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The Normative Force of the Factual

Legal Philosophy Between Is and Ought

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Preface

The idea for this volume originated in the aftermath of a panel organized by the editors at the XXVIII World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR) in the summer of 2017. Although the title of the panel was based on Georg Jellinek's notion of a "Normative Force to the Factual," the panelists came up with a broad range of ideas revolving around the topic so defined. Thus, the papers presented in Lisbon addressed not only Jellinek's theory of how facts may merge into norms but also the dichotomy of "is" and "ought" according to Kelsenian theory, the connection between law and force, the question of how discourse shapes our understanding of the normative sphere, and the fundamental problems of the concept of "normativity."

The diversity of these accounts reassured us that it would be useful to pursue further the topic of the interrelation of facts and norms and to ask still more friends and colleagues to join the conversation. We were pleased that so many of them accepted our invitation and we are even more pleased to present the result of our common efforts in this volume.

We would like to thank the editors of Springer's "Law and Philosophy Library" for including the volume in the series and Anitha Chellamuthu of Springer International for diligently looking after the volume. Anja Krasser and Laura Christandl kindly assisted in correcting the proofs. We are grateful for their support.

Finally, we would like to thank the contributors to this volume for sharing their knowledge and wisdom and thereby significantly enhancing our understanding of many of the aspects that are to be considered when it comes to the ties of facts and norms. We hope that our readers will benefit from their insights just as much as we did.

Geneva, Switzerland — Nicoletta Bersier Ladavac
Graz, Austria — Christoph Bezemek
Charlottesville, VA, USA — Frederick Schauer
February 2019

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Introduction

Nicoletta Bersier Ladavac, Christoph Bezemek, and Frederick Schauer

Law's 'normativity', its capacity to impose obligations, is among the great mysteries of jurisprudence; or so the bulk of the literature dedicated to the topic strongly suggests. As mysteries typically do, the mystery of law's 'normativity' (if there is indeed such a thing) derives from various sources. One of them (and one of major importance) is the question as to the interrelation of facts and norms.

This interrelation has become complicated as well as contested, at the very least since David Hume introduced the "Is-Ought-Problem" to moral philosophy 1739 in his paradigm-shifting "Treatise on Human Nature". There Hume denied that prescriptive statements could be deduced from descriptive statements. More than 150 years later G.E. Moore described what is nowadays commonly referred to as the 'naturalistic fallacy'. In his "Principia Ethica", published in 1903, Moore emphasized the difference between 'natural' and 'moral properties'. From a jurisprudential perspective the separation of 'is' and 'ought' remains a central tenet of positivist theory in general and of Hans Kelsen's "Pure Theory of Law", first published in 1934, in particular. To this day the relationship between 'is' and 'ought' persists as one of the major topics in any field of practical reasoning and, thus, for legal theory and legal philosophy.

Against this background, this volume intends to revisit the question of normativity and the interrelation of facts and norms from various perspectives and based on

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various theoretical approaches. The volume's title pays tribute to a concept introduced by the great constitutional theorist Georg Jellinek in his "Allgemeine Staatslehre", originally published in 1900. Analyzing what he designated the "Normative Force of the Factual", Jellinek raises questions such as: How does non-law become law in the first place? Which phenomena lie at the roots of this transformation? How is its result upheld? And how does it elapse?

To answer these questions, Jellinek dissects the human tendency to infer rules from recurring events, to perceive a certain practice not only as a fact but as a norm; a norm which not only allows to distinguish regularity from irregularity, but at the same time, to treat deviance as transgression.

Jellinek, arguably one of the greatest legal scholars of his time, remains understudied in Anglo-American academia. This volume, while dedicated to normativity and the interrelation of facts and norms in general and not to Jellinek's work in particular, seeks to take a step to lessen that gap, as the notion of a "Normative Force of the Factual" still allows for new insights into the interrelation of law and fact, into the emergence of normativity, and into the efficacy and the defeasibility of (legal) norms. This inquiry leads us back to early legal history, connecting anthropology with legal theory, and demonstrating the interdependence of law and the social sciences. In short, exploring the normativity of law invites us to transcend disciplinary boundaries.

At the same time, Jellinek himself would have cautioned us against accepting this invitation lightheartedly: Although he encouraged the analysis of the phenomena of law and state from various disciplinary perspectives, his approach remains opposed to excess methodological 'syncretism'. The various disciplines that help us to understand legal normativity are synergistically vauable, but they persist as separate perspectives. To adequately understand the notion of a "Normative Force of the Factual", thus, presupposes to understand Jellinek's scientific approach to the concept of the state.

In the first chapter of this volume, Oliver Lepsius' contribution fosters a Jellinek type of understanding, thereby also providing an introduction to those chapters that are arranged around Jellinek's position and its obvious tension to the separation of 'is' and 'ought' in positivist thought. It is this tension that the second chapter, written by Nicoletta Bersier, explores, in focusing on the problem of normativity according to Hans Kelsen's position and in raising the question as to the interplay of natural and positive law. Following that, in the third chapter, Matthias Klatt discusses two elements of Jellinek's thought: the "Normative Force of the Factual" and the "Two-Sided-Theory of the State"; assessing them in the light of Kelsen's position as described in the previous chapter and the nature of legal argumentation. In the fourth chapter, Christoph Bezemek sets out to reconcile Jellinek's and Kelsen's approach by emphasizing the dichotomous interrelation of fact and norm in light of a close analysis of the "Normative Force of the Factual". The fifth chapter, written by Andreas Th. Müller, brings in another core concept of Jellinek's work, the "three-elements-doctrine of the state", to the test of international law doctrine, raising the question of the relation of a fact-based approach to the formation of the state to issues of legitimacy.

Following on many of the positions discussed in these first five chapters, (while still going beyond them), a second group of contributions places the interrelation of facts and norms on a broader foundation. In the chapter "How the Facts Enter Into the Law", Clemes Jabloner asks the question of how the facts enter into the law, distinguishing 'facts of reality'—things as they are—and the 'state of facts' as established by a court when rendering a judgment. Michael Potacs, in the chapter "The Fact of Norms", introduces a difference between the 'normative' and the 'factual' existence of norms as a difference between a norm's validity and its meaning. And Alexander Somek, in the chapter "Ex facto jus oritur", explains how the concept of the 'legal relation' helps to understand the origins of the norm based on the facticity of practical reasoning by others.

A third group of contributions concludes this volume by focusing on (select aspects of) the problem of 'normativity'.

Jorge Nunez, in the chapter "The Many Forces in Law: Rational, Physical and Psychological Coercion", examines how Kelsen understands different variants of coercion (rational, physical and psychological) and why the Hartian tradition misunderstands the Kelsenian approach. The chapter "Legal Facts and Reasons for Action: Between Deflationary and Robust Conceptions of Legal Normativity", written by Noam Gur—takes the problem of normativity seriously, addressing the question whether the fact that the law requires an action can constitute a reason for its performance. Frederick Schauer's final chapter offers a contrasting approach, arguing that 'normativity' may not pose a distinct puzzle at all, but rather a non-puzzling instantiation of an array of different traditional perspectives, none of which proves to be particularly puzzling in its own right.

The different angles this volume offers on the problem (if there is indeed such a thing) of normativity and on 'is' and 'ought' are intended to serve three (even if hardly separate) purposes: to reintroduce Georg Jellinek's important theoretical concepts to the contemporary jurisprudential debate in Anglo-American academica; to clarify the interrelation of fact and norm in positivist thought; and to (somewhat) demystify the phenomenon of 'normativity'. Of course: accomplishing any of these goals would be no small achievement.

Georg Jellinek's Theory of the Two Sides of the State ("Zwei-Seiten-Lehre des Staates")

Oliver Lepsius

Abstract This chapter focusses on Georg Jellinek's specific approach to the concept of State: the Two-Sides-Theory which differentiates between a social and a juridical conception of the State. It analyses claim, content, methodology and context of this theory and shows that, from an interdisciplinary, epistemological and normative standpoint, the concept of State as expounded by Jellinek has retained its scientific attraction to the present day.

The concept of State has intensely intrigued legal studies, humanities, economics and social science, particularly in Germany.[1] The debates around the State almost inevitably pose methodological questions. Sometimes, they even turn out to be expressions of fundamentally diverging methodological convictions. "The State" is therefore a popular subject of general epistemological considerations, and Georg Jellinek, being one of the leading German legal theorists around the turn from the nineteenth to the twentieth century,[2] set new scholarly standards. Which discipline is competent for exploring its nature? From a juridical point of view, one may ask in particular whether the legal concept of the State is conceivable without taking into consideration sociological, historical, philosophical or political aspects. How can one overcome these interdisciplinary epistemological difficulties?

The expression "state" may denote a given situation as well as an ideal. It may refer to a state of affairs or to a normative standard—to an "Is" or an "Ought". No matter from which disciplinary perspective one approaches "the State", one has to acknowledge that it comprises both factual and normative components. How can one grasp a dimension that oscillates between the "Is" and the "Ought"? As a rule, the concept of State is linked to expectations regarding the political ordering. Yet how can one canvass these expectations without resorting to value judgements while

[1] See, e.g. Kelsen (1925), pp. 3–5; Thoma (1926), Matz (1974), Draht (1987), Boldt et al. (1990), and Vollrath (1998).

[2] On the biography of Georg Jellinek, see Kempter (1998). For brief accounts see Sinzheimer (1953), p. 61; Sattler (1993), and Kersten (2015).

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retaining a critical distance to ideology? A theory of State that claims to be "general"—as does Jellinek's *Allgemeine Staatslehre*—has to face the following issues: the relation of the academic disciplines to one another (interdisciplinary issues), the relation between the object and the method of investigation (epistemological issues), the relation of value-free science and political ideas (issue of theory and practice). With his theory of the two-sided State, Jellinek responded to all of these issues, offering a novel conception of the concept of State. It is not least due to these aspects that the theory has retained its importance up to the present day.

1 The Claim of the Two-Sides-Theory

1.1 Definition and Theoretical Basis

"The theory of the State has to explore the different sides of the state's nature. In accordance with the two perspectives, from which the state can be considered, the theory has two focuses. On the one hand the State is a social entity; on the other hand, it is a legal institution. Hence the theory of State has to be divided into the social theory of the State and the legal theory of the State."[3] In Jellinek's own words, this is the quintessence of the 'Two-Sides-Theory'. Jellinek claims that the State has a twofold nature being both a social entity, hence a matter of fact, and a legal institution, that is, a system of normative powers. The 'Two-Sides-Theory' considers the State as a single object of recognition with two different manifestations which have to be distinguished epistemologically and methodologically. It is this differentiation of methodological approaches that constitutes the Theory of the two-sided State. Jellinek (1900), pp. 19–20 sets out to investigate the same object, the state, using different methods which he refers to as "causal" approach and "normative" approach ("Kausalwissenschaft und Normwissenschaft"). The normative approach allows determining the legal side of the State, while the causal approach accounts for its factual side. Jellinek provides the juridical theory of State—the *Staatsrechtslehre*—with a specific normative epistemology while leaving everything else, that is, "the State" in its historical, philosophical and sociological dimensions to an unspecified "causal science". In his own words, "[t]his results in an important methodical difference between the social *Staatslehre* and the juridical *Staatsrechtslehre*. The former concerns the objective, historical and, as has been said not quite correctly, 'natural' being of the state, while the latter deals with the legal norms which are supposed to be materialized in this real being."[4] This methodological dualism reflects the

[3] Jellinek (1914), pp. 10–11: "Die Staatslehre hat den Staat nach allen Seiten seines Wesens zu erforschen. Sie hat zwei Hauptgebiete, entsprechend den zwei Gesichtspunkten, unter denen der Staat betrachtet werden kann. Der Staat ist einmal ein gesellschaftliches Gebilde, sodann eine rechtliche Institution. Dementsprechend zerfällt die Staatslehre in die soziale Staatslehre und in die Staatsrechtslehre."

[4] Jellinek (1900), p. 20: "Daraus ergibt sich ein wichtiger methodologischer Unterschied zwischen sozialer Staatslehre und Staatsrechtslehre. Die erstere hat das gegenständliche, historische, wie

Two-Sides-Theory: It explains what the theory is about and, at once, presents itself as the logical consequence of the latter.

Jellinek sets out the Two-Sides-Theory in the first pages of his "General Theory of the State" (*Allgemeine Staatslehre*). The fundamental differentiation governs the entire work.[5] Jellinek divides his "General Theory" into the parts: "Introductory Analysis", "General Social Theory of State" and "General Legal Theory of State". The first part mainly provides a methodological justification for differentiating the two sides of the State, both of which are subsequently illustrated in the second and third part. Further methodological justifications are provided at the beginning and the end of the second part.

1.2 The Program of the Two-Sides-Theory

Starting his analysis, Jellinek makes clear that the State is a multifarious phenomenon that can be considered from many different points of view. By fundamentally dividing his work into a "General Social Theory of the State" and a "General Legal Theory of the State" Jellinek puts this diversity into an order. He admits that the law is vital for the State as the State could not be conceived without it. However, he maintains (1900, 11) that the theory of the State should not be identified with the juridical theory of the State. Jurisprudence only forms a part of the overall area of investigation. It must be supplemented by the social theory of the State which considers its object as a social entity and which should be contrasted to the legal theory of the State. This differentiation and contrast is due to the diverging methodological approaches that prevail in both areas. Hence, confounding legal phenomena with that which antecedes the law is not permissible in the scientific representation of the issue."[6] According to Jellinek, only the combination of both aspects, the legal and the social theory of the State, can account for the epistemic goals of a general theory of the State: to scientifically depict the State as a uniform object.

Thus, Jellinek (1900), p. 12 opposes the line of thought according to which only a non-legal (sociological, historical, political) explanation of the state is appropriate[7] as well as the opposite opinion that maintains that "only the jurist was competent for resolving all the issues linked to the phenomenon of the State, with his own means of investigation." Jellinek distinguishes legal epistemology from all other kinds of epistemology. He argues that law is a genuinely different object of investigation. Law as the epitome of norms does not belong to the realm of the "Is", but is part of that what should be—the "Ought". Legal concepts do not aid in recognizing

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auch wohl nicht ganz zutreffend gesagt wurde, natürliche Sein des Staates, die letztere hingegen die in jenem realen Sein zum Ausdruck kommen sollende Rechtsnormen zum Inhalt.".

[5] Jellinek (1900), pp. 9–12; see besides that in particular 50–52, 136–140, 174–183.

[6] Jellinek (1900), pp. 11–12; regarding the clarity of methods see 25–30, 50–51.

[7] Jellinek (1900), pp. 12, and 162: a completed recognition of the state was impossible without the knowledge of its legal nature.

the reality, but are consulted for its evaluation. "By legal norms one cannot recognize reality. It is not up to jurisprudence to determine the "Is" of the state as such, but to arrange the given phenomena under fixed categories for certain purposes and to evaluate them in accordance with the abstract legal norms. Hence, jurisprudence is a science of norms (*Normwissenschaft*). It resembles logics which do not teach us what things are, but how they are to be conceived in order achieve consistent knowledge." (1900, 138) Legal recognition of an object fundamentally differs from the recognition of matters of fact. Its subject is "the recognition of legal norms originating from the State which are intended to govern the State's institutions and functions and the relationship between its factual elements and its legal standards. The juridical investigation of the State has to complement the social-scientific approach but should on no account be confounded with it. Its methodology is exclusively juridical." Jellinek proceeds (1900), pp. 138–139: "The misjudgment and obliteration of the difference that is illustrated here, has up to the present day been the cause of one of the most fatal misconceptions. The legal nature of the State and its institutions is continuously being confounded with its social reality. Indeed, it has not been realized at all that there are different ways of exploring the nature of the State."

1.3 The Juridical Starting Point of the Two-Sides-Theory

The Two-Sides-Theory is the corollary of a specific conception of juridical methodology. Since juridical methods are devised solely for the recognition of legal phenomena, complementary perspectives are necessary in order to grasp the State's nature. Lawyers are not able to recognize the State's nature by employing their methods. They are only competent for organizing and evaluating aspects of the State in light of normative criteria. According to Jellinek, the State "per se" (*an sich*) cannot be identified that way. The restriction and the "scientification" of juridical methodology calls for the expansion of the object of recognition in order to be able to describe a uniform phenomenon such as the "State". The Juridical theory of the State examines the norms of "State law" (*Staatsrecht*). The social theory of the State examines the State as a "social entity". This includes considering the law "in its capacity as a social function" (1900, 51), as an "actual factor in the life of the people" (1900, 21). By contrast, the juridical concept of the State does not aim at apprehending the "real nature" of the State, but at rendering it legally conceivable, that is, devising a conception under which all legal features of the State can be comprehended without any contradiction (1900, 163).

Therefore, the State has two sides: one legal and one social. Only their combination can describe the State as a uniform object. Differentiating the way of dealing with the state into a juridical and a sociological approach is not the result of two a priori manifestations of the state, but a methodological corollary. Juridical methodology is as unsuitable for grasping the social side of the State as is sociological methodology for understanding its legal nature. The different methodological approaches call for distinguishing the State into its two sides (1900, 27), but they do

not divide up the State as such. On the contrary, it has to be retained as a uniform object.

Jellinek had already outlined a large part of his methodological foundations before writing the "The General Theory of State". Eight years earlier, he insisted in his book "The System of Subjective Public Rights" ("Das System der subjektiven öffentlichen Rechte") that it was impossible to find a preexisting epistemological object, and that these objects rather had to be scientifically established by employing the methodology of the respective disciplines (1892, 15–20). As a consequence, by employing juridical methodology, one cannot contemplate an "Is", but only an "Ought" (1892, 16–17). One can understand the "General Theory of State" as a monumental implementation of the program already outlined before, and the theory of the two-sided State as its state-theoretical manifestation. In the "System of Subjective Public Rights", Jellinek had examined the methodologically appropriate recognition of an object by adducing a purely normative phenomenon as an instance. In the "General Theory of State", he applied his methodology to another object of investigation, one that cannot be clearly categorized as either "factual" or "normative": the State.

1.4 The Uniformity of the State as a Juridical Problem

According to Jellinek (1900), pp. 140–158, the nature of the State cannot be determined without presuppositions. In his eyes, it is neither an objective fact nor a moral organism. Jellinek opposes conceptual realism, misguided objectivity and naturalistic conceptions of state. He aims at rationalizing and "scientificating" epistemology by an approach free of value judgements and critical of ideology. Facticity and normativity are supposed to check on one another. Legal norms select the normatively relevant from the "factual mass" while facticity limits legal validity. Therefore, Jellinek (1900), pp. 172–175 controverts both realism and idealism insofar as they pretend to be objective. Nevertheless, he thinks fit to call his theory a "general theory" of State since only by employing juridical methodology can one grasp the State's uniformity and therefore its "generality". Every other individualistic or collectivistic, naturalistic or intellectual approach, in Jellinek's opinion, merely pretends to be realistic and empirical while still unable to explain the uniformity of the State. Hence, sociological, historical or philosophical examinations of the state are of limited value for him. At best, they may be of use for explaining aspects of the State which, in turn, depend largely on subjective presuppositions.

For Jellinek, the State's uniformity cannot be conceived as an objective intellectual or empirical entity, but only as an imagined entity. Thus, he poses the question: How we think of the State as a uniform entity? Jellinek (1900), p. 165 does not devise a theory for grasping the state in its real nature, but for discovering the concept of the State under which all legal features of the state can be conceived without any contradictions. As a general phenomenon, independent of specific historical and

social emanations, the "State" can indeed be conceived as a legal creation (1900, 183). Thus, Jellineks "General Theory" is primarily a juridical theory of the State.

2 The Content of the Two-Sides-Theory

2.1 The Social Conception of the State

Jellinek defines the social conception of the concept of State as follows: "The State is an association of sedentary people vested with original authority."[8] How does Jellinek arrive at this definition? According to him, neither the "Is" nor the "Ought" can be recognized autonomously. As a factual entity the State is subject to normative influences as much as it reconnected to facticity, being a creation of law. These reciprocal influences are coupled by psychological phenomena, namely the recognition of the belief that what exists ought to exist. The social conception of the State is, thus, the result of subjective attributions. It is neither naturalistic nor objective, but subjective and psychological. It results from a function of the mind (1900, 174). This psychological function that focusses on the human being shapes the social conception of the State.[9] Jellinek does not examine the social conception of the State as such, but rather he poses the question the other way round: How does a social entity come into existence by human recognition?

To be sure, the State, being a social entity, cannot be created by an individual mental operation. Its creation requires corresponding states of mind of all those who accept the State as a conceived order. Hence, the State as a social entity owes its existence to "the concurrence of mind of a majority of people".[10] Jellinek illustrates this by referring to the example of tradition. Although tradition may be powerful in infusing all social affairs, it does not derive its (objective or naturalistic) power from

[8] Jellinek (1900), pp. 180–181: "Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit seßhafter Menschen."

[9] Jellinek (1900), p. 174: "Social relations between humans in certain activities appear to be the sum/amount of the final objective elements of the state. More precisely they are, because the term amount/sum already implies a form of subjective synthesis, a juxtaposition and succession of certain activities that become clear in the relations between people. Therefore, it is in no way a substance but exclusively a form of function. The substance that underlies this form of function are the people. But this form of function is exclusively of psychological nature, an even if it also causes physical effects, these are always psychologically conveyed." In the original: "Als letzte objektive Elemente des Staates ergeben sich eine Summe bestimmter in Tätigkeiten sich äußernder sozialer Beziehungen zwischen Menschen oder, noch genauer gesprochen, da der Begriff der Summe bereits eine Form subjektiver Synthese bedeutet, ein Neben- und Nacheinander bestimmter, in Beziehungen von Menschen zu Menschen sich äußernder Tätigkeiten. Er ist somit nach keiner Richtung hin Substanz, sondern ausschließlich Funktion. Die dieser Funktion zugrundeliegende Substanz sind und bleiben Menschen. [Abs.] Diese Funktion ist aber ausschließlich psychischer Art, und wenn sie auch physische Wirkungen hervorruft, so sind diese doch stets psychisch vermittelt."

[10] Jellinek (1900), p. 176: "in den Willensverhältnissen einer Mehrheit von Menschen".

"the outside", but rather from "inner creation".[11] History has a bearing on the social theory of the State. It cannot be conceived objectively or naturalistically, but is to be learned by each generation anew. This way, Jellinek tries to explain why certain historical events trigger intellectual effects while others fall into oblivion. Forgotten events are not included in the collective "concurrence of mind". Therefore, basically every factor may influence the social theory of the State—political ideas as well as social circumstances. Of course, empirical conditions may become relevant too, but not by virtue of them being empirical—thus not due to being objective or naturalistic—, but by virtue of acknowledgement. We can think of numerous concurrences of mind, which are able to constitute different associations. In the context of State theory, Jellinek is of course, interested in the concurrences of mind that are related to authority. To be sure, Jellinek does not limit the State to the exertion of authority, but he understands authority as being constitutive of the State. For it is only the State that is able to unconditionally enforce its will against opposing intentions, and that, in doing so, exerts authority.[12] On this assumption, Jellinek may justifiably assert that the State is "an association of sedentary people vested with original authority".

In the course of his analysis, Jellinek applies these conceptual considerations to a couple of basic problems. In particular, he discusses the justification of the State, (1900, 184–229) the State's purpose, questions of emergence and demise of statehood and the historical prototypes of the State (1900, 287–331). This selection of topics shows that what really matters to him is the juridical recognition of the State. For this purpose, the social conception is merely instrumental.

2.2 The Juridical Conception of the State

The juridical conception of the State terminologically differs only slightly from its social counterpart. Jellinek gives the following definition: "Thus, as a legal concept the State is the corporate body of a sedentary people, vested with original authority" or "territorial entity vested with original authority."[13] The social and the juridical

[11] Jellinek (1900), p. 176: "Dark, subconsciously operating forces do not shape the continuity of all human affairs in a mystical way. The entire knowledge and skills of the past have to be recreated by an inner experience of every new race, by learning and experience. These processes predominantly belong to the sphere of consciousness." In the original: "Nicht dunkle, unbewußt wirkende Kräfte gestalten in mystischer Weise die Kontinuität aller menschlichen Verhältnisse. Vielmehr muß das ganze Wissen und Können der Vergangenheit durch inneres Erleben eines jeden neuen Geschlechts, durch Lernen und Erfahrung von neuem erzeugt werden, und diese Prozesse fallen überwiegend in die Sphäre des Bewußtseins."

[12] Jellinek (1900), p. 180: "Diese Macht unbedingter Durchsetzung des eigenen Willens gegen andere Willen hat nur der Staat."

[13] Jellinek (1900), p. 183: "Als Rechtsbegriff ist der Staat demnach die mit ursprünglicher Herrschermacht ausgerüstete Körperschaft eines seßhaften Volkes", bzw.: "die mit ursprünglicher Herrschermacht ausgestattete Gebietskörperschaft."

conception differ only in their references to legal categories—"territorial entity" (*Gebietskörperschaft*) instead of "corporate body" (*Verbandseinheit*), "a people" (*Volk*) instead of "people" (*Menschen*).

In order to illustrate the juridical concept of the State, Jellinek presents a sequence of attributional concepts of law. The general attributional concept "territorial entity" is divided into several elements which consistently are legal concepts and need not be derived from the tension between normativity and facticity, as in the case of the sociological-attributional concepts. Legal concepts are normative and can be applied with far less epistemological presuppositions.

Jellinek (1900), pp. 394–434 commences, introducing the following three elements that constitute the legal status of the State: people, territory, and authority (Staatsvolk, Staatsgebiet, Staatsgewalt). He examines important features like sovereignty, indivisibility of the State's authority and the ability of self-organization and self-governance. Jellinek describes the legal side of the State regarding its organization. The chapters on "constitution", "government bodies", "representation" and "representational bodies" are followed by chapters on the division of powers, decentralization and self-governance. Subsequently, a long section deals with the different types of government, primarily monarchy and republic from a historic and systematic point of view. A chapter on "associations of States" concludes the "General Theory of State". In this last substantial chapter, Jellinek deals with confederations and other legal forms of associations. What follows under the heading "The Guarantees of Public Law" is not more than a couple of pages on how the validity of law may be ensured by social, political and legal safeguards. These safeguards are not particularly elaborated. Hence Jellinek's *opus magnum* does not conclude with a summary or a synthesis of the two conceptions of the State.

Neither the general social theory nor the general juridical theory of the State addresses contemporary issues. The fact that they underlie many chapters of his book as *leitmotif* is due to Jellinek's methodological impetus aimed at overcoming State positivism and recognizing the importance of political ideas for constitutional law. Jellinek does not present suggestions for the solution of specific contemporary problems as this would contradict the theoretical standard of the book that claims to be a "general" theory of State. It would of course have enhanced the vividness of his considerations, had Jellinek illustrated his theory by practical applications.

2.3 The Systematic Relationship Between the Social and the Juridical Side of the State

It becomes clear that Jellinek's general theory of the State clings to a distinctive juridical point of view. Employing legal attributional categories, the "General Theory of the State" is an implementation of his epistemological program of explaining the State by legal concepts. In doing so, Jellinek has established many long lasting insights and concepts (i.e. the "Three-Elements-Doctrine" and his