

**“PLENTY OF NORMS, EMPTY MEANING.
HOW THE QUEST FOR MEANING IS NOT IMPACTED
BY NORMATIVE INFLATION”**

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Abstract

In this paper it is intended to evaluate the epistemological theory of Otto Neurath and Alf Ross regarding legal theory and norms. In order to do so, one particular phenomenon shall be examined: normative inflation. The fact that there are too many norms creates a specific situation for knowledge just like the absence of norms does. The hypothesis is that knowing “the” applicable norm is epistemologically equivalent whether there are too many norms or too few. In order to do so it seems interesting to rely on Neurath’s definition of knowledge that emphasizes its underdetermination and its uncertainty.

Keywords: *Epistemology, Legal science, Interpretation, Legal system, Validity, Alf Ross, Otto Neurath*

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I. Introduction and hypothesis

There is some sort of an issue with regulatory inflation. Every single authority speaks about it and everyone wants to reduce it. This paper shall use logical empiricism from the Vienna Circle and Scandinavian realism to show that, to a certain extent, situations of too much and too little normativity are epistemologically equivalent.

Firstly, let's start with a short hypothesis:

The quantity or quality of rules does not make it possible to get rid of the issue of the meaning because:

- a. humans cannot plan everything out especially because of the evolution of the world and of the human being itself;
- b. humans cannot grasp facts and “ought” statements exclusively rationally. There is a part of irrationality in the human interpretation of reality that does not depend upon the structure of the normative system.

II. Epistemological background: Otto Neurath and Alf Ross

Then, the epistemological background is Neurath's theory. Otto Neurath is an Austrian economist and epistemologist who wrote mainly between the 1910s and the 1940s. He is part of the core members of the logical positivist (or empiricist)'s Vienna Circle even though having not been trained in physics or natural sciences. His thought gives an epistemological account of social knowledge that might not have been thoroughly elaborated by other members of the Circle.

His general thought is best abstracted in this sentence from Cate Cartwright: “All science must be understood as practical knowledge infected with uncertainty and reliant upon educated guesswork”¹. It actually contains everything about what science is about, according to Neurath.

“All science” is literally every single area of study that has for an object an empirical reality. It outlines the importance of the unity of science project of Neurath who did not distinguish between social and natural sciences.

¹ Cartwright et al., *Otto Neurath*, 131.

They are always “practical knowledge” because every science is founded in historical reality and is oriented toward some sort of practice. All science is not technological but it is practical because of its relation with empirical reality.

It is “infected” because indeed it could be seen as a fault of science not to be certain and well founded, but it is, in fact, uncertain. There is no way to actually access fully rational and “raw data”² that could prove one hypothesis at a time.

It is “reliant upon [...] guesswork” because of its uncertainty, antifoundationalism and underdetermination. There is no *tabula rasa* and therefore accepting an hypothesis is never to give it certainty but to guess that, regarding other accepted hypotheses on the experiment itself or on more general assumptions, this hypothesis may be given a certain level of certainty in a general set of hypotheses.

Finally, this guesswork is “educated”. This basically refers to the idea that humans are not rational but try to be so when it comes to knowledge. We therefore create intellectual tools in order to guess—here meaning to take a decision in a given direction. To guess is to decide even though we are not certain. These tools are named auxiliary motives³.

This introduction to the thought of Neurath shall suffice for our purpose.

If Neurath has elaborated a great epistemology for social sciences, it has very little respect for legal science because of its object: norms⁴. Since norms do not exist in an empiricist way, their study is metaphysical, that is meaningless. Therefore, his theory shall be completed with the one of the Danish legal realist Alf Ross. The idea is however not to propose, in such a short paper, a whole epistemology for legal science. Some very important questions such as the status of law, its scientificity or methods will obviously be set apart.

² Cartwright et al., 121.

³ See Neurath, *Philosophical Papers, 1913-1946*, 4–6.

⁴ See for instance Neurath, *Philosophical Papers, 1913-1946*, 210.

III. Knowledge and its content: too much to know?

Here let's start from a postulate: there is an exponential tendency of a multiplication of normative statements. It is called normative, legislative or regulatory inflation. This is condemned by almost every authority in the world, from legislators writing new statutes, to judges elaborating new decisions and government enacting new regulations⁵. This inflation has become a reality for lawyers that students can feel when discovering what it means to study law, to learn the law. However, it may be considered that this question, if tackled by scholars working on positive law, has been set aside by legal philosophers.

Students have to learn the law and that it now means knowing a growing amount of "things". Here arises huge issues regarding these words when considered in the length of epistemology. What does it mean to learn, to know, what are those "things" that we are supposed to learn? And also, does it make any difference to study law when there are too many norms or when there are too few of them? Legal philosophy loves this latter question of judging a situation that is so new that it has not yet been regulated⁶. This is linked to the question of adjudication and interpretation: how can we interpret a text in such a way that the norm it creates applies to a state of facts? And especially when there is a difficulty based on the semantic distance between the common understanding of the meaning of the text and the common understanding of the facts.

IV. Example: "No vehicle in park"

Let's take a very classic example. The statement located in a regulatory text of a city says "No vehicle allowed in the park". Based on the legal and political status of the regulatory text, we will infer—without more precisions here—that this very sentence is normative. It is understood as

⁵ As an example in France of the measure and condemnation of the normative inflation, see the annual report of the French Conseil d'État from 2016, "Simplification et qualité du droit" at <https://www.conseil-etat.fr/publications-colloques/etudes/simplification-et-qualite-du-droit>. For a proper measure see Mackaay, 'Normative Inflation'..

⁶ Dworkin whole theory of principles is designed to solve hard cases. These are cases where norms are unable to grasp the situation and solve it; we therefore have to rely on principles in order to find the right solution.

an interdiction subject to sanction. We make the assumption that everyone would agree that if one enters the park with a car, this person will be sanctioned for they will have gone against the norm. Legal scholars have long disputed whether a bicycle or a skateboard is allowed. The disputes of meaning are central to rendering a norm applicable to a fact. Basically, when a skateboard enters the park, we do not know if a norm applies—that is this norm or any other norm regulating circulation in the park—, or if any of those norms has such a meaning as to apply to the case.

However, what also happens is that the object “skateboard” is so much integrated within a framework of norms, that we do not know which norm applies. Is it the one that says that skateboarding may be permitted on weekdays during 9 am and 4 pm, the one that says that a skateboard is not a vehicle but must be parked in some specific area, the one that says that skateboarders must be careful when surrounded with people? All the three at once, none of them, and what about the other norms we do not even know about?

Now, what does it mean to know a norm? One knows that there is a norm in European law that forbids States from imposing taxes on imported goods from within the European Union. But what do we actually mean with this statement? And if we do not know that there is another norm creating exceptions to this first interdiction, we will then not be able to take this exception into account when trying to give an overview of EU law nor will we be able to *correctly* solve a case.

The question is therefore the one of epistemic access to norms and of epistemic discourse about it: how do we know norms and their meaning?

V. The two situations, their meaning and their relativity

Let’s distinguish two situations as mentioned in the examples above.

- Situation A is a situation where there are too few norms;
- Situation B is a situation where there are too many norms.

First, “too much” or “too few” are relative terms, there is no legal system where there would be absolutely too many norms⁷. One could argue that

⁷ Or at the cost of considering the possibility of an ideal legal system with some

there might be a limit considering the structure and functioning of a society or even of the human being. But it is therefore still relative to society or to humanity.

Second, it is important to note that these statements are also relative to a factual case. To say that there are too few norms conveys an instrumental meaning. There is a purpose to which one lacks some elements, those elements being norms. The most obvious example is adjudication: a judge wants to solve a case but the facts of the case are not covered by any norm.

The judge might not personally know the norms that regulate the case but there might be some. Or the judge might not know said norms because the legal system within which they operate does not contain at all such norms. This is an important point about knowing a fact: law is practiced by individuals who have cognitive limits. Therefore, too much or too few norms might first simply be relative to the individual who wishes to solve a given case.

It might however, and, that is the main meaning for legal scholars, mean that the legal system as a whole does not know certain norms, it does not *contain* it. A legal system does not contain norms regulating interactions within a blockchain for instance.

We could distinguish those meanings of “knowing” according to the situation A or B they refer to.

In situation (A), no one “knows”; here the absence of knowledge is *systemic*. There must therefore be a general method to discover from existing and known norms or facts how a case should be ruled. Legal theory has already discussed this question at length through interpretation and sources of law.

In situation (B), only the interpreter does not know, therefore the absence of knowledge is *individual*. The system could “know” (here meaning: contain) such a norm but it is unknown from the individual interpreter who is thereafter unable to bring it to a factual reality through its application to a case.

qualitative and quantitative absolute criterias but we then have to assume some strong jusnaturalist assumptions.

Furthermore, it is important to point out that the absence of proof is not a proof of absence. Therefore, the fact that an individual does not know whether a norm exists or not does not make it possible to conclude that this norm does not exist within the legal system. We would then have to find a proof that the norm does not exist and this, depending on the way in which we read and interpret texts, may prove impossible. It may be known for certain that the legislator never created a norm intended to rule specific cases because these cases did not exist before. In which case we know something. But does it mean that no existing norm actually rules the case?

VI. Validity of systems

For both Alf Ross and Otto Neurath, a system is quite a controversial *thing*. System construction is “pseudo-rationalist” and is an important mistake, even a “lie”⁸ for Neurath. If he speaks of a system of hypotheses⁹), it is to speak of a theoretical proposition based on interconnected hypotheses. He strongly refutes that there is any completeness to be found in knowledge: knowledge cannot be systematic. That is why he has advocated so vigorously in favor of an encyclopedian perspective on science¹⁰.

For Ross, there is a possibly valid system of norms¹¹; but this system is here referred to as a general “scheme of interpretation for a corresponding set of social actions”¹². It is therefore a scientific theory that is valid because of its interpretative power, it does not exist over there, waiting to be discovered by scientists.

Furthermore, Neurath and Ross are empiricist and physicalist, which means that “the sum of verifiable implications is said to constitute the ‘real content’ of the proposition”¹³. Following Ludwig Wittgenstein, a statement is meaningful if and only if it has implications that can be checked upon in the physical world. This idea is expressed in what is usually called the “first

⁸ Cartwright et al., *Otto Neurath*, 187.

⁹ Neurath, *Philosophical Papers, 1913-1946*, 29.

¹⁰ Neurath, 139.

¹¹ Ross, *On Law and Justice*, 34.

¹² Ross, 34.

¹³ Ross, *On Law and Justice*, 39. see also for Neurath: Aray, *Otto Neurath et le Cercle de Vienne de gauche*, 20.

Wittgenstein”, that is, mainly, in the *Tractatus Logico-Philosophicus*. It is best defended in the aphorisms 3 and following about the proposition itself and 4 and following about the language¹⁴. The positivists of the Vienna Circle have concluded from such theory that a proposition makes sense if and only if it is reliable with reality. The first aphorisms also imply that the world, the reality, is made of physical “things” which are constituted of observable and sensible facts. It is therefore only the physical reality.

According to this background, “a legal system does not know a norm” is a meaningless statement. Everything is reducible to individuals’ knowledge. If an individual has too many norms to know or too few regarding a specific case, to such an extent that he does not know any norm that could solve the case, then there is no reason to say that both situations are different. In the end, it is just one individual who does not know a norm, whether or not he or she should have¹⁵ known it.

VII. Validity of norms

Ross’ definition of a valid norm states that a norm is valid if and only if the following statement is true: under certain conditions a court will apply that norm¹⁶. Here “applying” means a process by which a norm forms part of the decisive factors of the court’s conclusions¹⁷. This poses another difficult question: if a norm is valid when taken into account by a court, are valid norms only norms that are known by the courts? What would the epistemic status of an unknown (by judges) “validly” enacted norm be? Since norms are instructions to courts¹⁸, then, is an obligation still an obligation when it has no past nor possible application?

The fact that there are too many norms for individuals to respect them or for courts to properly know and apply them does not have any impact on

¹⁴ For instance, in 4.01: “The proposition is a picture of reality”.

¹⁵ It might be very interesting here to reflect on this obligation to know. Knowledge in law is also inhabited by the fact that most law workers actually are obliged to know; they are not like scientists who just want to know. This obligation is even legal itself since, in France for instance, attorneys are held liable for their ignorance of the case law.

¹⁶ Ross, 40.

¹⁷ Ross, 42.

¹⁸ Ross, 51.

the issue at hand. Following Ross and Neurath's logical empiricism, it just means that the individual will not apply the norm to the case, making the case "bad" or "wrong" in regards to the system because eventually not followed by later courts' decisions. Our previous knowledge will have been moved but we will have to rely on other, previous and later, decisions and facts to decide whether to keep this element as a knowledge or not.

However, there is indeed an issue for the legal scientist. Doctrinal assertion about valid law, for Ross, "is a prediction"¹⁹, it always refers to the future and that is what gives it a meaning: its testability²⁰. There, the legal scientist wants to make a prediction regarding the use of a norm by a court in order to test a hypothesis on this norm's validity. He will therefore look at the court decision to find this norm mentioned—even though it has been excluded by exceptions or superior norms' application. If the judges making up the court did not know the norm in situation A, then the court will produce a set of data that will contradict the hypothesis by ignoring the norm in its reasoning.

This may be solved by the emphasis put by Ross on the fact that a single court's decision does not prove anything²¹, it just gives clues or data that will "shake" our confidence in our previous theory²². The general epistemological stand of Neurath and Ross is that nothing is proven by any experience; logical empiricism refuses certainty. Science is always probabilistic. It is also the case with law²³. However, it is important to give more and more importance to decisions when they are coherent: "In the face of an established practice of the courts, theory must capitulate"²⁴.

Thereafter, our question of systematic "knowledge" arises anew. Lots of courts not applying a norm for a long time is a state of facts that has to provide the legal scientist with the information that this norm is not valid. Even though the absence of application is only imputable to the ignorance of the judges. Actually, after discovering the text containing this "ought

¹⁹ Ross, 42.

²⁰ see Ross, 40 note 1.

²¹ Ross, 49–50.

²² Neurath, *Philosophical Papers, 1913-1946*, 123.

²³ Ross, *On Law and Justice*, 44.

²⁴ Ross, 50.

statement”, judges may apply other principles such as legal security to exclude this norm from their decisions.

VIII. Same overall method, different auxiliary motives

If law is the product of a decision making process because of its political dimension, so is science. An interesting aspect of Neurath’s epistemology is the need for science to decide. In some way it can be said that it is close to bayesianism which implies that a scientific theory has to bet²⁵. A statement has to propose an outcome regarding a specific protocol to be valid. Verification is very important for logical positivism but Neurath makes it a practical element in some sort of *radical fallibilism*²⁶. Neurath’s anti-foundationalism makes it impossible to check or verify strictly and definitely a statement. Therefore, science has to rely upon auxiliary motives: devices to help make decisions under uncertainty²⁷. To use the word of Cartwright: they are “aids for conation, not cognition”²⁸.

With the notion of auxiliary motives, it is actually possible to better understand why there is no difference between a too much and a too little normativity; but also why there might be a need to temper this statement. Auxiliary motives are the least irrational tools that a human may use to reach decisions about knowledge under uncertainty. That means virtually every situation. In both cases, humans having to decide do so under uncertainty, and they thereafter rely on reasons but also on auxiliary motives. This very situation of conflicting norms is somehow addressed by Neurath himself. And in this case, he just conceives that there is no absolute solution, simply an earthly weighting of reasons aided by auxiliary motives²⁹.

In epistemological methodological terms, the fact that there are too many or too few norms does not change anything about the fundamental elements of the treatment of knowledge. It is uncertain, it does not have any secure

²⁵ Lin, ‘Bayesian Epistemology’, pt. 3.1.

²⁶ Uebel, ‘Vienna Circle’, pt. 3.1.

²⁷ Cartwright takes the example of unity or simplicity of a theory. To say that we prefer simpler or unified theories are decision-based motives that are not arbitrary nor irrational but they are not absolute rules of science Cartwright et al., *Otto Neurath*, 134–35..

²⁸ Cartwright et al., *Otto Neurath*, 134.

²⁹ Neurath, *Philosophical Papers, 1913-1946*, 5.

foundation, it is incomplete, it is based on ordinary language used through the way of protocol statements to describe a reality that is subjectively accessible. Under this last point, it relies on auxiliary motives.

Our thesis at first was to consider that, for the above-mentioned reasons, there is no epistemological reason to differentiate between a factual situation where too many norms may apply to the extent that it is unknown what norm to use in order to solve a case and a situation where there are too few norms to find one that rules the case. However, because science has to be *decided* because of the uncertainty of the statement about facts, there is an important part of subjectivity in building knowledge. That is a limitation to the thesis here defended, especially for the legal field: lawyers do not apply similar interpretative methods nor principles to choose the appropriate norm. This means they—as a scientific community—decided to create specific auxiliary motives that are different in each situation. Just like the physicist will always prefer the fact that fits best within the simplest possible theory, the jurist will consider the normative statement that is more specific than general (*specialia generalibus derogant*). But this last principle, this auxiliary motive, applies only when the structure of the knowledge relative to a case is of the A type. Other principles may apply in situations B³⁰.

IX. Conclusion: All knowledge is incomplete

Scientists therefore have to decide as much as they have to describe. Actually, describing, depending on the terms one uses to account for reality, is already based on decisions. How to treat facts and theories, linking them together, choosing one against the other, all that rests upon decisions.

The fact that there are too many texts regulating an area of human life or too few is at first a political choice. The way judges and scientists treat existing norms does not depend exclusively on their quantity because science is not certain. Judges find in norms “good reasons”³¹ to solve the case in a given way. Treating a “too much normativity” simply figures

³⁰ But then is it still about epistemology or isn't about something else? This question arose while writing this text but I am not capable yet to give it a more detailed answer. Could method be considered out of epistemology as a philosophy of knowledge?

³¹ Ross, *On Law and Justice*, 42.

a certain structure of the available data. It is so abundant that we do not know it, that our knowledge of the law is not exhaustive. Just like any other situation of ignorance because “incompleteness is a condition of all human knowledge”³².

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³² Cartwright et al., *Otto Neurath*, 129.

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TROP DE NORMES, TROP PEU DE SENS. POURQUOI LA RECHERCHE DU SENS DES NORMES N'EST PAS IMPACTÉE PAR L'INFLATION NORMATIVE

Résumé

Cet article s'intéresse à l'épistémologie d'Otto Neurath et Alf Ross concernant les normes juridiques. Il examine pour ce faire un phénomène particulier : l'inflation normative. Le fait qu'il y ait trop de normes (le trop plein) crée une situation épistémique bien particulière. Situation que l'on pourrait opposer au cas d'une absence de normes (le trop peu). L'hypothèse défendue est que connaître la norme applicable est épistémologiquement équivalent, qu'il s'agisse d'une situation de trop peu ou de trop plein de normes. La définition de la connaissance de Neurath, laquelle met l'accent sur sa "sous-détermination" et son incertitude sert à appuyer cette hypothèse.

Mots-clés : *Épistémologie, Science du droit, Interprétation, Système juridique, Validité, Alf Ross, Otto Neurath*

