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R. Stammler's "Surmounting" of the Materialist Conception of History, Part 2
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Source: *British Journal of Law and Society*, Vol. 3, No. 1 (Summer, 1976), pp. 17-43
Published by: Blackwell Publishing on behalf of Cardiff University
Stable URL: <http://www.jstor.org/stable/1409797>
Accessed: 21/02/2010 01:18

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R. STAMMLER'S "SURMOUNTING" OF THE MATERIALIST CONCEPTION OF HISTORY*

4. *The concept of a "rule", "regularity", "norm", "maxim".*

The decisive distinguishing characteristic of "social life", its "formal" property, is, according to Stammler the fact that it amounts to a "regulated" living together in reciprocal relationships "under external rules". Let us stop here at once and ask, before we follow Stammler any further, just what can be imagined to be covered by the terms "regulated" and "rule".

By "rules" can be understood:

(1) General statements about *causal* links: "natural laws". If one wishes to understand by "laws" only general causal propositions of unconditional strictness (in the sense of being without exceptions) then one will reserve the term "rule" (*a*) for all empirical propositions which fail to meet this strictness and not less (*b*), for all those so-called "empirical laws" which conversely are empirically without exception but where insight into the causal determination of their universality is either lacking or else theoretically insufficient. It is a "rule" in the sense of an "empirical law" (as in (*b*)) that men "must die", it is a "rule" in the sense of a general empirical proposition (as in (*a*)) that certain reactions of a specific nature are "adequate" on the part of a member of a student club to a slap on the face.

By "rule" can further be understood:

(2) A "norm", by which past, present or future processes may be "measured" in the sense of a "value judgment". This is the general statement of an "ought" (logical, ethical, aesthetic), in contrast to an empirical "is" with which "rule" in the cases under (1) is concerned. The "validity" of the rule in the second case signifies a general¹ imperative, the content of which is the norm itself. In the first case the "validity" of the rule means simply the claim to "validity" of the assertion that the actual regularities which correspond to it are "given" in empirical reality or are to be derived therefrom by generalisation.

But as well as these two very simple basic meanings of the concept, "rule" and "regulatedness" we find others which cannot simply be resolved into one or the other. To them belongs that which is usually termed "maxims" of conduct. For instance Defoe's Robinson Crusoe—Stammler operates with him sometimes just like the economic theorists and so we have to also—pursues in his isolation, in accord with

* This is the second and final part of Professor Albrow's translation. The first part appeared in (1975) 2 *British J. of Law and Society* 129. Copyright of the translation rests with J.C.B. Mohr (Paul Siebeck), Tübingen.

¹ Whether *necessarily* "general" can be left for the moment.

his conditions of existence, a rational *economy*. Without any doubt this means that he submits his consumption and production of goods to certain "rules", and in particular "economic" rules. From this, if we can prove anything at all with the example of Robinson Crusoe, we can see straightaway that it is erroneous² to assume that the economic "rule" can belong only to "social" life: that it presupposes a plurality of subjects subordinated and tied to it.

Of course Robinson Crusoe is a very unreal literary product, a mere conceptual unit with which the "scholastics" operate. But Stammler is also a scholastic and must content himself that his readers treat him in the same way as he them. Moreover if it is a question of strict "conceptual" distinctions and the concept of a "rule" is treated as *logically* constitutive of "social" life, and if, moreover, "economic phenomena" are only envisaged as set "conceptually" upon the ground of "social regulation" as is the case with Stammler, then such beings as Robinson Crusoe, constructed without either logical contradiction or (what is not the same) absolute contradiction to rules of experience, should not be able to forge a way into the concept. And it is most ill-becoming for Stammler when he asserts in anticipation of this point that Crusoe may only be construed *causally* as a product of "social life" from which he has been accidentally ejected. He has preached himself, with complete justification though in his own case here again with very scant success, that the causal origin of the "rule" is quite irrelevant to its conceptual nature.

When Stammler later (p. 146 and repeatedly) asserts that such an isolated imaginary individual may only be explained by "natural scientific" methods since it is simply "nature and its technical mastery" which forms the subject of discussion, we have to recall the earlier discussion of the ambiguity of the concepts "nature" and "natural science". Which of their many meanings is being referred to here? Above all, however, we recall, if it is a matter simply of the concept of a rule, that technology is a process which runs according to "purposefully set" "rules". The working together of the parts of a machine for example happens in the same "logical" sense according to "humanly set rules" as the working together of forcibly coupled draught-horses or slaves or indeed the "free" human worker in a factory. For in this last case, it may be a matter of a correctly calculated "psychological compulsion", effected by the "thought" of the closed factory door where there is deviation from the "work regulations", by the empty purse, starving family and so on, as well as perhaps a variety of other ideas, of an ethical nature or just plain custom. But even if it is these factors which keep the worker in the total mechanism as opposed to the

2 It is self-evident that "rule" in the sense of a moral norm is *conceptually* not limited to "social beings". Conceptually even Crusoe can act "immorally" (compare for instance the moral norm in para.175 of the RstGB, second case, where it is made the object of legal safeguard).

physical and chemical qualities of the parts of a machine, in neither case does this make the slightest difference as far as the *meaning* of the concept of a rule is concerned.

Take for instance the following crudely sketched series of ideas in the head of the worker. Through experience he knows that food, clothing and warmth are “dependent upon” reciting a set form of words in the “office”, or giving some other sign which is customary in what the “lawyers” call a “work contract”, that he then enters the mechanism physically, that is performs certain movements of his muscles. If he does all this he knows he has the chance of getting periodically certain specifically formed metal discs or paper notes which, if he hands them to others, result in his getting bread, coal, trousers etc. There is the further consequence that if someone tried to wrest these objects from him, his appeal with a certain probability would summon people in spiked helmets who would help to restore them to him. With a certain probability we can count upon this very complicated series of ideas being present in the heads of workers and the industrialist takes them into account as causal determinants of the contribution of human muscle power in the technical production process in just the same way as the weight, hardness, elasticity and other physical qualities of the materials which the machines assemble or through which they are set in motion.

One can be seen in exactly the same *logical* sense as the other as a causal condition for a certain “technical” result, for example the production of x tons of crude iron from y tons of iron ore in a time span of z . In each case we have “working together to rules” in exactly the same *logical* sense of a “precondition” for technical success. The fact that in one case “conscious processes” intrude into the causal chain and in the other they do not, makes not the slightest “*logical*” difference. So if Stammler contrasts “technical” and “social scientific” points of view, then the factor of the presence of a “rule for working together” cannot constitute in itself a decisive difference. The industrialist takes into account the fact that people exist who are hungry, and that those other people in the spiked helmets will prevent them using physical force to simply take the means where they find them which could serve to allay their hunger, and that thus the series of ideas outlined above must emerge. He does this just as the hunter calculates the qualities of his dog. Just as the hunter calculates that his dog will react in a certain way to his whistle and after a shot will perform a certain way, so the industrialist counts on the posting of a paper printed in a certain way (“work regulations”) producing a specific result with greater or lesser certainty.

To take another example, the way an individual today handles the metal discs which are called “money” is just like the “economic” behaviour of Robinson Crusoe, in respect of the available “supply of goods”

and means of production on his island. He knows that these discs in his pocket, or which he believes rightly or wrongly can be induced into his pocket through certain procedures, like a scribble on a piece of paper called a "cheque" or cutting off another piece called a "coupon" and presenting it at a certain counter, can be used in certain ways to bring certain objects under his (actual) control. He has noticed these behind shop windows or at refreshment counters and knows that he cannot simply take them without the people in spiked helmets coming and putting him behind bars. How it actually happens that these metal discs have these properties, the individual need have as little idea as of what makes his legs work. He can content himself with the observation made since childhood that they work this way in anyone's hands with just the same regularity as in general anyone's legs work or as the heated stove gives out warmth or July is warmer than April. He adjusts his use of money, "regulates" it, "economises" with it, according to his knowledge of its "nature".

According to Stammler it would have to be the task of "technical" natural science to study how this regulation is in practice undertaken by the concrete individual, how thousands and millions of people proceed as a result of making their own or learning from others' "experience" of the "consequence" of various sorts of "regulation" and how each group among the groups which can be differentiated in a given population proceeds *differently* in relation to the distribution of chances of being able to safeguard and control these metal discs (or equivalently "effective" pieces of paper). *Natural* and not "social science" would have to observe this and, as far as the material permits, make it understandable, for it is always a matter of the explanation of the behaviour of the *single* individual. For these "rules" by which individuals proceed are "maxims", just as they are with Crusoe, supported in each case in their effectiveness in causally influencing the empirical behaviour of the individual by rules of experience, personally developed or learnt from others, which take the form: If I do x then, by rules of experience, y is the result. Crusoe's "purposeful action according to rules" proceeds on the basis of these "empirical propositions". So does the action of the "money owner". However vastly complicated the conditions of existence with which the latter has to "reckon" in comparison with Crusoe's, there is no *logical* difference. Each has to calculate the regularly experienced type of reaction of the "environment" to specific types of his own behaviour. It makes not the slightest difference for the "logical" nature of the "maxim" that in the one case there are human reactions and in the other only animals, plants and "dead" natural objects. If Robinson Crusoe's "economic" behaviour, as Stammler would have it, is "simply" technical and *therefore* not the object of "social scientific" enquiry, then neither is the behaviour of the individual towards a plurality of human beings, however composed, in so far as its "regulation" through "economic" maxims and their effects is being investigated.

The “private economy” of the individual (we can express ourselves now in the usual language) is governed by “maxims”. These maxims in Stammler’s terminology would be called “technical”. They “regulate” the behaviour of the individual empirically with variable stability, but after what Stammler has said about Robinson Crusoe, they cannot be the “rules” he is talking about.

But before we try to approach these “rules” let us ask how the concept of a “maxim”, with which we have so extensively operated, relates to the two types of “rule” concepts we introduced earlier, namely “empirical regularity” and “norm”. This will require a short general consideration of what it means to designate specific personal conduct as governed by a rule.

In the sentence: “my digestion is regulated” a person is only expressing the simple “natural fact” that it follows a certain temporal sequence. The “rule” is an abstraction from the course of nature. But he can be put to the necessity of “regulate” it through the elimination on his part of “disturbances”. If then one uses the same sentence the external course of events remains the same but the meaning of the concept of “rule” changes. In the first case the “rule” was observed in “nature”. In the second it is aspired to *for* nature. Observed and aspired to “regularity” can *de facto* coincide, which is fortunate for the person concerned, but “conceptually” they have distinct meanings. The one is an empirical fact, the other an aspired to ideal, a “norm” against which the facts are “evaluatively” measured.

For its part the “ideal” rule can play a role in two forms of study. We can ask: (1) which *actual* regularity would correspond to it?; and then also, (2) what degree of *actual* regularity is causally occasioned by aspiring to it? For the fact that someone for instance undertakes that “measurement” by the hygienic norm and “directs” himself accordingly is certainly on his side *one* of the causal components in the observable empirical regularity of his body. This is also influenced causally by an infinite variety of conditions including the medication he is taking to “realise” the hygienic “norm”. His empirical “maxim” is, as one sees, the conception of the “norm”, operating as a real agent of action.

It is no different with the “regulatedness” of the behaviour of people to goods and to other people in particular with their “economic” behaviour. We talked of Robinson Crusoe and owners of money behaving in certain ways to their goods and supply of money respectively so that their behaviour appears to “follow a rule”. This can prompt us to give a theoretical formulation to the “rule” which we see, at least partially, “governing” this behaviour: for instance, as the “principle of marginal utility”. This *ideal* “rule” contains a theorem on this, which contains the norm which Crusoe “would have” to follow *if* he simply wanted to hold to the ideal of

“expedient” conduct. On the one hand then it can be treated as a standard of evaluation, though naturally not “moral” but “teleological”, setting “purposeful” action as the “ideal”. On the other hand, however, it is a heuristic principle, permitting us to identify Crusoe’s empirical action, in its actual causal determination, if we for once assume the real existence of such an individual. In this case it serves as an “ideal typical” construction, and we use it as a hypothesis to “test” how far it fits the “facts” and to assist in ascertaining the *actual* causation of his action and how far it approximates to the “ideal type”.³

This “rule” of expedient action may come into consideration in two very different senses for the *empirical* knowledge of Crusoe’s behaviour. First, possibly, as an element of his “maxims” which constitute the object of the enquiry, that is as a real agent in his empirical action. Second as an element of the store of knowledge and concepts which the *investigator* employs in his work. His knowledge of the ideal possible “meaning” of action facilitates his empirical understanding of it. Both are to be logically clearly distinguished. At the empirical level the “norm” is undoubtedly a determinant of events, but only *one*, logically considered, in just the same sense as in the “regulation” of the digestion the consumption of medication “according to a norm” and hence the norm itself, which the doctor stipulated, is one, but only one of the determinants of the actual outcome.

This determinant can influence action with very different degrees of consciousness. Just as the child “learns” to walk, to be clean, and to avoid dangerous pleasures, so he grows into the “rules” by which he sees others leading their lives. He learns to “express” himself verbally and to participate in “everyday business” partly (1) without any subjective conceptual formulation of the “rule” by which, with very varying constancy, he abides, partly (2) on the basis of conscious utilization of “empirical propositions” of the type: after *x*, there follows *y*, partly (3) because the “rule” has been impressed on him through “education” or simple imitation as the conception of a norm which is *obligatory* in its own right. Through the experience of living and reflection it is then developed further and helps to determine his action.

If one says in the last two instances that the operative, moral, conventional, teleological rule is the “cause” of a specific action, then this is naturally very imprecisely expressed. It is not the “ideal validity” of a norm but the empirical conception of the actor that the norm “should be valid” for his behaviour that is the cause. This holds for “moral” norms just as for rules whose “claim to validity” is a matter of pure convention or “worldly wisdom”. It is naturally not the conventional rule of greeting, for example, which personally bares my head when I meet an acquaintance, but my

3 On the logical meaning of “ideal type” see above p.190ff in this volume. (*Gesammelte Aufsätze zur Wissenschaftslehre* (1973 J.C.B. Mohr (Paul Siebeck), Tübingen) edited by Johannes Winckelmann.

hand. But it is prompted to do so either because of my simple “habituation” to abide by such a rule, or through knowing from experience that it will be seen by others as inept not to do so and would have unpleasantness as a consequence; that is a “dislike” calculation, therefore. Or finally it could happen because I consider it “unseemly” for me not to observe such a universally followed and harmless “conventional rule” without a compelling reason: *i.e.* through the “conception of a norm.”⁴

With this last example we have reached the concept of “social regulation”, the rule “valid” for the behaviour of people to one another which is the concept to which Stammler anchors the object, “social life”. We will not discuss the justification for this conceptual specification by Stammler just yet, but will continue the discussion of the concept of a rule independently of Stammler for a stretch further.

Let us take the elementary example which is also occasionally used by Stammler to indicate the significance of a “rule” for the concept of “social life”. Take two people who in other respects have no social relationship and who “exchange” any two objects with each other. They could be savages of different tribes, or a European and a savage who meet in darkest Africa. Quite rightly one puts emphasis on the fact that a simple depiction of the overtly perceivable course of events, the muscle movements and, if there is “speaking”, the sounds, which make up the “physical” events in no way capture their “essence”. For this “essence” consists of the “meaning” which each imputes to their external behaviour and this “meaning” of their present behaviour in turn sets the “regulation” of their behaviour in the future. Without this “meaning”, one says, an “exchange” would neither be possible in reality, nor even conceivable. Quite so! The circumstances that “external” signs serve as “symbols” is one of the constitutive presuppositions of all “social” relationships. “But only in respect of these?” we must immediately ask again. Obviously in no way. If I put a “bookmarker” in a book, then that which is “externally” visible as a result of this action is obviously just a “symbol”. The circumstances that a strip of paper or some other object has been stuck between two pages has a “significance” without the knowledge of which the bookmarker would be useless and meaningless to me and the action itself would be causally inexplicable. Yet in no way has a “social” relationship been established. Or, entering rather again exclusive Crusoe territory, if Crusoe “marks” certain trees with his axe because the forest resources of his island require “economic” care and he is considering felling them for the coming winter, or if he divides his grain supplies into portions and budgets so that one part is stored as “seed corn”, in all such and innumerable

4 The reader will have to excuse this and many other almost excessively trivial comments in view of the necessity to counter at the outset certain strongly *ad hominem* arguments by Stammler

similar cases which the reader may invent for himself, the “external” visible process is not the “whole process”. It is the “meaning” of these measures, which certainly have no content of “social life”, which impresses their character on them and gives them “significance”. In principle this is just the same as the “total significance” of the black spots which one has “printed” on a file of sheets of paper, or as the “verbal significance” of the sounds, which another “speaks”, or finally, as the “meaning” the parties to the exchange attached to their conduct, to the externally visible component of it.

If we now distinguish conceptually the “meaning” which we find “expressed” in an object or process, from the elements which remain when we abstract them from this “meaning” and if we call this kind of study which reflects exclusively on the remaining elements “naturalistic”, then we obtain another concept of “nature” distinguishable from the earlier ones. Nature becomes “meaninglessness”, or, more correctly, a process *becomes* “nature” if we do not ask after its “meaning”. But then clearly the antithesis of “nature” as “meaninglessness” is not “social life”, but the “meaningful”, and this “meaning” which can be attributed to or “discovered” in an object or process extends from the metaphysical “meaning” of the cosmos within a religious doctrine to the barking of Crusoe’s dog when a wolf approaches.

Once we have convinced ourselves that the quality of being “meaningful” or “signifying” something is not the exclusive property of “social” life, we can return to the process of that “exchange”. The “meaning” of the “external” behaviour of the two parties can be viewed logically in two quite different ways.

In the first place as an “idea”: we can ask what *conceptual* consequences can be discovered in the “meaning” which we, the observers, attribute to a concrete process or how this “meaning” can be subsumed in a more comprehensive “meaningful” conceptual system. From the “standpoint” we have thus achieved we can then undertake an “evaluation” of the empirical course of the process. For instance, we could ask, what would Crusoe’s “economic” behaviour “have” to be, if it were pursued to its ultimate conceptual “consequences”. This is what marginal utility theory does. And we could go on to “measure” his empirical behaviour against that conceptually conveyed standard. In the same way we can ask how the exchanging parties would *have* further to behave, after the outward completion of the surrendering of the exchanged objects on both sides, so that their conduct should correspond to the “idea” of exchange, that is, so that we could find them conforming to the conceptual consequences of the “meaning” which *we* discovered in their action. We start therefore with the empirical fact that processes of a specific kind in *practice* occur linked mentally with a certain “meaning” which is not thought

through clearly in detail but in just a vague notion. We then *leave* the empirical field and ask how the “meaning” of the action of the participants can be *conceptually* construed so that a non-self-contradictory conceptual system is generated.⁵ We are working then at the “dogmatics” of the “meaning”.

On the other hand we can ask whether the “meaning” which “we” can attribute dogmatically to such a process is also that which each empirical actor on his side imparts to it or whether they had some other, or indeed any conscious “meaning” at all. We thus have to distinguish two further “meanings” of the concept of “meaning”, dealing as we are now simply with its *empirical* sense. In our example it could be meant that the actors consciously *wished* to take upon themselves an “obligatory” norm and that they were therefore of the (subjective) view that their action bore an obligatory character: a “norm-maxim” was established among them.⁶ Alternatively all that is meant is that each sought a specific “result” with the exchange, in relation to which their action based on “experience” was a means and the exchange had a (subjective) conscious “purpose”. It is naturally doubtful in the case of each kind of maxim to what degree it was empirically present, and in the case of the “norm-maxim” whether it was there at all. It is questionable how far the two parties in our example were really conscious of the “expediency” of their action. It is also questionable how far they think that their relations “should” be so “regulated” that one object *should* rate as “equivalent” to the other and that each should “observe” the other’s “ownership” of the object which before the exchange was his, etc: How far then has this idea become a conscious “maxim”, a “norm-maxim”? How far was the conception of this “meaning”: (1) a causal determinant of the emergence of the decision to engage in this “act of exchange”; and (2) how far does it constitute the basis for determining their behaviour *after* the act of exchange? Our “dogmatic” image of the “meaning” of “exchange” must clearly be very useful with

5 Any thought of a “legal” order is for the time being to be kept far away. Obviously, if necessary, several different *ideal* “meanings” of an act of “exchange” could be constructed.

6 One thing we have to establish at once if we are going to designate the “meaning” of the act of exchange with the first of our meanings, the “norm-maxim”; a “regulation of the relations” of the parties with each other, their *relationship* as “regulated” through the norm they conceive for their future *behaviour*. Here the words “regulated” and “regulation” do not comprise at all necessarily a “subsumption” under a general “rule”, with the possible exception “that agreements should be loyally fulfilled”, which means nothing else than “that the regulation should be treated as a regulation.” The two parties need to know nothing at all about the general ideal “nature” of the norm of exchange. We can even accept that two individuals may complete an act, the associated “meaning” of which is absolutely individual and not, as with “exchange”, subsumable under a general type. In other words, the concept of the “regulated” in no way *logically* presupposes the idea of *general* “rules” of specific content. We are establishing this fact firmly now and for the sake of simplicity will subsequently treat normative regulation throughout as being set under “general” rules

such questions for the purpose of hypothesis construction and as “heuristic principle”. But they naturally are not in any way to be settled by simple reference to the fact that “objectively” the meaning of what they did “could be” completely specific and derived dogmatically according to definite logical principles.

It would naturally be pure fiction, corresponding, say, to the hypostatisation of the “regulative idea” of the “international treaty”, if one simply decreed that both *wanted* to regulate their social relations with each other according to the ideal “concept” of “exchange”, because we, the observers, attribute this “meaning” on the basis of the *dogmatic* classification. Logically considered we could just as well say that the dog that barks has “wanted” to realise the “idea” of protection of property because of the “meaning” this barking can have for the owner.

The dogmatic “meaning” of “exchange”, from the empirical point of view, is an “ideal type” which we employ heuristically or for classification because in empirical reality an enormous number of processes take place which correspond to it to a greater or lesser “pure” extent. “Norm” maxims, which treat this “ideal” meaning of exchange as “obligatory” are to be sure *one* of the different possible determinants of the actual course of the parties’ action. But they are only one, and their empirical presence in the concrete act is as much a hypothesis for the observer as it is (and this is not to be forgotten) for each actor in respect of the other.

It is naturally quite normal for one or other or both of the parties *not* to accept the normative “meaning” of the exchange as how own “norm-maxim” in the knowledge that it is customarily treated as ideally “valid”, that is it should be valid. Each or both then calculate on the probability that the *other* party will do so and his own maxim is a pure “purpose” maxim. To assert that the actors have so regulated their relations that the process in this case is “regulated” in the meaning of the ideal norm has naturally no empirical meaning. If we do, however, occasionally express ourselves in this way then it is the same double meaning of the word “regulated” which we found with the man and his artificially “regulated” digestion and will often find again. It is harmless if one always keeps in mind what is understood in the concrete instance. But it would naturally be completely meaningless if one wanted to designate the rule which in the dogmatic “meaning” of their behaviour the parties are supposed to have followed as the “form” of their social relationship, as a “form” of the *event*. For that dogmatically derived “rule” “is” itself in each case a “norm” which claims ideal “validity” for action, but never a “form” of some empirical “existence”

Whoever wishes to discuss “social life” as empirical “existence” may naturally not effect dogmatically a metabasis in the field of what “ought-to-be” In the field of “being” the rules in our example exist only in the sense

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of being causally explicable and causally operative empirical “maxims” of the two parties. In the sense of our third concept of “nature”, as outlined in the first half of this translation (1975) 2 *British J of Law and Society* 151, we would express it thus, that the meaning of an external process also becomes “nature” in the logical sense if one reflects upon its *empirical* existence. For then one is not asking after the “meaning” which the external process has *dogmatically* but the “meaning” which the “actors” in practice really associated with it or at least gave that appearance through recognisable “signs”. This is naturally how it stands in particular with the “legal rule”.

The rules of a game

Before we tread the ground of “law” in the usual sense of the word, let us clarify some of the issues left open in our general problem by reference to another example. Stammler himself sometimes refers to the analogy of “rules of a game”. For our purpose we have to think this analogy through much more thoroughly. So let us take skat and treat it in the same way as those fundamental components of culture of which “history” relates and with which “social science” is concerned.

When one says the three players of skat submit themselves to its rules one means that they have the norm maxim that certain signs *should* determine whether someone has played correctly in the sense of “according to the norm” and who shall count as the “winner”. Very different kinds of logical consideration can now attach themselves to this statement. First the “norm”, the rules of the game, can be made the object of purely conceptual discussions. These may in turn be either practical evaluation: for example, as happened once, if a “skat congress” concerns itself with whether from the standpoint of those “values” (eudemonic) which skat serves it would be appropriate to establish the rule henceforth, any *Grand* is higher than *Null Ouvert*, a skat-political question. Or they could be dogmatic: for example whether a particular type of provocation “must necessarily” entail a certain sequence of play, a question of general skat-legal doctrine with a “natural law” problem setting. In the field of genuine skat-jurisprudence belongs the question of whether a game counts as “lost” if a player has played the wrong card just as all subsequent questions whether a player in a particular case has played “rightly” (according to the norm) or “wrongly”. The question of *why* a player actually played “wrongly” (knowingly? by oversight? etc.) is simply *empirical* and more precisely “historical” in nature. Then whether a player actually played “well”, that is expediently, is a “value question”, which, however, is to be answered purely empirically. “Rules of experience” decide whether a specific line of conduct customarily does or does not increase the chance of “cutting into the ten”. These general rules of practical skat wisdom contain propositions from experience which can be calculated from the “possible” combinations and then practical experience of the way fellow-players are likely

to react. They can then be raised to varying high degrees of stringency, becoming "rules of skill" by which the "efficiency" of the conduct of the skat player is "evaluated". Finally the behaviour of the player could be measured against the norms of "skat morality". Inattentive play which allows the common opponent to win is customarily solemnly denounced by the partner. On the other hand the maxim, which in "human" terms is highly reprehensible, to engage a third man as lamb for the slaughter with a view to exploiting him, is not customarily strongly condemned in the everyday skat-ethic.

Corresponding to these different possible directions of evaluation we can distinguish in the field of everyday skat maxims of "morality", "fairness", and "expediency" each depending conceptually on very different principles of evaluation and thus having correspondingly different "normative" dignity, from "absolute" down to pure "facticity". We found the same state of affairs in the exchange example and, just as there, as soon as we enter the territory of purely causal-empirical study the different orientation points of the maxims which the normative (skat-political, skat-legal) point of view treats as "ideally valid" are resolved into actual thought complexes. It is these which determine the actual conduct of the player, either in conflict with each other (his interest can, for instance, speak against the retention of the "fairness maxim") or, regularly, in combination. The player puts his ace on the table because, on the basis of his "interpretation" of the "rules of the game", his general skat experience and his "ontological" assessment of the total circumstances, he considers this the adequate means to bring about the situation where the "rules" he has in mind attach the consequences that he counts as the "winner". He calculates as the result of his action, for instance, that the other lays a ten and that this in conjunction with a further series of events he expects will bring about his success. On the one hand he counts on the others having the rules of the game in mind in the same form and letting them determine their play because he imputes constancy to the determining strength of their subjective "fairness maxim" and because he knows them to be men who normally act according to "morality maxims". On the other hand he takes into account the likelihood, based on his knowledge of their skat qualifications, that they will act teleologically, more or less expediently, in accord with their interests. They are, that is, in a position to realise their "expediency maxims" in practice. The consideration which sets the standard for his own behaviour is covered, therefore, by propositions of the form: if I do x , y is the probable result, because the others will not knowingly break rule a , will play expediently and because I am faced by situation z .

Now one can undoubtedly characterize the rules of the game as a "presupposition" of an actual game. But then one has to be clear about what this signifies for the empirical study which concerns us now. The

rules of the game are first of all a *causal* “moment”. Naturally it is not the “rules of the game” as “ideal” norm of the laws of skat which belong to the co-determinants of their actual action but rather the conception the players have of their content and binding nature. The players “presuppose” of each other normally, that each makes the game’s rules into “maxims” for their action. This normally made assumption in practice, which can be more or less realised later empirically, is the regular *substantive* “presupposition” for each of them to resolve to let their action be determined by the corresponding maxim, in reality, or in appearance if one is a swindler. Whoever would like to establish the causal course of a concrete game of skat would have to include in the causal regress as effective constant determinants the speculation of each player on the others actually keeping to the usual rules and therefore also their “acquired” knowledge of the rule. This would be in the same way as any other causal “presuppositions” of the conduct of the players. *Thus far* there exists no difference between them and the “conditions” which human beings require for living and conscious action.

But if we designate the rules of skat as the “presupposition” for empirical “skat knowledge” there is an essentially different logical meaning of course. It means then they are the distinctive sign of “skat” in contrast to those other “general” substantive “presuppositions” of the event. To formulate it more long windedly such processes which count as relevant from the standpoint of the norms of a game usually labelled the “rules of skat”, characterize for us a complex of operations as the “game of skat”. The conceptual content of the “norm” is thus the standard for selection of the “conceptual essence” from the multiplicity of tobacco smoke, beer drinking, table banging and disputations of every kind which is how a genuine German game of skat customarily appears to us and is the contingent “milieu” of the actual game. So we “classify” a complex of processes as “skat” when it contains processes which count as relevant for the application of the norm. It is these which a “historical” analysis of a concrete game of skat as it develops empirically would seek to explain causally. They constitute the empirical collective term, “a game of skat” and the empirical generic concept, “skat”.

In sum, relevance from the standpoint of the norm delimits the *object* of investigation. Clearly, then, the meaning in which the rules of skat are a “presupposition” for our empirical knowledge of skat, that is are a specific sign for the *concept*, is to be sharply distinguished from the meaning they have for the knowledge and calculation of the player as “presupposition” for the empirical course of “games of skat”. Moreover this service the norm concept performs in the classification and delimitation of the object makes no difference to the logical character of the empirical, causal enquiry into the object which has thereby been delimited

The content of norms permits us to discern, and this is the limit of its important service, those facts and processes which a subsequent “historical *interest*” would concentrate on in any causal explanation. That means they limit the points of departure in the causal regress and progression in a multifarious reality. A causal regress would, however, proceed far beyond the sphere of processes “relevant” from the standpoint of the norm, if someone wanted to undertake this for a concrete game of skat. In order to “explain” the course of the game he would have to establish, for instance, the talents and education of the players, the extent of their “freshness” as a condition of their attentiveness at the given moment, the extent of each person’s beer consumption and its influence on the degree of tenacity to the maxims of “expediency”, etc. Thus it is only the starting point for the regress which is determined by “relevance” from the standpoint of the “norm”.

We are concerned here with a case of so-called “teleological” concept formation as it is to be found, not only outside the study of “social” life but also outside “human” life. Biology “selects” out of the multiplicity of processes those which are “essential”, namely in the specific “sense” of “sustaining life”. In discussing a work of art we “select” from the multiplicity of the phenomenon those elements which from an “aesthetic” point of view are “essential” and that means *not* aesthetically “of value” but “relevant to aesthetic judgment”. This is moreover also true, if we are envisaging the historical-causal “explanation” of its individual qualities or using it to exemplify general causal propositions about the conditions for the development of art, both cases of pure empirical knowledge, rather than attempting an “evaluation” of the work of art.

Our selection of the object which is to be explained empirically is “routed” through relating it to aesthetic or biological or, in our example, skat-legal “values”. In these cases the object itself is not artistic norms, vitalistic “purposes” of God or the spirit of the universe or skat-legal propositions. In the case of the work of art it is the brush strokes determined by the spiritual state of the artist to be explained causally by reference to “milieu”, “ability”, “life’s fortunes”, or concrete stimuli, etc. With the “organism” it is specific, observable, physical phenomena. In the case of the game of skat it is the thoughts conditioned by actual maxims and the external operations of the players.

Yet another meaning in which the “rules of skat” can be designated a “presupposition” for the empirical *recognition* of skat hinges on the empirical fact that the knowledge and observance of the “rules” belong to the (normal) empirical “maxims” of the skat players and thus causally influence their operations. To do this we are helped naturally only by *our* knowledge of the “law of skat” in discovering the nature of this influence and the empirical causes of the players’ action. We are employing here our

own knowledge of the ideal “norm” as a “heuristic means”. This is just like the art historian who uses *his own* aesthetic (normative) “power of judgment” as a *de facto* indispensable heuristic means in order to establish the actual “intentions” of the artist in the interest of the causal explanation of the nature of his work of art.

Exactly the same holds if we wish to set out *general* propositions about the “chances” of a specific development of the game when a particular hand has been dealt. We would employ the “presuppositions” that (1) the ideal rules of the game (skat law) are actually adhered to and (2) that play is strictly rational, that is teleologically “expedient”. This is how it is taken for granted in the “skat problem” (or in the case of chess, the chess problem) which the papers publish.⁷ We do this in order to be able to assert the greater or lesser “likelihood” that games with these hands develop corresponding to this type, since by experience in general a certain approximation to this ideal type is striven for and attained.

Thus we have seen that the “rules of skat” can play a role as “presuppositions” in *empirical* discussion with three logically quite different functions: classificatory and conceptually constitutive in the *delimitation* of the object; *heuristic* in its causal understanding; and finally as a causal *determinant* of the very object under scrutiny. Furthermore we have persuaded ourselves of the fundamentally different meanings in which skat can itself be an object of enquiry: skat-politically, skat-legally,—in both cases as “ideal” norm, and finally empirically, as actually effective and being affected. Provisionally we may draw the conclusion that it is unconditionally necessary always to establish with the greatest care in *what* sense one is talking of the “significance” of a “rule” being the “presupposition” of some kind of knowledge. Above all we are in permanent danger of maximising hopeless confusion of the empirical with the normative if we do not carefully avoid every ambiguity in this expression.

The rules of law

Let us now leave the territory of the “conventional” norms of skat and the quasi-“jurisprudence” of the law of skat and move to “genuine” law, (without enquiring first into the decisive differences between legal and conventional rules). If we assume that our earlier “exchange” example occurs within the area of jurisprudence of a positive law which also “regulates” the exchange, then *apparently* a further complication is added to those we have discussed. For the construction of the *empirical* concept of “skat”, the skat-*norm*, was the concept-limiting “presupposition”, in the sense of defining the scope of the object. The operations which are skat-legally relevant provide the starting point for an empirical-historical skat analysis, should anyone want to undertake it. It is different in respect

7 In this they correspond in a *logical* respect to the “laws” of theoretical economics.

of the relation between the rules of law and empirical course of human “cultural life”⁸ as soon as a structure regulated by law is subjected to “cultural-historical” or “cultural-theoretical” study (just to express it in general terms initially), rather than to legal-dogmatic or pure legal-historical study. This means, once again to put it as indefinitely as possible, it is different once we search either for the causal development of specific elements, significant in relation to cultural values, of a reality ideally regulated by law too (“historical” study), or for general propositions about the causal conditions of the emergence of such elements or about their causal effect (cultural-theoretical study).

Whereas the intention assumed in the above discussions was the undertaking of an empirical-historical exploration of the course of a concrete “game of skat” and the fashioning of the object (the “historical individual”) depended simply on the relevance of the facts from the standpoint of the “skat norm”, this is definitely not so with a “cultural”—historical rather than a purely legal study of a legal norm. We classify economic, political and other facts also by other than legal features, while facts of cultural life, which are quite irrelevant legally, “interest” us historically. Consequently it is an open question how far in each case the features of such facts which are *relevant* from the standpoint of an ideally valid law and the corresponding construction of juristic concepts are also relevant for the construction of historical or “cultural-theoretical” concepts.⁹ In its capacity as “presupposition” for the construction of the collective concept the legal norm in principle drops out.

But the problem may not be resolved quite so simply through the two kinds of concept formation having nothing to do with each other. As we shall see, quite regularly legal terms are employed for concept formation, e.g. economic, which are relevant from essentially different points of view. We cannot for that reason dismiss it simply as terminological misuse. The particular legal concept, *empirically* applied, has frequently served and could serve as the “archetype” for the particular economic concept. Moreover evidently the “empirical legal order”, a concept we will discuss directly, is customarily of substantial significance (to put it only generally at first) for facts which are relevant from economic points of view. But, as we will discuss later, the two do not simply coincide. The concept of “exchange”, for example, extends economic study to facts of the most heterogeneous legal character because the features relevant to it are

8 The “culture” concept used here is Rickert’s (*Grenzen der naturwissenschaftlichen Begriffsbildung*, chap. 4, sections II and VIII). The concept of “social life” will be intentionally avoided here, in advance of the discussion of Stammler. Otherwise I refer to my various essays (above pp. 146ff, 215ff). (*Gesammelte Aufsätze op.cit.*).

9 The skat norm would naturally undergo the same thing if we once assumed that a skat-legal normatively regulated state of affairs were an element of an object of research which had a “world-historical” interest.

found in them all. Conversely it comprises, as we shall see, very often features which are quite irrelevant legally and attaches to them its distinctions.

We shall repeatedly return to the problems which emerge from this. At this point we are just reminding ourselves that the forms of study which are logically possible and which we demonstrated with the example of skat reoccur in the field of "legal rules". We are also staking out, though purely provisionally, the limits for this analogy without attempting at this point a definitive and correct formulation of the logical circumstances.¹⁰ We will return for more thorough consideration after we have learnt still further from Stammler's mode of argument how one may *not* jump about with these problems.

Juristic and empirical concepts

A particular paragraph of the *Bürgerliches Gesetzbuch* can become the object of reflection in different senses. In the first place, legal *political*: one can discuss its normative "justification" according to ethical principles, or its value or lack of value for the realisation of certain "cultural ideals" or of "power political" or social political postulates, or its "use" or "harm" for "class" or personal interests. We are going to exclude straightaway this kind of direct evaluative discussion of "rules" as such since we encountered it *mutatis mutandis* with skat and it poses no new logical problems in principle.

Two questions remain. One can ask, in respect of the paragraph in question, what it "*signifies*" "*conceptually*", or what its "effects" are empirically. Naturally it is important in its own right that an answer to these two questions is a presupposition for the fruitful discussion of the problem of the paragraph's ethical, political or other value. But naturally the question of its value is still quite independent and to be strictly separated from these two.

Let us consider the logical nature of these two questions. In both cases the grammatical subject of the sentence is "it", namely the "paragraph" in question. Yet in each case quite different objects are concealed

¹⁰ Reference may be made to the incisive comments G. Jellinek has made on our problem in the second edition of his *System der subjektiven öffentlichen Rechte*, Chap. III, pp. 12P. Compare his *Allgemeine Staatslehre*, 2nd edition, Chap. VI. His interest stems from exactly the opposite interest to ours. He has to ward off naturalistic incursions into legal dogmatic thought. We have to criticize legal-dogmatic falsifications of *empirical* thought. The only person who up to now has fundamentally taken to heart the problem of the relations between empirical and juristic thought from the standpoint of the first is F. Gottl whose *Herrschaft des Worts* contains quite excellent suggestions, although they are certainly only suggestions. The treatment of legally protected interests (subjective rights) from the special standpoint of economic thought was developed in his time with consistent clarity by von Böhm-Bawerk in his treatise *Rechte und Verhältnisse vom Standpunkt der volkswirtschaftlichen Güterlehre* (1881).

by this “it”. In the first case “it”, the “paragraph”, is a complex of ideas put in a word, which the legal researcher treats as a pure, ideal and distilled object for conceptual analysis. In the second, “it”, the “paragraph” is the empirical fact that whoever picks up one of the files called *Bürgerliches Gesetzbuch*, will regularly find an imprint at a particular place which will awaken his consciousness. In accord with principles of “interpretation” he has learnt by experience, with greater or lesser clarity and lack of ambiguity, he imagines specific, actual consequences which could follow upon a specific outward behaviour. A further consequence of this state of affairs, at least regularly, if by no means without exception, is that certain psychological and physical “instruments of coercion” are available to those who know the method of convincing certain people usually called “judges” that this “outward behaviour” has actually taken or is taking place. Yet another consequence is that any person can “reckon” on other people in all likelihood behaving in a certain way to him, without the efforts of the so-called “judges”. In other words he has a certain chance of being able to count on actual undisturbed control over a specific object and he is able to and does organise his life on the basis of this chance. The empirical “validity” of the “paragraph” in question means therefore in this case a series of complicated causal links in the reality of the empirical-historical context. It evokes real personal conduct of men to each other and to non-human “nature” through the fact that a particular paper was covered with particular “marks of writing”.¹¹

But the “validity” of a legal proposition in the “ideal” meaning we discussed first signifies for the scientific conscience of the seeker for “juristic truth” a binding conceptual relationship of *ideas* to one another: an “obligatory validity” of certain thought processes for the juristic intellect. For its part it is by no means without empirical consequences that there is regular “deduction” of this sort of ideal “obligatory validity” of a certain legal proposition expressed in certain words by actual people who *desire* “juristic truth”. Indeed it is of the utmost empirical-historical significance. For the fact that there is “jurisprudence” and the empirical-historical developed mode of the “habits of thought” which *de facto* dominate it is of considerable practical-empirical consequence for the actual structuring of human behaviour. This is because in empirical reality the “judges” and other “officials” who are in a position to influence this behaviour through specific physical and psychological means of coercion, have been educated to desire “juristic truth” and conform to these “maxims”, in practice to a very variable extent.

The empirical “regulatedness” or our “social life”, that is that it transpires in daily “regularities” like the baker, butcher or paper-boy turning

¹¹ We are artificially simplifying here!

up is naturally co-determined in the most fundamental way by the existence of an empirical “legal order”, that is by a conception of what should be, by maxims which help to act as a cause of the action of human beings. But both these empirical regularities and the empirical “existence” of “law” are naturally something quite different from the juristic idea of its “obligatory validity”. “Empirical” validity belongs to the “juristic error” on occasion to the same degree as to “juristic truth”. The question of what, in the concrete case, “juristic truth is”, that is conceptually what should be or should have been valid according to “scientific” principles, is logically completely different from the question of what in the concrete case or cases actually happened as a “result” of the “validity” of a particular paragraph. The legal rule in the one case is an ideal conceptually derivable *norm* and in the other is a *maxim* of behaviour of actual people which it can be ascertained empirically is more or less consistently followed. A legal order in the one case is organized into a system of ideas and concepts which the scientific legal theorist employs as a value standard in juristically evaluating and measuring the actual behaviour of particular people; judges, advocates, delinquents, and citizens, acknowledging or denouncing it in so far as it corresponds or does not correspond to the ideal norm. In the other case it consists of a complex of maxims in the heads of particular empirical people which causally influences their actual action and thereby indirectly the action of others.

Thus far it is all relatively simple. It is more complicated however with the relationship between the *legal* concept “United States” and the identically named empirical-*historical* “structure”. Logically both are different things because in every case the question arises how far that which is relevant from the standpoint of the legal rule for the empirical phenomenon remains relevant for empirical-historical, political and social scientific study. One may not allow oneself to be deceived by the fact that both are decked out with the same *name*:

The United States are competent to complete trade treaties in relation to individual states.

The United States have accordingly completed a trade treaty with content *a* with Mexico.

The trading interest of the United States had required however content *b*.

For the United States export quantity *d* of produce *c* to Mexico.

Therefore the balance of payments of the United States is in state *x*.

This must have influence *y* on the currency of the United States.

In the six sentences the term “United States” has a different meaning each time.¹² This is the point where the analogy with the “skat” example breaks down. The empirical concept of an actual “skat” game is identical with the processes which are relevant from the standpoint of skat law. We

12 See Gottl, *ibid.*, p.192, note 1 and following pages.

have no occasion for a deviant use of skat concepts.¹³ It is different with the concept "United States". This is clearly related to the practice we noted above of transferring juristic *terminology* (for example, the concept "exchange") to other areas. Let us make even clearer in the most general respects how this influences the logical state of affairs.

First, some recapitulation. In any event from what has already been said it is clear that it is meaningless to conceive of the relation of the rules of law to "social life" in such a way that the law could be considered as the, or a "form" of "social life", to be contrasted to something else as the "matter" and to seek to derive "logical" consequences from this. The legal rule, conceived as "idea", is no empirical regularity or "regulatedness", but a norm which can be *thought of* as "obliging validity". It is quite certainly no form of "being", but a value standard by which actual existence is evaluatively measured, *if* we seek "juristic truth". The legal rule, considered empirically, is by no means a "form" of social existence, however that may be conceptually defined, but an actual component of empirical reality, a maxim, which causally determines, with greater or lesser "purity", the empirically observable behaviour of an indefinitely large section of people in each case, and in each case is more or less consciously and more or less consistently followed.

The judges by experience follow the "maxim" in order to "decide" "conflicts of interest" in accord with a certain legal rule. Other people, sheriffs, police, etc. have the maxim of "being guided" by this decision. Further the majority of men think "legally"; that is, abiding by legal rules is normally a maxim for their action. All these are elements, and uncommonly important ones too, of the empirical reality of life, in particular of "social life". The "empirical existence" of law as the maxim-constructing "knowledge" of actual human beings we called here, the empirical "legal order". This knowledge, the "empirical legal order", is one of the bases for the determination of the deeds of acting human beings. In so far as he acts purposefully it is partly one of the "obstacles" which he aspires to master, either through, as far as possible, riskless infringement or else through "adaptation" to it. In part it is also a means which he seeks to bring into the service of his "purposes" in exactly the same way as his knowledge of any other proposition from experience.

In accord with his interests he seeks to change this empirical state of affairs through influencing other people, in exactly the same sense, logically considered, as he would seek to change some state of nature through the technical use of natural forces. Suppose, for example, to use an occasional illustration from Stammler, he cannot stand the smoke from a neighbouring chimney. He enquires of his own empirical knowledge or of

13 For the simple factual reason of the small importance "skat rules" have for cultural life.

another's (for instance a "lawyer's") whether he can expect, if he presents certain pieces of writing to a particular place (the court), that certain people, called "judges" will sign a piece of writing (called a "judgment") after a series of procedures, which as an "adequate" result leads to psychological or ultimately physical coercion being used on certain people not to light the stove in question any more. To calculate the likelihood with which this is to be expected he, or his lawyer, naturally tests above all the question, how the judge would "have to" decide the case in accord with the conceptual *meaning* of the legal rule. But this "dogmatic" testing does not rescue him. However dispassionate the result of this testing, for his empirical purposes it is only *one* item in the probability calculation of the likely empirical course of events. As he well knows, there are the greatest variety of reasons why it might happen that, in spite of the lawyer's conscientious scrutiny of the "norm" in respect of its ideal meaning and finding it in his favour, he nonetheless "plays it wrongly" in the court—as colloquial speech terms the process very appropriately.

In fact, it really needs no further exposition to demonstrate that a *court* case displays the most complete analogy to the "game of skat". The empirical legal order is the "presupposition" of the empirical course of events, namely as "maxims" for the sitting judges and as "means" for the contesting parties. The knowledge of its conceptual "meaning", its dogmatic-juristic significance, plays just as big a role as an indispensable heuristic means in the empirical-causal "explanation" of the actual course of a concrete case as the rules of skat play in the "historical" analysis of a game. It is, moreover, constitutive for the delimitation of the "historical individual". If we wish to give a causal explanation of a concrete case as a *case* it is the legally *relevant* elements of the process to which the interest of the "explanation" attaches. Here the analogy with skat rules is complete. Just as the concrete case of skat relates to the rules of skat, the empirical concept of a concrete "legal case" is made up without remainder of the elements of the section of reality in question which are relevant from the point of view of the legal rules.

However, this state of affairs alters if we conceive our task to be the "history", in the sense of explaining its juristic outcome, not of a concrete "court case", but of an object thoroughly influenced by the legal order such as the "labour relations" of a specific industry, say the textile industry of Saxony. What "concerns" us here is by no means exhausted by those elements of reality which are relevant for some "legal rule". Evidently it is incontestable that the legal rules have the most forcible causal significance for "labour relations" from whatever point of view we are going to consider them. They are one of the general *substantive* "conditions" which are taken into account in the study. But facts which are "relevant" in this sense, unlike the situation with "skat rules" and the actual

game, or the legal rules and the case, are no longer *of necessity* those elements of the "historical individual", the "facts", the nature and causal explanation of which are our "concern". This is notwithstanding the circumstance that one of the decisive causal "conditions" for all these facts is the nature of the actual "legal order" at a particular time and place. The presence of a "legal order" is as indispensable as a general (substantive) "presupposition" as the presence of wool, cotton or linen and their employability for specific human needs.

One could, though we will not do it here, attempt to construct a series of type of possible objects for enquiry where, with each instance, the general causal significance of the concrete nature of the "empirical legal order" would recede. The features of other conditions would gain ever more causal significance and one would finish up with general propositions about the extent of the causal importance of empirical legal orders for cultural facts. Here we are contenting ourselves with establishing in principle the variability of this importance in relation to the nature of the object. The artistic nature of the Sistine Madonna for example has even got a very specific empirical "legal order" as a "presupposition" and, if we imagine an exhaustive causal regress, it would have to encounter this as an "element". Its empirical emergence without *any* sort of legal order as a general "condition" would be empirically so unlikely as to border on the impossible. But the facts which constitute the "historical individual", the Sistine Madonna, are *legally* quite irrelevant here.

The professional lawyer is clearly understandably inclined to view civilized men in general as potential litigants, in the same way as the shoemaker sees them as potential shoe buyers and skat players as potential "third men". But either would equally be quite in the wrong were he to assert that civilized man may and can only be the object of cultural scientific study in so far as he is the one or the other. So would the jurist be wrong were he to consider men only as *potential* "legal skat players", nursing the belief that only those elements in the relations between human beings *relevant* to an eventual court case could make up possible elements of an "historical individual". The need for empirical explanation can attach itself to elements of reality and especially to the conduct of men to each other and to non-human nature which are just irrelevant from the standpoint of the "legal rule". In the practice of the cultural sciences this is continuously the case.

In contrast it is a fact, to expand on our earlier remarks, that important branches of the empirical disciplines of cultural life, in particular political and economic study, make use of juristic concepts not only terminologically as we have said, but also as a kind of *prestructuring* of

their own material. Primarily it is the highly developed state of legal thought which fosters this borrowing for the purpose of a provisional ordering of the multifarious actual relations which surround us. But for that reason it is necessary always to remain clear that this juristic pre-structuring is abandoned as soon as political and economic study brings its own "point of view" to the material and thereby translates the juristic concepts into facticities of necessarily different meaning.

But there is no greater obstacle in the way of this acquisition of knowledge than the desire to raise legal ordering to the level of a "formal principle" for knowledge fitting human communal life because legal concept formation renders such important services. The error comes so close simply because the *actual* importance of the empirical "legal order" is so significant. For as has been said, leaving the sphere of study where processes are only "interesting" because of their legal relevance means that the significance of the "legal rule" as a "presupposition", as an organizing principle for the delimitation of the object, disappears. But, on the other hand, the universality of the *causal* significance of the "legal rule" for any study of the behaviour of men to each other, to take the comparison with skat as our example again, is extraordinarily great for two reasons. The "legal rule" empirically is normally furnished with the power of coercion. Moreover it has the utmost universal range of validity.

In skat in general no one has to join in and submit himself to the effects of the "empirical validity" of the rules of skat. On the other hand it is *de facto* impossible to avoid constantly, (even prior to being born) crossing the territory of states of affairs which are "relevant" to empirical legal orders. Looked at empirically one continually becomes a "potential legal skat player" and has to adapt one's behaviour to this situation whether out of maxims of expediency or legality. Certainly in this sense, speaking empirically, the existence of a "legal order" belongs to the universal empirical "presuppositions" of such actual behaviour of human beings to one another and to non-human objects. It makes the very existence of "cultural phenomena" possible. But in this sense it is an empirical datum, in the same way, say, as a certain minimum of solar warmth is also, and hence belongs simply among those causal "conditions" which help to determine that behaviour. In an actual time and place a specific concrete "state of affairs" belongs to the "legally ordered" in the same way as the objective legal order in the empirical sense. Thus, returning to our example of the smoking chimney, such a state of affairs is the extent of the effects of the smoke nuisance, where the neighbour has the prospect of the support of the "legal order" to ward it off, that is he has a corresponding "subjective right".

From an economic standpoint this simply offers him an *actual probability*, but this is "calculable" in the same *logical* sense as any "technical"

process or a result in skat and it amounts to calculating that the “judges”:-

- (1) will strictly observe the maxim to come to a decision “according to norm” and are, therefore, incorruptible and conscientious;
- (2) will “interpret” the meaning of the legal norm in the same way as the person annoyed by the chimney or as his lawyer;
- (3) can be successfully brought to the conviction in practice that in their view the “norm” should be applied;
- (4) will make the decision in accord with the norms and this will be followed by compelling its implementation.

If the desired result is now obtained then undoubtedly the “legal rule” has causally influenced the non-smoking of the chimney in future, in spite of Stammler’s protest against this possibility. Naturally this is not imagined as an ideal “ought” (“norm”) but as actually bringing about specific behaviour on the part of participants, such as neighbours, bailiffs or judges, in whose heads it existed as a maxim for the decision.

The “rule” character of the “empirical legal order” means that it is an ascertainable datum and as such it is known to a plurality of people that the maxims of the judge amount to attaching and enforcing a generally identical decision between conflicts of interest to certain *generally* specific states of affairs. The “legal norms” then possess the character of generalised propositions, “legal rules”, and exist in this form as maxims in the heads of the judges. These circumstances produce directly or indirectly the *empirical* regularities in the actual behaviour of men to one another and with goods. There is no suggestion, naturally, that the empirical regularities of “cultural life” constitute general “projections” of the “rules of law”. But the “rule” character of law *can* have empirical regularities as an “adequate” result. It is then *one* causal element among others of this empirical regularity.

The great importance of it as a determinant in this respect depends on the fact that empirical human beings are normally in their nature capable of a “reasonable” grasp and pursuit of “purpose maxims” (empirically considered) and of possessing “norm conceptions”. In consequence the legal “regulation” of their behaviour is capable of securing under some circumstances a greater empirical “regularity” than the medical “regulation” of a man’s digestion can obtain in the way of physiological “regularity”. But imputing the causal determinacy of empirical regularities to the empirically available rules of law (as maxims of specific people)

varies in kind and degree, wherever it is pertinent at all, and from case to case. It is certainly not in general determinable.

The legal rule is the decisive cause for the empirical “regular” appearance of the government official in his office in a quite different way and degree than for the empirically regular appearance of the butcher, or for the empirical regularities in the way men dispose of their supplies of money and goods which they actually control, or for the cycles of the phenomena termed “crises”¹⁴ and “unemployment”, or for “price” movements after harvests, or for birth rates with increases of “prosperity” or increasing intellectual “culture” in specific human groups.

When empirically a specific “legal proposition” is newly created it means the following. An empirical plurality of human beings is *accustomed* to a specific method which is usual for the “fixing” of legal rules and is *regarded* as binding on them and a “symbolic” process takes place which corresponds to these customs. The effect of this fact upon the actual behaviour of these people and of those they in turn may influence is in principle as accessible to “calculation” from experience as the effect of any “natural facts”. Thus general propositions from experience about the “effects” are possible and take just the same form as other propositions with the schema: whenever x happens, y follows. These are familiar to us in the everyday world of politics.

These *empirical* “rules”, which express the adequate “effect” of the empirical validity of a legal proposition are from a logical point of view naturally the extreme antithesis of those *dogmatic* “rules” which can be developed as “consequences” of the same legal propositions if they are treated as the object of jurisprudence. This happens because each undertakes a quite heterogeneous conceptual operation with a particular fact, even though both start with the self-same empirical “fact”, that a legal rule with specific content is considered to be valid.

One can call a study “dogmatic” because it remains in the world of “concepts”. Then its antithesis is considered to be “empirical” in the sense of any causal study whatsoever. There is however nothing to stand in the way of calling the empirical-causal “view” of “legal rules” “naturalistic” in contrast to their treatment in juristic dogmatics. One only has to be clear that then the totality of all empirical reality is being designated “nature” and that then includes “legal *history*” which logically is a “naturalistic” dis-

14 There is no plan to undertake here an analysis of the *empirical* content of the states of affairs corresponding to these concepts.

cipline. It is the *facticity* of legal norms and not their ideal *meaning* which makes up its object.¹⁵

We are not going on here to analyse “the conventional rule” and to relate it in a similar fashion to actual “regularities”. We will shortly have to discuss the way Stammler defines this concept. “Rule” in the sense of an imperative and “rule” as an empirical “regulatedness” are logically different things and as miles apart as in the case of “legal rules”. For any study of *empirical* regularities conventional rules are causal determinants turning up in the object of study in the same sense as legal rules and are equally neither “form” of existence nor “formal principle” of knowledge.

The reader will anyway have long tired of our complicated presentation of absolutely self-evident facts, especially as their formulation has been crude and imprecise since, as we have said, it is only provisional. But

- 15 The conceptual operations of “legal history”, it may be remarked in passing, are by no means so simple to classify logically as might at first sight appear. Thus, what does it mean, from the *empirical* point of view, to say that a specific legal institution was “valid” in a specific past time? The fact that the principle is to be found printed in symbols of printer’s ink in a file passed down as a “law book” is certainly highly important, but is not necessarily the only decisive indicator. Often this source of information is totally lacking and furthermore it always requires “interpretation” and “application” to a specific case, and that can again be a source of problems. The logical “meaning” of that “past validity” in the sense of legal history may be expressed in a hypothetical proposition. If a “jurist” had been applied to for a decision of a conflict of interest in accord with legal rules of a certain kind, a decision of a certain content would have been expected with substantial *likelihood* in accord with the customary juristic ways of thinking as known to us to have been in force, no matter what our sources might be. But we will be all too easily inclined to ask, instead of the question, “How ‘would’ the judge have probably actually decided?”, this question, “How *should* he have decided in this case?” Thus a dogmatic construction is brought into the empirical study. This is all the more likely because (1) we cannot do without such a construction as a “*heuristic means*”. Quite regularly we proceed perforce that we first interpret the historical “legal sources” dogmatically and then “test” where necessary and possible this historical-empirical “past validity” of our interpretation against the “facts” (handed down judgements etc.) (2) In order to achieve the establishing of the “past validity” at all, we very frequently, indeed regularly, resort to *our* interpretation as a means of presentation, in that otherwise a connected account of historical law would not be possible in intelligible form, for a firm, unambiguous and consistent juristic concept was not developed or not universally accepted (consider “investiture” in certain mediaeval sources). In this case we will naturally seek to establish with care how far the one or other of the “theories” we have developed as possible correspond to the empirical “legal consciousness” of the men of the time. Our own “theory” serves us as the provisional schema of the order. But the “legal consciousness” of men of the time is by no means necessarily something unambiguous and still less a given without contradictions. In each case we are employing our dogmatic construction as an “ideal type” in the sense I developed elsewhere. Such a conceptual structure is never the *end* point of empirical knowledge, but always either a heuristic or presentational tool (or both). Following this argument a legal-historical rule, that is a “legal rule” which has been established as empirically “valid” for a historical period of space and time functions similarly as an “ideal type” for the *actual* behaviour of the people who are potentially covered by it. We proceed from the probability that the *actual* behaviour of the people of the time in question has adapted to it at least to a certain extent. Then we “test” where necessary and possible the hypothesis of the existence of corresponding “legality maxims” among the people of the time against the “facts”. There follows as a consequence the frequent substitution of the “legal rule” for the empirical “regularity” and the juristic terms for economic circumstances.

he will be forced to hold that the sophistry of Stammler's book unfortunately requires these distinctions because all the paradoxical "effects" he strives for and achieves depend among other things upon a continual confusion of "regular", "regulated", "legally regulated", "rule", "maxim", "norm", "legal rule", "legal rule" as object of conceptual juristic analysis, "legal rule" as empirical phenomenon, i.e. as causal component of human action. "Is" and "ought", "concept" and "the conceptualized" we well know, whirl around in and out of each other. This is not to mention, as will be apparent, the repeated confusion of the different meanings in which "rule" is a "presupposition".

Were Stammler to read these pages, he himself would, to be sure, probably be inclined to refer with emphasis to the fact that all, or nearly all of what has been discussed here in such detail has been conceded as correct at various places in his book, and much has been explicitly emphasized. In particular he stated very forcibly that it goes without saying that one can treat the "legal order" as an object of a purely causal as much as of a "teleological" problem setting. To be sure! We will have to confirm that ourselves. But, leaving aside the accompanying defects which will show up, it will emerge once again above all that he himself has forgotten these simple truths with their equally simple consequences at other points, and exactly at the *decisive* points, in the book. This forgetfulness certainly was very much to the advantage of the "effect" of his book. Had he, namely, at the beginning said straight out that he was simply concerned with the "ought-to-be" and that he wanted to demonstrate a "formal" principle which would provide a guide for the legislator in questions of legislation or for the judge where his fair "assessment" is appealed to, then such a project, whatever one might think about the worth of the actual proposals, would have stimulated a certain interest. But it would then have been obviously completely irrelevant for empirical "social science". Stammler would, above all, have had no occasion to write that extensive but also imprecise discussion of the nature of "social life". We now turn to a critique of that in order to develop further the analysis of what up to now has been a quite provisional sketch of the contrast between empirical and dogmatic methods of study.¹⁶

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1864-1920

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16 A further article should have followed. The incomplete continuation found by Marianne Weber in the literary remains of the author is printed at the end as a postscript. (*Gesammelte Aufsätze, op.cit.*, pp.360-383).