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Chapter 3

Norms in Law and Society: Towards a Definition of the Socio-legal Concept of Norms

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Introduction

During the last century, the concept of norms has kept a central position within the behavioural, social and legal sciences (see some examples from the extensive literature: Kelsen, 1967; Coleman, 1994; Pound, 1996; Ehrlich, 2001; Ross, 2002; Lewis, 2002; Ajzen, 2005; Bicchieri, 2005; Sugden, 2005; Hechter and Opp, 2005; Sumner, 2007; Posner, 2007; Fishbein and Ajzen, 2009). Although this multidisciplinary focus on norms has produced a variety of theoretical discussions, the need for clarification regarding the definition of the concept has remained significant. Different disciplines have formulated their own perspectives, and so the concept of norms has not developed into the unifying force that is its potential.

The aim of this chapter is to present a model for creating a more coherent concept, designed to meet the demands of the multidisciplinary field of sociology of law (hereafter shortened to 'SoL'). This model is built on an ontological analysis that can incorporate different perspectives. The suggested analysis is mainly founded on the Aristotelian concepts of 'essence' and 'accident.' Thus, the method is concerned with distinguishing between the 'essential' attributes that lie in the nature of the norms (together they form the general definition of the socio-legal concept of norms) and other 'accidental' attributes that are characteristic within certain groups of norms (such as social and legal norms). The result of this model for creating a definition – and the actual definition itself – has been tested in a number of research projects within SoL at Lund University (for example, Hydén and Svensson, 2008; Svensson, 2008; Baier and Svensson, 2009; Svensson and Larsson, 2009 and 2012; Leo, 2010; Hydén, 2011; Urinboyev, 2011; Larsson, 2011a; Naujėkaitė, 2011; Svensson and Urinboyev, 2012; Svensson et al., 2013; Larsson, Svensson, and de Kaminski, 2013; Leo and Wickenberg, 2013).

One of the advantages of this particular definition is its ability to adapt to different scientific perspectives. Each of the suggested essential attributes can be focused on individually, and a certain project might choose to apply only one of the essences (for example, pure legal science tends to focus on the normative aspect of the norms). SoL, however, being preoccupied with questions concerning relations

and interactions between law, society and behaviour, tends to include multiple dimensions (attributes) of the norms. The essential attributes (of the norms) let us know what aspects of the norm concept are shared by all norms. The accidental attributes, on the other hand, are specific to each category of norms. In this chapter, the focus is on the two categories that are most relevant to SoL; namely, legal and social norms. However, one could imagine a research project focusing on ‘fashion norms’, for example, and then it would be necessary to identify the accidental attributes specific for norms that influence fashion (in addition to their essential attributes that are shared with all other norms).

An important final introductory remark is that the model for norm research presented in this chapter is not an unconditional support for the consensus theory within social science. Nor does it represent a presumption that norms are always functional within society. On the contrary, one important role of the empirical socio-legal research on norms is to unveil and explain conflicts and tensions in society, and to expose the manifest and latent dysfunctions of norms. The ‘spirit’ of the empirical research projects during the last decades, conducted within norm theory, in fact often resembles the ambition and tradition of critical theory (compare, for example, Horkheimer and Adorno, 1969; Marcuse, 1986; Adorno et al., 1993; Habermas, 1996), even though norm research is theoretically more inspired by functionalism within social science (compare, for example, Merton, 1949; Comte, 1988; Durkheim, 1997; Herbert, 2009). A striking example of that dual approach is the work of the research group Cyberrnorms, within the field of SoL, which aims to critically explore norm structures (social and legal) that appear in the wake of changing information technology (for example, Hydén and Svensson, 2008; Svensson and Larsson, 2009 and 2012; Larsson and Svensson, 2010; Larsson, 2011b and 2012; Larsson, Svensson and de Kaminski, 2013; Larsson, Svensson, de Kaminski et al., 2013; Svensson et al., 2013).

The socio-legal need for a multidisciplinary concept of norms

Whenever SoL is described in a general manner, the presentation revolves around some variation of the following theme: ‘deals with the relationship between law and society’¹ – a description as pedagogically efficient as it is hazardous. While this description makes SoL seem concrete and easy to grasp, it also runs the risk

1 For example, Thomas Mathiesen, Professor of Sociology of Law at Oslo University, with reference to the classical Scandinavian legal scientist Ragnar Knoph (1894–1938), has demarcated Sociology of Law as the study of three basic questions: (a) to what extent, and how (when applicable), does the rest of society influence legal rules, legal decisions and legal institutions; (b) to what extent, and how (when applicable), do legal rules, legal decisions and legal institutions influence the rest of society; and (c) to what extent does there exist a reciprocal action between legal rules, legal decisions and legal institutions on the one hand and the rest of society on the other.

of hiding the core question: what aspects of law and society are comparable? One consequence of neglecting this particular question is the constant difficulty arising from trying to make SoL legitimate to both legal and sociological academics. David Nelken has discussed this problem in terms of identifying different ‘truths about the law’ (1993), and Roger Cotterrell comments:

In a rich discussion of relationships between law and scientific (including social science) disciplines, David Nelken describes the efforts of these disciplines to tell ‘the truth about law’ as being confronted, now, with law’s own ‘truth’. In other words, law has its own ways of interpreting the world. Law as a discourse determines, within the terms of that discourse, what is to count as ‘truth’ – that is, correct understanding or appropriate and reliable knowledge – for specifically legal purposes. It resists scientific efforts to describe consequences (for example, in economic cost-benefit terms, psychological terms of causes and consequences of mental states or sociological terms of conditioning social forces). None of these interpretations, it is claimed, grasps law’s own criteria of significance. (1998)

However, in the concept of norms lies the potential to supply a term that is accepted within both the legal field and the social sciences. A prerequisite for this, however, is that the concept is formulated so that it corresponds to the basic ontological presumptions of each respective field. In this text, I will assert that the concept of norms is crucial when trying to understand the relationships between law and society, and that the concept of norms is as central to SoL as, for example, the concept of attitudes is central to social psychology. The idea of norms as a cardinal phenomenon in society is older than empirical social science itself. David Hume has been described as the first thinker who, in a serious fashion, described the importance of norms. He did not, however, use the term ‘norm’. Instead, he recognized ‘mutual rules’ as the natural solution to problems that emerged when different shortages limited the access to resources in demand, given that morality is essentially a product of human selfishness (Young, 2007).

SoL, as a science, takes its departure mainly from two distinct scientific traditions. First and foremost, SoL is a social science and has a sociological foundation. This gives SoL a solid anchorage in empirical and inductive method. Secondly, the discipline is, of course, closely tied to the legal sciences. It is impossible to attain a deeper knowledge of the law without acknowledging the internal nature of the legal system. It is becoming increasingly evident, however, that SoL, in order to grasp a phenomenon such as obedience, also needs to incorporate a behavioural (social psychology) perspective.

Being multidisciplinary, SoL must be able to take both an internal deductive and an external inductive approach when handling norms (for example, legal rules). In a sense, it could be said that SoL is supposed to explain logically normative statements from their material (empirical) context, something often argued as impossible by scientific philosophy. David Hume, the Scottish philosopher (1711–1776), established the basic philosophical ‘law’ that the ‘ought’ can never logically

be derived from the 'is'. Hume's law had a considerable influence on modern legal thinking and created a fundamental divide between legal scholars, who came to consider norms (legal) essentially to be normative statements (without tangible connotations), while sociologists came to consider norms to be equal to 'things' that interacted with other phenomena in society and that could be studied empirically.

Hans Kelsen (1881–1973), Emile Durkheim (1858–1917) and Muzafer Sherif (1906–1988) are all three considered to be classical thinkers, dealing with the norm perspective within their respective field (law, sociology and social psychology). They also represent opposite solutions to the is/ought problem of norm studies. Their respective perspectives illustrate the problem of combining research on normative statements with empirical research. However, their perspectives can also symbolically serve as 'suppliers' of one 'building block' each for the proposed socio-legal definition of the concept of norms.

Identifying the essential attributes of norms

The world-renowned Professor of Philosophy Irving M. Copi (1917–2002) wrote a chapter (1954), that is often referred to, called *Essence and Accident*. He argued that the notions of essence and accident, introduced by Aristotle (384BC–322BC), still play important, unobjectionable roles in pre-analytical thought and discourse, especially when creating definitions and categories.

'Essence' and 'accident' are two types of attributes that a phenomenon can have. Essential attributes form the phenomenon's existence, and the different essential attributes of a certain phenomenon together constitute its definition. If an object is lacking one or more of a phenomenon's essential attributes, it is a privation (and an exception). Hence, the definition of the concept of norms can be viewed as a number of essential attributes, and the challenge is to identify which attributes are common for all norms (legal, social and so on), and thereby essential. Accidental attributes, on the other hand, are variations within the phenomenon. For example, it is the accidental attributes that separate different kind of norms into categories (such as legal and social). The definition of legal norms will be the essential attributes (common for all norms) plus the accidental attributes specific for legal norms; and the definition of social norms will be the essential attributes (common for all norms) plus the accidental attributes specific for social norms, and so on.

In this chapter, I will argue for three essential attributes (based on the three dominating scientific perspectives on norms: law, sociology and social psychology) that can be considered to form the foundation for a definition of the norm concept (Hydén and Svensson, 2008; Svensson, 2008). I will not take upon myself to specify the accidental attributes that separate legal norms from social norms in this text, even though I will reflect on some of the consequences of making such a differentiation.

The evasive boundary between law and social norms

Since SoL emerged as a scientific discipline in the early twentieth century, one of the central tasks has been to define law, and thereby also to distinguish law from other norms in society. Eugen Ehrlich (1862–1922), however, in his groundbreaking book *Fundamental Principles of the Sociology of Law* (2001), pointed out that there is no real ontological difference between law and other norms:

The legal norm, therefore, is merely one of the rules of conduct, of the same nature as all other rules of conduct. For reasons readily understood, the prevailing school of juristic science does not stress this fact, but, for practical reasons, emphasizes the antithesis between law and other norms, especially the ethical norms, in order to urge the judge at every turn as impressively as possible that he must render his decision solely according to law and never according to other rules.

This indicates that the difference between legal and social norms (in fact, all norms, including legal, are social, according to Ehrlich) does not lie in the nature of them, but rather in how they are practised. Consequently, the essential attributes of law are the same as for all other norms in society; and the accidental attributes of law are context-dependent and vary between different societies, and between different types of law within the same society. In order to complicate matters even further, law is ultimately an abstract term; and, as Julius Stone pointed out (1964; Vago, 2009): ‘... the definer is free to choose a level of abstraction; but by the same token, in these as in other choices, the choice must be such as to make sense and be significant in terms of the experience and present interest of those who are addressed’. Given that the attributes that differentiate law from other types of norms in society are highly context dependent, and that every attempt to define law must include a choice of level of abstraction, it is not hard to understand why Steven Vago comes to the conclusion (2009) that there are almost as many definitions of law as there are theorists (even though probably more scholarship has gone into defining and explaining the concept of law than into any other concept still in use in sociology and jurisprudence). For reviews of the literature dealing with the definition of law, see, for example, Ronald L. Akers and Richard Hawkins (1975); Robert M. Rich (1977); Lisa J. McIntyre (1994); Steven Vago (2009).

On a general level, following the suggested structure of this chapter, all norms in society are essentially of the same basic nature. Within SoL (and other legal sciences), for practical reasons, law is singled out and described through context-dependent accidental attributes. Consequently, we have a basic categorization between legal norms and (other) social norms. On a more detailed level, it is of course also possible to identify (through their specific context-dependent accidental attributes) other categories of social norms, such as ethical, technical and economic. Hence, the preferred terminology within SoL is: (a) ‘societal norms’ (or just norms) when referring to all varieties of norms; (b) ‘legal norms’ (singled

out as the social norms that are the main object of study); and (c) ‘social norms’ (actually, all non-legal forms of social norms).

The sociological functionalistic perspective

Emile Durkheim was the first scholar to formulate and practise an empirical science that had its point of departure in the understanding of normative structures in society. His use of the concept of ‘social facts’ works as a guide to many scholars who are interested in social norms. The American sociologist George C. Homan (1910–1989), for example, claimed that there are indeed social facts as Durkheim described – and that they do apply a significant force on individuals and their actions. He also claimed that the best example of a social fact is a social norm, and that norms within a specific group undoubtedly force individuals to a degree of uniform behaviour (1969). Durkheim himself argued that² ‘the first and most basic rule is to consider social facts as things’ (1982), and that ‘[t]o treat phenomena as things is to treat them as *data*, and this constitutes the starting point for science’ (1982). By doing so, Durkheim avoided the impediments of Hume’s law. His position was that norms (although he did not name them so) are facts that can be studied, as they interact with other facts in society (material and non-material); a position that leads away from the study of human beings as mental figures. ‘Social phenomena must therefore be considered in themselves, detached from the conscious beings who form their own mental representations of them. They must be studied from the outside, as external things, because it is in this guise that they represent themselves to us’ (Durkheim and Lukes, 1982). Durkheim, in other words, places the forces of social life in an external (compared to individuals) structure of society. Furthermore, he makes an ontological statement through which he declares that the forces exist as things and that they, in that sense, are objective. The ‘ought’ is thus linked to an individual level, and falls outside any sociological or social analysis. Durkheim’s concept of social facts is broader than the modern concept of norms. However, it is clear that Durkheim’s ontological and methodological analysis of social facts is highly relevant when trying to understand the concept of norms: not solely because that would be a recipe for success in terms of finding a scientific method that could capture norms, but because it would be the way to understand the ontology of the norms. However, when claiming that norms are things, it is also understood that the most essential characteristic of those things is as carriers of normative messages. In other words, norms in this perspective are objects (things) containing messages of how reality ‘ought’ to be.

2 Durkheim himself was of the opinion that it was Montesquieu who, through his philosophy, cleared the way for Saint-Simon who was the first to start the real work on formulating a science about the social reality. Furthermore, Durkheim pointed out Comte as the one who brought order into the work of Saint-Simon.

The legal positivistic perspective

One of legal positivism's leading representatives, Hans Kelsen, introduced the word 'norm' to the legal discourse as a central concept. When explaining his pure theory of law, he argues that law is a system of norms, norms being 'ought' statements describing certain modes of conduct. The legal system is in that sense a structure of legal 'oughts', rather than social facts, as described by Emile Durkheim. Kelsen formulated his theory in polemic with the dominating discourse at the time; a discourse that he found to be hopelessly contaminated with political ideology and moralizing, on the one hand, and with attempts to reduce the law to natural or social sciences, on the other hand (Marmor, 2002). He considered these approaches to be reductions in a way that he could not accept. Instead, he argued that jurisprudence should be the pure theory of law, because it aims at cognition focused on law alone. Kelsen was convinced that, if the law is to be viewed as a unique normative practice, methodological reductionism should be avoided entirely. But this perspective is not only a question of method. Reductionism must be avoided because the law *is* a unique phenomenon, quite separate from morality and nature (Marmor, 2002). Furthermore, Kelsen was influenced by Hume's law and firmly believed in the distinction between 'is' and 'ought', and in the impossibility of deriving 'ought' conclusions from factual premises alone. The consequences of this reasoning are intriguing. Kelsen was convinced that law cannot be reduced to the natural actions or social and political contexts that give rise to it. The procedure of arguing, voting and so forth is not the actual law. The legal system consists essentially of 'ought' statements, and, as such, they cannot be deduced from factual premises alone (Marmor, 2002). This perspective forced Kelsen to explain how law is possible. If it does not emerge from human actions and societal substances in a direct manner, there must be another source. Kelsen's solution is the notion of an 'ought' presupposition in the background, rendering the normativity of law.

As opposed to moral norms, which, according to Kelsen, are typically deduced from other moral norms by syllogism (e.g., from general principles to more particular ones), legal norms are always created by acts of will. Such an act can only create law, however, if it is in accord with another "higher" legal norm that authorizes its creation in that way. And the "higher" legal norm, in turn, is valid only if it has been created in accordance with yet another, even "higher", legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing product is no longer the product of an act of will, but is simply presupposed. This is what Kelsen called the Basic Norm. More concretely, Kelsen maintained that in tracing back such a "chain of validity" (to use Raz's terminology), one would reach a point where a "first" historical constitution is the basic authorizing norm of the rest of the legal system, and the Basic Norm is the presupposition of the validity of that first constitution. (Marmor 2002)

Whereas Durkheim avoided breaking Hume's law by claiming that social facts (such as legal norms) adhere to the 'is', Kelsen chose to claim that the law

should, in its entirety, relate to the ‘ought’, and that the law takes its source, not from a concrete context, but from a basic norm that belongs to the social ‘ought’. In this chapter, I argue in favour of a norm concept that is capable of capturing the ‘ought’, as well as the ‘is’, and thereby can work as a link between the two dominating ‘truths’ concerning the legal system. By agreeing with Durkheim, as well as Kelsen, it is possible to avoid abuse of Hume’s law. Since norms are bearers of characteristics that represent both the ‘ought’ and the ‘is’, it is possible, through norm analysis, to derive the ‘ought’ of the legal system from the ‘is’ of society. Furthermore, we will present a third, basic characteristic of norms related to their relationship with cognitive processes. Unless the individual level is taken into consideration, it will not be possible to understand, for instance, enforcement and obedience.

The social psychology perspective

Muzafer Sherif (1906–1988) is considered one of the founders of social psychology. His focus on social norms and social conflict forms the base of modern social psychology, and his book (1966) is still valued as one of the key works in the field. To Sherif, norms are psychological phenomena that occur when individuals perceive reality together with their social surrounding (for example, group). To Sherif, the social was closely related to the mental figures of individuals, and he often carried out experiments involving actual people.³ Hence, the starting point for the social psychology perspective on norms is neither that they belong strictly to the ‘ought’, nor to the ‘is’, but rather to the ‘individually perceived reality’. Another characteristic of the social psychology perspective on norms is that the behaviours they comprise are goal-directed and can be interpreted as purposive (but not necessarily conscious) (Cialdini and Trost, 1998). Further, social psychology tends to focus on norms that are primarily social in nature. According to Cialdini and Trost (1998), social norms can be considered as rules and standards that are understood by members of a group, and that guide and/or constrain social behaviour without the force of norms. These norms emerge out of interaction with others; they may or may not be stated explicitly, and any sanctions for deviating from them come from social networks, not the legal system.

The definition of norms

As showed, the concept of norms has maintained a central position within the behavioural, social and legal sciences (all perspective necessary to SoL);

³ One of his most famous experiments was the Robber’s Cave experiment, where Sherif let two groups of young boys live for some weeks in a remote area and develop mutual norms and compete for desired resources.

subsequently, SoL must create a norm concept that adopts influences from these three academic fields. And, as a result, the socio-legal concept of norms, presented here, acknowledges three essential attributes that define the nature of norms. The first two relate to the dual ontological existence/shape of norms (see the matrix in Figure 3.1 below); and the third to the importance of acknowledging the behavioural dimension. Hence, all types of norms (for example, social and legal) have two ontological attributes and one behavioural. Accordingly, norms are:

1. imperatives (the ‘ought’ dimension of the norm; ontological);
2. social facts (the ‘is’ dimension of the norm; ontological); and
3. beliefs (the psychological dimension of the norm; behavioural).

These three essential attributes can also be described as norms, being (a) normative statements that (b) are socially reproduced and (c) represent the individual’s perception of the expectations surrounding their own behaviour. The first essential attribute (the ‘ought’ dimension) is best represented by the positivistic legal science, where norms (and law) are considered to be essentially ‘ought’ statements (normativities) that should be studied deductively (Kelsen, 1967). The second essential attribute (the ‘is’ dimension) is tied to sociology and structural functionalism, which argues that norms (social facts) should be considered as things or data that can be studied empirically (Durkheim and Lukes, 1982) and inductively. These two dimensions (‘ought’ and ‘is’) can be applied to legal as well as social norms.

The ‘ought’ and ‘is’ of legal and social norms describe the most basic societal tensions that have been identified by scholars within the field of SoL. In law (legal norms), there is a tension between what is often referred to as ‘law in books’ and ‘law in action’, first described in those terms by Roscoe Pound (1910). These terms could, in many respects, be translated to what in Figure 3.1 is found in the normative and the factual dimension of legal norms respectively. This perspective emphasises that a legal code by no means equals its intended practice in its implementation. The social, economic and cultural context that the law addresses

	The normative dimension	The factual dimension
Social norms	‘ought’	‘is’
Legal norms	‘ought’	‘is’

Figure 3.1 The Four Dimensional Socio-Legal Model (FDSL-model) – modified from Svensson, 2008

in practice will also shape, contribute to, and explain its outcome.⁴ In society (social norms), there is a tension between the normative and factual dimensions as well. This tension (for example, deviance) has been discussed and analysed by scholars such as Robert Merton (1936 and 1949) in his strain theory and in his writings about manifest and latent functions and dysfunctions in society (Larsson and Svensson, 2010; Larsson, Svensson, de Kaminski et al., 2013; Svensson et al., 2013). Finally, there is a tension between legal and social norms that is of particular relevance to SoL. Many socio-legal scholars focus their studies on ‘the gap’ between the law and the intentions of the policy makers, on the one hand, and behaviour and social norms on the other (Nelken, 2009; Banakar, 2011). The third essential attribute of norms is that they are also beliefs; therefore, social psychology is needed in order to understand them fully. Following the logic of the ‘theory of planned behaviour’ (TPB) within social psychology (Ajzen and Fishbein, 1980; Ajzen, 2005; Fishbein and Ajzen, 2009), norms can be understood as a belief in the form of the individual’s understanding of the surrounding expectations regarding his or her own behaviour. This attribute must be considered in order to explain the connection between norms in ‘law and society’ and human behaviour.

Robert C. Ellickson, a professor at Yale Law School, was one of the first legal scholars to fully recognize the importance of socially enforced norms. He states that ‘much of the glue of a society comes not from law enforcement, as the classicists would have it, but rather from the informal enforcement of social norms by acquaintances, bystanders, trading partners, and others’, and ‘informal systems of external social control are far more important than law in many contexts, especially ones where interacting parties have a continuing relationship and little at stake’ (Ellickson, 1998); and Drobak (2006) claims that social norms guide people’s actions and social interaction to a greater degree than does the law.

Norm theory and legal pluralism

Even though legal pluralism, as a scientific field, perhaps has its most recognized roots within research of colonial and post-colonial societies (for example, Malinowski, 1926), it has since the 1970s been of increasing interest among SoL scholars for applying the classic concept of legal pluralism to western societies of, for example, Europe and the US (Merry, 1988). However, since SoL emerged

4 The ‘law in action’ perspective means focusing on law and its relationship to society, as ‘a tool to better understand law and its operations, to improve the science of law and legal education and to develop law as a more effective instrument of social engineering’ (Banakar, 2011:6). For Pound, valid law consists of legal rules laid down by authorities, and the distinction between law in books and law in action served ‘to highlight the social nature of the legal process, a process which, once grasped sociologically, could be engineered to manufacture a tighter fit between law and the social reality it tried to regulate’ (Banakar, 2011:7).

as an academic field in the early twentieth century, scholars have laid down the theoretical foundation for a pluralistic view on social control and norms. This is, to some extent, a separate path from what is normally described as legal pluralism, and it started with classicists such as Eugene Ehrlich (1862–1922), *Fundamental Principles of the Sociology of Law* (2001); Leon Petrazycki (1867–1931), *Law and Morality* (2011); Karl Renner (1870–1950), *The Institutions of Private Law and Their Social Functions* (2009); Nicholas Timasheff (1886–1970), *An Introduction to the Sociology of Law* (1939); and George Gurvitch (1894–1965), *Sociology of Law* (2001) (see Cotterrell, 1992).

Following that tradition, norm science can be used for studies within legal pluralism (or norm pluralism). One of the main advantages of the norm concept presented here is the possibility of identifying norms via the three-fold definition built on essential attributes, and then the possibility of classifying different types of norms via their accidental attributes (identified through empirical studies). A recent example of a study that uses this socio-legal norm concept in order to examine what could be described as legal pluralism (Svensson et al., 2013) focuses on social norms online versus traditional legal development. In that study, more than 90,000 respondents answered questions on their views and practices regarding file sharing. The result showed a striking gap between traditional law and online living law.

Conclusions

In this chapter, I have argued that the norm concept is central to sociology of law and could be held to be equally important as, say, the concept of attitude to social psychology. It will probably never be possible to fully bridge the classic gulf between the two dominating academic perspectives on law – namely, sociology and legal science. However, the norm concept, defined via the essential attributes, tells us that all norms (legal and other social norms) have three properties in common: they are imperatives (‘ought’), yet social facts (‘is’), and, in the end, always subjective beliefs.

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