NORMATIVITY OF LEGAL SCIENCE

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1. The problem of the so-called normativity of the legal science has been widely discussed in many methodological discussions. But this problem is not peculiar to legal science alone, since it is only one example of a wider discussion on all the social sciences, and particularly ethics. It seems that all these discussions involve many assumptions not stated clearly enough and that at least an essential part of the resulting dissensions flows from the vagueness of the term «normative science» itself and it largely depends also upon the lack of adequate definition of some philosophical and methodological assumptions relevant to the problem in question. The historically known distinctions between descriptiveness and normativeness of science, between the peculiarities of the so called humanities versus the sciences, about the problems of cultural understandings and the place of values in the sciences do interfere here within the more or less sophisticated general framework.

I shall try now to analyze the principal possible meanings of the term «normative science», to state the principal general assumptions taken as granted in adopting each of these meanings and only then shall I formulate the problem if, and to what degree, legal science can be called «normative».

2. The term «normative science» is understood in several ways. It is not, however, within the scope of the present inquiry to give a description of the various meanings which are historically ascribed to this term. That catalogue could, of course, be put up as an inventory of its linguistic uses, but it would not be interesting for us here. It is sufficient for us to pick up only principal meanings of the term in question, treating them as models for the existent theoretical constructions. For these principal meanings I choose the following synonyms of the term «normative science»: (a) norm-making science, (b) norm-evaluating science, (c) norm-describing science and (d) science cognizing through norms (1).

(1) N. Bobbio differentiated two meanings of the normativity of legal

The philosophical presuppositions for the first three meanings may be treated jointly, as based upon a shared set of assumptions; the last one, must however be treated separately.

3. The first three meanings may be explained by analyzing the semantic categories of propositions, norms and value-judgments. Let us determine these categories in so far as it is necessary for our problem.

By sentences we mean here the linguistic utterances which, preceded by the expression «It is true that...» or «It is false that...» are meaningful in a given language (2).

By norms we mean here linguistic utterances of the form «In conditions C person P should behave in manner Z», «In situation S a person P has a duty to do D (or has a right to do R)», «One ought to behave B» etc (3).

By teleological rules we mean here the linguistic utterances of the form: «If you wish to obtain G, you ought to do B».

It is important to differentiate between norms and technical rules, in discussing the relation of norms to sentences. The reason is, that while the problem of the truth-value of norms is an area of violent and fundamental disagreements, the teleological rules are, with some exceptions, understood as some kind of transformations of sentences stating the causal nexus in the language of prescriptions and, hence, one treats the truth-value of teleological rules as depending in the same way on the truth-value of corresponding sentences (4). I cannot here discuss in detail the problem of differentiating norms from teleological rules, but it may be important to

science, corresponding to our (a) and (c). See N. BOBBIO, *Scienza e technica del diritto,* Torino 1934, p. 6-9. The author formulated the opinion, that legal science can be treated as a «normative science» only as a technical knowledge (*loc. cit.,* p. 9 and seq. and chpt. III).

(2) Comp. H. VON WRIGHT, *Norm and Action,* London 1963, p. 18, 22.

(3) Our term «norm» corresponds roughly with v. Wright's «prescriptions» or «regulations», H. VON WRIGHT, *op. cit.*, p. 7.

(4) Comp. about the truth-value of teleological rules E. GOBLOT, *Traité de Logique*, Paris 1947, p. 369 sq.; A. PAP, The Verifiability of Value-Judgments, *Ethics* 3, 1946, p. 180 and seq. According to H. von Wright «technical norms »are neither descriptive nor prescriptive and they should be differentiated from anankastic statements (H. VON WRIGHT, *op. cit.*, p. 10, 103).

emphasize, that the reduction of norms to teleological rules seems to me unsatisfactory on the semantic level of analysis. It is true that at least some norms are created as means to achieve one or more purposes, but this moment does not make them teleological rules, similarly as aims of the commanding subject do not transform an order into a teleological rule ([5]).

The most essential question is, whether norms are sentences, and, hence, whether they are true or false. The problem has been discussed from several points of view. In our present perspective it may be treated as related to the question of the meaning of norm.

There are three principal positions in dealing with this question: the first one states that there is an essential difference between norms and sentences, the second reduces the meaning of norms to the meaning of some sentences, and the third sustains the view that there are no arguments now determining the decision ([6]).

Those asserting the essential difference between norms and propositions underline the difference between the descriptivity proper to propositions and the prescriptivity proper to norms. This difference on a pragmatic level of analysis consists in the functions of propositions and norms. The former are used chiefly (but not exclusively) to describe (more or less truly) certain things or events, and only secondarily are thought of as means for inducing human actions. The latter, however, primarily are used as stimuli to evoke certain actions, and only secondarily can they be used as descriptions ([7]). All depends on determined situations, and our formulation is a very rough one, since on the higher level of theo-

([5]) Comp. J. WRÓBLEWSKI, *Zagadnienia teorii wykladni prawa ludowego*, Warszawa 1959, p. 57 and seq.

([6]) See for a more detailed discussion of the problem J. WRÓBLEWSKI, *Zagadnienia...; op. cit.*, p. 55-77; J. WRÓBLEWSKI, The Problem of the Meaning of the Legal Norm, *Österreichische Zeitschrift für öffentliches Recht* 3/4, 1964, p. 253-263; J. WRÓBLEWSKI, El Problema del significado de la norma juridica, *La Ley 7.X.1965*, passim.

([7]) Comp. e.g. H. FEIGL, Logical Empiricism in *Readings in Philosophical Analysis*, ed. H. FEIGL and W. SELLARS, New York, 1949, p. 7; Ch. MORRIS, *Signs, Language and Behaviour*, New York 1946, p. 96-8; M.M. LEWIS, *Language in Society*, London 1947, p. 121; H. VON WRIGHT, *op. cit.*, p. 96-103.

retical abstraction we can treat each linguistic simple or complex sign as a stimulus to evoke some response within the behavioristic theories of meaning (8). But for our purposes it is sufficient to underline that functional difference, which is obvious e.g. when comparing the functions of the law-maker issuing a norm and of the social scientist asserting the existence of some customs within a given spaciotemporally determined social group.

Semantically the difference in question is expressed by statements that if norms have a meaning, then it is an other meaning than that characterizing sentences. If the latter have any meaning «proper» or «descriptive», then the former have some kind of «emotive meaning» or a meaning close to that of exclamations (9). Norms and sentences do belong to other semantical categories and, hence, they cannot be coupled in any relations of inference of one from the other.

The second position, that is, the position reducing the meaning of norms to that of sentences, has many formulations. As the principal kinds we can mention: a norm as a sentence about some objective ideal Ought; a norm treated as a teleological rule reduced to some sentences about the causal nexus relations; a norm as a synonym of a sentence asserting certain psychical or social phenomena. It seems to me, that this position either is related to some idealist ontology, or to a pragmatically false reduction of norms to teleological rules or to an equally pragmatically and semantically unconvincing substitution of meaning of norm with the description

(8) E.g. Ch. MORRIS, *op. cit. passim.* Comp. T. STORER, The Philosophical Relevance of «Behavioristic Semiotic», *Philosophy of Science* 1948, p. 318; L. BLOOMFIELD, Linguistic Aspects of Science, *Intern. Encyclopedia of Unified Science* IV, 1947, p. 9-13.

(9) About emotive meanings comp. e.g. Ch. L. STEVENSON, *Ethics and Language,* New Haven 1960, chpt. III; Ch.L. STEVENSON, *Facts and Values,* New Haven and London 1963, chpt. II, IX.; C.K. OGDEN and I.A. RICHARDS, *The Meaning of Meaning,* New York 1959, 8 ed., p. 123-6, 147-159; A. ROSS. On the Logical Status of the Propositions of Value, *Theoria* 1945, *passim*; T. S. SEGERSTEDT, Imperative Propositions and Judgments of Value, *Theoria* 1945, *passim.* The differentiation of descriptive and prescriptive language in legal theory comp. U. SCARPELLI, *Il problema della definizione e il concetto di diritto,* Milano 1955, chpt. I.

of its genesis, function, psychological or sociological phenomena related to its making or understanding etc ([10]).

The third position states that there are no sufficient arguments for a choice between these two positions ([11]). It seems that one can maintain such an attitude only so far as the decision in question does not influence the analysis of determined problems. But outside such a field the consequence of such an attitude would be that of giving two alternative solutions for each problem, which is hardly plausible.

Hence I can state without proving here my assertions that the semantic difference between norms and sentences is an essential one, that only sentences are true or false expressions, and that this essential difference should not be understood in such a way as to break the factual relationship between the norms and real facts and events conditioning their making and functioning.

So far I have been referring to norms and sentences that were not referred to other linguistic expressions. There are, however, such sentences and norms, as for example, sentences of the type: «sentence S is true» (sentence about sentence) or «the norm N is included in the text of normative act A» (sentence about norm) or norms of the types «sentence S should not be expressed publicly» (norm about sentence) or «the norm N should be enacted as soon as possible» (norm about norm). In semantical analysis all these expressions are on a higher level of language than the beforementioned ones. If the language containing norms or sentences referring to behaviour is a language of the N^{th} level, then the language of the expressions which are referring to the expressions of the language of the N^{th} level is a language of the N^{th+1} level ([12]). This distinction is of essential relevance for the problems of legal science enabling us to avoid a confusion between law and legal science expressions: «the same norm appearing in the text of a

([10]) For the literature, see positions referred to in note 6.

([11]) A. NAESS, «Do we know that basic norms cannot be true of false» ?, *Theoria* 1, 1959, p. 31 and seq. *passim;* A. NAESS, La validité des normes fondamentales, *Logique et Analyse* 1, 1958, p. 5 and seq. *passim.*

([12]) About levels of language comp. A. TARSKI, *Pojecie prawdy w jezykach nauk dedukcyjnych,* Warszawa 1943, p. 14, 18 and *passim;* R. CARNAP, *The Logical Syntax of Language,* London 1937, p. 153 and seq.

legal act and in a treatise of legal science semantically belongs to two different levels of language, and even to two different languages: to law-language and juridical language respectively» ([13]).

The third of the semantical categories, besides that of sentences and of norms, is one of value-jugdments. There is no need here to enter into a detailed discussion about the properties of value-judgements, and especially about the matter of their differentiation from sentences and from norms. Let us assume, that these problems concerning value-judgments are strictly analogous to those concerning norms ([14]). We should, therefore, distinguish proper value-judgments from teleological value-judgments; without reducing the former to the latter, we have to do with several theoretical positions as to whether value-judgments could or could not be reduced to some types of sentences. The position taken here is that there is an essential semantical difference between sentences and value-judgments proper. We have to distinguish, of course, between these value-judgments not referring to any linguistic expressions and those referring to them as belonging to different levels of language.

With the question of valuation in law there is a problem of linguistic utterances of the type «Behaviour B in accordance with the norm N». The question is what kind of linguistic utterance is it — a sentence or a value-judgment. It is evident, that the answer could have fundamental relevance to the characteristics of legal science using expressions of that kind — let us name them as «norm-relativised expressions». From the semantical point of view (not a psychological one), such norm-relativised expressions are sentences if the norm in question is not interpreted in this instance and does not include evaluative terms. The conditions are blocking the way for the evaluations necessary, as a rule, in each interpretation and are evidently inevitable if the norm in question is formulated evaluatively. When these conditions have been fulfilled, a

([13]) Comp. B. Wróblewski, *Jezyk prawny i prawniczy*, Kraków 1948, passim. J. Wróblewski, Jezyk prawny a teoria dogmatyki prawa, *Panstwo i Prawo*, 1958, p. 58-62.

([14]) Compare the discussion of ethical value-judgments in M. Ossowska, *Podstawy nauki o moralnosci*, Warszawa 1963, 3 ed., chpts. II, III, IV and notes 6, 9.

norm-relativised expression is simply a sentence about a meaning (or a part of a meaning) of the norm N in relation to behaviour B. Under these conditions when legal science is using them, it is formulating sentences.

Let us turn now to the meaning of the term «normative science» using the semantic categories of sentence, norm and value-judgment.

Firstly, «normative science» as a norm-making science would be a science creating norms. That creation would be analogous to that of a law-maker, but, as a rule, would not have a law-making authority proper to State organs determined by a given legal order. It is only exceptionally that positive law confers the law-making competence on the scientists. The expressions of such a science are norms.

Secondly, «normative science» as a norm-evaluative science would be a science about norms. Such a science would formulate expressions about norms, but their semantic character would not be a description, but an evaluation. That evaluation could be either an ethical or a political one. The expressions of which such normative science would be constructed are value-judgments.

Thirdly, «normative science» as a norm-describing science would be a science about norms consisting in their description. The expressions of such a science would be sentences about norms, or, eventually, about some facts related with norms too.

4. As was said above, the fourth meaning of the term «normative science» is that of a science cognizing through norms. Philosophical presuppositions of such a construction are based on the peculiarities of epistemology dealing with cultural objects. Namely the trend of thought culminating in the opinion that cultural objects are radically different from natural ones, and that the cognitive acts of humanities or cultural sciences must be radically different from those proper to (natural) science, was expressed in various versions of *Kulturphilosophie* and theories about the understanding of cultural objects as the specific method of studying culture ([15]). This trend of thought coupled with some interpreta-

([15]) Compare in legal theory G. RADBRUCH, *Rechtsphilosophie,* Stuttgart 1956, 5 Aufl., p. 91-105, 117 *seq.*; M.E. MAYER, *Rechtsphilosophie,* Berlin 1933, 3 Aufl., pp. 3-5, 31-39, and chpt. II.

tions of phenomenology formed the background for the new concept of normative science that we are now discussing. It was elaborated by the Egological Theory of law. Let us summarize briefly the egological notion of «normative science» in a very simplified manner, but sufficient for our present purposes.

Egology, accepting Husserl's regional ontology, differentiates four kinds of objects. There are: (a) ideal objects (unreal, not given in sensory experience, neutral to values), (b) natural objects (real, given in sensory experience, neutral to value), (c) cultural objects (real, given in sensory experience, evaluated positively or negatively), (d) metaphysical objects (real, not given in sensory experience, evaluated positively or negatively) ([16]). Putting aside the analysis of all regions of objects with corresponding cognitive acts, we shall concentrate upon cultural objects, because it is among them that egology locates the law.

Cultural objects are cognized in the acts of «understanding» (*compresiòn*), and are constituted by two elements: the substratum and the meaning. The former is something material, given in sensory experience. But that substratum has to be understood through its meaning, evaluating it positively or negatively. The method of cognition is «empirical» so far as it must be based upon the empirical substratum, but is «dialectical» because that substratum must be taken with a meaning, comparing mutually one with the other in the successive aproximations until reaching the full cognition expressed in an «understanding» of this substratum. Among cultural objects there are «egological objects» that is, objects whose substratum is human behaviour. Law is, according to Egology, such an egological object and it is defined as human behaviour in intersubjective interference. Let us not enter into the rather complicated explanation of law defined in such a manner ([17]), because

([16]) C.Cosssio, *Teoria de la Verdad Juridica,* Buenos Aires 1954, p. 63-87; C. Cossio, *La teoria del derecho y el concepto juridico de libertad,* Buenos Aires 1964, 2 ed., p. 54-101.

([17]) C. Cossio, *Teoria de la Verdad, op. cit.,* p. 78-83; C. Cossio, *La teoria del derecho...,* op. cit., chpt. I; C. Cossio, *La teoria egologica del derecho, Su problema y sus Problemas,* Buenos Aires 1963, s. 17-40; J. Wróblewski, Law and Liberty in The Egological Theory of Law, *Österreichische Zeitschrift für öffentliches Recht,* 1-2, 1966, p. 7 and seq.

our interest lies in the role played by norms in cognition of law as this kind of behaviour.

According to Egology one can decide whether a determined behaviour is law not knowing anything about any norm. For by definition law is a kind of behaviour which can be described without any reference to any norm. But to qualify such behaviour as a duty, right, prestation or sanction it is necessary to understand it through a norm qualifying such behaviour in a definite manner. The role of norm is, hence, analogous to that played by a concept in a cognition of natural objects. We can make a constatation of their existence without any reference to concepts, but they are necessary to describe them. The norm is a means of cognition of law. The science about norms is a science about forms of cognition, it is a logic and not a legal science ([18]). And, in addition to that, Egology based on phenomenological logic does not differentiate a concept from a judgment (proposition), nor a norm from an expression about a norm ([19]). And, consequently there is a rejection of the differentiation of the semantic categories we have introduced above (point 3). It is evident that the truth and falsity values are ascribed here both to concepts and sentences and to norms.

Based upon such a philosophical framework «normative science» is understood as the science cognizing through norms. Within such a science there are all kinds of linguistic expressions — sentences, norms and value-judgments, all of which have some kind of truth-value and all of which are necessary for dealing with the law as an egological object. Such a science is not neutral toward its object — the cognition of a legal science is a protagonist cognition, and the model of such cognition is the attitude of the judge deciding a case ([20]).

([18]) C. Cossio, *Teoria de la Verdad, op. cit.*, p. 104-106; C. Cossio, *La teoria egologica, op. cit.*, chpt. II, 2; E.R. Aftalión, F. Garcia Olano, J. Vilanova, *Introducciòn al derecho,* Buenos Aires 1956, vol. I, p. 124-135.

([19]) C. Cossio, *Teoria de la Verdad, op. cit.*, p. 193, 212, 220-248; C. Cossio, La logica juridica formal en la concepciòn egologica, *La Ley* 20. III. 1959, p. 6 and seq.

([20]) C. Cossio, *Teoria de la Verdad, op. cit.*, p. 188-215; C. Cossio, *La*

5. Having now outlined the presuppositions of each of the principal meanings of the term «normative science» we can go one step further. The next problem is if, and to what a degree, legal science is a «normative science» in any of the above mentioned meanings of this term. To perform such an analysis it is necessary to delineate the scope of legal science. Legal science, like any other science, can be approached from two radically different points of view. The first one is the descriptive approach in which one is interested in legal science as it is done within a determinate time by some group of persons. The second is the approach formulating a program for the «true», «really scientific» etc., legal science directed towards bettering the actual legal science. Our interest is now exclusively in the former approach. We have, then, to define the scope of legal science as it is here and now. But even this task is not an easy one, because in the current usage of language the boundaries of «legal science» are very vague because of historical changes, and last not least, there are many differences between science in different legal systems, the various types of organisation of legal education and legal traditions and ideology. We have, then, to simplify our problem of actual legal science by assuming that legal science always has to do with an elaboration of three fundamental groups of problems ([21]) though in changing proportions and in varying degrees.

The first group is concerned with the law in force, namely with the construction of legal material into a coherent whole, elaboration of various legal concepts and institutions, determination of the meaning of legal prescriptions and so on. This group of problems is traditionally regarded as the very corner-stone of legal science, forms the bulk of legal studies and has a very long tradition in the so-called legal dogmatics.

The second group is constituted by problems concerned with the psychological and sociological determination and functioning

teoria egologica, op.cit., p. 113 and seq., 127 and seq., p. 64 and seq., 545 and seq.

([21]) Comp. e.g. J. LANDE, *Studia z filozofii prawa,* Warszawa 1959, p. 369-414; J. STONE, *The Province and Function of Law,* Sydney 1950, 2 ed., chpt. I and especially § 10, § 13; A. ROSS, *On Law and Justice,* London 1958, p. 46.

of law. Although known from classical antiquity these problems only recently emerged as a basis for identifying new kinds of research.

The third group of problems contains the questions of evaluation of existing law, of postulates towards law-making, law-applying and law-interpreting activities stating how they should be done.

These three fundamental groups of problems are dealt with in contemporary legal science. The controversial questions, however, are whether and to what degree particular legal sciences are specialized in solving each group of the above mentioned problems and whether each science dealing with them is always to be considered as a part of legal science, and not a part of e.g. psychology, sociology, axiology or political science. These questions, however, are not decisive for our purpose — we can assume, thus, that as a rule, all three groups of problems are proper to legal science as a whole.

After the preliminary outlining of the three groups of fundamental problems dealt with in legal science we have to analyze what is the impact they exert on the «normativity» of legal science. To do this we have to consider the kinds of linguistic utterances in which each group of problems is dealt with ([22]).

5.1. The first group of problems has to be divided into subgroups, the first concerned with problems of elaborating the conceptual apparatus of legal prescriptions and of its systematic ordering, and the second with the problems of legal interpretation and of the application of the law. The expressions related to the former are typically of the formula (5.1.1.) «the norm N_1 is in relation R to the norm N», (5.1.2.) «The person P_1 has a duty (right) D/R/ to person P_2 in legal relation R according to norm N_1», (5.1.3) «the norm N_1 is valid in legal system S during the time T», etc. The expressions related with the latter subgroup belong ordinarily to the type of formula (5.1.4) «the term T means M in the norm N (in the part of the system S)», (5.1.5.) «the case C is regulated by norms $N_1N_2...N_n$ taken in meanings M_1, $M_2...M_n$».

The semantic properties of determined kinds of these expressions

([22]) Comp. J. WRÓBLEWSKI, O naukowosci prawoznawstwa, *Panstwo i Prawo* 8/9 1965, p. 196 and seq.

are controversial. Without trying to settle these controversies it is, however, necessary to point out of what they consist.

The case of the expressions of the first subgroup is relatively easy, if we assume, that for them we do not use an interpretation of the norm in question. The expressions (5.1.1.) and (5.1.2.) then are the sentences about norms in the sense above determined. Only the expression (5.1.3) has a semantical status dependent on some theoretical constructions. Namely there is the question whether the expression (5.1.3) is a sentence about norm (that is a sentence asserting its validity) or a norm about a norm (that is a norm prescribing the duty to obey N_1) ([23]). The semantical status of (5.1.3) depends, thus, on accepting some legal theory about the validity of legal norm.

Expressions of the second subgroup are related to legal interpretation. The problem of the semantic character of the expressions dependent upon the results of interpretation is determined by the views about the character of legal interpretation itself. The theories as to the nature of legal interpretation can be ranged within a *continuum* between two extreme solutions. One asserts, that legal interpretation is a description of meaning hidden in a legal text which, when extracted, is something objective and could be described with propositions about norms. The second extreme solution asserts that there is no such thing as meaning independent from the interpretative process, and that the interpreter creates (wholly, or partially) a meaning and ascribes it to the text. Thus, interpretative process is not cognition, it is a creation of norms according to the interpreter's views of what ought to be done. The result of such interpretative process is not a proposition, it is a norm. It seems to me, that the meaning of a legal norm ascertained as the result of interpretative process is to be relativized to the

([23]) E.g. validity as some kind of fact: A. Ross, *On Law and Justice*, p. 41 and seq.; validity of norm conditioned by other norms within a given legal system e.g. H. Kelsen, *General Theory of State and Law*, Cambridge 1949, p. 112 seq.; A. Merkl, Prolegomena zu einer Theorie des rechtlichen Stufenbaues, in *Gesellschaft, Staat und Recht*. Untersuchungen zu reiner Rechtslehre, Wien 1931, p. 254 and seq. Discussion on both manners of treating validity see A. Ross, *Towards a Realistic Jurisprudence*, Copenhagen 1946, p. 57-73.

directives of legal interpretation used in this process. There are many such directives and they are often contrary and, hence, there is often the necessity for a choice between them, and between results obtained by using them. This choice is based on accepting some values ([24]). One can show that in most interpretative processes there are involved several evaluations ([25]). Without entering here into these very important but very controversial topics of the theory of legal interpretation let us assert, without any proof, two theses. First, if one will not relate interpretative expressions to the accepted directives of interpretations, then these expressions either are not propositions or are only elliptic (incomplete) expressions. Second, if interpretative expressions are related to the interpretative directives used in finding the meaning of the legal norm in question, then such expressions are sentences about norms containing the formula «the meaning M of the Norm N_1 according to the interpretative directives ID_1, $ID_2 \ldots ID_n$».

5.2. The second group of problems dealing with the conditions determining the genesis and functions of legal norms may be formulated as expressions of the type (5.2.1) «the norm N_1 was created in condition C_1, $C_2 \ldots C_n$, (5.2.2.) «application of the norms N_1, $N_2 \ldots$, N_n gives effects E_1, $E_2 \ldots$, E_n», (5.2.3.) «the norm N_1, is an effective means for achieving goals G_1, $G_2 \ldots G_n$», (5.2.4) «State organs apply (shall apply) the norm N_1 in the meaning M_1», (5.2.5.) «the adressees of the norm N_1 react (shall react) in the manner R to this norm», etc. Expressions of these types are sentences describing some social or psychic facts or processes, and, hence, are verifiable, although this verificability may be technically not always easy ([26]).

5.3. The third group of problems is characterized by expressions of the type (5.3.1.) «the norm N_1 has a positive value (e.g.

([24]) Comp. J. WRÓBLEWSKI, *Zagadnienia, op. cit.*, chpt. IV, VIII; J. WRÓBLEWSKI, Semantic Basis of the Theory of Legal Interpretation, *Logique et Analyse* 21/24, 1963, p. 404-415.

([25]) Comp. J. WRÓBLEWSKI, Wlasciwosci, rola i zadania dyrektyw interpretacyjnych, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4, 1961, p. 100 and seq.

([26]) Comp. U. SCARPELLI, Il problema della definizione, *op. cit.*, p. 104 and seq. 116.

is good, just, right), (5.3.2) «one should create a norm N_1», (5.3.3) «one should understand the norm N_1 in a meaning M_1». These expressions are either value-judgments about norms (5.3.1.), or norms about norms (5.3.2, 5.3.3).

The three groups of expressions corresponding to the three groups of problems dealt with in legal science do not cover, of course, all the expressions appearing in legal science, but form a part of them sufficiently characterizing legal science as a whole. We can assume, that the expressions of the three aforementioned groups exist in legal science in a sufficiently high degree for us to treat them as relevant to the problem of its «normativity». This «sufficient degree» is of course quite undetermined here, but it is not necessary for our purposes to try any exact measure. If one treats some expression as *sit venia verbo* «a foreign body within the law science corpus», then one can not treat the consequences of its existence for the problems of the normativity of legal science as being relevant in the case in question. Our problem, then, can be stated in the following way- if the expressions of each of the aforementioned groups do exist to a sufficient degree in legal science, then could this science be treated as a normative science in each of the meanings of this term, or not ?

6. To answer this question, we have to go back to the four meanings of the term «normative science »and analyze them one by one in the light of the three groups of expressions appearing in legal science.

The meaning of «normative science» as a norm-creating science can have only a relatively narrow application to legal science. Legal science, if it formulates any norms at all, formulates them in another manner than the law-maker ([27]). Omitting the law-making activities of science within legal authorization, legal science does not formulate legal norms, but postulates the creation of norms by the law-maker. Hence, if one would like to treat legal science as a norm creating science ,one should take into account only norms about norms. Assuming some theoretical construc-

([27]) The clear cut distinction between norms issued by the law-maker and norms stated in legal science; comp. e.g. H. KELSEN, *General Theory*; *op. cit.*, p. 45, 164; H. KELSEN, *Reine Rechtslehre*, Wien 1960, 2 Ausg., p. 73-83; A. ROSS, *On Law and Justice, op. cit.*, p. 9 and seq.

tions such kind of expressions could be found : expressions about the validity of norms (5.1.3), about the meaning of norms (5.1.4, 5.1.5) and norms postulating the creation of some other norms (5.3.2.). The last group is explicitly taken as *de lege ferenda,* while the first two could be treated either as expressions *de sententia ferenda,* or more often they are treated as some kind of propositions without any normative character whatsoever. To discuss this problem is not, however, possible within the scope of our present investigation.

«Normative science» as norm-evaluative science can be applied to the value-judgments about norms, qualifying them as just, right, good etc (5.3.1). The question of to what degree such expressions are «justified» within a legal science depends upon the very essential question of the scientific character of the evaluation. Without entering here into this problem, we may limit ourselves to the assertion, that there are philosophical positions for which such an evaluation in law is necessary. The first example provides a natural law doctrine in which there is an immanent necessity for evaluating positive law taking as criteria for evaluation norms of natural law ([28]). The second example is formed of legal theories asserting the political involvement of the law resulting in the need for its political (and often ethical) evaluation. As examples of such an attitude may be taken some formulations within marxist legal science or policy oriented jurisprudence ([29]).

Legal science according to each of them can be treated as a normative science. I have to add, that there is a possibility of evaluating legal norms, which does not conduce to such kind of normative science. The way to do so consists in a relativization of evaluation. Namely, it seems worth while to differentiate an evaluation *tout court,* as expressed in value-judgments (e.g. «the

([28]) Natural law doctrine can be defined as a doctrine asserting the superiority of natural law over positive law, and thus, the latter must be evaluated from the point of the former. Comp. N. BOBBIO, *Giusnaturalismo e positivismo giuridico,* Milano 1965, p. 128.

([29]) Comp. O. S. JOFFA and M. D. SZARGORODSKI,*Zagadnienia teorii prawa,* Warszawa 1963, chpt. I. About policy-oriented jurisprudence: K. OPALEK - J. WRÓBLEWSKI, *Współczesna teoria i socjologia prawa w Stanach Zjednoczonych* A. P., Warszawa 1964, chpt. VI.

norm N_1 is just») from relativized evaluation, as expressed in sentences about value-judgments (e.g. «the norm N_1 is just according to the normative system S»). The former we may call «primary evaluation» and its acceptance in science is determined by accepting the evaluative activities into scientific activities, the latter — we may call it «secondary evaluation» — does not preclude the above mentioned question but tends to limit legal science to the formulation of sentences ([30]).

The third meaning of normative science as a science describing norms is evidently accepted very widely. All sentences about norms are to be included here (5.1.1, 5.1.2) and testify to the fact that the very long jurisprudential tradition can be rooted firmly within the framework of actual semantic analysis. But, as was shown above, the semantic characteristics of some expressions thought of as a «description» of norms, namely those about the validity (5.1.3) and meaning of norms (5.1.4, 5.1.5), do raise some doubts about their semantic qualifications, and that these doubts are to be solved within a determined broader theoretical framework.

The fourth meaning of normative science, that is as science cognizing through norms, does not depend on the kinds of expressions used in legal science. It depends, as was shown above, on the determined philosophical and epistemological approach to law treated as a determined kind of human behaviour. When these general assumptions are accepted, legal science is «normative» in the above mentioned meaning of that term.

Summing up we can conclude, that legal science can be treated as normative science, according to the meaning attributed to that term ,if it is characterized by the three fundamental groups of problems and the corresponding kinds of expressions or if characterized by special philosophical and methodological assumptions.

7. We have been discussing the normativity of legal science taking to it a descriptive approach. There is, of course, the possibility of a normative approach when issuing programmes for legal science. These programmes are of course based on a general

([30]) J. Wróblewski, Zagadnienia przemiotu i metody teorii panstwa i prawa, *Panstwo i Prawo* 11, 1961, p. 752.

philosophical and theoretical outlook and on determined views as to what is the law.

If law is defined as a norm (or system of norms) then expressions of legal science are only expressions about norms. And if only description is «scientific», then such a science would consist only of sentences about norms. Such is the case of Kelsen's fully developed normativism.

If law is defined as a fact, then expressions about law are ones concerning facts. And if only descriptions are thought of as scientific then we have within legal science only sentences about facts. Such is e.g. realism as far as it treats law only as behaviour of persons related to the law ([31]). If however, law as fact is to be evaluated when cognized through norms, then within such a science there is no sharp distinction between sentence-norms, and value-judgments at various levels. Such is the position taken by the Egological Theory of Law.

If law is defined as a complex phenomenon, such as norms related with certain psychic and social phenomena, then within legal science there is a place for sentences about norms and facts. And, hence, these expressions will be sentences about norms, psychic and social phenomena. But when one accepts too the possibility of scientific evaluation, then one must add also value judgments treating the law in logical, psychological, sociological and axiological dimensions ([32]).

Each program can give a starting point for the appraisal of the existing legal science. The result of it may be either the banning of some expressions as not «properly» belonging to legal science (e.g. *actio finium regundorum* performed by normativism) ([33]) or the postulating of new areas of research (e.g. criticism of legal science built upon *Begriffsjurisprudenz* model) aiming at the in-

([31]) E.g. K. N.LLEWELLYN, *The Bramble Bush,* New York 1951, p. 12.

([32]) Comp. J. WRÓBLEWSKI, *Zagadnienia przedmiotu i metody ..., op. cit.* p. 752 and seq.; J. WRÓBLEWSKI, *Zagadnienia naukowosci pranoznawstwa, op.cit.*, p. 200 and seq., K. OPAŁEK, *Problemy metodologiczne nauk prawnych,* Warszawa 1962, chpt. III; W. LANG, *Obowiązywanie prawa,* Warszawa 1962, part. I, chpt. I.

([33]) H. KELSEN, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatz,* Tübingen 1911, Vorrede.

clusion of the topics of psychology, sociology and, eventually axiology ([34]) or all of them. Each program could be directed to legal science as a whole or to some determined kinds of legal science such as legal theory or a particular legal science (e.g. private or penal or constitutional law) ([35]).

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([34]) Comp. e.g. the methodological controversy between natural doctrine and positivism and the revolt against formalism, N. BOBBIO, *Giusnaturalismo ...*, *op.cit.*, chpt. IV, p. 141-143. Lately about the «legal dogmatics» in Polish discussions: S. EHRLICH, Kilka uwag w sprawie metodologii nauk prawnych, *Panstwo i Prawo* 11, 1964; J. WRÓBLEWSKI, O naukowosci prawoznawstwa, *op.cit.*

([35]) The present essay is a revised version of the paper J. WRÓBLEWSKI, Zagadnienia normatywnosci prawoznawstwa, from the volume «*Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybylowskiego*», Kraków-Warszawa 1964, p. 533-553.