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The Structure of a Legal Norm System*

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Two Kinds of Connection Between Legal Norms

That which in Hans Kelsen's theory has become a permanent feature of general legal studies is his observation that twofold connections may exist between norms of conduct: content (static) and competence (dynamic).[1] However, what has to be considered misguided in Kelsen's conceptions is, firstly, the excessive stress placed on the fact that legal norms create a system based on competence connections, and, secondly a failure to give sufficient attention to the role of the content connections in the structure of a system of legal norms in a given country in a given period.[2]

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1 Hans Kelsen, *General Theory of Law and State*. Cambridge, 1945, 113–114.

2 Jerzy Wróblewski, "Stosunki między systemami norm", *Studia Prawno-Ekonomiczne* 6. 1971: 21.

We can speak of the system of statements of some kind (sentences, judgmental pronouncements or norms) when they form a whole ordered in a certain specific way. How they are ordered is only generally analogous for various kinds of statements. The ordering, specifically, involves some basic statements used to include further statements of a given kind in a given system according to some or other rules of inference. A system is thus characterised among others by the fact that it is made up of some statements and properly inferred consequences of these. A system, or at least a properly built system, is characterised by the fact that the statements included in it are not inconsistent with one another in some or other understanding of this inconsistency; they are appropriate for their type; and that there are appropriate rules for eliminating inconsistencies that arise and are considered as not belonging to the system. All systems of statements interconnected in this way may be called static in the sense that since basic statements, rules of inference and possibly collision rules have beenadopted, then from that moment on the entire system is given *in nuce*. It is rather a matter of chance whether a given fragment of the system is formulated and elaborated on in a given moment (we are talking here of a fragment because it is hardly imaginable that somebody would exhaustively elaborate on a system of sentences, norms or judgmental pronouncements).

A peculiarity of norms is the fact that they can be connected not only by content (static) ties, but also by ties of competence capacity, or competence connections for short. That is to say, a norm may command specific people to conduct themselves in a manner determined by some norm that will be enacted (by a specific entity, in a specific manner and in a specific scope), or obey norms that will be recognised as binding in a given system by an appropriate procedure. In this case, a system is not given from the outset, but rather develops through successive enactments or recognitions of further norms by an entity granted the competence to do so pursuant to an appropriate norm of competence. Therefore, a system based on this kind of connection is called dynamic. Of course, there is a greater danger in the case of such a sys-

tem that norms inconsistent with one another will be included in it because norms granting norm-giving competence, especially to various entities, can hardly be expected to be designed in such a way that any inconsistency between norms enacted in the future will be eliminated.

The fact that a legal system is comprised of norms on account of their being enacted pursuant to appropriate law-making competence norms does not prevent the system from encompassing not only norms enacted by a specific act, but also any other norms being the consequences of the latter. Hence, the use of a dynamic connection to develop a fragment of the system does not prevent the system of norms from being reconstructed, taking into account a static connection at a further stage.

The Content (Static) Connection Between the Norms of a Legal System

The Concept of a Statement System

A description of a system of norms based on a static connection calls for a comparison of the system of norms with a system of statements, i.e. sentences considered true in a logical sense. For in the sphere of building sentence systems, certain basic concepts characterising the system construction have been developed which might possibly be applied *mutatis mutandis* to the construction of a system of norms, with major differences being identified in the process.

Actually, sentence systems do not necessarily have to be systems of the sentences that have definitively been recognized as true (i.e. systems of statements). Contemporary logic, while designing hypothetical-deductive systems, does not claim that the axioms of such systems are true sentences, in particular, that they are self-evident axioms. The empirical sciences, which formulate theories of phenomena, present sentence systems consisting of principal hypotheses, then hypotheses of a lower order which follow from them, then laws recording the regularities occurring in a given field, and finally sentences ascer-

taining individual facts. The hypotheses of the empirical science are by definition revocable in the event that facts are discovered which cannot be explained, and which would suffice to falsify the hypothesis in question.[3]

In principle, in the formal sciences, such as logic and mathematics, a deductive system of sentences is given if system axioms are formulated, and the system language (relying on primary terms and related definitions) and inference rules are specified according to which successive sentences may be added to the system. Axioms are required to meet a number of formal requirements, such as the postulate of consistency (no contradicting sentences can be derived from the axioms of a given system), the postulate of completeness (every sentence formulated in the system language may be predicated if it is a system statement), the postulate of adequacy (every true sentence of the system can be derived from the axioms), the postulate of independence (no axiom can be derived from another), etc. Known to every Polish lawyer, the classical sentential calculus in formal logic may be expressed as this kind of system. The inference rules will usually include rules for variable substitution, the substitution of some expressions with equivalent ones, and the detachment of the antecedent of an implication accepted to the system.[4]

The Concept of a System of Norms on Account of a Static Connection

If we consider a body of norms and only take into account content (static) connections, such a system would include some principal norms and those norms that are considered consequences of the principal norms or norms previously included in the system. A crucial question arises as to what will be considered the consequences of other norms, such as those inferred, i.e. inferentially derived, using a body of accepted inference rules (of course other than inference rules for deriv-

3 For more on the topic, in an accessible manner, v. Zygmunt Ziembiński, *Metodologiczne zagadnienia prawoznawstwa*. Warszawa, 1974, 29–53.

4 For more information v. "System dedukcyjny" in *Mała Encyklopedia Logiki*. Wrocław, 1970, 284–287.

ing sentences from sentences). Depending on what inference rules are admissible in designing a system of this kind, different norms-consequences can be derived from the same principal norms.

The choice of inference rules, however, is not entirely arbitrary. The rules must be chosen so as to make norms included in the system form a sensible whole and enable rational management of human deeds. If, for instance, a rule is adopted, which could be called a normative *dictum de omni*, namely that if it is believed that all entities having property *P* should under specific circumstances do *C*, then it must be also believed that entity *x* having property *P* should under such circumstances do *C*, we will have an example of an inference rule that is absolutely necessary in designing any system of norms. After all, it is necessary to move from general norms to the recognition of individual norms for particular persons. If, however, a rule is adopted stating that if it is believed that every *x* with properties *P* should do *C*, then it must be believed that every *x* with properties *P* should not do *C*, we will have an example of a totally absurd rule, a rule that would lead to a system that would be absolutely unfit to manage human actions.[5]

Obviously, it is hard to specify what degree of logical or praxeological inconsistency of the norms derived from principal norms justifies the opinion that a system is defective or that it is not a system of norms at all. The latter opinion would be justified if an inference rule is adopted that is totally absurd, like the example given above.

If by the rationality of somebody's behaviour is understood the consistency of this person's behaviour with their knowledge and judgments (preferences), setting the goal for their conduct, then, assuming the rationality of the entity choosing the inference rules which would serve the purpose of building a system of norms which would be socially useful, it would be necessary to distin-

5 Cf. Zdzisław Ziemba, and Zygmunt Ziembiński, "Uwagi o wynikaniu norm prawnych", *Studia Filozoficzne*, no. 4. 1964: 113–114.

guish between inference rules which refer to the assumed knowledge, and others which refer to the judgments of the person who would accept such rules.

In the former case, we would be dealing with inference rules which refer to a certain state of knowledge on the connections between the fulfilment of particular norms (a state of logical and extra-logical knowledge), which enables the formulation of rules based on connections that can be conventionally called norm implication connections. Apart from these kinds of rules, which can be considered peremptory, like deductive inference rules in relation to sentences, there are also rules based on the assumption that norms included in a legal system should have an appropriate axiological justification in some ordered set of preferential judgments.[6]

The point of departure for a static system of norms is some principal norms adopted independently of system construction rules.

There is an understandable temptation, to which lawyers are particularly prone because of their only superficial knowledge of the problems of formal logic, to treat a system of legal norms in its entirety as a system of norms inferred according to certain rules from the principal norms of the system, let us say, from constitutional norms. However, the temptation is doubly illusory. First, the implications between norms are much more complex than such connections between sentences, while inference rules are also based on some other specific assumptions. Second, in order to reconstruct a contemporary system of legal norms by inferences from some principal assumptions, it would be necessary to adopt a very great number of such principal norms, the consequences of such principal norms would be inconsistent with one another and these mental acrobatics would, on the whole, do more harm than good.

If one encounters systems of moral norms or systems of natural law, which allegedly assume the form of a system of norms inferred (or to put it even more incautiously: 'deduced') from several principal assumptions, it is easily noticed

6 For a broader but elementary approach, v. Zygmunt Ziembiński, *Logika praktyczna*. Warszawa, 1977, 252–262.

that in these *quasi*-deductive operations, which would supposedly produce a legal system or a moral system designed *more geometrico*, so many successive diverse enthymematic premises are added that the 'geometric structure' of such a system is largely illusory (especially if those enthymematic premises are not fully realised).

The construction of a legal system, as shall be demonstrated below, cannot rest on only connections of one kind.

The Contentiousness of the Logic of Norms

If between norms making up the legal system of a country a static connection is to hold in some cases, in particular the connection of 'one norm following from another' as a foundation for the use of appropriate inference rules, the logic of norms must have central importance for the construction of the legal system. The logic of norms therefore is to be understood as a logic ascertaining the formal connections between norms, connections arising pursuant to the very structure of these norms, especially such as the those between a norm and its negation, connections of implication, connections of conjunction and of an alternative, etc.

At this juncture, however, major difficulties arise. Norms do not describe reality (they may be only a sign of a certain state of reality), hence, they are neither true nor false. All these concepts, therefore that in a sentential logic invoke the concepts of truth and falsity—as in the case of the truth functor matrix as the signs of negation, conjunction, alternative, implication, etc.—cannot simply be transferred to the logic of norms, as they call for some reinterpretation. If, thus, norm logic calculi are constructed using the signs of sentential logic, it has to be noted that a similarity will be merely apparent, or respective signs will be used properly from the point of view of the syntax and semantic rules hitherto associated with them.

Until this very day, a dispute continues whether a logic of norms is possible and, in particular, if a logic of norms in some way analogous to sentential logic is possible. A way out may be to construct a logic of deontic sentences,

that is, a logic of sentences determining the qualification of specific deeds on account of a given norm or, which is far more complex, a specific set of norms. The latter, for simplicity, may be initially assumed not to include norms inconsistent with one another.[7] This is a convenient way out of trouble, as much as the calculus in this case concerns sentences in a logical sense, albeit of a specific kind: pronouncing a given action or a action of a given kind, to be prohibited, prescribed, indifferent, etc. on account of some norm. Hence, we can speak without reservation of the truth or falsity of these sentences, associate them with truth functors, etc. From a practical point of view, only rarely is a difference noted between a norm of conduct and a sentence saying that (on account of a given norm) somebody is prescribed to act or prohibited from acting in this way or that.[8] Of course, various kinds of problems will arise in this context related to referring the prescription or prohibition not to a single simple norm of conduct but rather to a set of norms. However, any major difficulties in this case shall certainly be overcome. There are also some problems with the quantification of this kind of calculi, which is important for lawyers because of their interest chiefly in general and abstract norms.[9] In relatively simple cases, in calculi of this kind applicable to legal norms, it would be necessary to allow for a great number of relativizations of this or that kind, as for instance relativizations to time. Therefore, there will be still a lot of problems to solve, which call for intensive studies.

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7 For a broader treatment, v. Zdzisław Ziemba, *Logika deontyczna jako formalizacja rozumowań normatywnych*. Warszawa, 1969, 114.

8 Georg Henrik von Wright, *Norm and Action*. London, 1963, 132 claims that using the same symbols, respective inscriptions may be interpreted 'prescriptively' as 'norm-formulation' or 'descriptively' as 'norm-proposition'.

9 The best-known, already 'classic' today, systems of deontic logic, such as, for instance, von Wright's, were calculi of deontic sentences formulated on account of individual and concrete norms. These systems, however, are too deficient to satisfy the needs of legal studies. For more on the subject v. Georges Kalinowski, *La logique des norms*. Paris, 1972, 79 ff. Cf. also doubts on the iteration of deontic functors raised by Ota Weinberger, "Die Struktur der rechtlichen Normenordnung" in *Rechtstheorie und Rechtsinformatik*, ed. G. Winkler. Wienna, 1975, 126.

Another solution might be to reinterpret appropriately sentential logic concepts into norm logic concepts, in particular the concepts of norm negation and of implication between norms. However, negation already poses significant difficulties.[10] Usually, putting negation before a norm: 'It is not so that *x* should do *C*' produces an utterance that is not a norm but a sentence ascertaining the absence of the norm '*x* should do *C*' or the invalidity of the norm '*x* should do *C*' in a given system (similarly '*x* should not do *C*' if literally understood). Introducing negation into the middle of the norm: '*x* should not do *C*' changes the norm into a prohibitive one or creates further problems with the interpretation of the utterance: '*x* should do non-*C*', because a norm prescribing the performance of all other acts than act *C* is absurd if taken literally. For it would prescribe at the same time to do *D* and non-*D*, if act *D* and acts consisting in doing something other than *D* (e.g. mowing a meadow and not-mowing a meadow) are the acts that do not coincide with the class of act *C*, e.g. with ploughing – as mowing is not ploughing and most cases of non-mowing are not ploughing. The sense of the negation is probably such that in the narrower class of acts of some significance for the realisation of act *C*, an indication is made of a class, complementing up to the class of acts classified as the execution of act *C*. For the class of omissions of act *C* is considerably narrower than the class of all other acts than act *C*. This issue shall be discussed further together with the major varieties of the inconsistency of legal norms.

The concept of implicating with respect to norms, and even more so the concept of implying, pose even more difficulties and misunderstandings, examples of which are not lacking from legal discussions either. The connective 'if … then …' from Polish may have multiple meanings in relation to norms. It may be used to indicate the grounds for norm validity: (1) 'If *y* is so enacted, then *x* should do *C*'. It may be used to formulate a norm indicating the scope of its application in the antecedent of the conditional: (2) 'If circumstances

10 Cf. Alf Ross, *Directives and Norms*. London, 1968, 150–158 and the literature quoted therein.

W occur, then *x* should do *C*', it may be used to indicate a connection between norms of the kind that if the first is to be binding, then we believe that the second would have, 'out of necessity', to be binding too, e.g.: (3) 'If *x* should do (separately) *C* and *D* and *E*, then *x* should do *C*'. The connective 'if… then …' may be used to formulate a teleological directive, specifying what should be done to achieve a desired state of affairs: (4) 'If you want to achieve *A*, you should *C*', etc. In a single utterance, various senses of 'if… then…' may be intertwined, e.g. 'If: if *y* is so enacted that if circumstances *W* or *Z* hold, then *x* should do *C*, then by enactment of *y*, if circumstances *W* hold, then *x* should do *C*'.

If it is said that 'one norm implies another', it must be remembered that this term is used in a different meaning than the usual one that serves the purpose of specifying the connection between the logical value—truth or falsity—of some sentences. For norms (unlike deontic sentences and sentences about the validity of a norm) are considered to be pronouncements fulfilling a persuasive function and not a descriptive one, at least not directly.

The relation of the implication holding between sentences consists in an objective connection between the logical value of these sentences (in the case of formal implications—a connection between the logical value of all sentences of an appropriate structure). In the case of connections between norms, 'implication' is most often taken to mean that there is a 'necessity', making one recognise a norm as valid since another norm has been recognised as valid from a certain point of view. In other words, it would be somehow at odds with common sense if the first norm were to be binding while the second were not. If there is a norm in force that a person should shovel snow off the street throughout the winter, then a norm is in force that they should do it in January on account of the uncontested fact that January is a winter month in our country. If a person is obliged to deliver ordered bread and milk every morning, then they should not hesitate to deliver ordered bread on account of the fact that the delivery of bread is a necessary component act of acts consisting in the delivery of both bread and milk.

If a person is to appear in an office in the morning, they should leave home early enough, because if they do not live in the office, leaving home early enough is a necessary condition of appearing on time.

Reconstructing popular intuitions related to one norm 'implying' another, it can be said that norm N2 is implied by norm N1 when, generally, without the fulfilment of norm N2, the fulfilment of norm N1 is impossible in one sense or another, and the fact of fulfilling norm N1 predetermines the fulfilment of norm N2 (if the person delivered bread and milk, they delivered bread, if they shovelled off snow all winter, they shovelled it off in January, if they appeared on time, then they left home early enough).

If the impossibility of fulfilling norm N1 without fulfilling norm N2 is ascertained on account of knowledge that the scope of application and the scope of regulation directly specified by norm N2 are contained, respectively, in the scope of application and the scope of regulation of norm N1, we speak of norm N2 being logically implied by norm N1, on account of this kind of knowledge on relations between the scopes of application and, respectively, the scopes of regulation of these norms. This is a logical implication based on extra-logical knowledge (that January is a winter month) or logical knowledge (that the class of events A and B is at the same time contained in class A, hence the absence of A predetermines the absence of A and B).

If the impossibility of fulfilling N1 without fulfilling N2 arises on account of appropriate causal connections between the performance of acts prescribed by these two norms, norm N2 is said to be instrumentally implied by norm N1 on account of the ascertained causal connection.

Adopting this understanding of the relation of implication between norms, we can formulate appropriate inference rules, prescribing, on account of recognising one norm as binding in a given system, that another must be recognized as binding in the same system. At this juncture, it is necessary to observe that there are inference rules that are not based on any implication between legal norms, hence, if a logic of norms in the strict meaning of this term could be

built, it would, admittedly, be necessary but insufficient to explore the structure of a legal system. What is more, by an explicit enactment, the legislator who enacted the norm-reason may enact a norm prohibiting what the norm-consequence prescribes. This would be usually considered a modification of the original enactment and not an irrational enactment, since the way that 'one norm implying another' is understood is actually an outcome of specific assumptions about the rationality of the legislator.

Next to the debatable problems related to implication between norms, misunderstandings may easily arise in connection with the use of other typical sentence connectives to join norms. In part, such misunderstandings are analogous to confusing truth functors in a descriptive language with roughly corresponding sentence connectives from colloquial language; often, however, these are particular misunderstandings.

If, for instance, a conjunction of norms is mentioned of which one prescribes a person to do *C* and the other to do *D*, doubts may arise as to whether they prescribe to do each act separately (e.g. to destroy files and light a fire in a stove) or perform such an act that would combine the characteristics of both prescribed acts (to destroy files by using them to light a fire in a stove). If we have norms prescribing a person to do *C* and/or do *D*, a doubt arises as to whether they prescribe the performance of at least one of the acts according to their choosing, or at least one of these acts, namely, an act indicated regardless of the choice made by the addressee of the norm (which forms the crux of the so-called Ross's paradox, which used to be much discussed at one time), etc.[11]

Norm Connections Relying on Common Axiological Grounds

The logical connections between norms discussed in the previous section rested on specific logical or extra-logical knowledge on the relations between the scopes of application and, respectively, scopes of regulation of these norms.

11 For a broader treatment, see Zygmunt Ziembiński, "O warunkach zastosowania logiki deontycznej we wnioskowaniach prawniczych", *Studia Filozoficzne*, no. 2. 1972: 201–215 and the basic literature quoted therein.

In addition, instrumental connections may hold between the fulfilment of these norms. There are also such connections between norms that provide grounds for formulating appropriate inference rules, taken into account while designing a system of legal norms, that are based on a different kind of assumptions concerning these norms.

These connections involve the axiological grounds of norms. Whether a norm is a valid part of a legal system is decided first of all by its proper enactment by a state body wielding actual power. At the same time, however, it is assumed that the body endowed with power to enact legal norms is a rational body, being guided not only by specific knowledge, but also by specific values. From the assumption of the rational legislator (the assumption is crucial, which shall be discussed below, for solving dogmatic problems), an argument is derived that norms enacted by the legislator have axiological grounds in a specific system of values. Thus, if it is found by interpreting a legislative text that the legislator enacted a specific norm, there are grounds—albeit shaky—to believe that enacting this norm the legislator envisaged some axiological grounds for it (on the other hand, sometimes it is known that the legislator made a given decision in a rather random way, for instance, to make proceedings in a given area somewhat more uniform). Therefore, without being overly strict, it may be concluded that another norm, having suitably similar axiological grounds (*analogia iuris*) or even more convincing axiological grounds (*a fortiori—a minori ad maius*, *a maiori ad minus* argumentation) in such judgments, is binding 'at the behest of the legislator' as well. For if a rational legislator 'willed' the first norm to be binding, then it also 'willed' a norm of analogous or stronger still axiological grounds to be binding.

Without going into details, it must be noted that inference rules based on the assumption that the legislator's judgements are consistent are not peremptory but rather argumentative.

If, thus, we look at the elements of the content (static) connection of a system of legal norms, the connection, in the case of inference rules based on logi-

cal or instrumental implication of norms, is clearly stronger than the connection based on the assumption of the consistency of the legislator's values. If the legal literature stresses the latter more often, it must be because the connection of 'implication' seems at times so obvious as to be ignored. This stance is to the extent that when formulating the calculi of norm logic or deontic logic, it turns out that starting with various 'obvious' intuitions, paradoxical rules from the point of view of these popular intuitions are arrived at more than once.

The Polish juristic literature is quite aware of the fact today that it is not possible to reconstruct the system of legal norms of a country through relying solely on the content connection. These issues were dealt with in particular by Opałek and Woleński.[12]

The Competence (Dynamic) Connection between System Norms

The Formal Nature of Competence Connection

The content (static) connections between system norms are called by some 'substantive' norm connections.[13] In turn, the connection between norms based on the fact that some are enacted relying on other norms that grant appropriate norm-giving competence, could be called 'formal' by analogy. A norm granting norm-giving competence to some entity prescribes that norm addressees, that is, persons subject to the enacted competence, to fulfil such norms that will be enacted by the entity granted competence. The duty may be doubly potential because, first, it depends on whether the entity granted competence to enact norms in a given field will make use of it; second, the entity granted compe-

12 Kazimierz Opałek, and Jan Woleński, "Problem aksjomatyzacji prawa", *Państwo i Prawo* 1. 1973: 3–14. J. Nowacki writes: "The finding that some legal norms show specific content relations by no means implies that the same relations hold between other or even all norms belonging to a given set of norms". Józef Nowacki, "'Materialna' jedność systemu prawa", *Zeszyty Naukowe Uniwersytetu Łódzkiego: Nauki Humanistyczno-Społeczne* 108. 1976.

13 This is, similarly to the term 'content connection', an awkward term as much as the strongest connection of this kind is the connection of logical implication.

tence will enact such a norm that will prescribe some conduct in the circumstances that have not occurred yet.

A norm of norm-giving competence prescribing obedience to a norm of a precisely specified content, which the entity granted competence would have otherwise a duty to enact under strictly defined circumstances, would be as a matter of fact socially redundant. Unless its purpose would be to grant a given entity competence to officially ascertain that the anticipated circumstances (e.g. a natural disaster) have occurred and, therefore, a norm is enacted that would have to be enacted in such circumstances. If, however, there was no such a purpose, the enacting of a competence norm to enact a norm of a precisely specified content would be complicating matters unnecessarily. The social sense of granting norm-giving competence instead of enacting a substantial norm right away lies in postponing the decision on the contents of the substantial norm and passing it to the executor of a policy that is outlined only in general terms in a law-making act of a higher order. The granting of norm-giving competence is thus enacting a formal duty, the exact content of which is yet to be specified. It will be specified only in an appropriate act of enacting a norm in a prescribed manner by the entity granted competence.

It would be wrong, however, to see only the formal aspect of the competence connection between legal norms. First of all, a competence norm enacted in a given system never grants any entity competence to enact any and all norms that it thinks fit in a manner binding on all entities subject to a given jurisdiction. As a rule, the principle *nemo plus iuris transferre potest quam ipse habet* applies. However, even a norm of norm-giving competence granted to a sovereign parliament or a head of state by a revolutionary constituent assembly does not empower the sovereign to enact any norms as legal norms, but at best empowers it to enact norms within the framework of socio-political assumptions of a written or unwritten constitution.

Only fundamental law-making acts are binding on all entities subject to a jurisdiction, while others usually rest on norm-giving competence to enact norms for only a limited group of entities.

The content of norms enacted in pursuance of the law-making competence an entity enjoys is, as a rule, defined by the requirement of consistency (absence of inconsistency) of these norms with the norms of a higher order—in particular constitutional norms. What is more, the postulates of substantive legality in a socialist legal system should include the postulate of making norm-giving competence norms, stipulated in a statute, grant administrative bodies the competence that would be substance-oriented and not a blanket one, giving a free hand to its executor, restrained only by the statutes in force. This postulate is supplemented by another of keeping the number of such delegations down.[14]

Whereas the content connection between legal norms requires the compilation of a catalogue of inference rules which will serve to derive the consequences of fundamental norms, the discussion of the competence connection between legal system norms needs a certain set of rules for enacting competence norms, specifying what use is to be made of the norm-giving competence granted and when norm enacting acts are 'valid' or 'invalid'. There are well-known ambiguities and differences in conceptions in this area, even in countries where governance is organised along stable principles and the sources of law are specified in detail, in a constitution. Even greater difficulties and disputes in this area must arise in the legal systems of countries where state organisation is unfledged and of a revolutionary origin, and the constitution is short on detailed juristic elements.

However, even where legal provisions on law-making are relatively detailed, one has to allow for the inability to reconstruct in detail norms granting law-making competence from a legislative text alone, even by a person having a perfect command of a given ethnic language. The exact meaning of such legal provisions is comprehensible only to a person well-versed in the authoritative juristic literature on law-making competences, while the opinions found in it are only fragmentarily reflected in legislative texts. From the point of view of

14 Cf. Józef Nowacki, *Praworządność. Wybrane zagadnienia*. Warszawa,1977, 74–75; Henryk Rot, *Problemy kodyfikacji prawa PRL*. Wrocław, 1978, 134.

a lawyer trained in accordance with the precepts of a specific legal culture, the inclusion of some elements commonly adopted in the authoritative juristic literature in a legislative text may seem unnecessary. For instance, in our legal culture it may seem unnecessary to give expression to the assumption that statutory provisions may contain only general and abstract norms and not individual and specific ones[15] and that the rights, and duties of all citizens may be enacted only by Act or regulation based on a clear statutory delegation, and not by other acts of state administration, etc. This issue is relatively simple when the political and legal cultures of a given country evolve slowly. Major difficulties arise when changes are revolutionary or an existing legal system undergoes a major overhaul. The elements of the authoritative juristic literature, determining the content of norms of law-making competence alongside the provisions of law, are related to diverse factors. The opinions of the juristic literature on these matters are shaped by political and legal ideology shared by a given socio-economic formation, e.g. the ideology preaching the sovereignty of the people or the sovereignty of specific bodies of the state. Moreover, such opinions are moulded by the membership in a given realm of legal culture, specific historical traditions, advancement of law studies, impact of foreign legislation, etc. No mean role is played by the customs of legal practice, the previous state of law and seemingly third- or fourth-rate acts relating to the organisation of statecraft that build the actual mechanisms of law-making.

This 'indefiniteness' of both legal provisions and the authoritative juristic literature on this issue is of great socio-political relevance. Namely, without amending principal legislative texts, by changes to the state apparatus, it is possible to make actually applied norms of law-making competence substantially change their political character.[16] It is enough to hedge about the exercise

15 Cf. Stefan Rozmaryn, *Ustawa w Polskiej Rzeczypospolitej Ludowej*. Warszawa, 1964, 47 ff., where the author believes that a general and abstract character of statutory norms (which he calls 'generality') is part of being a statute, irrespective of the absence of an explicit provision in this respect.

16 Cf. Stefan Rozmaryn, *La Pologne, Comment ils sont gouvernés*. Paris, 1963, 42.

of granted competence with a suitable set of instructions on how bills are to be drafted, or to actually prevent the execution of certain initiatives, or to treat statutory reservations liberally, in order for the political effect of exercising law-making competence norms to be substantially changed.

Problems of Further Competence Delegation

If a norm of law-making competence prescribes the performance of what is indicated by a norm enacted in a given area by a given body under a specific procedure, it may in particular prescribe that a norm prescribing conduct consistent with a norm enacted in a given area by some other body should be followed. It could thus be accepted that granting competence to enact legal norms in a given area naturally entails granting the competence to subdelegate this wcompetence. This would be a very simple mental construct, opportunistically convenient for bodies equipped with norm-giving competence, but involving grave risks. With the unlimited subdelegation of law-making competence, society could find itself in such an undesirable situation as that of a litigant who is approached by the substitute of the substitute of their attorney a minute before a hearing. Often, there would then be no way to find out who is responsible for the direction of legislation and the distortion in detailed regulations of the overall direction of statutory regulations. A subdelegation, even if it is a useful law-making tool in certain cases (e.g. the setting of dates for crop treatment operations that are obligatory under a given statute), can easily lead to the enactment of such statutes the entire content of which 'will be specified by regulation'.

It would be thus advisable to adopt a different mental construct. The enactment of legal norms, as we all know, is a certain kind of conventional act, which can be performed only when we rely on peculiar rules that prescribe that an act performed in this or that way be assigned the sense of performing a conventional act. In the absence of rules of this kind, a conventional act simply does not exist as such. In a country in which all organs are supposed to act 'on the basis of the law', in the absence of a clear provision for a subdelegation, there is simply no

possibility of one unless it is believed that a subdelegation is permitted in a given case by a sufficiently clear opinion expressed in the authoritative juristic literature. However, such an opinion, should it cohere, can be either tolerated or opposed.

This mental construct allowing for the possibility of an express subdelegation but precluding a norm-giving subdelegation by the operation of law may be considered more convenient if one wishes to rein in a notorious subdelegating of norm-giving competence.

Attention should be drawn to the fact that different views can be held with regard to, on the one hand, general and abstract legal norms (in accordance with the dominating opinion of the juristic literature) and, on the other, a system of legal norms if viewed as including individual and concrete norms, for instance, those established in a court judgment. It is understandable that substantial norms, e.g. in the field of civil law, usually form grounds for formulating appropriate norms granting the competence to establish individual and concrete norms in a judgment which prescribes a certain kind of performance.

Generally speaking, it does not appear that the pyramid of norms of norm-giving competence which is discussed in normativistic conceptions was supposed to consist of too many tiers. Indeed, judging by the changes to the organisational structure of our country, it could be argued that there is a tendency today to simplify the chain of competence norms including those based on express successive delegations of competence. Normativistic conceptions can be charged with devoting too much attention to the role of the competence connection in the structure of a legal norm system without developing a theory of competence norms that would be specific enough.

The Problem of the First Competence Norm and Revolutionary Changes of a Legal System

If a system of legal norms is viewed as a system of norms tied only by the connection of competence descendance, questions arise as to the character of norms constituting the ends of this chain (which only has a few links at most). The ends,

of course, are made up of some substantial norms that prescribe certain types of conduct that is defined differently than the conduct consisting in obeying a norm enacted in some way. The matter, in this case, is more complex, inasmuch as the substantial norms of judiciary law grant the competence to issue such and such judgments, and not others, in cases of a given kind. In any event, however, successive grants of competence to enact general norms or ultimately an individual norm leads to the enactment of a non-competence norm.

What does, however, the chain of competence norms 'begin with'? In normativistic conceptions, the basic competence norm is to play an equivalent role in the dynamic system, *mutatis mutandis*, of the principal norm of the static system (the specificity lies in the completely way that derivative norms are derived from principal norms). The question arises of what ground the validity of the 'first' competence norm is based on, since *vi definitionis* it is not a norm whose validity is based on another competence norm. Normativism adopted the mental construct of a 'basic competence norm' as a kind of fiction, one necessary for explaining what the source of the binding force of the constitution of a given country is (if this is not a constitution whose legitimacy derives from a previous constitution).[17] It appears that this construct is unnecessary. It is enough to assume that a set of law-making competence norms included in some non-octroyed constitution (as this is what actually is meant) is 'valid at law' in another sense than the other legal norms whose legitimacy stems from a constitution. Constitutional norms can be viewed as signs of the sovereign authority of the body politic making up a constituent assembly. Its authority derives from the actual readiness of members of society to obey the norms laid down in the constitution.

This actual readiness is usually motivated, on the one hand, by ideology connected to a constitution and, on the other, by fear of physical force which the leaders of any viable state organisation have at their disposal. A strong ideological motivation may sometimes suffice even where little force is avail-

17 Kelsen, 115 ff.

able to coerce people into obedience. If the state has ruthless physical force at its disposal, it would be unreasonable to defy its authority. Between these extremes, ideological arguments may to a degree be substituted by the threat of force and vice versa. Reasonable management of social life first seeks to convince people to obey legal norms and only considers the use of force as an argument of last resort.[18] Of course, a reverse order of arguments is also possible: beginning with *argumentum baculinum* and ending with a suitable ideology to supplement it. What elements will dominate in a given case—a parade of well-armed troops or an ideological justification, especially one bearing a relation to the legal culture hitherto shared by the people of a given country and the legal culture of its civil servants and public officials—depends on the specific political situation. In any event, it would be difficult to support the 'first' norm of law-making competence solely with the arguments of bayonets and pistols, or only by disseminating a specific political ideology. These two kinds of arguments may only substitute for each only partially.

It is thus necessary, bearing in mind the dynamic connection between the norms of a legal system, to highlight the fact that out of conceptual necessity, the system of norms viewed from this angle comprises not only norms enacted pursuant to law-making competence, but also norms enacted in a sovereign manner, without any competence authorisation. The latter have only political authorisation and are 'valid at law' in a different meaning of this phrase from that used in respect of the other norms of the system viewed from this perspective.

When deriving legal norms from some basic competence norms, it is important to recall that they may grant the competence not only to enact, but also to recognise norms, for instance customary ones, as legally binding. Admittedly, this problem is only of minor importance in our legal system, but may be vital for the legal systems of other countries, even socialist ones.

18 Władimir Iljicz Lenin, *Dzieła*, vol. 32. Warszawa, 1972, 214.

The issue of the legal system's derivation from the 'basic competence norm' is related to many problems discussed in jurisprudence. One such problem is the continuity of a legal system viewed from the perspective of the dynamic connection with an appropriate basic competence norm or, to put it more realistically, with the basic competence norms of a given legal system. Two extreme situations can be imagined here. For instance, a new regime coming to power in a manner not anticipated by the provisions of the existing law declares itself to be a supreme law-giver and at the same time, for some tactical reasons, announces that it will honour the legal norms hitherto in force. What we are dealing with in this case is the change of the 'basic competence norm' without any content modification whatsoever of the norms included at this moment in the set of derivative competence norms and substantial norms. In the other situation, which is perhaps more fantastical, on the basis of the same basic competence norm, all the legal norms of a given system would be changed on a single day. Of course, such a situation can arise only in the narrow mind of the person who does not realise that certain legal norms are practically indispensable for a society to function, irrespective even of its class organisation. Moreover, although their function changes in the context of various systems, they cannot be changed in a completely arbitrary manner. In the first situation, a normativist would be prepared to speak of a radical change of the legal system, although a jurist following a sociologically-oriented approach would be prepared to speak of the continuity of the legal system. In support of the latter stance, it could be said that 'nothing has actually changed' in the behaviouristic picture if, apart from the change of the very apex of the system competence pyramid, the set of norms continues to function as before. In the second situation, a sociologically-oriented jurist would see that there has been a radical change of the system, although for a normativist, it would be only the evolution of the system in agreement with its principles. Accidentally, the evolution would be extraordinary, as it would be very quick.

The Interdependence of Content and Competence Connections in a System of Norms

The Uselessness of a System of Norms Founded Solely on a Competence Connection for Managing Society

The legal-theory conceptions that take a legal system to be composed of norms tied by competence connections, and that point to 'the gradual construction of a legal system', usually underestimate content connections between system norms. If it so happened that substantial norms enacted pursuant to lower-order competence norms would be, in agreement with common intuitions, consequences of substantive norms enacted pursuant to higher-order competence norms, a radical normativist would consider this an accidental matter. For such a theorist is not interested (at least apparently) in the praxeological cohesion of a system and, consequently, is not sufficiently aware of the fact that every substantive norm properly enacted in a legal system has its consequences, derivable according to specific inference rules accepted in a given community. The consequences, too, are taken to be norms belonging to the system.

This element of legal system design may be passed over in the cases when it suffices to refer to otherwise obvious inference rules based on the logical implication of norms or on instrumental implication when appropriate causal connections are widely known and uncontested. Then, it can be accepted that 'it goes without saying' that in a legal system there are norms in force, alongside norms enacted pursuant to law-making competence or enacted in a sovereign manner, that are recognised as the undeniable consequences of the latter. However, when we pass from the simplest and practically uncontested inference rules to such rules that provide only inconclusive arguments, when the precise import of an inference rule is muddied in paroemias simplifying the matter, then it can be seen that the problem of the validity of norms-consequences compared to expressly enacted legal norms is by no means trivial.

The question arises of whether it would be at all possible to speak of a socially viable legal system, were it comprised only of the norms that have been

expressly enacted or officially recognised. First, it must be noted that usually we do not see a norm of conduct being formulated *expressis verbis* but rather we see provisions being issued from which appropriate norms of conduct are reconstructed, following adopted interpretation rules. The reconstruction involves dozens of assumptions about the legislator's 'will', 'goals' and 'aspirations'. Second, even if it were difficult to elude the norm that is an obvious logical consequence of a generally formulated norm (e.g. you should support your offspring, you should support your great-grandparents), it would be possible to try to elude such norms the fulfilment of which is instrumentally necessary to fulfil the norm that has been expressly enacted by claiming that the statute does not prescribe it. However, it would be absolutely impossible to draft a statute that would list all the actions that are instrumentally necessary to execute expressly enacted commands for the simple reason that it is impossible to foresee what actions would be instrumentally necessary in this or that situation to carry out expressly formulated commands.

Out of necessity then, a system of legal norms must be viewed as one whose norms are tied by two types of connections. Only in part can it be reconstructed relying on the facts of enacting specific norms (either competent or substantive ones) in a manner specified in appropriate norm-giving competence norms, beginning with those laid down in a sovereignly established constitution. As a rule, a norm-giving competence norm does not serve to derive some other norms but is used to enact further norms of the system. However, in reliance on the substantive norms of the system, following the inference rules adopted in it, appropriate norms-consequences are included, independently of any acts of the entity equipped with law-making competence.

Thus, a system of legal norms has the structure of a dynamic system 'from the top', while 'from the bottom', in increasingly detailed expansions, its structure is static. If substantive norms enacted pursuant to competence norms of various degrees could be considered in some case as tied by a content connection, then enacting norms-consequences would be in principle redundant,

but this is a matter of secondary importance. If, however, these substantive norms were inconsistent, the system would have to be considered faulty, unless system design rules included suitable collision rules.

The Inefficiency of a System Tied Solely by Content Connections

Since a dynamic system of norms, not supplemented by other norms which are their logical and instrumental consequences, would be impractical, the question arises of whether a system of legal norms would be practical if, from a single or several principal norms, all other system norms would be derived pursuant to inference rules based on norm 'implication' or the connection of a common axiological justification. In other words, if a legal system, as the ancient proponents of natural law imagined, was made up of norms derived from a number of principal norms, would it be a set of norms suitable for use in a modern state?

This question, which of course is not posed here in earnest, is formulated to highlight certain major practical faults of such a system allegedly designed *more geometrico*. Allegedly—because the language of socially relevant norms is not and cannot be a language of geometry, an artificially designed language, referring to the world whose (without going into ontological deliberations) only an approximate equivalent is what we see as plane figures, polyhedrons, spheres, etc. The language in which the principal system norms would have to be formulated may not be a sufficiently explicit language, while the right sense of principal norms can be seen only when their further consequences are being formulated (and on many an occasion, these principal norms are formulated in such general terms in order that, when appropriately interpreted and after adopting suitable additional assumptions, desired consequences of detail can be derived from them).

Due to the vagueness of principal norms (e.g. 'It is not permitted to block natural aspirations of man', 'A social order relying on agreeable cooperation of all interested parties is to be implemented', etc.) and inference rules, especially those which invoke common axiological assumptions, and due to the contentiousness of these axiological assumptions and the enthymematic

premises of the conclusions in this respect, the system of norms tied solely by static connections may point only to a general direction of conduct in a given field. It cannot, however, provide grounds for rigorous decisions which the acts of a person are legally prohibited or prescribed, or are legally indifferent.

In particular, if we invoke the axiological justifications of some norms to include some other norms in the system, in order to make such inferences more specific, relying on some logic of norms or logic of preferences, it would be advisable to be able to invoke sufficiently precise evaluative judgements. They should indicate what state of affairs we value higher than others.[19] Invoking an ordered catalogue of such preferences can be assumed, but nobody compiles such a catalogue, because they articulate preferences in practice only when faced with the necessity of making a choice, and in casuistically given situation for that matter.

For this reason, the contemporary versions of traditional conceptions of natural law speak of natural law norms as of certain general moral principles and avoid compiling detailed codes, which are necessary for the practice of managing society with the use of law.[20] At the same time, the need for 'positive law' is acknowledged, which is indispensable for deciding more particular cases. 'Positive law' must make final decisions in these cases in which some activity should be uniformly regulated and which lack judgmental grounds for choosing this or that option (e.g. Is the time limit for filing an appeal to be 14 or 15 days?). 'Positive law' becomes in a sense a component of the 'nature of society' assumed by these conceptions.

Norms Granting Norm-Giving Competence vs. Substantial Norms in the Legal System Structure

To present graphically the structure of a legal system, it could be compared to a huge bunch of grapes in which norm-giving competence norms of various

19 Cf. Aleksander Archipowicz Iwin, *Osnovaniya logiki ocenok*. Moskva, 1970.
20 Cf. Konstanty Grzybowski, "Katolicka doktryna prawa natury", *Etyka* 6. 1970: 106–110.

rank would play an analogous role to ever thinner stalks while substantive norms, drawing juices through them from the grapevine, could be likened to grapes (anyway of a sour taste). Every substantive norm (except for those substantive norms that are laid down in a constitution adopted sovereignly and not octroyed) is justified by being enacted or officially recognised as valid pursuant to a specific norm-giving competence norm or, possibly, several chains of interrelated norm-giving competence norms. A substantive norm does not provide any grounds for justifying a further norm-giving competence norm; except that a factual state involving a breach of a substantive norm is a state of affairs belonging to the scope of application of norms granting competence to enact individual sanctioning norms.

While on the topic of substantive norms, they have been juxtaposed, by way of a temporary terminological convention, with norm-giving competence norms. From this point of view, norms granting competence to update somebody's potential legal duty by an act of a different kind than enacting a norm of conduct (e.g. by choosing alternative performance or by administering a declaration of entering into marriage with numerous legal effects following from it) would be counted among substantive norms. It is debatable whether all norms granting competence can be reduced to norms granting norm-giving competence. Perhaps norms granting competence to perform an act updating a previously assigned legal duty (other than a blanket duty to obey norms enacted in a certain way) can be reduced to some supplements of a norm-giving competence norm. This appears, however, to be too complicated a mental construct which is inconsistent with the practice of juristic thinking on these matters.

The more we view the structure of a system of legal norms from 'top' to 'bottom', the more restricted, of course, will be the scope of application and regulation of norm-giving competence norms and the greater the share of norms will be which have been called substantive. The excess of competence norms on the lower tiers of the system structure may be otherwise a symptom of the excessive bureaucratisation of the state organisation.

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