvious, indeed, that being appetizing is the mere reflection of the appetite experienced by the subject towards the roast — which is a merely subjective, internal psychic emotion (see Petrażycki 1909-1910/2011, p. 40).

Two theses can in fact be distinguished in Petrażycki's analysis.

The *first* thesis concerns the nature of *normative properties*: it claims that there are no normative properties intrinsic or immanent in conducts, persons or things, since they are mere emotional projections of the individual in which a normative psychic state or experience actually occurs. In this sense, Petrażycki's remarks constitute a rhetorically effective argument against those conceptions — such as natural law theories, and especially the doctrine of *Natur der Sache*, as well as other objectivistic meta-ethics — which hold that certain conducts, subjects or things possess intrinsic normative properties that are immanent and independent from the actual attribution of such properties by human's mind.⁵

The *second* thesis concerns the *existence of norms* themselves: it claims that the conviction that a norm exists in the world outside one's mind is itself a mere projective illusion, which is engendered by the mere occurrence of certain psychic emotional states in one's mind.

In his theory of law and morality Petrażycki describes such psychic emotional states as the “existence and operation in our mind of certain immediate combinations of action-representations and impulses rejecting or encouraging the corresponding actions” (Petrażycki 1909-1910/2011, p. 30, translation modified). Here is one of his examples:

In an honorable man, invited to commit (for money or other advantage) deceit, perjury, defamation, homicide by poisoning, or the like, the very idea of such ‘foul’ and ‘wicked’ conduct will evoke impulses which reject these acts. (Petrażycki 1909-1910/2011, p. 30)

Petrażycki explains that normative impulses may spontaneously arise in the mind of an individual, in which case he speaks of “*intuitive law*”; but they may also be engendered by the existence of certain external facts — which he calls “*normative facts*” — such as the issuing of a normative act by a Parliament or other normative authority, in which case he speaks of “*positive law*”. However, Petrażycki stresses that there is no necessary correlation between the existence of a normative fact and the actual occurrence of a corresponding normative impulse in the mind of individuals: it is not guaranteed, in other terms, that a normative fact actually engenders the occurrence of a corresponding normative impulse in the minds of the individuals, notably of the norm-addressees. In other words, under this point of view, the occurrence of a normative impulse in an individual's mind — be it intuitive or positive — is always a mere matter of fact: either it *does* occur, or it *does not*.

2.2. *The subjective reality of norms as psychological phenomena*

To recapitulate, in Petrażycki psychologistic and solipsistic approach, the reality of norms is reduced to the reality of merely *subjective* psychological phenomena —

⁵ This first thesis is in principle not incompatible with those legal positivistic conceptions of law according to which the legal properties of conducts, subjects and things depend exclusively on the existence of the norms of positive law, which are indeed created or postulated by human beings.

phenomena that occur uniquely *within* the mind of an *individual* subject. Petrażycki himself indeed remarks that “every sort of psychic phenomenon appears in the psyche of one individual and only there”. Consequently, from this point of view, “every kind of law and all legal phenomena represent purely and exclusively individual phenomena” (Petrażycki 1909-1910/2011, p. 74).⁶

This view has two immediate implications.

- (i) The *first* implication is that it would be an illusion to think that norms may have an existence independent of the *actual occurrence* in an individual’s mind of a specific normative psychic state or experience. The conditions of existence of a norm are therefore merely *factual* conditions, which consist precisely in the actual occurrence in a given individual’s mind of a specific psychic state or experience.
- (ii) The *second* implication is that, since norms are located exclusively *within* the mind of the individuals experiencing them, it would be an illusion, or an illegitimate hypostasization, to think that they may have an existence *outside* the mind (the psyche) of single *individuals*.

This approach does not imply, though, that norms and normative phenomena are not *real*. They are *real* in the specific sense in which psychological phenomena are real, that is, in the sense in which one’s emotions and psychic states are real. One would not deny, indeed, that one’s feelings or emotions of joy, of anger, of hunger and so on, are *real* — even though one’s feelings and emotions may be more or less justified by actual facts happening in the external world.

Furthermore, norms and normative phenomena, as all other psychological phenomena, may have a real impact on the behaviour of individuals, in the sense that they can act as motivational factors — among others — of an individual’s behaviour.

However, the reality of psychological phenomena is by definition a *subjective* reality: the psychological reaction of an individual to a given fact may be completely different from that of other individuals. This holds true also of normative experiences.

In conclusion, according to this first way of understanding norms as mental objects, norms are merely *subjective* realities.

2.3. *Two drawbacks of the psychologistic conception of norms*

The first way of understanding norms as mental objects, i.e. the psychologistic and solipsistic conception of norms, allows for grasping certain specific aspects of the mental reality of legal norms, but it presents at least two drawbacks. By highlighting these two drawbacks in the following, we do not intend to criticize or refute Petrażycki’s or any other psychologistic theory of legal norms: as we have clarified in section 1.3. above, we are rather suggesting that, while a psychological approach allows for grasping certain specific aspects of the mental reality of legal norms, it cannot grasp other aspects of such a reality; therefore, a different complementary approach is also required for a more

⁶ For a defence of Petrażycki’s solipsistic approach, see Fittipaldi (2012a, 2012b). For a recent overview of Petrażycki’s contributions to the theory and sociology of law, see also Fittipaldi and Treviño (2023) and Passerini Glazel (2017, 2022).

comprehensive understanding of the reality of legal norms, as we argue in section 3. below.⁷

2.3.1. A *first* drawback of the psychologistic and solipsistic conception of norms derives from the observation that norms as mental objects are not necessarily correlated, in fact, to specifically *normative* psychic emotional states, such as an impulsion rejecting or encouraging a given action, or the feeling of an obligation to act (or restrain to act) in a given way.

The Czech legal philosopher Ota Weinberger draws a distinction, indeed, between two kinds of intentional experience that have a norm as their intentional object. The first kind is what he calls a “*Soll-Erlebnis*” (“ought-experience”), or “experience of obligatoriness”, which is a properly *normative* experience that Weinberger understands as “consciousness that something ought to be the case”. The second kind of intentional experience that can have a norm as its intentional object is what he calls a “*Soll-Wissen*”, or “ought-knowledge”: it consists in the mere *knowledge* concerning an ought existing within a certain normative order, in Weinberger’s words “the knowledge that some ‘ought’ is valid [*gilt*] for some human group”. In the latter case — Weinberger clarifies — the ought “is not necessarily also accepted [*akzeptiert*] or willed [*gewollt*] by the observer” (Weinberger 1970/1986, p. 40 [pp. 210-211]; translation modified).

A similar point was already emphasised by the German phenomenologist Adolf Reinach in his critique to the psychologistic account of promises and the correlated claims and obligations: Reinach (1913/1983) deems indeed necessary to distinguish the “cold knowing” of an obligation from the experience (*Erlebnis*) that consists in “feeling oneself to be bound”.

Reinach remarks also that there is no necessary correspondence between the *existence of an obligation* for someone — an obligation which may depend on the fact that he previously made a promise, received a command, or the like — and his *feeling to be obliged*: indeed, one can very well feel oneself to be obliged without there really being an obligation (Reinach 1913/1983, p. 11); on the other hand, one can conversely have an obligation to do something without actually feeling to be obliged.

Furthermore, Reinach remarks that while the simple knowledge of an obligation “is in no way changed according as it refers to one’s own obligations or those of another subject”, on the contrary, the feeling oneself to be bound is possible only with regard to one’s own obligations (Reinach 1913/1983, pp. 10-11).

2.3.2. A *second* drawback of a psychologistic and solipsistic analysis of normative phenomena concerns the different temporal dimensions of the existence of norms and of the existence of actual normative psychic emotional states or experiences in the mind of individuals.

Reinach (1913/1983) observes that claims and obligations “can last for years without change” (p. 11); he questions, though, that the same can be said of the corresponding psychological experiences (*Erlebnisse*) of an individual: “there are no experiences which

⁷ For a further understanding of the plurality of approaches that is required for a more comprehensive investigation of the reality of norms, see Conte 2012/2022; Passerini Glazel 2020; Di Lucia and Passerini Glazel 2023.

last like this" (*ibidem*). Such psychological experiences are obviously not present when a subject is asleep or loses consciousness (p. 9); nonetheless, we would not say that, because of that, the existence of claims and obligations is an intermittent existence.

By the same token, the norms of a legal system seem to have an existence that endures and persists in time well beyond, and independently of, the possible occurrence of the merely psychological corresponding experiences or emotional states, which are in comparison ephemeral and discontinuous phenomena.

To this consideration one may add that it is not an ephemeral and discontinuous existence the existence of social entities, such as nation-states, universities, money and the like, which are made possible by certain systems of norms. Even this kind of existence — i.e., the existence of certain legal and institutional phenomena — endures and persists in time in a way that is not reducible to the way in which the ephemeral and discontinuous normative psychic emotional states or experiences occur in the mind of individuals.

To sum up, if Weinberger and Reinach are right, then the existence and the reality of norms and obligations — as well as that of social entities which are made possible by them — cannot be reduced to the actual occurrence of merely subjective normative psychic states, such as ought-experiences or feelings of obligation.

Therefore, if the mode of existence of norms is neither that of material entities, nor is it reducible to that of psychological phenomena, the possibility that norms may have a different, specific mode of existence should be considered.

We will consider this hypothesis in the following section 3.

3. Norms as *ideal* entities

3.1. *Beyond the psychological dimension of norms*

The second way of understanding the idea that norms are mental objects consists in understanding norms as *ideal* (*ideell*) entities in the sense of meaning-contents that *can* be the correlate of actual psychic experiences, but whose reality is *not reducible* to that of such psychic experiences and has a temporal dimension of its own. A paradigmatic reconstruction of legal norms in terms of ideal entities (*ideelle Gebilde*) and meaning-contents (*Sinngehalte*) has been elaborated by Hans Kelsen in his *Pure Theory of Law*, in apparent contrast to the attempts to explain norms in a merely psychological perspective.

To be true, Kelsen manifested a specific interest in the developments of psychological research, notably in Sigmund Freud's psychoanalysis.⁸ Nonetheless, he considered as detrimental the acritical recourse to psychology in the science of law: one of the main critiques he addressed to traditional legal science was indeed that "in an utterly uncritical way, [it] has been entangled in psychology and biology, in ethics and theology" (Kelsen 1934/1992, ch. I, § 1., pp. 7-8). To such uncritical contaminations of legal science, Kelsen notoriously opposes the methodological principle of the "purity"

⁸ Kelsen used to attend the Wednesday meetings organized by Sigmund Freud. In 1922 he published the essay *The Conception of the State and Social Psychology. With special reference to Freud's group theory* in the psycho-analytical journal *Imago*. The essay was translated in English in 1924.

of the theory of law, which “aims to free legal science of all foreign elements” (*ibidem*). Among such foreign elements he expressly mentions — as we have recalled above — the recourse to psychology. This purification of the science of law from contamination with psychology is deemed necessary by Kelsen precisely because it would be impossible, for him, to explain legal norms and legal phenomena in terms of psychological phenomena.

In the following sections 3.2. and 3.3. we will show that Kelsen’s conception of legal norms as ideal entities and meaning-contents implies a *double de-psychologization* of the notion of norm: (i) on the one hand, norms are de-psychologized with reference to the *norm-addressees*, in the sense that legal norms are not reducible to the actual occurrence of normative psychic states or processes in the mind of those who are supposed to abide by or apply them; (ii) on the other hand, legal norms are de-psychologized with reference to the *norm-positors*, in the sense that legal norms are not reducible to the psychological will of the subjects that act as norm-creating authorities.

3.2. *The de-psychologization of norms with respect to the norm-addressee (a parte subiecti praescripti)*

3.2.1. Kelsen — not differently from Petrażycki — conceives of psychology as a science of purely individual phenomena, that is, phenomena that occur exclusively in the mind of a given individual. He therefore claims that “ultimately all psychological investigation is only possible considered as individual psychology” (Kelsen 1922/1924, p. 7). As a science of purely *individual* phenomena psychology is *not* capable of accounting for the specific mode of existence of *social* phenomena, such as social groups like nation-states, and legal systems of norms. These phenomena manifest specific properties, such as an inter-individual *objective* character, a duration or *permanence* in time, and a *spatial* dimension, that sharply contrast with the nature of psychological phenomena, which are, in contrast, intra-individual subjective phenomena, have an ephemeral, fluctuating, lighting-like existence, and have no extension in space.

In criticizing the conception of social obligations proposed by the French sociologist Émile Durkheim, Kelsen remarks that “the question of whether someone is legally obliged to do something, and if so, what, is not answered by an examination of the empirical human being and his will” (Kelsen 1922/1928, § 8, p. 56). According to Kelsen, indeed, “the answer to this question is independent of what this person *in concreto* thinks, feels or wills”. The only way to answer this question is “by the interpretation of an ideal system [*ein ideelles System*] of legal propositions [*Rechtsätze*]” (*ibidem*).⁹ It is precisely and uniquely by reference to an ideal (*ideelles*) system of legal norms that one can ascertain that someone is legally obligated to do something, and this independently of what this person *in concreto* thinks, feels or wills.

To better explain his conception of an ideal system of legal propositions, Kelsen draws on a distinction made by the German philosopher and sociologist Georg Simmel between the *psychic existence* (*seelische Existenz*) of certain ideal contents (*ideelle Inhalte*)

⁹ In this work Kelsen has not yet elaborated the distinction between “legal propositions” (*Rechtssätze*) — which he later calls in English “rules of law” — and legal norms (*Rechtsnormen*). This distinction — that will be of the utmost importance in later developments of the Pure Theory of Law — is initially delineated in Kelsen (1941).

and their “validity” (*Gültigkeit*). Simmel (1908/1923) remarks that the norms laid down in a legal code, just like the lexicon and the syntactic rules that are presented in a dictionary and a grammar book, “are valid [*gelten*] independently of the particular cases in which they are applied by individuals”, in a way similar to that of the Pythagorean theorem: “the validity of their contents – Simmel claims – is not a psychic existence that needs an empirical bearer [*empirischer Träger*]” (p. 422).¹⁰

Simmel explains that the Pythagorean theorem has a “spiritual nature” (*geistiges Wesen*): “it does not consist in a physically existent triangle, since it expresses a relationship among the three sides that is not found in their existence for themselves” (*ibidem*). However, the validity of the Pythagorean theorem, in its incorporeal character, “is not equal to the fact of being thought by individual minds”: it remains valid, indeed, “independently of whether it is thought by such minds at all or not, just as language, legal norms, moral imperatives, cultural forms exist [*bestehen*] according to their content and meaning, independently of the completeness or incompleteness, frequency or rarity with which they appear in empirical consciousnesses” (*ibidem*).

The Pythagorean theorem – as well as legal norms, rules of language, moral imperatives and cultural forms – consists, for Simmel, in “an objective spiritual content [*geistiger Inhalt*], which is no longer something psychological, just as little as the logical sense of a judgement is something psychological” (Simmel 1908/1923, p. 422).

Elaborating on Simmel’s distinction, Hans Kelsen (1922/1928) remarks that it is true that “there could be no Pythagorean theorem if there were no people to think it”, but “the psychic act of thinking [*der psychische Akt des Denkens*] is the *conditio sine qua non* [i.e., the necessary condition], not the *conditio per quam* [i.e., the sufficient condition], for the spiritual content [*geistiger Inhalt*] that is called Pythagorean theorem” (§ 17., p. 93). In other words, the validity (*Geltung*) of the Pythagorean theorem “does not find its specific foundation in the fact that it is thought, but in some ultimate axioms” (*ibidem*). For Kelsen, indeed, “it is unacceptable to mix a spiritual content [*geistiger Inhalt*] with the mental process [*seelischer Prozeß*], the natural course of psychic acts, which, as it were, only bear the specific content whose *intrinsic legality* [*Eigengesetzlichkeit*] matters” (Kelsen 1922/1928, § 16., pp. 91-92). This applies also to those peculiar spiritual contents that are legal norms.

For a proper account of legal norms – and of the social entities that are made possible by them – what is relevant, according to Kelsen, is not the investigation of actual psychic processes or acts – which only *bear* the content of norms – but rather that of the specific “legality”, of the “validity” of such contents. It is precisely in this *validity* (*Geltung*) that the specific spiritual existence (*geistige Existenz*) of norms and normative systems consists (see Kelsen 1922/1928, § 16., p. 91). And this validity of norms is *not* reducible to the actual occurrence of the psychic processes or acts that bear them as their content in the mind of individuals.

¹⁰ Simmel in passing remarks an important difference between the “being valid” of the Pythagorean theorem, as well as that of the norms of logic and natural laws, and the “being valid” of the norms of a legal code and the lexicon and syntactic rules of a language: while the former are valid in a *superhistorical* sense (*überhistorischer Sinn*), the latter are instead valid in a historical sense (Simmel 1908/1923, p. 422), that is, in a temporal dimension.

In other words, norms and normative systems are conceived of by Kelsen respectively as “ideal entities” (*ideelle Gebilde*) and “ideal orders” (*ideelle Ordnungen*), whose specific mode of existence consists in their validity.

However, to properly understand Kelsen’s conception, it is necessary to distinguish two different meanings of the adjective “ideal”. The *first* meaning — which corresponds to the main meaning of the German adjective “*ideal*” — refers to “something that is considered as a model of perfection”, like in the expressions “my ideal partner”, “the ideal model of society”. The *second* meaning — which rather corresponds to the main meaning of the German adjective “*ideell*” — refers merely to “something that is non-material, that is spiritual or ideational”. When Kelsen speaks of a legal system of norms in terms of an “ideal order” (*ideelle Ordnung*), he employs the German adjective “*ideell*”: he does not refer, thus, to a “perfect system of norms”, but merely to the fact that a legal system of norms is a system of non-material meaning-contents (*Sinngehalte*), or spiritual contents (*geistige Inhalte*), whose mode of existence is that of validity understood as an “ideal existence” (*ideelle Existenz*) (see Kelsen 1979/1991, ch. 8, § VI, p. 28).

3.2.2. The existence-as-validity of legal norms as meaning-contents cannot be understood, according to Kelsen, in psychological terms, that is, as the existence of certain facts of consciousness, notably not as the actual willing or representing of those norms in the mind of individuals. Kelsen writes:

The Pure Theory of Law, as a specifically legal science, directs its attention to legal norms: not [to legal norms] as facts of consciousness, not to the willing or the representing of legal norms, but rather to legal norms *qua* — willed or represented — contents of meaning. (Kelsen 1934/1992, § 7., p. 14, translation modified)

The task of the Pure Theory of Law is thus not to investigate the actual psychological occurrence of certain normative psychic states or experiences, but rather to investigate the specific conditions of validity of those meaning-contents or ideal entities that we call norms. It is in this theoretical framework that Kelsen famously equates validity with “the specific existence of norms” (Kelsen 1934/1992, § 6., p. 12).

However, the parallelism traced by Kelsen and Simmel between the validity of the Pythagorean theorem and the validity of legal norms needs an important clarification. In fact, the two validities are not of the same kind. The validity of the Pythagorean theorem is a *timeless dianoetic* validity: it is the validity of an inference or derivation, which merely depends, as Kelsen remarks, on some ultimate logico-mathematical axioms and is independent of time. On the contrary, the validity of legal norms is a *time-related deontic* validity (a normative validity):¹¹ it is the specific validity of norms, which depends on the one hand on the relation of a norm to the conditions of validity established by higher norms (meta-norms) of the same system, and on the other hand on the occurrence of a norm-creating act or fact taking place in a given moment of time.

Simmel himself underlines that the Pythagorean theorem is valid in a *superhistorical* sense (*überhistorischer Sinn*), in contradistinction to the norms of a legal code, of a lexicon

¹¹ For the distinction of the two kinds of validity, i.e. deontic (or normative) validity and dianoetic (or logical) validity, see Conte 1986/1995.

and the syntactic rules of a language — which are instead valid in a historical sense (Simmel 1908/1923, p. 422), that is, in a temporal dimension.

The norms of a positive legal system are thus not eternally nor atemporally valid: they *become* valid in a given moment of time — either through the performance of a specific norm-creating act or through the historical process of formation of a customary norm — and can *cease to be* valid in another moment of time — either through the performance of a specific act of abrogation or through the historically determined phenomenon of desuetude.

The temporal character of the deontic validity of legal norms is correlated to what Kelsen calls “the *dynamic principle*” that characterizes the *positivity* of law (see Kelsen 1945/2000a, p. 400): according to this principle, it is not sufficient (and in certain cases it is not even necessary) for the existence of a norm — i.e., for its deontic validity — that the content of the norm can be logically inferred, or derived, from higher norms; for a legal norm to be valid it is always necessary that the norm be posited through an act of will of a law-making authority.¹²

To sum up, in Kelsen’s perspective, the mode of existence of legal norms is only partly similar to the mode of existence of *ideal* entities or meaning-contents such as the Pythagorean theorem. Legal norms are indeed ideal entities of a peculiar kind, since their existence is *temporally* determined: they come to existence only when certain acts of will of normative authorities actually take place.

3.2.3. It is important to stress that the existence of the acts of will, on which the coming to existence of norms depend, can be, in principle, objectively and empirically verified, since these acts are phenomena that take place in the empirical world external to the mind of the norm-addressees. This is a further argument against the possibility of identifying or reducing the existence of norms (understood as ideal entities) to the existence of certain normative psychic states or experiences (such as the feeling of being obligated) in the mind of the norm-addressees. It indeed implies, as Kelsen remarks in one of his early works, that it is possible, and necessary, to distinguish the objective *cognition* (*Erkenntnis*) of a norm as valid within a legal system from its subjective *recognition* (*Anerkennung*), which is understood by Kelsen as “a subjective act, that takes place in the interior of the individual” consisting in “self-submission to the recognised law”, in “the decision to make the law the motive for one’s own will and action” (Kelsen 1911/2008, p. 18 [p. 98]).¹³ As Kelsen later remarks in the second edition of the Pure

¹² Kelsen recognizes that legal norms can also be established through custom; however, he reconstructs also the customary genesis of legal norms in term of collective will (see, for instance, Kelsen 1960/2005, ch. V, § 35., letter b). See also Scarpelli 1989/2024.

¹³ Kelsen points out, though, that this distinction is possible and necessary only with regard to *heteronomous* norms, such as legal norms. On the contrary, in the case of *autonomous* norms, such as moral norms, the cognition and the recognition of a norm are one and the same, because “the objective norm and the subjective feeling of duty [*Pflichtgefühl*] are one, so that, strictly speaking, only what is experienced [*empfunden wird*] as a norm can be considered [*gelten*] as a norm” (Kelsen 1911/2008, p. 18 [p. 98]). As a consequence, “the moral law, which carries within itself the tendency of its observance in every individual to whom it applies, only proves itself in the cases of its observance”, which implies that “in an individual case one can only ever speak of a moral law if it was actually observed in this case or if at least the impulse to observe it, i.e. the consciousness of the moral law, was present”. In other words, “a moral norm exists for the individual only insofar as he establishes it for himself, submits himself to it, wants to obey it” (Kelsen 1911/2008, pp. 34-35

Theory of Law (1960/2005), “even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law” (p. 218n). The cognition of a norm as valid within a given legal system does not imply that the cognizing subject recognizes that norm and lives a corresponding normative experience; it suffices that he verifies that the norm has been created through the actual performance of an act of will in accordance with the higher norms of that legal system.

In this sense, Kelsen’s conception of the existence-as-validity of legal norms is also capable of overcoming the first drawback of the psychologistic conception of norms, which — as we have pointed out above in section 2.3. — is implied in the thesis that the existence of norms should be reduced to that of certain normative psychic states or emotions.

3.3. *The de-psychologization of norms with respect to the norm-positor (a parte subiecti praescribentis)*

In the above sections 3.2.2. and 3.2.3., we have shown that, in Kelsen’s legal positivistic perspective, the existence-as-validity of legal norms always depends on the existence of an act of will (be it the explicit act of will of a norm-creating authority or the normative will that, according to Kelsen, is implied in the formation of a customary legal norm). Kelsen in fact defines a legal norm as *the meaning of an act of will* (see, for instance, Kelsen 1960/2005, ch. I, letter *b*, pp. 4-5; 1979/1991, ch. 41, p. 163),¹⁴ notably the meaning “that something *ought* to be or *ought* to happen, especially that a human being *ought* to behave in a specific way” (Kelsen 1960/2005), ch. I, letter *b*, p. 4).¹⁵

However, if the norm is the meaning of an act of will of a legal authority, one could be tempted to advance another possible reconstruction of legal norms in terms of

[p. 119]). This is not the case for legal norms, because law never has this individually autonomous character, not even in the case of customary law.

Incidentally, Kelsen seems to admit in the above-mentioned pages that in the investigation of autonomous norms is possible in principle to conceive norms as “ethical impulses” (*sittliche Triebe*) and, in a passage quite similar to the passage by Petrażycki mentioned in § 2.1., he explains that “if the individual perceives the moral ought, the norm, not merely as a subjective impulse, but as a demand approaching him from outside, from a higher power, this is attributed to a peculiar process of objectification, through which man projects certain psychic facts outwards, from where they return to him in forms that hardly reveal their origin” (Kelsen 1911/2008, p. 21 [p.101]). However, he reasserts that such a psychological way of understanding norm is not admissible in the science of law.

¹⁴ In the English text Kelsen uses the noun “meaning” (in French “*signification*”) to render what in the first Austrian edition of the *Reine Rechtslehre* (1934), he had expressed with the German noun “*Sinngehalt*” which, translated literally, would rather mean “content of meaning”, or “meaning-content” (see Hans Kelsen 1934/1992, § 5, pp. 20-21). It is important to stress that, when Kelsen defines the norm as the specific meaning of a norm-creating act (an act of will), he is not referring to the semantic meaning expressed by the legislator’s utterances, nor exclusively to the subjective pragmatic-illocutive meaning of the norm-creating act, but rather to an objective pragmatic-normative meaning that is conferred to the norm-creating act by higher norms of the system. Kelsen (1979/1991, ch. 8, § I, p. 26) maintains that “it is more correct to say ‘a norm *is* a meaning’ than ‘a norm has a meaning’”, and explains: “The act of will [...] ‘has’ the meaning of an Ought. This Ought is the norm”. See Passerini Glazel 2020 (ch. 3, pp. 45-53).

¹⁵ It is of the utmost importance to stress that the general meaning expressed by the word ‘ought’ includes, for Kelsen, not only the meaning of prescriptions, but also that of permissions and authorizations (see Kelsen 1960/2005, ch. I, § 4., letter d).

psychological phenomena: notably, one could identify legal norms with the *psychological will* of the individuals that have the role of legal authorities.

Kelsen, though, expressly rejects also this alternative psychological reconstruction of legal norms. The Kelsenian definition of the norm as the meaning of an act of will, in fact, should not lead one to confuse the *norm* either with the *act* itself or with the psychological *will* of the person performing that act.

On the one hand, Kelsen stresses that “the norm, as the specific meaning of an act directed to the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is” (1960/2005, ch. I, letter *b*, p. 5). In an essay originally published in 1942, Kelsen (1942/2000b) points out, indeed, that the norm begins to “exist” only after the legislative procedure has been completed, and therefore it must necessarily be something different from this procedure. This something different — which is in fact the ideal meaning-content that something *ought* to be or *ought* to happen — has a mode of existence that is completely different — as we have shown — from the *factual* existence of the acts of human behavior through which the norm is brought into existence. Kelsen contrasts here the *normative validity* — the *existence-as-validity* — of a norm as an *ideal meaning-content* to the *factual* existence — the *existence-as-facticity* — of an *act* in the realm of natural facts.

On the other hand, Kelsen specifies that the existence of the legal norm should neither be confused with the *will* of the people who, for instance, make up the legislative body, where the will is *understood as a psychological phenomenon*. The norm, in fact, is considered to exist even when the persons who created it no longer will the content of it, and even when those persons are no longer living and therefore no longer able to will that content. Kelsen explains:

A legal norm, owing its existence to a parliamentary decision, obviously first begins to exist at a moment when the decision has already been made and when — supposing the decision to be the expression of a will — no will is any longer there. Having passed the law, the members of parliament turn to other questions and cease to will the contents of the law, if ever they entertained any such will. Since the legal norm first comes into existence upon completion of the legislative procedure, its ‘existence’ can not consist in the will of the individuals belonging to the legislative body. (Kelsen 1942/2000b, pp. 213-214)

Kelsen then adds:

A jurist considers a law as ‘existing’ even when those individuals who created it no longer will the content of the law, even in fact when nobody at all any longer wills its content. It is quite possible and often actually the case, that a law ‘exists’ at a time when those who created it are long dead and no longer able of having any sort of will. (Kelsen 1942/2000b, p. 214)

This implies that “a jurist who wants to establish the ‘existence’ of a legal norm, by no means tries to prove the existence of any psychological phenomena” (*ibidem*).

Kelsen opposes this view to the imperativist conception of law, advanced by John Austin, according to which a law is defined as the commands of the sovereign. Kelsen maintains that “when laws are described as ‘commands’ or expressions of the ‘will’ of the legislator [...] this must be understood as a figurative mode of speech” (Kelsen 1945/2000a, p. 35). This figurative mode of speech is based on an analogy between “the

situation when a rule of law ‘stipulates’, ‘provides for’, or ‘prescribes’ a certain human conduct” and the situation “when one individual wants another individual to behave in such-and-such a way and expresses this will in the form of a command” (*ibidem*). The crucial difference is that “when we say that a certain human conduct is ‘stipulated’, ‘provided for’, or ‘prescribed’ by a rule of law, we are employing an abstraction which eliminates the psychological act of will which is expressed by a command” (*ibidem*). Kelsen concludes:

If the rule of law [*Rechtsregel*] is a command, it is, so to speak, a *de-psychologized command*, a command which does not imply a “will” in a psychological sense of the term. (Kelsen 1945/2000a, p. 35, emphasis added)

In other words, a norm is, for Kelsen, “a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really ‘wants’ the person to act that way” (*ibidem*), and the statement that one “ought” to observe the conduct prescribed by the law means that “the conduct prescribed by the rule of law is ‘demanded’ without any human being having to ‘will’ it in a psychological sense” (*ibidem*).

3.4. *The objective reality of norms as ideal entities*

To recapitulate, in Kelsen’s positivistic conception of law, even if no norm is possible without an act of will (whose meaning is the norm), the norm as a meaning does not coincide with the act of will itself, nor with the psychological will of the individuals acting as legislators. Kelsen explains:

The norm is not possible without the creating act; but the two are *toto genere* different entities. The creating act is the *conditio sine qua non* of the norm, but it is not its *conditio per quam*. (Kelsen 1942/2000b, p. 215)

The heterogeneity of the act of will and the norm is irreducible because, in Kelsen’s philosophical perspective, the act of will is a fact that belongs to the sphere of *Is* (of *Sein*), while the norm is a meaning that belongs to the sphere of *Ought* (of *Sollen*). The existence of an act (as well as that of a psychological will) is a factual existence — it is an *existence-as-facticity* — whereas the existence of a norm, of an ought, is an ideal existence (*ideell* existence) — it is *existence-as-validity* (see Kelsen 1979/1991, ch. 8, § VI, p. 28).

However, the fact that the existence-as-validity of legal norms is necessarily connected to the existence-as-facticity of a certain norm-positing act of will has an important consequence as to the *objectivity* of the existence-as-validity of legal norms. Indeed, if a certain act of will has been performed by a certain legal authority, and if that act of will has the objective legal meaning of a norm-positing act in virtue of its conformity to the higher-level norms (the meta-norms) that establish the conditions of validity within a legal system (and if the norm has not later been repealed or derogated, of course), then one can objectively assert that a corresponding legal norm is valid — and thus existing — in that legal system, independently both of any subjective normative psychic state or experience occurring in the mind of the norm-addressees, and of the persistence of the psychological will of the individuals acting as a legal authority.

Kelsen explains that legal norms, even when they are customary norms, “establish an obligation for the individual regardless of whether he wants what is intended, and indeed regardless of whether he is even aware of the norm” (Kelsen 1911/2008, p. 35 [p.

119]). The legal norms are indeed applied to the individual case even if they are not followed, in fact precisely when they are not followed, that is, when a sanction is applied by a court to the individual who does not follow them. According to Kelsen, this possibility of application (*Anwendung*) regardless of the psychic experience of individuals belongs to the essence of law — a thesis that he summarizes in the icastic motto: “No law without a court!” (p. 35 [p. 120]). In this possibility becomes apparent, for Kelsen, the *objectivity* of legal norms.

The existence-as-validity of legal norms, then, cannot be identified — as we have shown — with a merely *subjective psychological* existence; on the contrary, it consists, for Kelsen, in an *objective ideal (ideell)* — though temporal — mode of existence.

On this peculiar objective mode of existence of legal norms also rests — as we will show in the following section 4. — the objective existence of social entities like the State.

4. The non-psychological reality of the State

In section 1. we observed that norms seem to play an essential role in the construction and creation of the *social reality* in which we live, and that the existence and functioning of social entities such as nation-states, schools, universities, banks, money, corporations, football matches, the Olympic Games, and so on, are made possible by systems of norms such as legal norms. On the one hand, we consider these social entities as *real* and *objective* entities; on the other hand, the existence of these social entities is made possible by norms, which are not part of the material world and can rather be conceived of as *mental* objects — be they understood as psychological phenomena or as ideal entities.

The question arises, now, of how the existence of such social entities is to be conceived of and explained: are these social entities to be explained in terms of the existence of psychological phenomena — which would imply that believing in an objective existence of such entities in the reality outside our individual minds is a mere projection and illusion — or are they to be explained in terms of objective ideal entities, whose existence is to be characterised as an existence-as-validity like that of legal norms?

A possible answer to this question can be found in Kelsen’s investigation concerning the *reality* of the State, which is one of the most prominent social entities (*soziale Gebilde*). In some of his early works devoted to this question, Kelsen expressly criticizes the various attempts to give an account of the reality of the State in merely sociological and psychological terms. He advances the thesis that the State is to be identified with the legal order — whose existence, as we have seen, is an existence-as-validity — and that the State “does not find the foundation of its validity in the reality of the volitions and actions that have it as their content” (Kelsen 1922/1928, § 17, p. 93).

In *The Conception of the State and Social Psychology*. With particular regard to Freud’s group theory, a paper published in 1922 in Freud’s psychoanalytic journal *Imago*, Kelsen expressly formulates the problem “concerning the peculiar ‘reality’ of the State [“*Realität*” des Staates], the specific nature of its being [*die spezifische Art seiner Existenz*]” in the following terms: “Like all other social groups, the State, [...] is the specific unity of a multitude of individuals, or at any rate of individual activities, and the inquiry into the nature of the State is fundamentally an inquiry into the nature of this unity” (Kelsen 1922/1924, p. 1).

The question of the unity of the State — i.e., of the specific nature of its being — arises from the observation that “the State as a unit can neither be seen, nor felt, nor touched” (Kelsen 1926, § 8., p. 11). Nevertheless, the State is, in our experience, a “reality”, to which we attribute, for instance, certain actions, such as the action of punishing a person who has committed an offence, the action of building a school or the action of administering a railway. But what does it mean to say that “the State punished this man”, “the State built this school”, “the State administers this railway” (Kelsen 1914/2010, p. 448)? To make sense of these statements, Kelsen believes that it is necessary to determine “how a multiplicity of individuals and individual acts are connected in a supra-individual whole” (Kelsen 1922/1924, p. 1).

Kelsen expressly criticizes all the theories, developed for instance in the context of sociology and social psychology, according to which the *unity* and *reality* of the State can be determined in terms of a *natural* reality. Such theories move from the (false) assumption that, if one wants to assert the real existence of a phenomenon, it is necessary to consider it as a phenomenon of nature, which, as such, must be defined by natural sciences (see Kelsen 1922/1924, p. 1).

Some of these theories, including the one developed by Simmel, see “the social factor [...] in a specific union [*Verbindung*], a reciprocal connection of human beings [*Verknüpftsein der Menschen untereinander*], in a being-together [*Zusammensein*] (somehow determined)”; but they believe that this union consists in a “psychic interaction [*psychische Wechselwirkung*], that is, in the fact that the psyche of one human being exerts effects [*Wirkung übt*] on the psyche of the other and suffers effects [*Wirkung empfängt*] from it” (Kelsen 1922/1924, p. 2, translation modified; see also Kelsen 1922/1928, § 2, p. 4).¹⁶ Adopting an organicist parallelism, these authors believe that the unity of a multiplicity of elements consists, in an empirical sense, in nothing more than an interaction of elements, as in the case of organic bodies. The State would thus constitute a unity by virtue of the fact that there is a corresponding reciprocal influence, of a causal nature, between its citizens.

Kelsen remarks, though, that not every reciprocal interaction determines a union of social elements: there are, indeed, also reciprocal interactions and influences that are determined not by aggregating forces, but by disrupting forces, as in the case of class conflicts. The existence of reciprocal interactions and influence cannot therefore demonstrate, according to Kelsen, the existence of a specific form of association that is such as to make of a multiplicity of individuals a society.

Other theories go so far as to hypostasize the existence (considered by Kelsen to be impossible) of supra-individual psychological phenomena, such as a “general will”, a “collective will”, a “collective feeling”, that would emerge from the parallelism, the agreement, the summation or the intensification of psychic processes (wills, feelings, thoughts, *etc.*) that manifest themselves in the individuals who form a social group. These supra-individual wills and feelings are considered as the manifestation of a supra-individual entity, the State, which is endowed with a “collective consciousness” (see Kelsen 1922/1928, § 6., p. 36).

¹⁶ Kelsen considers here, in particular, the theory of society (*Gesellschaft*) as interaction (*Wechselwirkung*) proposed in Simmel 1908/2023.

The mistake made by these theories consists in seeking an answer to the question of the unity of a social and inter-individual group in the investigation of the psychological processes that take place within the mind of individuals. For Kelsen, however, as we have recalled above, any psychological research is possible only in terms of individual psychology, since psychological phenomena are *intra-individual* phenomena by their nature, which can only take place within the mind of the individual (see Kelsen 1922/1928, §§ 3-6).

The very idea of a *psychological bond* connecting two or more individuals is a figurative representation that ascribes a spatial dimension to psychic phenomena that are not spatial and cannot be spatial. As a psychological fact, a union between two individuals is a phenomenon — a representation or a feeling — that occurs within the mind of the individual who experiences such a union. Kelsen explains that “to assert that *A* is connected with *B* is merely hypostasizing an entirely intra-individual relation erroneously transposed into the external physical world” and that “reciprocity indeed is entirely irrelevant to the discussion” (Kelsen 1922/1924, p. 6; see also Kelsen 1922/1928, § 3, pp. 12-13).¹⁷

However, since sociological inquiries investigate phenomena that extend *beyond* individuals, social psychology tries to overcome its limits by referring to the parallelism of psychic processes, through the image, for example, of a “folk-spirit” (*Volkgeist*). If, however, this folk-spirit is understood as a psychic reality distinct from the individual minds, it assumes, according to Kelsen, the unacceptable character of an unreliable fiction or a metaphysical hypostasization, through which what is actually obtained by mere *abstraction* from a single characteristic common to a plurality of individuals is presented as an entity in its own right.

Through the hypostasization of psychic processes and supra-individual psychic entities, some sociological theories try to explain the *objectivity* of social formations like the State. However, according to Kelsen, psychic phenomena are intrinsically *subjective* phenomena that can have a reality only within the minds of individuals: he does not understand, therefore, how “real subjectivity can become, thanks to its pure and simple accumulation or multiplication, an equally real objectivity” (1922/1924, p. 26).

Alongside the impossibility, recognized by Kelsen, that a form of supra-individual objectivity emerge from the mere accumulation or multiplication of psychic phenomena — which are by their very nature individual and subjective phenomena — a further reason why psychology cannot answer the question concerning the specific criterion of unity and the specific mode of existence of the State consists in the fact that psychic phenomena are by their nature ephemeral and inconstant phenomena.

Kelsen points out, in this regard, that “the essential uniformity and continuity of [the] specific existence [of the State], [...] which is, of course, only the permanence of a sharply defined validity [*Geltung*]” are definitely irreconcilable “with the fluctuating, wavering, constantly intermittent, now expanding, now contracting reality of those psychic group-

¹⁷ Kelsen acknowledges that Freud has remained faithful, unlike others, to the principle according to which psychology can only be a science of intra-individual phenomena (cf. in particular pp. 403-405). The question of “collective intentionality” is one of the most debated topics also in current research on social ontology, at least, since the publication of Searle (1995).

phenomena under which a psychological scientific theory vainly endeavours to subsume this social formation [*soziales Gebilde*]” (Kelsen 1922/1924, p. 26, translation modified).

Therefore, the uniformity and continuity of the specific being of the State cannot be founded, according to Kelsen, on the subjective and discontinuous existence of psychic states, but only on the *objective* and *constant* existence of a system of legal norms, with which Kelsen ultimately identifies the State itself.

According to Kelsen, thus, the specific unity of the State, is not constituted by the fact of an interaction, nor by that of the mere coincidence of a subjective representation or an individual feeling, but rather by a peculiar objective *normative* bond. When sociologists investigate the State as a social group, they in fact *presuppose* a concept of the State that they can only draw from a different speculative order, that is, from the science of law, as a normative social science.¹⁸ When they ask: “Who belongs to the State? Which persons make up the State?”, they do not in fact *explain*, but *presuppose* the unity of the State as it is determined by the system of legal norms.

This unity of the State can only be established by the science of law since, according to Kelsen, “membership in the state is determined wholly legally, according to the uniform application of a legal code presumed to be valid” (Kelsen 1922/1924, p. 3): in fact, “all those for whom the legal or State code is assumed to be valid are considered as belonging to the State” (p. 4). And the legal code of the State, on the basis of which membership of the State is determined, is evidently not, for Kelsen, a natural phenomenon; on the contrary, it represents “a specific association of elements according to peculiar laws of its own” (pp. 3-4).

It is true that there can be a partial coincidence between the legal determination of who belongs to the State and the feeling of unity that may be found in the mind of some individuals; but among the persons belonging to the State from the legal point of view there are also “children, lunatics, sleepers and such as entirely lack any awareness of their membership” of the State (Kelsen 1922/1924, p. 4).

Furthermore, it is only on the basis of reference to the norms of a legal system that it is possible *to impute* certain actions carried out by natural persons to a subject distinct from them, namely the State. Kelsen (1911/2008) explains:

If certain actions of certain natural persons are valid for legal consideration not as actions of these persons but of another, different from them, there is a special case of *imputation* [*Zurechnung*] here. The legal fact [*Tatbestand*] posed in the activity of these persons is not imputed to these same persons, but to a different person. The point of imputation, however, does not fall on another human being [...]. If one asks what is the principle according to which this type of imputation is carried out, what cases are ascribed to such an imputation, in other words what are the actions of the State, the answer to this question lies in the *legal proposition* [*Rechtssatz*]: in the law [*Gesetz*] — that

¹⁸ This Kelsenian thesis was at the center of the famous controversy that Kelsen had with Eugen Ehrlich, after the publication of the *Fundamental Principles of the Sociology of Law* (Ehrlich 1913/2009), regarding the relationship between the science of law and the sociology of law. On this controversy and its evolution, see also Ehrlich and Kelsen 1992; Ridolfi 2020.

is, in the complex of legal propositions — it is expressly established how the State will act — through its organs — and in what circumstances. (pp. 183/293-294)¹⁹

In Kelsen's conception, the reality of the State is therefore made possible by the norms of the legal system. More specifically, the State itself is identified by Kelsen with the legal system: it *coincides* with the legal system. As a consequence, the State, too, as a social entity, can only be conceived of in terms of a system of norms whose mode of existence is that of an objective ideal (*ideell*) validity.

5. The relationship between *efficacy* and *validity* in the dialectic of *real* and *ideal* in the phenomenology of the normative

In the section 3. we have reconstructed Hans Kelsen's conception of legal norms as ideal entities, whose mode of existence is that of an objective ideal validity. We have shown that this conception overcomes two drawbacks of a psychologistic conception of legal norms, notably the possibility of cognizing the objective existence of a legal norm independently of the occurrence of a corresponding subjective normative psychic experience, and the possibility of accounting for the specific temporal dimension of the existence of legal norms.

In section 4. we have shown that Kelsen's conception — in contradistinction to a psychologistic approach — is capable of accounting also for the specific objective mode of existence of such an important social reality as the State.

However, Kelsen himself remarks that when the *efficacy* (*Wirksamkeit*) of norms is to be taken into account, it is improper to attribute such an efficacy to the legal norms themselves as valid ideal entities. In fact, for a norm to become *effective* — to have an impact — on an individual's behaviour it needs to be represented in that individual's mind. Such a representation of a legal norm is a psychological phenomenon.

Efficacy, thus — understood here as the actual impact of a norm as a motivational factor on one's behaviour — is not a property of the *norms* themselves as ideal entities, but rather of the *representations of norms* (*Norm-Vorstellungen*) in the mind of individuals. Kelsen explains:

It is not actually the norm or the normative order, in its specific existence-as-validity [*spezifische Geltungsexistenz*], that becomes 'effective' [*wirksam*]. It is the fact that people represent [*vorstellen*] the norm or the normative order, and it is this representation [*Vorstellung*] that becomes effective by causing people to behave in accordance with their representation [...]. (Kelsen (1926, § 4., p. 8)²⁰

Kelsen therefore claims that "a clear distinction must therefore be made between the *norm* that is *valid* [*gilt*] and the *representation of the norm* [*Norm-Vorstellung*] that is *effective*" (*ibidem*, emphasis added). He explains:

¹⁹ At this stage, Kelsen has not yet introduced the distinction between the rule of law (in German: *Rechtssatz*, in English: *rule of law*) and the legal norm (in German: *Rechtsnorm*, in English: *legal norm*). For a reconstruction of this distinction, see Di Lucia and Passerini Glazel (2024, in particular ch. 6).

²⁰ Fulfilment or acting in accordance with a norm is not the only way in which a norm can be effective [*wirksam*]: it is only the most prototypical case. For a discussion of the phenomenon of "efficacy without fulfilment" see, for example, Di Lucia 2024.

The norm as such is an extra-psychological fact, the expression of an ought [*Sollen*]; and its 'validity' does not fall within the realm of natural being — which is governed by the law of causality. The representation that has a norm as its object (content), the mental act [*der seelische Akt*] that carries the norm as spiritual content [*als geistigen Inhalt*], is a purely psychological fact; it can be cause and effect, because it is in the sphere of natural being (*ibidem*).

These remarks made by Kelsen suggest that, even though a proper account of legal norms as elements of an objectively valid normative system imply the double de-psychologization that we illustrated in section 3., nonetheless, for a thorough investigation of norms and normative phenomena, which should take into account also the efficacy of norms and their impact on human behaviour, it is also necessary to investigate normative phenomena in a psychological perspective.

All the more so, if — as Kelsen acknowledges — the validity of legal norms, as well as the validity of a legal order, despite not being *reducible* to the actual occurrence of corresponding normative psychic states in the mind of individuals, nonetheless implies that at least *a certain degree of efficacy* of the legal norms — more precisely, of the norm-representations — is maintained. In the second edition of the *Pure Theory of Law* Kelsen explains:

Just as the norm (according to which something *ought to be*) as the meaning of an act is not identical with the act (which actually *is*), in the same way is the validity of a legal norm not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm are — just as the norm-creating act — the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective. (Kelsen 1960/2005, p. 213)

In *Law, State and Justice in the Pure Theory of Law*, an essay published in 1948, Kelsen expressly says that “the Pure Theory of Law has never claimed to be the only possible or legitimate science of law” (p. 383); he expressly affirms that the law may also be the object of other sciences, such as sociology of law and history of law, and that these sciences, together with the structural analysis of law (i.e., the pure theory of law), are all necessary for a complete understanding of the complex phenomenon law.

In this perspective, we suggest that, whereas it is essential to maintain the awareness that both the respective *objects* (*norm-representations* as the object of psychic states or normative experiences on the one hand, and *norms as ideal entities* on the other) and the relative *methods* of investigation are different and distinct, the analysis in terms of *psychological phenomena* as well as that in terms of *ideal entities* can be considered both necessary, and in fact complementary, for a more complete understanding of the complex reality of legal norms and of the social entities made possible by them.

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