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Legal Indeterminacy and Constitutional Interpretation

APPENDIX: TRUTH-CONDITIONS AND THE LOGICAL ANALYSIS OF LEGAL STATEMENTS

In this appendix, I will present an alternative way of reaching the same conclusions as in section 4, where the truth-conditions of legal statements were examined, on the basis of a paradigmatic example from logical analysis. I mean the controversy between Russell (1919) and Strawson (1950) about the analysis of defined descriptions.

Russell and Strawson want to analyze statements like

(1) The present King of France is wise.

They agree on the following:

(i) The sentence has meaning, and if someone were to pronounce it now, he would be pronouncing a sentence that makes sense.
(ii) If someone were to pronounce that sentence now, he would be formulating a true sentence only if there really existed one single King of France now, and that King were wise.

But Strawson criticizes Russell — among other things — for endorsing the following assertion:

(iii) Whoever pronounces statement (1) is formulating an assertion that is either true or false.

As is commonly known, Russell's analysis of (1), which I will call a *predicative sentence*, is as follows:

(1a) There is one and only one x such that x is King of France and x is wise.[62]

Thus, for Russell, (1) implies

(2) There is one and only one King of France.[63]

(2) will be called an *existential sentence*. Thus, if there is no King of France, then, according to Russell's analysis, (1) is false.

According to Strawson, the relation between (1) and (2) is not one of *implication*, but of *presupposition*. Strawson understands that relation of presupposition in the

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[62] In predicate logic, (1a) could be expressed in the following way:

(1b) $\exists y\ (\forall x\ (x$ is the present King of France $\leftrightarrow x = y) \wedge (y$ is wise$))$

Cf. Quine (1970, 25 f.; 1981, 299-304).

[63] That is:

(2a) $\exists y\ (\forall x\ (x$ is the present King of France $\leftrightarrow x = y))$

following way: (1) presupposes (2) if, and only if, (2) is true if (1) is true or false; or, what amounts to the same, (1) presupposes (2) if, and only if, (1) is neither true nor false if (2) is not true. This enables him to conclude (Strawson 1950, 66):

„So when we utter the sentence without in fact mentioning anybody by the use of the phrase, 'the King of France', the sentence does not cease to be significant: we simply *fail* to say anything true or false because we simply fail to mention anybody by this particular use of that perfectly significant phrase."

Statements like (1) assume the existence of certain entities, just as legal statements assume the existence of certain norms. Take the following legal statement:

> *(LSt)* Legally, all *F* ought to do ϕ.

As we have seen, *(LSt)* can be analyzed in the following terms:

> *(LSt$_1$)* There is a norm *N* in *LS*, and *N* stipulates: 'All *F* ought to do ϕ'.

Hence, according to Russell, *(LSt) implies*

> *(LSt$_2$)* Norm *N* exists in *LS*, i. e., *N* belongs to the normative consequences of *LS*.

In contrast, according to Strawson, *(LSt)* does not imply, but rather *presupposes (LSt$_2$)* Which means that if *(LSt$_2$)* is not true, then *(LSt)* has no truth-value. Alchourrón (1991, 535-543) has tried to show, among other things, that Strawson's theory adds nothing to that of Russell. One of the reasons that assertion rests on is the distinction between two senses of falsity in Strawson's thesis (as Strawson himself admits in Strawson 1967, 76 f.). For Strawson, a *predicative* sentence, i. e., a sentence containing a defined description, can be false in two senses. Hence, (1) can be false in two senses:

> (3) (1) is false$_1$ if and only if the description it contains describes one single object that does not have the property indicated in the predicate.

And

> (4) (1) is false$_2$ if and only if the condition of application for (1) to be true does not hold.

With these two senses of falsity, there are then two senses of *implication* underlying Strawson's theses:

> (5) (1) *implies$_1$* (2) if, and only if, (1) is *false$_1$* if (2) is not true.
> (6) (1) *implies$_2$* (2) if, and only if, (1) is *false$_2$* if (2) is not true.

Hence, Russell is right in saying that (1) not only presupposes, but also *implies$_2$* (2). The second sense of implication means that if (1) is true, then (2) is true; but that (1) pre-

supposes the truth of (2) also entails that if (1) is true, then (2) is true too.[64] That means that if (1) presupposes (2), then (1) *implies₂* (2).

Now, the sense Strawson gives to implication is probably the first of the two senses — the one reflected in (5). The notion of falsity in the first sense of implication is that of falsity$_1$. And we can very well hold that (1) can presuppose (2) without implying$_1$ (2). For (1) to imply$_1$ (2), the not-truth of (2) must lead to the falsity$_1$ of (1); but it is possible that (2) is not true — because there is no King of France — and (1) is not false$_1$ — because the description it contains does not describe anything. That means that the law of excluded middle does not hold for falsity$_1$, since

(7) (1) is true or is false$_1$

does not hold. There can be predicative sentences without a truth-value, and in that sense, (1) presupposes (2) without implying$_1$ it. Strawson's theory of predicative sentences can be summarized as follows (cf. Alchourrón 1991, 539):

(a) (1) presupposes (2).
(b) If (1) is true or false$_1$, then (2) is true.
(c) If (1) is true, then (2) is true, that is, (1) implies$_2$ (2).
(d) If (1) is false$_1$, then (2) is true.
(e) If (2) is not true, then (1) is not true and (1) is not false$_1$.
(g) (1) is true or false$_2$.
(h) (1) does not imply$_1$ (2).[65]

I think that truth-logic can account for this twofold behaviour of falsity in Strawson, and therefore also for his notion of presupposition. I will denote (1) with p and (2) with q. Then, to say that p presupposes q means that

(a') $Tp \lor T\neg p \to Tq$.

From (a'), we can deduce

(b') $Tp \to Tq$ and
(c') $T\neg p \to Tq$.
Also,

(d') $\neg Tq \to \neg Tp \land \neg T\neg p$.

And even if it holds that

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[64] If it is true that (1) presupposes (2) if and only if (2) is true if (1) is true or false, then it is also true that if (1) presupposes (2), then if (1) is true, then (2) is true too.

[65] When (2) is not necessarily true.

(e') $Tp \lor \neg Tp$,

it does not hold that

(f') $Tp \lor T\neg p$.

Strawson's falsity$_1$ is equivalent to $(T\neg p)$ being false in TL, and falsity$_2$ is equivalent in TL to $(\neg Tp)$ not being true. In this way, one can understand that while (f') is not valid — it is not a theorem of TL —, (e') — the law of excluded middle in TL — is valid. Also, one can understand a formulation like (d') which says that when some sentence is not true, then some other sentence has no truth-value. And one can also understand the notion of presupposition expressed in (a'), and the fact that this notion does not entail the notion of implication$_1$, although it does entail that of implication$_2$. The notion of implication$_1$ can be expressed in TL as follows:

(g') p implies$_1$ q if, and only if: if $\neg Tq$, then $T\neg p$.

(g') is invalid since, according to (d') — which expresses Strawson's idea of presupposition —, if $\neg Tq$, then $\neg Tp$ and $\neg T\neg p$.

In contrast, the notion of implication$_2$ is valid in TL:

(h') p implies$_2$ q if, and only if: if $\neg Tq$, then $\neg Tp$.

(h') is derived from (d') — according to which if $\neg Tq$, then $\neg Tp$ and $\neg T\neg p$. This enables us to say that in TL Strawson's conclusion can be accepted: (1) presupposes (2), which entails that (1) implies$_2$ (2), but that (1) does not imply$_1$ (2).

Alchourrón (1991, 539-542) has shown that these conclusions do not differ in any significant way from Russell's conclusions, even if Strawson did not see it this way. Strawson does not pay attention to a passage in Russell's work that shows how Strawson's ideas were already implicit in Russell (1919, 55):

„When descriptions occur in propositions, it is necessary to distinguish what may be called 'primary' and 'secondary' occurrences ... An instance will make this clearer. Consider 'the present King of France is bald'. Here 'the present King of France' has a primary occurrence, and the proposition is false. Every proposition in which a description which describes nothing has a primary occurrence is false. But now consider 'the present King of France is not bald'. This is ambiguous. If we are first to take 'x is bald', then substitute 'the present King of France' for 'x', and then deny the result, the occurrence of 'the present King of France' is secondary and our proposition is true; but if we are to take 'x is not bald' and substitute 'the present King of France' for 'x', then 'the present King of France' has a primary occurrence and the proposition is false. Confusion of primary and secondary occurrences is a ready source of fallacies where descriptions are concerned."

As Alchourrón (1991, 540 f.) observed, Russell's notions of primary and secondary occurrence correspond to Strawson's falsity$_1$ and falsity$_2$, respectively. Russell, of course, symbolizes predicative sentences as:

(8) $G(\iota x)Fx$

which is defined as

(9) $\exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge Gy)$.

Russell then considers what happens when a predicative sentence is negated. According to him, there are two senses in which we can conceive of the negation of (8).[66] First, there is the sense of negation corresponding to the so-called secondary occurrence. This can be symbolized by

(10) $\neg G(\iota x)Fx$.

(10) is true if and only if (9) isn't:

(11) $\neg \exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge Gy)$.

That means that (10) is true if, and only if, (8) is false$_2$, in Strawson's terminology.
    But there is another sense in which (8) can be negated, which corresponds to Russell's primary occurrence. This sense can be symbolized by

(12) $\rceil G(\iota x)Fx$.

(12) is true if, and only if, it is also true that:

(13) $\exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge \neg Gy)$.

This means that (12) is true, if and only if, (8) is false$_1$, in Strawson' terminology.
    From this we can conclude that there are no relevant differences between Russell's and Strawson's analyses of predicative sentences. In Russell, we must also distinguish two senses in which a predicative sentence can imply an existential sentence. Russell symbolizes existential sentences by

(14) $\exists!(\iota x)Fx$

which is defined by

(15) $\exists y\ (\forall x\ (Fx \leftrightarrow x = y))$.

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[66] For the same two senses of the negation of predicative sentences, cf. also Searle 1969, 159; Grice 1989, 271 f.

Strawson's conclusions according to which a predicative sentence not only presupposes but also implies$_2$ an existential sentence, but does not imply$_1$ an existential sentence, are also true in Russell's theory.

That (8) implies$_2$ (14) can be shown as follows: (8) implies$_2$ (14) if, and only if, (8) is false$_2$ if (14) is not true. (14) is not true when:

$$(16)\ \neg \exists y\ (\forall x\ (Fx \leftrightarrow x = y)),$$

and (8) is false$_2$ if, and only if, the predicative sentence is negated in its secondary occurrence, that is, if (10) holds, which is equivalent to (11):

$$(11)\ \neg \exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge Gy).$$

That (8) presupposes (14) means that if (8) is true or false$_1$, then (14) is true, or that if (14) is not true, then (8) is neither true nor false$_1$. (14) is not true when:

$$(16)\ \neg \exists y\ (\forall x\ (Fx \leftrightarrow x = y)),$$

and thus, as can easily be seen, when it is not true that

$$(9)\ \exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge Gy),$$

which is equivalent to (8). But (8) is also not false$_1$, because that is the case when (8) is negated in its primary occurrence, i. e., when

$$(13)\ \exists y\ (\forall x\ (Fx \leftrightarrow x = y) \wedge \neg Gy).$$

Finally, it can also be shown in Russell's theory that (8) does not imply$_1$ (14). That (8) implies$_1$ (14) means that if (14) it not true, then (8) is false$_1$. We have seen that (14) is not true when (16) holds, and that this does not entail the falsity$_1$ of (8), as reflected in the negation of its primary occurrence in (13).

    Neither

$$(17)\ G(\imath x)Fx \vee \rceil G(\imath x)Fx,$$

the law of excluded middle with falsity$_1$, nor

$$(18)\ \exists!(\imath x)Fx \rightarrow \rceil G(\imath x)Fx,$$

Strawson's first sense of implication, are theses of Russell.

    Since, if presented in this way, Russell's and Strawson's theses are equivalent, one can assume that it is possible to reconstruct a parallel version of them for legal propositions.

    Thus, we can distinguish two senses of falsity for

(LSt) Legally, all F ought to do ϕ.

In order to do this, we must reformulate the two senses of falsity:

(F₁) (LSt) is *false₁* if and only if the negation of norm N belongs to *LS*.
(F₂) (LSt) is *false₂* if and only if the condition of application for *(LSt)* to be true does not hold.

The negation of norm N — 'All F ought to do ϕ' — is 'An F may do not-ϕ'.[67] Therefore, *(LSt)* is false₁ if there is a norm in *LS* which permits an F not to do ϕ.

   Also, we can distinguish two senses of implication between *(LSt)* and the legal statement

(LSt₂) Norm N exists in *LS*,

according to the two senses of falsity:

(I₁) (LSt) implies₁ (LSt₂) if and only if *(LSt)* is *false₁* if *(LSt₂)* is not true.
(I₂) (LSt) implies₂ (LSt₂) if and only if *(LSt)* is *false₂* if *(LSt₂)* is not true.

We can now conclude that although *(LSt)* not only presupposes but also implies₂ *(LSt₂)*, it does not imply₁ *(LSt₂)*.

   On the other hand, Alchourrón and Bulygin (Alchourrón 1969; Alchourrón/Bulygin 1989; Bulygin 1993) have constructed a logic of normative propositions that can be regarded as the Russellian version of the analysis of legal propositions. In their view, we must distinguish between normative operators in a prescriptive sense ('O' for 'obligatory', and 'P' for 'permitted' will be enough, since 'prohibited' is equivalent to 'not permitted')[68] and in a descriptive sense. The latter are contained in expressions that enunciate propositions about a norm or set of norms. An expression like '$O\alpha p$' means that in the system of norms α there is a normative consequence obligating one to do p:

$$O\alpha p =_{\text{def.}} \text{'}Op\text{'} \in NC(\alpha).$$

In the case of permission, the situation is more complex since to say that p is permitted in α is ambiguous: It can mean that there is a norm in α permitting p — *strong* or *positive* permission —, or that there is no norm in α prohibiting p, i. e., '$O\neg p$' does not be-

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[67] This conception of the negation of a norm corresponds to the one presented by von Wright 1963a, 138 f., and satisfies the requirements stipulated there, one of which is that just as the negation of a proposition is a proposition, the negation of a norm is a norm. In von Wright's own words: „On our suggestion the negation of a positive command is a negative permission and conversely, and the negation of a negative command is a positive permission and conversely."

[68] Actually, we only need one operator, since they are interdefinable; but for the sake of simplicity of the presentation, I will use the two operators mentioned.

long to the consequences of α — *weak* or *negative* permission. The two kinds of permission can be defined formally as follows:

$$\mathbf{P}^+\alpha p =_{def.} \text{'}Pp\text{'} \in NC(\alpha).$$
$$\mathbf{P}^-\alpha p =_{def.} \text{'}O\neg p\text{'} \notin NC(\alpha).$$

The only part of the logic of normative propositions I am interested in here is the one referring to the logical behaviour of negation. In the logic of normative propositions, there are two kinds of negation: external negation ($\neg$) and internal negation ($\daleth$). Let us look at how these negations behave in the case of operator $\mathbf{O}$. First, external negation:

$$\neg\mathbf{O}\alpha p =_{def.} \text{'}Op\text{'} \notin NC(\alpha).$$

Then, internal negation:

$$\daleth\mathbf{O}\alpha p =_{def.} \text{'}\neg Op\text{'} \in NC(\alpha) =_{def.} \text{'}P\neg p\text{'} \in NC(\alpha).$$

Note that '$\neg\mathbf{O}\alpha p$' is equivalent to the negative permission not to do p, i. e., to '$\mathbf{P}^-\alpha\neg p$', and that '$\daleth\mathbf{O}\alpha p$' is equivalent to the positive permission not to do p, i. e., to '$\mathbf{P}^+\alpha\neg p$'.

We can now say that *(LSt)* is synonymous to '$\mathbf{O}\alpha p$', and that that expression implies$_2$ *(LSt$_2$)*, sind if *(LSt$_2$)* is not true — if norm N does not exist — then *(LSt)* is false$_2$, i. e., we have the external negation of *(LSt)*, '$\neg\mathbf{O}\alpha p$'.

It is also correct that '$\mathbf{O}\alpha p$' presupposes the truth of *(LSt$_2$)*, i. e., the existence of N among the normative consequences of α. That means that if '$\mathbf{O}\alpha p$' is either true or false$_1$ — i. e., the internal negation of '$\mathbf{O}\alpha p$': '$\daleth\mathbf{O}\alpha p$' is true, the permission not to do p is a normative consequence of α —, then *(LSt$_2$)* is true.

However, '$\mathbf{O}\alpha p$' does not imply$_1$ that norm N exists. Because in that case the non-existence of norm N — i. e., that *(LSt$_2$)* is not true — would entail the falsity$_1$ of *(LSt)* and, thus, the truth of the internal negation of '$\mathbf{O}\alpha p$': '$\daleth\mathbf{O}\alpha p$', which means that the permission not to do p belongs to the set of normative consequences of α. But that *(LSt$_2$)* is not true is compatible with the fact that this permissive norm does not exist. In fact, in the logic of normative propositions the principle of excluded middle is valid with respect to the external negation of '$\mathbf{O}\alpha p$', but not to its internal negation. Thus,

(19) $\mathbf{O}\alpha p \vee \neg\mathbf{O}\alpha p$

is a valid formula, whereas

(20) $\mathbf{O}\alpha p \vee \daleth\mathbf{O}\alpha p$

is invalid, since it is possible that neither a norm obligating one to do p nor a norm permitting one not to do p belongs to α. That is the reason why it is maintained that the corresponding normative proposition has no truth-value, and therefore, just as in Straw-

son's analysis, internal negation, i. e., the first sense of falsity, acquires a privileged position.

This shows that the logic of normative propositions can represent the relations between legal propositions, and that it is equivalent to the presentation in terms of the truth-logic *TL* in the previous section. The only reason for preferring the presentation I have chosen here is the purpose of the present investigation which is to show the sources of the indeterminacy of the law. This seems to be clearer if one can say that some legal propositions have no truth-value (thus giving privilege to the first notion of falsity), rather than that there are several senses of negation. However, from what has been said it follows that the notions of internal and external negation of normative propositions have their correlates in our vocabulary in the expressions 'Legally, it is false that all *F* ought to do ϕ', and 'Legally, it is not true that all *F* ought to do ϕ'.

In conclusion, then, although Strawson thought that his theory differs from Russell's more than it actually does, in my view, Strawson's reasons for saying that predicative sentences have no truth-value when the corresponding existential sentences are not true — reasons which stem from a particular conception of what it means and entails to assert a proposition — are equally valid for the relation between legal propositions and the sentences that assert the existence of certain normative consequences in a certain normative system.

Dworkin (1977c, 289 f.) too has noted the similarity between legal propositions and propositions referring to non-existent entities:

„I should mention, however, one possible objection to this portion of my argument not foreseen in that discussion. This appeals, in a general way, to an argument which is familiar among philosophers of language, namely that propositions about non-existent entities are neither true nor false. There is a tradition which argues that the proposition that the present King of France is bald is neither true nor false (though there is also a tradition which argues that this proposition, properly understood, is simply false). The proposition about the King of France ... (according to one view) is neither true nor false. So (I have heard it argued) propositions of law ... may also be neither true nor false."

Dworkin thinks, however, that the analogy is useless because propositions referring to non-existent entities presuppose, but do not assert, the existence of the proposition's subject (which is non-existent), whereas what legal propositions in hard cases assert or deny is „the existence of a legal right or some other legal relation" (Dworkin 1977c, 290). And he adds:

„The comparable proposition is the proposition that there is now a King of France. No one supposes that that proposition is neither true nor false. It is either (as most of us think) false, or (as some extreme supporters of the Comte of Paris believe) true."

Dworkin's position on this point presupposes that legal propositions assert the existence of rights, obligations, and other legal relations, i. e., that they assert the existence of some normative reality. The thesis supporting that assertion is a (Platonic) realist thesis about that normative reality and will be discussed in Chapter V. But it can already be announced that it is a thesis that is incompatible with the legal constructivism presented here. According to constructivism (legal positivism), that way of understanding legal

propositions would convert them all into false propositions. For a legal positivist, the propositions asserting that certain persons have certain legal rights or duties presuppose that certain normative consequences belong to a legal system, that is, they presuppose the existence of certain complex social facts of norm creation and elimination.

III. LEGAL DYNAMICS

1. Introduction: Legal Order and Legal System

In the two previous chapters we have looked at sets of legal norms as sets that are structured by the relation of *deductibility*. Thus, we have considered legal systems as *static* systems, that is, systems containing all their logical consequences. It is a notorious fact, however, that the law changes over time, that there are acts of norm-creation (enacting) and acts of norm-elimination (derogation). Because of this, it is said that legal systems are *dynamic*.[1] The criterion habitually used to account for the dynamic structure of legal systems is the so-called *genetic* or *legality* criterion (Raz 1970, 183-185; Caracciolo 1988, 57 f.). According to this criterion, a norm *N* belongs to a legal system *LS* if there is another norm *N'* in *LS* authorizing some organ *O* to enact *N*, and if *O* enacts *N*; similarly, a norm *N* ceases to belong to a legal system *LS* if there is another norm *N'* in *LS* authorizing some organ *O* to derogate *N*, and *O* derogates *N*.

Obviously, the genetic structure of a legal system depends on the fact that certain *power-conferring* norms or norms of *competence* belong to the system. In legal-philosophical scholarship, the nature of such norms has been extensively discussed. One of the central points of that discussion is the question whether or not those norms are to be regarded as prescriptive or as conceptual rules. I will not explore this question here.[2] For my purpose, it suffices to accept that in many cases whether a particular norm belongs to a particular legal system depends on whether another norm belongs to that same system which confers on some organ the power to enact that first norm. For the notion of a *chain of norms*, which will be needed here, it does not matter whether such a norm is regarded as a permission (authorizing the performance of some normative act), as a conceptual rule (identifying as valid the norms created in the exercise of the corresponding competence), or as something else (e. g., as obligating one to behave in accordance with the norms created in the exercise of that competence).

The genetic criterion enables us to account for the introduction and elimination of legal norms through specific normative acts. Enacting and derogating norms brings about a change from a system LS_1 to another system LS_2. And since the identity of a set is a function of the identity of its content, every time the content is modified, we have a different set. This approach to the identity of a system, however, is inconsistent with another widely shared intuition that can be expressed as follows: Although the content of the law changes as a consequence of the enactment or derogation of norms, the legal system — e. g., the Spanish law — maintains its identity over time.

In order to solve this problem, I will introduce the distinction between a *legal system* and a *legal order* (Alchourrón/Bulygin 1971, 1981; also Caracciolo 1988; More-

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[1] For the distinction between static and dynamic systems of norms, cf., for example, Kelsen 1945, 112 f.

[2] On this point, cf., for example, Bentham 1970, 27 f.; Hart 1961, 78 f.; Kelsen 1945, 143; 1960, 57 f.; 1973, 83, 210; Raz 1970, 166-168; Ross 1958, 32; 1968, 113; von Wright 1963a, 192; Atienza/Ruiz Manero 1994, 1995; Bulygin 1991b; Caracciolo 1995a; Hernandéz Marín 1984, 33-43; 1989, 153-166; Mendonca 1992; Mendonca/Moreso/Navarro 1995; Paulson 1988; Spaak 1994.

so/Navarro 1993a, 1993b). Legal systems are momentary normative systems; every time a norm is enacted or derogated by a competent authority, the result is a different system. Legal orders are sequences of legal systems. The identification of a legal order *LO* conceptually presupposes the identification of the first system of the sequence (in what follows, the originating legal system LS_0); further systems LS_1, LS_2, LS_3, ..., LS_n belong to *LO* if, and only if, they satisfy certain membership criteria, such as the legality of the normative acts.

The concepts of 'legal system' and 'legal order' can be understood as a new way of expressing the distinction introduced by Raz (1970, 34 f.) between *momentary* and *non-momentary* legal systems. However, it is important to underscore three differences concerning *(i)* the membership of legal systems in legal orders, *(ii)* the judges' obligation to apply the norms of a legal system, and *(iii)* the relationship between the notions of legal order and non-momentary legal system and the notion of national law.

(i) The logical relations between momentary and non-momentary systems are characterized in an ambiguous way by Raz (1970, 34 f.; cf. Bulygin 1982b, 80). On the one hand, Raz asserts that momentary systems *belong* to non-momentary systems. On the other, he also holds that momentary systems are *subclasses* of non-momentary systems. Since the relations of *membership* and *inclusion* between sets are logically different (e. g., while inclusion is transitive, membership is not),[3] with Raz's distinction it is not clear whether non-momentary systems are to be regarded as systems of norms, or rather as sets of systems of norms. According to the definition of 'legal order' and 'legal system', a legal system is a set of norms, and a legal order is a set of systems. Since the relation of membership is intransitive, legal norms do not belong to a legal order; the only elements of legal orders are (momentary) legal systems.

(ii) According to Raz (1980, 211), a momentary system only contains such norms which the judges have the obligation to apply. The distinction between system and order, in contrast, does not presuppose that *all* norms of the system are applicable at a certain time *t*. As I will later show in detail, a norm may belong to a system and still be inapplicable (i. e., the judges have the obligation not to apply it). That is the case, for instance, during the time of *vacatio legis* of a norm, when it belongs to the system of time *t*, but is not yet applicable in *t*.[4]

(iii) Raz's non-momentary systems seem to coincide with the law of states, e. g. Spanish law, French law, German law, etc. The definition of a legal order given above, however, does not commit us to see it this way. If legal orders are regarded as sequences of legal systems, it is an open question whether or not they coincide with the law of some state. For example, in many cases when a political system changes, the legal systems arising from a new constitution do not belong to the same legal order as the old ones. Still, they may all be systems of the law of the same state. For instance, if one ac-

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[3] In Moreso/Navarro 1993b, we have analyzed the distinction and its consequences for the relationships between momentary and non-momentary systems in more detail.

[4] At the time of writing (January 1996), this was the situation of the new Spanish Criminal Code, enacted in 1995, which undoubtedly belonged to Spanish law at that time (as proven by the fact that it could be derogated), but was not yet applicable.

cepts (and I think there are good reasons for doing so) that the Spanish legal order originated from the Constitution of 1978 is a new legal order, then the systems prior to 1978 do not belong to the current Spanish legal order; but, obviously, that does not mean that Spanish law begins with the Spanish Constitution of 1978.

2. Identifying Legal Orders

The notion of a legal order, together with the criteria of deductibility and legality, is useful for the task of identifying a particular legal order. The conceptual rule satisfying that function I will call the *rule of identification (RI)*. *RI* serves to assess whether or not two systems belong to the same sequence, i. e., the same legal order. It also serves to assess what norms belong to a certain system of the sequence. For this, one needs to identify, first of all, the first system of the sequence (the originating system) and then the subsequent systems.

Since I am not interested in any specific legal order, the *RI* I will present here is only a definition pattern. For a definition of a particular legal order, the norms of the originating system would have to be spelled out one by one. The general structure of *RI* can be given in the following way (cf. Bulygin 1991a, 263 f.):

(1) *Independent norms*: Norms N_1, N_2, ..., N_n are valid in the legal system LS_0. LS_0 is the *originating system* of the legal order LO_1; norms N_1, N_2, ..., N_n are the *first constitution* of LO_1.

(2) *Introduction of norms*. If a norm N_j is valid in a system LS_t which belongs to LO_1, and N_j empowers authority x to enact norm N_k, and x enacts N_k at time t, then N_k is valid in system LS_{t+1} (i. e., in the system corresponding to the moment following t), and LS_{t+1} belongs to LO_1.

(3) *Elimination of norms*. If a norm N_j is valid in a system LS_t which belongs to LO_1, and N_j empowers authority x to derogate norm N_k which is valid in LS_t and x derogates N_k at time t, then N_k is not valid in system LS_{t+1} (i. e., in the system corresponding to the moment following t) that belongs to LO_1.

(4) *Persistence of norms*. The valid norms of a system LS_t, belonging to an LO_1, which have not been derogated at time t are valid in system LS_{t+1} of LO_1 (corresponding to the moment following t).

(5) *Derived norms*. All logical consequences of valid norms of a system LS_t belonging to an LO_1 are also valid in LS_t.

This rule calls for some comments:

(a) Independent norms are identified *extensionally*, and their being valid does not depend on the satisfaction of any systematic relationship with other norms. They are similar to what has sometimes been called *sovereign* norms (cf. von Wright 1963a, 197-204). Dependent norms are identified *intensionally*, on the basis of the satisfaction of certain relationships, namely, deductibility and legality.

(b) Independent norms, i. e., the first constitution, must be distinguished from *RI*, since *RI* is not a norm of any system. *RI* gives a *recursive* definition of a valid norm in a legal system *LS* which is a member of some legal order *LO*. In contrast, the first constitution is a set of valid norms. It makes no sense to predicate validity or invalidity of *RI*, as validity is equivalent to membership in a legal system.

(c) Legal systems are *static* systems of norms which are closed under the notion of logical consequence. When the constitution of LS_0 is identified, the content of the originating system is given by the logical consequences of that first constitution.

(d) The clauses of introduction and elimination of norms provide a conceptual explication of the genetic relationships between legal norms. The dynamic nature of the law is reconstructed by the genetic relationships between the norms belonging to an ordered pair of adjacent systems in a legal order. The genetic relationships are, thus, *intersystemic* (Raz 1970, 184 f.; Caracciolo 1988, 67-73).

(e) As has been said before, *RI* implies that while legal systems are sets of norms, legal orders are sets of legal systems. Since the relation of membership is intransitive, legal norms do not belong to a legal order. The elements of legal orders are static systems of norms. Besides, the expression 'legal order' is not the same as 'law of a state'. Normally, the law of a state must be reconstructed as a set of successive legal orders.[5]

(f) The continuity of the law is usually regarded as an essential characteristic of legal dynamics (cf. Hart 1961, 60-64). Therefore, *RI* also includes a clause — clause (4) — about the persistence of norms.

(g) A rule of identification like *RI* must not be confused with a social rule, addressed to the judges, prescribing the application of norms that are identified by some criterion. Since Hart, such a social norm is usually known as a 'rule of recognition' (for the idea that the rule of recognition imposes obligations on judges, cf. Raz 1970, 197-200). *RI* is nothing but the conceptual rule enabling us to identify valid norms, and is not of a prescriptive nature (cf. Bulygin 1976).

Now, I wish to underscore that the identity of a legal order depends on its originating system (the norms of its first constitution), on the one hand, and on the criteria of deductibility (reflected in clause (5)) and legality (reflected in clauses (2), (3) and (4)), on the other. In that sense, we can say that the originating system has a special primacy, conferred on it by the structure of *RI*.[6]

It should be clear that *RI* provides a possible *rational reconstruction*[7] of the notion of a legal order. That notion attempts to explicate in an adequate way our concep-

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[5] A. Merkl (1968, 1269) has expressed this idea as follows: „[E]inem Staate im historisch-politischen Sinne [entsprächen] unter Umständen mehrere Staaten im Rechtssinne ...; als Bruchstellen der Rechtskontinuität und Staatsidentität habe ich die Revolutionen gekennzeichnet." Cf. also Caracciolo 1988, 19 ff.; Bulygin 1991a; Moreso 1994b; Moreso/Navarro/Redondo 1995.

[6] In the following chapter, I will present this idea of the primacy of the originating system and its consequences in more detail.

[7] For an explication of the rational reconstruction of a concept, cf. Alchourrón/Bulygin 1971, 7-9.

tual intuitions about different questions, namely, the membership of norms in legal systems, the identity of legal orders, the normative changes correlated with the performance of certain normative acts of norm creation and elimination, etc. That conceptual reconstruction assumes certain constraints for our linguistic usage and, in that sense, delimits the sphere in which our conceptual intuitions will be accepted.

Usually, the validity of norms is associated not only with their membership in certain systems, but also with their *obligating force*. One of the aspects in which this obligating force is manifested is the capacity of valid norms to serve as premises in the justification of binding legal decisions. From this point of view, it should be noted that validity as membership in some system S_j of time t_j in the sequence of systems of a legal order is not the same as validity as obligating force, which I will call *applicability*. That a norm belongs to some system S_j in time t_j does not mean that is is applicable in t_j. Also, there are norms that do not belong to system S_j and which, nevertheless, are applicable in t_j.

In the following sections of this chapter, I will try to show in what way the distinction between validity as membership and validity as applicability helps one understand how the dynamics of legal systems affect the justification of decisions, i. e., the resolution of cases. Moreover, this will also show how a case can be *hard* not only because of problems of indeterminacy, as analyzed in Chapter II, but also because of problems caused by the applicability of norms.[8]

3. The Applicability of Legal Norms

It is a widely shared opinion among jurists that legal norms are applicable when normative authorities, e. g., judges, ought to apply them. In that sense, the statement 'Norm N is applicable' usually refers to institutional duties of normative authorities. The institutional nature of the law is intrinsically connected with its social and normative dimensions. Some specific institutional practices, e. g., the primary organs' practices in the recognition of norms, provide the criteria for the existence and identity of legal systems. Thus, it seems possible to conclude that the identification of applicable norms — those determining institutional duties — is one of the main topics of any legal theory.

The description of these institutional obligations, however, does not exhaust the theoretical relevance of the concept of applicability. At least two other important questions must be mentioned.

On the one hand, the notion of applicability is linked to the identification of the truth-conditions of legal propositions. As we already know, a proposition about rights, prohibitions, obligations, etc., is a legal normative proposition. Such propositions refer to the deontic qualification of some action and, thus, offer relevant information about the legal status of the actions of individuals. The truth of a normative proposition is always relative to a norm that is applicable at a certain time t. For instance, if a norm N

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[8] MacCormick (1978, 70-72; cf. also Atienza 1991, 138-140) has given a fourfold classification of hard cases in which he includes hard cases because of problems of relevance, i. e., problems in determining the norm that is applicable.

prescribes action p, but is not yet applicable at time t, individuals have no legal obliga-
tion to perform p in t in accordance with N. The criteria of applicability of a system S_j
enable all individuals (and not only the authorities) to know the deontic qualification of
an action. Therefore, when one asserts that a norm N is applicable, often what is inten-
ded is only to point out that *individuals* do not have the duty to behave in accordance
with N.

On the other hand, the criteria of applicability of legal norms not only serve to
identify the legal rights and obligations at a time t, but also to describe the relationships
between the actions of authorities and of individuals. Authorities and individuals are
rarely interested in the identification of applicable norms as a conceptual problem. Nor-
mally, authorities and individuals wish to identify the norms that are applicable to spe-
cific cases that affect them, i. e., those norms that are applicable in some litigation or
conflict of interests. Normative authorities, especially judges, solve conflicts of interests
through the application of general norms. Their decisions must be justified, *prima facie*,
by norms that are applicable to the facts.

An adequate reconstruction of the concept of applicability seems to be a useful
analytic tool for understanding the way in which the law motivates and qualifies human
behaviour. The motivation of behaviour is one of the main functions of the law. This
function is fulfilled by applicable norms when they regulate actions that have not yet
been performed. But the motivation of behaviour is not the only function of the law. Le-
gal norms also serve as guidelines for the qualification of behaviour. For example, an
action A performed at time t can be qualified in retrospect as legally obligatory, or pro-
hibited, by a norm N enacted at a time $t+n$. Norms can be applicable to actions that
were performed before their enactment, i. e., they can be retroactive; and although in
that case obviously they cannot affect the behaviour of individuals, they offer a guide-
line for determining the deontic status of those actions (Munzer 1977). As can easily be
seen, the two functions of the law are intrinsically connected, at least for the following
reason: Legal norms regulate judicial decisions, by prescribing the application of other
norms, i. e., of norms that are applicable to certain cases; and the latter, in turn, can
motivate and qualify the behaviour of individuals.[9]

Lawyers and legal philosophers often assert that a valid norm is a norm that has
legal effects. In this context, the expression 'Norm N has legal effects' is equivalent to
the expression 'Norm N is legally obligatory' or, in other words, 'Norm N is applicable'
(cf. Guastini 1993, 32 f.). This property of legal norms, as we have already seen, is in-
timately related to the institutional nature of the law, because a norm can have legal ef-
fects only if it is applicable by the judges and courts. Now, we need to *mold* a concept
of applicability that enables us, on the one hand, to distinguish it from other notions,
like that of membership, and, on the other, to show the conceptual relationships be-
tween these two notions.

I will speak of applicability when the truth of the statement 'Norm N_i is applica-
ble to an individual case c' depends on the fact that another norm N_j, which obliges to

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[9] On the relationships between norms addressed to judges and norms addressed to individuals, cf. Kelsen
1979, ch. 55.

or permits the use of N_i in c, belongs to some system S_j (Bulygin 1982b, 1991a). According to this proposal, if it is true that a norm N_i is applicable to an individual case c at time t, then it is also true that another *norm* N_j belongs to the legal system of time t. It should be noted that there must not necessarily be a one-to-one relation between N_i and N_j. N_j can also prescribe the application of other norms N_h, N_k, N_l, etc. Norm N_j offers one of the criteria of applicability of norms in a legal system S_j. The normative subjects of the norms stipulating the criteria of applicability in S_j are normative authorities of S_j, e. g., the judges.

The actions of individuals and authorities are thus normatively linked through a network of applicable norms. We can, therefore, define the concept of applicability as follows:

DF I. A norm N_i is applicable at time t to an individual case c, which is an instance of a generic case C, if, and only if, another norm N_j which belongs to the system S_j of time t prescribes (obliges to, or permits) the application of N_i to individual cases that are instances of C.

Legal systems are institutional systems of norms. The main characteristic of such systems is the existence of norm-applying institutions. Thus, only if there are norm-applying organs does it make sense to predicate the applicability of norms.

Although there are many interesting relationships between the applicability and the membership of norms in a legal system, the applicability of a norm does not imply its membership in the system of a certain time t, nor does membership imply applicability. On the one hand, not all norms that are applicable at time t to an individual case c belong to the system S_j of t. In cases regulated by international private law, a norm N of a legal system of state E_i may be applicable in another state E_j although N does not belong to the legal system of state E_j. In that sense, legal systems can be characterized as open normative systems (Raz 1979, 116). On the other hand, not all norms that belong to a system S_j are applicable. This is the case, for example, when a norm N_j belonging to S_j is declared inapplicable to certain cases by another norm N_i. For instance, in many countries certain constitutional guarantees and rights can be declared temporarily inapplicable, in accordance with the exercise of exceptional powers, e. g., exceptional parliamentary powers.

Now that membership and applicability have been clearly distinguished, we can say that normative authorities habe the obligation to apply certain norms that are not identified by *RI* as belonging to the legal system of the time of application, and that they have the obligation not to apply certain other norms that can be identified as belonging to the legal system in question. That is why the *open* nature of legal systems is an essential feature of the institutional nature of the law.

It must be noted, however, that *RI* conceptually still has a fundamental role in the identification of applicable norms. It is because of a norm that does belong to the legal system of time t that the norm-applying institutions must (or may) apply norms that do not belong to that system, or must (or may) not apply norms that do belong to it.

As I have already said, some very common situations in the application of the law that have to do with the role of time in the law can be understood with the help of that distinction.

This applies not only to the cases regulated by international private law mentioned above, but also, for instance, to cases in which a norm stipulates the obligation of applying the criminal norm most favourable for the defendant, of those valid between the moment in which the crime was committed and the time of trial. Thus, it may be the case that a judge must ground her decision on a norm that has already been derogated, but that is more favourable, and which perhaps belongs neither to the legal system of the time when the crime was committed nor to the legal system of the time in which it is tried (Bulygin 1982b).

It may also be the case that a norm that belongs to the legal system is not yet applicable because it is still in the period of *vacatio legis* (cf. n. 4 to this chapter).

The importance of the notion of applicability deserves to be emphasized, since the truth-conditions of legal propositions depend on the content of certain applicable norms. Hence, the characterization of the truth-conditions of legal propositions given in Chapter II must be complemented with what has been said about applicability now. But the theoretical fruitfulness of the concept of applicability does not stop here. The concept can also be useful in analyzing several problematic questions in legal theory.

As *RI* has been stipulated, some norms habitually used in justifying legal decisions cannot be identified as belonging to the legal system of a certain time. On the other hand, norms identified as belonging to the legal system of a certain time seem to be unfit candidates for appearing as justifications of judicial decisions.

The first situation is that, for example, of *customary* norms that do not result from a normative act of law-creation by a normative authority; or of some *standards of morality, implied principles,* etc. that cannot be identified through the clauses of *RI*; or of *irregular* norms (unconstitutional norms, illegal regulations, etc.) which, since they were issued by *incompetent* organs, do not belong to any legal system of the sequence; or of *received* norms, i. e., norms that belonged to the legal systems prior to the constitution of the legal order O_j and which are still applicable in O_j, but which no clause of O_j identifies as belonging to any system of O_j.

In the group of norms identified as belonging to the system but which are unfit candidates for appearing as a normative premise of a judicial justification, we can point out those norms that, although they belong to a certain legal system, come into conflict with other, *prevailing* norms, on the one hand, and *irrelevant* logical consequences to which I have dedicated part of Chapter I, on the other.

In the sections that follow, I will try to show how the concept of applicability can overcome these difficulties. Here, the term 'validity' will be used as synonymous with 'membership in a legal system', in order to distinguish it clearly from the term 'applicability'.

4. Applicable But Invalid Norms

The paradigmatic case of applicable, but invalid norms, in the sense that they do not belong to the legal system at the time of application, is perhaps that of the application of norms already derogated. It is the best-known case among jurists, and all other cases are analogous to it.

As suggested before, this explication can be extended to the case of the norms of a legal system of another state which are applicable to certain cases according to the norms of conflict in international private law. For instance, if an Italian makes his will in Spain and there are doubts about the validity of the act because of certain problems concerning the testator's capacity, and in accordance with the norms of conflict the capacity for making a will follows the law of the testator's country — as is the case in Spanish law —, then that conflict should be resolved according to Italian law. That means that the Spanish judge ought to apply the corresponding Italian legal norms which, obviously (according to the notion of membership expressed in *RI*), do not belong to the Spanish legal system of that time.

In what follows, I will try to broaden that explication still more, so that it will include the cases of customary norms, standards of morality, irregular norms, and received norms.

a) Customary norms

RI does not enable us to account for customary norms. Therefore, when the notions of legal order and legal system are presented, one usually adds the reservation that these notions do not reconstruct how customary norms belong to the law (Alchourrón/Bulygin 1979, 18 f.). Nevertheless, the courts in most legal systems apply norms arisen from custom, because they recognize that unter certain conditions such norms possess binding force.

If membership is not the ground of the binding force of customary norms, then what is it based on? A tentative explication could consider such norms, which do not belong to any legal system, *applicable* in accordance with norms stipulating under what conditions customs ought to be taken as a foundation for certain judicial decisions. Even in countries where the theory of the sources of the law concedes a privileged place to customs, some requirements customs must fulfill in order to be applicable are usually added (e. g., that they are not applicable in all legal areas, that they may not contradict the law, nor public order or morality, and that they must be well-established) (cf. Raz 1972a, 853).

I think this conception does not fall under the objection Hart (1961, 43-47) expressed against those who ground the validity of customs in some act of tacit acceptance by the authorities, nor does it assume that the applicability of customary norms derives from the fact that they are recognized by the courts. The courts apply them because under certain conditions they have the obligation to do so. Now, once applicability and membership are clearly distinguished, there is no need to assert that customary norms belong to some legal system in order to recognize that they have binding force and ought to be applied by the courts.

b) Standards of morality

It is often argued that judges, in deciding a case, take into account not only legislated norms, but also certain standards of morality. It has even been held that disregard of this fact is one of the main shortcomings of legal positivism (Dworkin 1977c, 22-28). And

because of this, it is concluded, we should enrich our concept of law by including those standards.

Here, I do not wish to reproduce that controversy or its connections with the positivist thesis of the separation between law and morality.[10] I only want to point out that the notion of applicability can help clarify part of that controversy.

In those instances where norms belonging to the law stipulate the obligation of the courts to take into account certain standards of morality, we can say that those standards are applicable, although they do not belong to the law. Those standards then receive the same consideration as norms of foreign law or customary norms, which sometimes also must be applied by the courts.

I will not go into the question of how such standards are identified either. Whether they must be found through an empirical investigation of a society's positive morality or through some kind of epistemic access to critical morality is, of course, an important question; but whatever those standards may be, I think it is clear that in some cases they are applicable.

Thus, when the Spanish Civil Code (in the third paragraph of art. 1271) stipulates that 'All services that are not against the law or against good customs can become an object of contract', the appeal to good customs undoubtedly is an appeal to a standard of morality. Should we interpret this appeal saying that it *incorporates* into the law those moral rules that stipulate what good customs are? I think not, and in that sense the thesis of the separation of law and morality is fully upheld. Still, those moral rules must be applied by the courts when they judge the validity of contracts.

In general, we can conclude that references of legal norms to certain standards of morality declare these to be applicable, rather than incorporating them into legal systems as members.[11]

c) Irregular norms

Irregular norms, i. e., unconstitutional norms, are invalid since they do not satisfy the required systematic relationships with member norms. *RI* thus guarantees that no irregular norm ever belongs to any system of the sequence of a legal order. Elsewhere (Moreso 1994b), I have said that this notion of legal order shapes what can be called an *optimal legal world*, i. e., that possible world where all the autorities creating norms (looking like legal norms) do so on the grounds of a previous norm authorizing them to do so. In that world, the legislative power issues laws only in accordance with the Constitution, the executive power only issues regulations authorized by law, and the judicial

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[10] Which is what has led Raz to defend a form of positivism called *exclusive* positivism, according to which the law is based on certain social sources, in contrast to an alleged *inclusive* positivism said to hold that the law also consists in certain standards of morality. Cf. Raz 1994, ch. 9; Waluchow 1994.

[11] In Chapter V, we will see some important consequences of that distinction. I already wish to point out that one of them is that, whatever the force of the thesis that legal measures must be interpreted in accordance with the authority's intention (as will be determined in that chapter), that thesis does not apply to the rules stipulating standards of morality, since obviously such standards are not created by any authority.

power (or the administration) only issues sentences (or administrative resolutions) in accordance with valid laws.

Now, in the real world, authorities often issue irregular norms, and it may even happen that a court of last instance (e. g., a Constitutional Court) decides that an irregular (and, in that sense, invalid) norm is valid. As Hart (1961, 138-144) reminds us, this is possible if we distinguish the *finality* of a decision from its *infallibility*: a decision of last instance is final, but not infallible. But if a Constitutional Court stipulates that a particular invalid norm is in accordance with the constitution, then the courts must apply it.

Here, again, it is useful to distinguish validity from applicability (Bulygin 1991a, 267). Irregular norms are invalid, and the fact that a court says that they are valid does not make them so, even though under certain circumstances (by decision of a court) they may become applicable for certain organs.

d) Received Norms

In legal theory, sometimes there are questions about the status of the norms that existed before the enactment of a new constitution — elaborated independently of the previously existing rules — and which are still used afterwards by the courts, and by legal operators in general, for attributing obligations and rights to individuals.[12] For instance, even after revolutionary changes resulting in a new political system, great parts of the previous law (e. g., usually most of private law) are still applied. Traditional opinion is that, therefore, *received* norms (as they have been called) belong to the legal systems arising from a new constitution.

However, none of the clauses of *RI* permits such a conclusion. Therefore, in Moreso/Navarro 1996b we have proposed once again to use the distinction between membership and applicability. Although received norms do not belong to any legal system of the order resulting from a new constitution, they are applicable according to those clauses of the new constitution that say so.

At least on one occasion, Kelsen suggested that there is a similarity between the case of received norms and the case of applicable norms of some foreign law. But since he did not distinguish between validity as membership and validity as applicability (cf. Bulygin 1990), he did not draw the same conclusions as I do here. Kelsen (1945, 244) presented the case as follows:

„The rule obliging the courts of a State to apply norms of a foreign law to certain cases has the effect of incorporating the norms of the foreign law into the law of this State. Such a rule has the same character as the provision of a new, revolution-established constitution stating that some statutes valid under the old, revolution-abolished constitution should continue to be in force under the new constitution. The contents of these statutes remain the same, but the reason for their validity is changed.“

If one accepts Kelsen's suggestion that the conflict norms of international private law have the same status as those norms which convert norms of previous legal orders into

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[12] Cf. Kelsen 1945, 244; Fuller 1969, 142; Finnis 1973; Hart 1983, 362 ff.; Moreso/Navarro/Redondo 1995.

received norms, then the proposal to regard them as invalid, but applicable gains plausibility.[13]

5. Valid But Inapplicable Norms

The paradigmatic case of norms that are inapplicable although they belong to a certain legal system at a certain point in time is probably that of enacted norms that have not yet come into force. In this paragraph, however, I want to consider two additional instances: that of norms whose applicability is cancelled by some criterion when they come into conflict with other norms (I will call them *cancelled* norms), and that of norms which are irrelevant logical consequences of other norms (they will be called *irrelevant derived* norms).

a) Cancelled norms

When a norm N_1 is inconsistent with another norm N_2, and both of them belong to the same legal system, then for logical reasons the courts cannot ground their decision in both norms at the same time if they want to motivate the addressees' behaviour. Therefore, legal systems usually contain so-called antinomy-resolving criteria which in the case of such an inconsistency permit one, so to speak, to *cancel* the application of one of the norms.

Take, for example, two norms N_1 and N_2, both belonging to the same legal system, of the following content:

N_1: Killing another person will be punished with 10 to 15 years in prison.

N_2: Killing another, terminally ill person with her consent, in order to deliver her from unbearable pain will not be punished.

Obviously, one cannot apply both norms to a case of euthanasia, because they reach mutually inconsistent conclusions. If the legal system contains the *lex specialis* rule, we can say that the applicability — though not the membership — of N_1 is cancelled, and only N_2 will be applicable to the case.

If, as I propose, the *lex specialis* rule is seen as a criterion of applicability, then criteria of applicability provide legal systems with a *rank order*. Because of such criteria of applicability for the norms belonging to one system, legal systems are not only sets of norms containing all their logical consequences, but *hierarchically* ordered sets of norms (cf. Alchourrón/Makinson 1981).

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[13] Sometimes the problem of the reception of norms has been linked to the problem of the identity of the state, on the assumption that the legal order of a state owes its identity to the political identity of the state (cf. Hart 1983, 309-342; Honoré 1967; Raz 1979, 78-102; Finnis 1973; Eekelaar 1973; Harris 1971). Whatever the status of that assumption, it should be noted that the problem of the reception of norms is independent of the question of state identity. A state can very well receive norms of another, disappeared state, as is the case, for instance, when a state is divided (for example, the norms the Czech Republic has received from former Czechoslovakia).

Now, of course, there are many criteria of applicability in legal systems that enable one to establish a rank order, and unfortunately, they don't always lead to one and the same order (cf. Bobbio 1964). But, in any case, they give us an additional reason for distinguishing between the norms that *belong* to a legal system and the norms that are *applicable* in it.

b) Irrelevant derived norms

In Chapter I, I have presented a notion of irrelevant logical consequence that enables us to divide the set of derived norms into the two subsets of relevant and irrelevant derived norms. I will now suggest that irrelevant derived norms are not adequate candidates for justifying judicial decisions. That means that, although they belong to a legal system, irrelevant derived norms are not *applicable* (cf. Moreso 1996). Thus, for example, although the norm 'Buyers must pay the price of the merchandise' leads to the irrelevant derived norm 'Buyers must pay the price of the merchandise or dance a waltz', a judicial decision grounded in this irrelevant derived norm that would stipulate 'Ticius, having bought a house from Sempronia, must pay her the price of the house or dance a waltz' would certainly not be considered a justified judicial decision. And the reason why it would not be justified is because it is grounded in an irrelevant derived norm, i. e., an inapplicable norm.

As already suggested in Chapter I, this idea could lead us to redefine the notion of a normative system as a set of statements (among which at least one must be a norm) containing all their *relevant* logical consequences. However, because of a problem related with derogation and the dynamics of legal systems, this possibility is not advisable. For example, take the following normative system *NS*:

$$N_1: p \rightarrow q.$$
$$N_2: q \rightarrow Or$$

Norm N_1 can be understood as a conceptual rule (a definition, for instance, 'Persons over 18 are of age'), and norm N_2 as a genuine prescription ('Persons of age must vote'). From these two norms, we can derive norm N_3: '$p \rightarrow Or$'. This is a relevant conclusion. Now, suppose a norm-authority derogates norm N_4: '$p \rightarrow O(r \vee s)$' (which could be done with a derogating measure like 'All norms prescribing persons over 18 to vote or to register are derogated'). N_4 is an irrelevant consequence of system *NS*. If irrelevant derived norms would not belong to *NS*, the authority's act of derogation would be an unhappy act, i. e., it would not succeed in eliminating any norm from the system. Now, if all derived norms belong to *NS*, then the elimination of N_4 also implies the elimination of N_3 (a relevant logical consequence) and — but that is another problem — leaves open the question of whether N_1 or N_2 ought to be eliminated too (the thesis of the logical indeterminacy of the system, cf. Alchourrón/Bulygin 1981).

Or take another case: A father orders his children: 'You must do your homework every afternoon' ('Op'). Later, he decides to soften the strictness of the norm, and permits his children not to do their homework on any of their birthdays. That second norm

can be seen as a derogation of the derived norm 'Even if it is one of your birthdays, you still must do your homework' ('$q \rightarrow Op$'). That is a norm derived from 'Op' and, there-fore, the act of derogating it implies the elimination of 'Op', which is replaced by an-other norm, like '$\neg q \rightarrow Op$' ('If it is not one of your birthdays, you must do your home-work'). Now, if we would not accept that *irrelevant derived* norms belong to the norma-tive system, the father's act of permission would not succeed in eliminating any norm, since the derogated norm is an irrelevant derived norm ('$q \rightarrow Op$', where variable q can be replaced by any other *salve validitate*).

If only for this reason, we must define the notion of a normative system as a set of statements containing *all* their logical consequences. But in such a set, it is important to distinguish between relevant and irrelevant logical consequences.

Moreover, legal dynamics (changes in the law as a result of the enactment or de-rogation of norms) can be seen as a special case of the dynamics of knowledge. It has been pointed out that in processes of knowledge change, previously irrelevant conse-quences can become relevant as a result of a contraction process. It is, therefore, neces-sary to distinguish between the set of all beliefs and the subset of the relevant parts of that set. Contractions and revisions must be applied to the set of all beliefs, rather than to its relevant parts only (Schurz/Lambert 1994, 94 f.). If one accepts that derogation (a kind of contraction and revision of normative systems) is similar to a kind of belief change (Alchourrón/Gärdenfors/Makinson 1985), then the conclusion sketched here, according to which derogation must be applied to all the logical consequences of a nor-mative system, rather than to its relevant derived norms only, is an application of the more general thesis about the dynamics of knowledge.

6. Conclusions

The introduction of elements of legal dynamics brings with it the need to mold a more complex concept of a legal system than the one presented in Chapter I. Through certain authorized acts of the enactment and derogation of norms, new legal systems can be generated. The distinction between a *legal order*, as a sequence of systems of norms, and a *legal system*, as a set of norms that is closed under the notion of *logical conse-quence*, adequately reproduces this dynamic feature of the law.

RI expresses a notion of 'legal order' and of 'legal system' that can, at the same time, account for the problem of the identity of the law (guaranteed by the identification of the independent norms of the originating system and the criteria of legality and de-ductibility) and the problem of changes in the law (represented by the succession of sys-tems in the legal order).

RI also provides a notion of the validity of norms, understood as membership of the norms in some system of the sequence. That notion must be clearly distinguished from the notion of *applicability*. Although in one sense applicability depends on mem-bership, since norms are applicable or inapplicable according to other norms that belong to the legal systems, there can be valid norms that are inapplicable, as well as invalid norms that are applicable. The notion of applicability enables us to underscore two im-portant characteristics of legal systems:

(i) Legal systems are *open* systems, i. e., they contain norms prescribing the application of other norms that do not belong to the system in question.

(ii) Legal systems are *hierarchically ordered* systems, i. e., they contain norms stipulating that certain norms are inapplicable to certain cases although they belong to the system in question.