# Essays in Legal Philosophy

EUGENIO BULYGIN

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# Introduction I

## Normative Systems and Legal Positivism

### Eugenio Bulygin and the Philosophy of Law*

*Pablo E. Navarro*



### 1. Introduction

Analytical legal philosophy refers to *conceptual* studies about law and legal theory. Unlike other approaches—for example, historical or sociological approaches—analytical studies deal primarily with three types of problem: (i) the characteristic features of judicial reasoning, (ii) the reconstruction of legal concepts, and (iii) the explanation of the systematic nature of law.[1] If such a characterization of analytical legal philosophy is accepted, it is then easy to conclude that Eugenio Bulygin counts as one of the most distinguished writers in contemporary analytical legal philosophy. In a half-century of academic writing he has developed—in part alone, in part together with Carlos E. Alchourrón[2]—a rich conception of law that is well represented in this book. As examples of this analytical persuasion, we present studies on:

- Interpretation and judicial reasoning (chapters 4 and 15)
- Validity and efficacy of law (chapters 1, 3, 10, and 17)
- The concept of a legal system (chapters 7, 13, and 21)
- Legal positivism and legal statements (chapters 6, 8, 11, and 20)
- Completeness and coherence of legal systems (chapters 17 and 22)
- The nature of legal norms (chapters 9, 10, 16, and 21)
- Deontic logic (chapters 5, 9, and 12)

* [*Editors' note*: Pablo Navarro's paper was written as an introduction to the present volume. It has not previously appeared in any form.]

[1] I have drawn this characterization of analytical legal philosophy from Joseph Raz, 'The Institutional Nature of Law', in Raz, *AL*, 103–21, at 103. [*Editors' note*: For this and other abbreviations, see the Table of Abbreviations.]

[2] See e.g. Alchourrón and Bulygin, *NS*, and Alchourrón and Bulygin, *ALD*.

There emerges from this impressive collection a complex variety of strategies for dealing with classical problems of legal philosophy: the normativity of law, the truth-value of legal statements, the systematic nature of law, and so forth. Bulygin's contributions to legal theory have not gone unnoticed, and he has defended his conception in several controversies with some of the most important contemporary authors on legal theory and deontic logic. For example, he exchanged views with Hans Kelsen on validity and effectiveness of law,[3] on deontic logic with Georg Henrik von Wright and Ota Weinberger,[4] on the nature of legal theory with Joseph Raz,[5] on the relation between law and morality with Robert Alexy,[6] and so on.

Analytic philosophy—primarily the writings of von Wright, Alfred Tarski, Rudolf Carnap, Peter Geach, Arthur Norman Prior, and others—has been the major source of Bulygin's philosophical inspiration. He has complemented his analytical conception of legal philosophy with a rather sceptical view regarding ethics and political philosophy. Given this perspective, Bulygin has developed a philosophy of law based on the premiss that law is solely positive law, and he, consequently, has emphatically rejected natural law doctrines.

The study of the logical aspects of legal science (or legal dogmatics) has been one of Bulygin's main interests as a legal philosopher from the beginning. In *Normative Systems*, Alchourrón and Bulygin show that only certain activities taken up by legal dogmatics can be regarded as scientific studies (that is, as a systematization of normative bases). Other activities are to be regarded, by and large, as empirical or normative, for example, interpretation, the elaboration of general principles, the reformulation of normative bases, legal doctrines that purport to solve legal indeterminacies, and so on. Undoubtedly, such activities are an essential part of legal fields of enquiry, but they cannot be justified as scientific knowledge. Along with his interest in the scientific aspects of the study of law, Bulygin's work reflects a firm belief that legal theory must incorporate sophisticated conceptual tools developed in other analytical domains—for example, deontic logic, the philosophy of language, and so on. In particular, he had great confidence in the value of applying



[3] See Bulygin, 'The Concept of Efficacy', in this volume, ch. 1. In 1965, Bulygin criticized Kelsen's reconstruction of efficacy, and that paper, 'Der Begriff der Wirksamkeit', appears here for the first time in an English translation. Kelsen replied in a paper of his own, written presumably in 1967, and it appears here as ch. 2. Bulygin's reply to Kelsen is reproduced here as ch. 3. These two papers also appear here for the first time in English translation. [*Editors' note*: For bibliographical references, see the asterisk footnote at the beginning of each of these three chapters.]

[4] There have been many exchanges between Bulygin and von Wright. See e.g. Alchourrón and Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law', in this volume, ch. 5. In the volume in which this paper first appeared, von Wright's reply is found at 872–7 [*editors' note*: see the bibliographical reference at the beginning of ch. 5 in this volume]. Alchourrón and Bulygin have debated with Weinberger on the nature of norms and deontic logic. See e.g. Alchourrón and Bulygin, 'The Expressive Conception of Norms', in this volume, ch. 9, and see Ota Weinberger, 'The Expressive Conception of Norms. An Impasse for the Logic of Norms', in *NN*, at 411–32.

[5] See the discussion on the possibility of a theory of law in Joseph Raz, Robert Alexy, and Eugenio Bulygin, *Una discusión sobre la teoría del derecho* (Barcelona: Marcial Pons, 2007).

[6] Robert Alexy and Eugenio Bulygin have debated several times on the relations between law and morality. The most important papers from these exchanges are available in a Spanish edition. See Robert Alexy and Eugenio Bulygin, *La pretensión de corrección del derecho* (Bogotá: Universidad del Externado, 2001).

logical analysis to legal discourse. Thus, in the introduction to *Normative Systems*, Bulygin and Alchourrón write:

> The divorce between deontic logic and legal science has had extremely unfortunate effects for the latter. Jurists have not only paid very little attention to the formal investigation of the normative concepts which they use in their disciplines; they have contrived to remain unaffected by the great revival in foundational studies which in the past hundred years has revolutionized the methodology of both formal and empirical sciences . . . It is true that legal science cannot readily be classified as an empirical science; much less readily can it be classified as a formal one . . . But this does not preclude the possibility of transferring to the study of law part of the knowledge gained and some of the methods used in the foundational studies of other, more developed, sciences.[7]

It would make little sense to attempt to summarize the contributions to legal philosophy made by Bulygin. It might well be of some interest, however, to offer an analysis of ideas of Bulygin's that mark crucial steps in our understanding of law and legal theory. In the following pages I will focus on four issues: logic and normative systems, validity and applicability of legal norms, the truth-conditions of legal statements, and the problem of legal gaps. Although they bear significant relations to each other, I will make no effort to spell these out. Rather, I will simply provide a sketch of Bulygin's approach to law and legal theory. I briefly indicate the aspects of alternative approaches, thereby providing the context required to follow the development of Bulygin's legal philosophy.



## 2. Logic and Normative Systems

It is often claimed that a legal norm, to be valid, must be a member of a certain normative system; legal norms cannot exist in isolation from each other. In the middle of the twentieth-century, the most important legal philosophers (for example, Kelsen and Hart) developed arguments in which they sought to explain the systematic nature of law. Still, in a paper published in 1968, Hart points out:

> there is a good deal of unfinished business for analytical jurisprudence still to tackle, and this unfinished business includes a still much needed clarification of the meaning of the common assertion that laws belong to or constitute a system of laws.[8]

A couple of years after the publication of Hart's paper, analytical studies devoted to the concept of the legal system received a great impetus from two books: *A Theory of a Legal System* by Joseph Raz[9] and *Normative Systems* by Carlos E. Alchourrón and Eugenio Bulygin.[10] Both approaches rejected an old philosophical tradition that had explained the nature of law based on the idea of the *legal norm*. According to the tradition, certain specific features of legal norms (for example, the

[7] Alchourrón and Bulygin, *NS*, 2–3

[8] H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law', in Hart, *EJP*, 309–42, at 310, in *NN*, 553–81, at 554.

[9] Raz, *CLS*.

[10] Alchourrón and Bulygin, *NS*.

institutionalized nature of legal sanctions) counted as the key to understanding law. Only after clarifying the nature of legal norms did the traditional approach take up the idea of a legal system and its differences from other normative systems—for example, systems of moral norms. Thus, legal systems could only be a set of *legal* norms just as a moral system could only be regarded as a set of *moral* norms.

The traditional view gave rise to many problems. For example, its proponents insisted that every law is a norm. Here Alchourrón and Bulygin assert that '[t]o speak of a normative system (or order) as a set of norms seems to imply that all the sentences composing this system are normative sentences (norms)'.[11] As is clear in the case of legal systems, however, many normative sentences (*laws*) do not establish obligations, prohibitions, or permissions, and it therefore became necessary to regard them as 'legally irrelevant' or as merely fragments of a complete norm. A similar idea had already been stressed by Raz:

> According to Bentham, Austin, Hart, and . . . according to Kelsen as well, the most important consideration in the individuation of law is to guarantee that every law is a norm. Thereby they make the principles of individuation, and the concept of a law which they define, the only key to the explanation of the normativity of law.[12]

Raz's book on legal systems as well as the book by Alchourrón and Bulygin invert the conceptual priority established by the traditional view. According to the new perspective, a norm is a legal norm to the extent that it belongs to a *legal* system. Thus, the main differences between law and other normative systems cannot be found at the level of norms, but rather in the specific characteristics that we predicate of legal systems—for example, coercion or institutionalization. This idea seems to be widely accepted in contemporary legal philosophy. For example, John Gardner writes:

> [W]e should tackle the grandiose question 'What is law', in the first instance, by asking 'What is a legal system?' rather than 'What is a law?' Most of Austin's and Kelsen's major errors were attributable, ultimately, to their failure to see that laws cannot adequately be distinguished from non-laws until legal systems have been distinguished from non-legal systems.[13]

Although both Raz's and Alchourrón and Bulygin's books share a wide philosophical horizon, their studies develop different models of the legal systems that are deeply entrenched in our legal culture. Raz's theory of legal systems might be called 'the institutional model' in so far as it is mainly an approach to the nature of law that attributes a special role to legal authorities in the explanation of the existence, identity, and structure of legal systems. By contrast, Alchourrón and Bulygin's theory—especially as developed in *Normative Systems*—is a 'deductive model' to the extent that it assumes that the content of legal systems includes their logical consequences.

[11] Alchourrón and Bulygin, *NS*, 58. [12] Raz, *CLS*, 169.

[13] John Gardner, 'The Legality of Law', *Associations*, 7 (2003), 89–101, at 91. See also John Gardner, 'The Legality of Law', *Ratio Juris*, 17 (2004), 168–81, at 169 (a longer statement of the same point).

A brief comparison of the two models is useful in coming to an understanding of their respective objectives and main differences.

## A. The Institutional Model

In his book, Raz points out that a theory of legal system is actually required by an adequate definition of 'a law', and he underscores the point that 'the existing theories of legal system are unsuccessful in part because they fail to realize this fact'[14]. His criticism is based on two ideas. On the one hand, legal systems contain elements (*laws*) that are not legal *norms* and, on the other, it is not possible to explain the nature of legal norms without taking into account their systematic relations. In this respect, legal systems are more than merely a set of norms, but a theory of legal systems is a part of a general theory of norms.[15] Raz stresses the difference between laws and norms in the following terms:

> 'A law' will be used to designate the basic units into which a legal system is divided, and a 'legal norm' [will designate] a law directing the behaviour of human beings by imposing duties, or conferring powers.[16]

In Raz's approach we find two innovations regarding the traditional theories. On the one hand, the basic units of law are not legal norms but a heterogeneous class of entities: *laws*. This fact does not mean that norms have no special relevance in the analysis of law. On the contrary, Raz explicitly defends the idea that every legal system contains norms and that every other law belonging to a legal system is internally related to norms. Moreover, these laws are relevant only to the extent that they affect the existence and application of legal norms.[17] On the other hand, the structure of a legal system has to be analysed not only in light of the relations between norms but also in the broader context of connections between laws.[18] The *internal* relations between laws determine the *operative* structure of a legal system. For this reason we can say that 'the operative structure of a legal system is based on its punitive and reparative relations',[19] and the proper analysis of this normative structure is necessary for understanding three different things: (i) the organization of legal material from some basic units—that is, the relations between *laws*; (ii) the operative structure of legal systems—that is, the way in which law regulates behaviour; and (iii) the basic characteristics of law—that is, its normative, coactive, and institutionalized nature.

According to Raz, the dynamic nature of law makes it necessary that one distinguish between momentary and non-momentary legal systems. Whereas momentary legal systems are sets of norms that meet the criteria for legal validity at a particular moment, non-momentary legal systems are sequences of momentary legal systems. The normative chain formed by a norm $N_1$ and another, higher norm $N_2$, which authorizes the creation of $N_1$, is a relation of legal validity. This relation determines the *genetic structure* of a non-momentary legal system.[20]

[14] Raz, *CLS*, 2. [15] Raz, *CLS*, 44. [16] Raz, *CLS*, 75. [17] Raz, *CLS*, 169.
[18] Raz, *CLS*, 170. [19] Raz, *CLS*, 185. [20] Raz, *CLS*, 184–5.

## B. The Deductive Model

According to Alchourrón and Bulygin, law can be regarded as a *deductive* system. Following Tarski, they say that 'a set of sentences A is a deductive system if and only if all the consequences of A belong to A, that is, if there is no consequence of A which is not included in the set A'.[21] Thus, the structure of legal systems is not completely captured either by genetic relations or by operative relations. Law is more than a set of norms explicitly issued at different times, for it includes implicit norms that can be logically derived from a specific normative basis. The conceptual content of a basis cannot be fully grasped without deriving its logical consequences. Thus, in every legal system we can distinguish between the normative bases of the system and their logical consequences—that is, the logically entailed norms. To make explicit the logical consequences of normative bases is one of the most important tasks performed by legal science in so far as the solution to normative problems is often found not in explicit legal material but rather in the logical consequences of the material.

The incorporation of logical consequences is pertinent to an understanding not only of the *static* aspects of law (that is, how legal norms determine obligations, rights, responsibility), but also of its *dynamic* nature. The analysis of the dynamic nature of legal systems requires that one take into account different sets of norms at different times. In this respect, Bulygin recognizes that one of the great merits of Raz's book was to make explicit the distinction between momentary and non-momentary legal systems, but he goes on to claim that Raz's analysis was not altogether successful.[22] According to Bulygin, the identity of legal systems—as with any other set—is determined by its elements, and no changes in the extension of a certain set can be made without affecting its identity. Thus, the addition of a norm $N_1$ to a normative set S changes the identity of this set; that is to say, it is replaced by another set $S_1$. As a result of the act of promulgation, a new set of norms $S_1$ is added to the sequence of systems belonging to a certain non-momentary legal system. This set $S_1$ is formed by the explicitly issued norm plus the sum of its logical consequences and the consequences of the other valid norms of the system. The set of norms introduced by the promulgation of a norm is a determined set in the sense that we can decide by the application of logical rules whether or not a norm belongs to this set.

If a given momentary system S were identified with the consequences of a set α of expressly issued norms, it would be tempting to think that the issuance of a new norm or set of norms β would be a new momentary system containing the sum of the logical consequences of α and the logical consequences of β (Cn(α) + Cn(β)). However, the incorporation of all logical consequences of issued norms offers a more complicated picture, because the new momentary system will be constituted from the consequences of the sum of the logical consequences of α and

[21] Alchourrón and Bulygin, *NS*, 49.

[22] In particular, according to Bulygin, Raz fails to separate different logical relations (e.g. membership and inclusion) in his analysis of both concepts of legal systems. As a result of such confusion, the logical nature of non-momentary legal systems remains unclear.

β (Cn(α+β)), which may be larger than the set obtained from (Cn(α) + Cn(β)).[23] For example, let the norm $p \rightarrow Or$ be the unique explicitly issued norm of a certain system S. Certainly, the norm $q \rightarrow Or$ cannot be inferred from this normative basis. If, however, a legal authority validly sets down a definition according to which $q \leftrightarrow p$ is introduced into the new momentary system, one could then obtain $q \rightarrow Or$ as a consequence of the conjunction of $p \rightarrow Or$ and $q \leftrightarrow p$, even if $q \rightarrow Or$ is a consequence neither of $p \rightarrow Or$ alone nor of $q \leftrightarrow p$ alone.

A very important discovery made by Alchourrón and Bulygin is the logical asymmetry between the processes of introducing and derogating legal norms. The traditional view on legal derogation assumed that the elimination of norms, like their issuance, would yield a well-defined set of norms, but in the case of the elimination of logically implicit norms that are entailed by more than one norm that had been explicitly issued, we have no logical criterion that identifies which explicit norm should be dropped in order to eliminate the derived norm.[24] For example, the derogation of a logically entailed norm such as $q \rightarrow Or$ in our previous example requires the elimination of the set $\{p \rightarrow Or, q \leftrightarrow p\}$, and this requirement would be met if one of its members were eliminated. However, we have no criterion for deciding between $p \rightarrow Or$ and $q \leftrightarrow p$. Thus, the remainder of an act of derogation could compel us to choose between open alternatives. In other words, in certain circumstances the elimination of a logical consequence produces a *logical indeterminacy* in the legal system.

It is well to stress the fact that Alchourrón and Bulygin's reconstruction of normative systems takes for granted what is a highly controversial issue: the existence of a genuine logic of norms. Ever since Jørgen Jørgensen formulated his well-known dilemma,[25] scepticism where deontic logic is concerned has been endorsed by prominent philosophers (among others, Hans Kelsen[26]), and its status remains an open question in deontic logic and legal theory.[27] Even if a sound rejoinder to scepticism vis-à-vis deontic logic were at hand, the answer would scarcely be conclusive where another important issue in legal theory is concerned, namely, the legal validity of logically entailed norms. The acceptance of deontic logic gives rise to the question: Are the logical consequences of valid norms also valid in the legal systems? Some philosophers of law (for example, Joseph Raz[28] and Andrei



[23] Alchourrón and Bulygin, 'On the Concept of a Legal Order' (1976), in this volume, ch. 7.

[24] The philosophical significance of this discovery lies in the analogy between derogation and changes in scientific theories. Indeed, this analogy was the starting point in the development of the well-known AGM model—short for 'Alchourrón–Gärdenfors–Makinson model'—which explains rational belief revisions. This model has had a profound impact on different fields such as epistemology and artificial intelligence, and it remains very influential in contemporary logic and analytical philosophy.

[25] See Jørgensen, 'IL'.

[26] See Kelsen, *GTN*.

[27] For a general perspective on this issue and its bearing on legal theory, see Pablo E. Navarro and Jorge L. Rodríguez, *Deontic Logic and Legal Systems* (Cambridge: Cambridge University Press, 2014).

[28] See Joseph Raz, 'Authority, Law, and Morality', in Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), 210–37, at 210–14.

Marmor[29]) claim that the mere acceptance of deontic logic does not demonstrate the legal validity of logically entailed norms.

The question is still open, and it bears on the main epistemological function of both models with respect to the identification of facts that make legal propositions true. On the one hand, the institutional model helps us to explain the *legal* nature of our rights and duties, as something different from other normative (moral) qualifications, for example, legal positions arising from norms issued by legal authorities. On the other hand, the deductive model shows why it is that some normative propositions can be true even if no explicit decision taken by a legal authority justifies this claim. Thus, the two approaches seem to be in a state of tension, for the first approach emphasizes that some norms are not legally valid because they have not been issued by legal authorities, whereas the second approach emphasizes that some norms are legally valid even though legal authorities have not explicitly issued them.



## 3. Validity and Applicability of Legal Norms

In legal philosophy, the existence of a legal norm has been traditionally associated with its validity or binding force. Valid legal norms meet certain specific criteria, and in so far as these criteria refer to internal relations between and among norms, they can be considered as the criteria for the identification of a legal system. For this reason, validity is often regarded as membership in a legal system. For example, in the *Pure Theory of Law* Kelsen claims that the existence of a legal norm (its validity) cannot be separated from either its binding force or its membership in a legal system. Bulygin, however, rejects this conclusion:

> In fact, the problem of membership is absolutely independent of any speculation about the binding force of legal norms. It makes perfectly good sense to ask whether a given norm is a member of a certain set of norms, even if we do not regard them as obligatory or binding.[30]

From this conceptual separation of membership and binding force there arises a challenge to a systematic reconstruction of law. If the importance of identifying a legal system does not lie in identifying binding norms, how then is it to be understood?

In offering an answer, Bulygin attempts to take account of both intuitions. He begins with a distinction between several concepts of validity.[31] One concept of validity is normative: to say 'the norm N is valid' is tantamount to prescribing that it ought to be obeyed. Since it is a prescriptive notion it must be set aside in a descriptive discourse about law. 'Validity', however, is also used in two different

[29] See Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), at 69–70.

[30] Bulygin, 'An Antinomy in Kelsen's Pure Theory of Law' (1990), in this volume, ch. 14, at 247.

[31] See Bulygin, 'Time and Validity' (1982), in this volume, ch. 10, at 171–2.

descriptive senses: membership in a legal system and applicability. Bulygin reserves 'validity' for membership in a momentary legal system, and the idea of binding force is (partially) captured by the concept of *applicability*. The relations between both concepts can be explained as follows:[32] the dynamics of law require that one distinguish between legal systems and legal orders (or non-momentary legal systems). Legal systems are momentary sets of norms whereas legal orders are sequences of legal systems. The identity of a legal system is determined by its elements in the sense that a legal system $L_1$ is replaced by another system, $L_2$, each time a new norm is issued (or a valid norm is rescinded) by a competent authority. In this respect, a legal norm exists only as a valid norm, which means that it belongs to a momentary legal system. Its existence can be intermittent, since a legal norm can be issued and rescinded several times.

Applicable norms make a 'practical difference' in that they are not to be ignored in solutions to legal problems. A norm $N_j$ is applicable if and only if another norm $N_k$, belonging to the legal system, prescribes the application of $N_j$. Thus, judges have to apply $N_j$ in virtue of the existence of $N_k$ in a particular legal system. Norms such as $N_k$ are the criteria for the applicability of norms in this legal system. Suppose, for example, that a crime C committed at time $t_1$ is regulated by two different norms ($N_1$ and $N_2$) that appear successively. $N_1$ is valid at the moment of the offence $t_1$, but at time $t_2$, $N_1$ is rescinded and replaced by $N_2$. According to one of the main criteria for applicability in Argentine criminal law (namely, '*Tempus regit actum*', established in art. 18 of the Constitution), the applicable norm is the norm valid at the moment of the offence.[33] Thus, the applicable norm at the moment of the judgment, $t_2$, is $N_1$, not $N_2$, even if $N_1$ is no longer part of the legal system.

The set of applicable norms is not necessarily a subset of the valid norms at the moment a particular case is considered or a subset from some other system within this particular legal order. Indeed, the set of applicable norms is normally a selection from various systems of a legal order. Therefore, applicability and systematic validity are logically independent properties. Even if applicable norms are usually a part of the legal system, the validity of a particular norm cannot be regarded as either a necessary or a sufficient condition for its applicability. In order to identify applicable norms, jurists must employ a normative criterion that has to be valid in the legal system. In this way, a systematic reconstruction of law has conceptual priority over the identification of applicable norms.[34]



[32] Other legal philosophers (for example, Joseph Raz, Stephen Munzer, Frederick Schauer) also distinguish between validity and applicability, but they do not recognize in their respective approaches the logical independence of the two properties. See, for example, Raz, 'The Institutional Nature of Law', in Raz, *AL*, 103–21, at 119–21.

[33] Many complexities have been set aside in the situation described, e.g. there could be more than one criterion for applicability. A criterion for applicability can also determine the inapplicability of a certain norm. For example, suppose that a valid norm N is in *vacatio legis*. Even if N is valid in the legal system, neither citizens nor judges are obligated by it until its period of vacancy is completed.

[34] Like validity, the applicability of legal norms is always relative to the existence of a systematic valid norm. Precisely this relativity is responsible for the deep conceptual problems that arise when we analyse the normative basis of a particular legal system. The question 'what is the ground of validity or applicability of these ultimate norms?' is a classical one in legal philosophy, and several answers have

One might well wonder, however, why validity is explained by appeal to membership in a legal system. Would it not be better to claim that a legal norm exists only to the extent that it is applicable? It is worth emphasizing that to identify applicability with existence seems to be misleading rather than illuminating. As Bulygin rightly points out, there is a strong conceptual argument against the view that would render the existence of legal norms a mere function of their applicability:

> the criteria of applicability are to be found in the law, not necessarily in enacted or written law, but in the legal material supplied by the different sources of law. Moreover . . . they must belong to the system corresponding to the present time ($S_p$), that is, to the last system of the series of systems pertaining to a legal order. Thus, in order to avoid circularity jurists must be able to identify this system by some independent criterion, which is not one of the criteria of applicability. Therefore, the concept of existence in a system must be independent of the concept of applicability and not a function of it.[35]



## 4. Normative Propositions and Legal Statements

In *Norm and Action*, the *locus classicus* on agency and deontic logic, Georg Henrik von Wright distinguishes between norms, normative statements, and norm-propositions.[36] Norms are prescriptions, whereas the other notions are descriptive categories. Normative statements indicate the deontic status of certain actions or states of affairs, and their truth-values are conferred by the existence of a norm. The statement that says that a certain norm exists is a 'norm-proposition' (henceforth, 'normative proposition'). According to von Wright, the relation between normative statements and normative propositions can be explained as follows:

> *One* important type of answer to the question: 'Why ought (may, must not) this or that to be done?' is the following: *There is a norm* to the effect that this thing ought (may, must not) be done. The existence of the norm is here the foundation or truth-ground of the normative statement.[37]

Von Wright's distinctions have been influential in legal philosophy. In *Normative Systems*, however, Alchourrón and Bulygin offer a rather different picture. They contend that there is no conceptual difference between legal statements and normative propositions. For the sake of simplicity, I might represent the *descriptive* legal statement 'it is obligatory *p*' as Op. According to Alchourrón and Bulygin, the meaning of 'Op' is the same as the meaning of a normative proposition asserting that the *norm* Op belongs to a certain system (i.e. Op = 'Op' $\in$ Cnα).[38] Thus,

been provided by different theories. It is not necessary to repeat here the merits and shortcomings of these answers.

[35] Bulygin, 'Time and Validity' (n. 31), at 185.

[36] See von Wright, *NA*, at 106.

[37] Georg Henrik von Wright, 'The Foundations of Norms and Normative Statements', in von Wright, *Practical Reason* (Oxford: Basil Blackwell, 1983), 67–82, at 68 (emphasis in original).

[38] See Alchourrón and Bulygin, *NS*, at 121–5.

by contrast with von Wright's tripartite distinction, Alchourrón and Bulygin simply distinguish between norms and normative propositions. In particular, the legal statement 'Op' and the normative proposition ('Op' ∈ Cnα) *mean* the same thing, but the differences between their grammatical forms could give rise to some misunderstandings. Let me invite attention to some of them:

a) There is a well-known ambiguity that infects the language of legal statements because the same statement (that is, the same token) can be used not only to provide information about the deontic status of actions but also to prescribe behaviour, to express acceptance of certain actions, and so forth. In such cases, legal statements do not express propositions, and it is in fact doubtful that they deserve to be called 'statements' at all. From a *descriptive* point of view, however, legal statements are ordinary true or false propositions that inform us about the deontic status of certain actions or states of affairs in the context of a legal system. Thus, normative propositions lack the ambiguity that infects the legal statement. In other words: normative propositions cannot be used to prescribe behaviour.

b) Two legal statements, such as 'Op' and '¬Op', seem to be contradictory. If this were the case, both statements could not be true at the same time, but the corresponding normative propositions ('Op' ∈ Cnα) and ('¬Op' ∈ Cnα) can both be true when the system Cnα is inconsistent. Thus, contrary to what is suggested by the grammatical form of legal statements, no inconsistency stems from a consistent description of an inconsistent normative system.[39]

c) Legal norms correlate cases with deontic solutions, and they are often represented as conditional prescriptions. For this reason, some legal philosophers (including Kelsen) believe that legal statements are also hypothetical or conditional propositions. For example, Kelsen claims that legal propositions (*Rechtssätze*) are hypothetical judgments,[40] and he emphasizes that the proposition describing the validity of a norm of criminal law that prescribes imprisonment for theft 'can only be formulated in this way: If someone steals, he ought to be punished'.[41] Contrary to Kelsen, however, Alchourrón and Bulygin defend the logical form of legal statements in altogether different terms. In so far as legal statements have the same meaning as normative propositions, they are not hypothetical but instead are categorical; that is, they assert that a certain norm belongs to a certain normative system. Moreover, even if many legal statements seem to be *general* propositions (for example, 'all thieves must be punished'), they are indeed *existential* propositions, saying, quite simply, that a certain norm 'exists' in a certain legal system.[42]



[39] See Alchourrón and Bulygin, *NS*, at 123.

[40] See Kelsen, *RR 2*, § 16 (at 73), *PTL*, at 71.

[41] Kelsen, *RR 2*, § 16 (77), *PTL*, 75.

[42] See Alchourrón and Bulygin, 'Limits of Logic and Legal Reasoning' (1992), in this volume, ch. 15, at 266.

Legal philosophers often ignore the logical differences between legal statements and normative propositions, overlooking the fact that legal statements have an elliptical form. Rudolf Carnap terms such an elliptical form the *transposed mode of speech*, thereby referring to the notion that 'in order to assert something about an object a, something corresponding is asserted about an object b which stands in a certain relation to the object a'.[43] Thus, according to Bulygin:

> In the expanded form a norm-proposition states that there is (in a given normative system) a norm prohibiting (enjoining, permitting) a certain action. So in order to say that in a given normative system there is a norm (object *a*) prohibiting action *p*, we say that *p* (object *b*) is prohibited.[44]

This reconstruction could be called the 'reductive conception' of legal statements, to wit: in a descriptive discourse about the content of law, these statements can always be replaced by normative propositions. This reductive conception must be clearly differentiated from other well-known reductions, for Alchourrón and Bulygin are not claiming that legal statements are predictive statements or mere descriptions of regularities of behaviour. Rather, they insist that legal statements are only to be understood as, so to speak, elliptically factual propositions. In other words, they are normative propositions that state a fact: A certain norm belongs to a legal system.

It is often claimed, however, that an adequate description of the law requires that one take into account the normativity of legal statements.[45] Many philosophers have developed this idea with the help of a pair of distinctions introduced by Hart in *The Concept of Law*: (i) internal and external statements, and (ii) the internal and external points of view. These distinctions are often interpreted as arguments in favour of the acceptance of legal norms as a requisite for analysing law. According to this claim, law is properly analysed only by a jurist who adopts an internal point of view and describes legal norms by means of internal statements. In other words, no sound description of law can be provided from an external point of view. Bulygin rejects this interpretation. He insists that internal statements are not statements at all (they do not state facts).

To the extent that legal science counts as a *neutral* discourse about law, it is required that one adopt an *external* point of view. It should be pointed out that external statements need not be mere descriptions of external patterns of behaviour. As Hart stresses, although an external observer must understand what it is to adopt the internal point of view, 'this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance'.[46] Therefore, the description of law does not require that one adopt an



[43] Rudolf Carnap, *The Logical Syntax of Language* (London: Kegan Paul, 1955), 80.

[44] Eugenio Bulygin, 'True or False Statements in Normative Discourse', in *In Search of a New Humanism. The Philosophy of Georg Henrik von Wright*, ed. Rosaria Egidi (Dordrecht: Kluwer, 1999), 183–91, at 188.

[45] See e.g. Roger Shiner, *Norm and Nature. The Movements of Legal Thought* (Oxford: Clarendon Press, 1992), at 137.

[46] Hart, *CL*, 3rd edn., 'Postscript', 238–76, at 242.

internal point of view. Indeed, those who use internal statements in recognizing valid rules of the system express their own acceptance of them as guiding rules. Moreover, to grant that a legal theorist must accept the validity (binding force) of a set of norms in order to describe the law is to adopt an ideological position. This point had already been stressed by Alf Ross:

> To me it is astonishing that Hart does not see, or at any rate does not mention, the most obvious use of external language in the mouth of an observer who as such neither accepts nor rejects the rules but solely makes a report about them: The legal writer in so far as his job is to give a true statement of the law actually in force.[47]

Although the distinction between different types of legal statement and legal points of view is necessary for an understanding of the role law plays, legal science might well be limited to registering attitudes toward the acceptance of rules, and this fact does not lend itself to statements expressing any 'normative' character. To summarize: Bulygin and Alchourrón, too, have always stressed that descriptive legal statements lack normativity, and Bulygin has criticized prominent legal philosophers emphatically for ignoring the basic distinction between norms and normative propositions. Indeed, such a distinction would be essential in order to separate description from prescription, information from evaluation, science from politics. Thus, the normativity of both legal statements and legal science is an altogether innocent form of normativity, for these statements convey no 'binding force'; they only refer to the fact that certain norms belong to a certain legal system.



## 5. Normative Propositions and Legal Positivism

The reconstruction of normative propositions offered by Alchourrón and Bulygin in *Normative Systems* does not take a specific position on the dispute between natural law theories and legal positivism. However, the Argentine professors actually claim that there is a connection between their reductive conception and legal positivism. In their own words:

> [Normative propositions] convey information about the deontic status of certain actions or states of affairs: They say that an action is forbidden, or obligatory, or permitted, and they are true if and only if the referred action has the property of being forbidden, being obligatory, or being permitted. When, however, does an action have the property of being forbidden? This question admits of different answers. Some philosophers believe that being forbidden is an intrinsic (perhaps non-natural) property of the action itself and that its presence can therefore be detected by a close inspection of the action. Other philosophers believe that it is by virtue of God's commands or some eternal principles of natural law that certain actions are forbidden while others are permitted or are obligatory. We are concerned, however, with the positive law and the positivist approach, which is shared by most jurists. The characteristic of this point of view is that an action $p$ is said to be forbidden if and only if there is a norm (of the positive law of the country in question)

[47] Alf Ross, Review: Hart, *The Concept of Law* (Oxford 1961), *Yale Law Journal*, 71 (1961/2), 1185–90, at 1189–90.

that forbids or prohibits that *p*, and not because it is intrinsically bad or disqualified by moral or natural law principles. This amounts to saying that the proposition that *p* is forbidden means the same as the proposition that there is (exists) a legal norm forbidding that *p*.[48]

This connection between normative propositions and legal positivism is somewhat surprising, for other leading figures of legal positivism have endorsed a different position. Three major theses have often been attributed to legal positivism: (i) the reductive semantic thesis (legal statements are not normative; they are factual statements), (ii) the conceptual separation between law and morals (there is no necessary connection between the law as it is and the law as it ought to be), and (iii) the social sources thesis (the identification of the existence and content of law requires no moral argument).[49] The most controversial of these theses is the first in so far as 'simple positivism' is endorsed, for example, by Austin but is rejected by 'sophisticated positivism', for example, by Kelsen, Hart, and Raz.[50] This discrepancy between versions of legal positivism can be perhaps explained in terms of alternative proposals for dealing with the idea that, for example, 'obligation', 'duty', and 'right' are given different meanings in legal and in moral contexts.

Neither version, simple positivism nor sophisticated positivism, is free of difficulties. On the one hand, simple positivism reduces legal statements to mere descriptions of regularities (for example, the probability of sanctions) but, as its critics have remarked, it cannot take account of the fact that law is a social institution with a *normative* aspect. On the other hand, sophisticated positivism claims that legal statements are normative but this seems to imply that no neutral description of law can be provided and, therefore, that no true *science* of law is possible.

Alchourrón and Bulygin offer an interesting solution to this puzzle. On the one hand, normative propositions are factual propositions but they are not descriptions of regularities of behaviour, and, on the other, norms are only mentioned by normative propositions and, for this reason, normative propositions need not convey any normative force. It would be a mistake, however, to infer from the rejection of the normativity of legal science that legal positivism is conceptually committed to the reductionism favoured by Alchourrón and Bulygin. Other alternatives, developed, for example, by Raz and Hart, are also of interest. It could be said, following Raz, that the relation between legal statements and normative propositions 'is not *identity of meaning* but that between ground and consequence'.[51] This strategy makes clear, as von Wright remarks, that the existence of a norm is the *foundation* of a legal statement. On the contrary, as Alchourrón and Bulygin claim, if legal statements and normative propositions were simply two different formulations of



[48] Alchourrón and Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law' (1973/89), in this volume, ch. 5, at 103–4.

[49] See Raz, 'PPT', in Raz, *AL*, 293–312, at 295, in *NN*, 237–52, at 239–40.

[50] 'Simple positivism' and 'sophisticated positivism' are terms coined by Roger Shiner. See Shiner, *Norm and Nature* (n. 45, this chapter).

[51] Raz, 'Legal Reasons, Sources and Gaps', in Raz, *AL*, 53–77, at 65 (emphasis added).

the *same proposition*, then it would be rather odd to stress the notion that the existence of a norm is the ground of a legal statement.

Hart also rejects the identity of legal statements and normative propositions. In one of his last published papers, he no longer mentions the distinction between internal and external statements of law. Rather, he offers a new distinction between statements *of the law* and statements *about the law*.[52] His purpose is to vindicate the positivist insight that treats the meaning of legal terms (for example obligation) as different from moral expressions that are similar. According to Hart, theories like the imperative theory developed by Bentham fail to take into account the normativity of legal statements—that is, statements *of the law* or of the legal position of certain individuals. Hart emphasizes that 'to say that a man has a legal obligation to do a certain act is not, though it may imply, a statement *about* the law or a statement that a law exists requiring him to behave in a certain way'.[53] In order to make clear the differences, Hart adds:

> Instead of saying that US male citizens have a legal duty to register for the draft on attaining the age of twenty-one we could with equal truth say that on a given date Congress enacted a law requiring this to be done and providing penalties for non-compliance. This would be a historical proposition *about* the law, not a proposition *of* law, but though both forms of statement are true and are intrinsically connected they do not have the same meaning.[54]

It remains unclear whether this new approach of Hart's—along with recent proposals developed by other legal positivists[55]—is sound, but these alternatives to Alchourrón and Bulygin's reductive proposal show that the relations between legal statements and normative propositions are still deserving of close attention.



## 5. The Problem of Legal Gaps

The problem of legal gaps has been a major topic in analytical legal philosophy. The problem tends to shroud from view a great variety of issues that must be carefully distinguished. For example, legal philosophers sometimes analyse the problem of legal gaps as a necessary step in elucidating the relations between the application of norms and judicial discretion.[56] On other occasions, jurists disagree about the

[52] H. L. A. Hart, 'Legal Duty and Obligation', in Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), 127–61.

[53] Hart, 'Legal Duty and Obligation', in Hart, *Essays on Bentham*, 144.

[54] Hart, 'Legal Duty and Obligation', in Hart, *Essays on Bentham*, 145.

[55] See e.g. Joseph Raz, 'Legal Validity' in Raz, *AL*, 146–59, at 153–7. For criticism, see Luís Duarte d'Almeida, 'Legal Statements and Normative Language', *Law and Philosophy*, 30 (2011), 167–99.

[56] See Fernando Atria, *On Law and Legal Reasoning* (Oxford: Hart Publishing, 2001), at 63–86.

connections between semantic indeterminacies and legal gaps.[57] The most important reason for the persistence of controversies on legal gaps, however, is perhaps the connection of this topic with other, more general philosophical problems, for example, the truth-value of legal propositions. In his well-known paper on the existence of right answers in law, Dworkin has claimed that the *social sources thesis*, a defining tenet of legal positivism, leads to absurd consequences.[58] Dworkin's argument seeks to establish the conceptual relation between a proposition of law 'p' and the statement 'Sp' about the existence of a social source ('Sp' says that there is a legal source that prescribes p). Raz has reconstructed Dworkin's main insight in the following way:[59]

| | | |
|---|---|---|
| (1) | p ↔ Sp | Sources Thesis |
| (2) | –p ↔ –Sp | by counterposition in (1) |
| (3) | –p ↔ S –p | by substitution of p with –p in (1) |
| (4) | –Sp ↔ S –p | by transitivity of the biconditional in (2) and (3) |

According to Raz, the conclusion establishes that 'whenever *p* has no source . . . *–p* has a source', but he adds:

> This conclusion is patently false. In England, for example, there is no source for the legal proposition that it is legally prohibited to kill any butterfly, but neither is there a source for its contradiction, i.e. that it is not legally prohibited to kill any butterfly. (1) must be rejected for it entails a false conclusion.[60]

Raz attempts to reject Dworkin's argument, and he shows how vagueness and unresolved conflicts generate legal indeterminacies. Thus, Raz concludes, Dworkin does not offer a refutation of legal positivism but actually ignores it.[61] In his analysis, however, Raz suggests that the principle of bivalence does not apply to legal discourse, that is, in certain circumstances legal statements are neither true nor false. Raz also concludes that there are no genuine legal gaps, for in cases that law does not explicitly regulate there are closure rules that conclusively permit the prima facie non-prohibited action.[62]

By contrast, Bulygin claims that it is not necessary to abandon bivalence in order to refute Dworkin. Bulygin stresses that the impoverished symbolism confers a certain plausibility to Dworkin's argument; in particular, 'p' has no reference to any normative predicate or normative operator. For this reason, it cannot be regarded as a canonical legal statement or normative proposition. If the proposition 'p' were replaced by the corresponding normative proposition, it would then be clear that Dworkin's conclusions can be avoided. Let me then



[57] See Jules Coleman and Brian Leiter, 'Determinacy, Objectivity and Authority', in *Law and Interpretation*, ed. Andrei Marmor (Oxford: Oxford University Press, 1995), 203–78, at 218.

[58] Ronald Dworkin, 'Is There Really No Right Answer in Hard Cases?', in Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 119–45.

[59] Raz, 'Legal Reasons, Sources and Gaps' (n. 51, this chapter), 55.

[60] Raz, 'Legal Reasons, Sources and Gaps', 55.

[61] Raz, 'Legal Reasons, Sources and Gaps', 59.

[62] Raz, 'Legal Reasons, Sources and Gaps', 76, and see Joseph Raz, 'Law and Value in Adjudication' in Raz, *AL*, 180–209, at 192.

replace the proposition 'p' with the normative proposition that asserts that the norm 'Op' belongs to a legal system LS. Thus, instead of 'p' we have ('Op' ∈ CnS).[63]

| | | |
|---|---|---|
| (1) | ('Op' ∈ CnS) ↔ (Sp) | Sources Thesis |
| (2) | –('Op' ∈ CnS) ↔ –(Sp) | by counterposition in (1) |
| (3) | ('O –p' ∈ CnS) ↔ (S –p) | by substitution of p with –p in (1) |

Since the expressions (2) –('Op' ∈ CnS) and (3) ('O –p' ∈ CnS) are clearly different, it would be a mistake to conclude (–Sp ↔ S –p). The same result would be obtained if the normative propositions were replaced by their elliptical forms (that is, legal statements).

| | | |
|---|---|---|
| (1) | (Op) ↔ (Sp) | The Social Thesis |
| (2) | –(Op) ↔ –(Sp) | by counterposition in (1) |
| (3) | (O –p) ↔ (S –p) | by substitution of p with –p in (1) |

Thus, it is clear that from propositions (2) and (3), the absurd conclusion drawn by Dworkin is no longer derivable. The reason is clear: The absence of a certain norm never serves as a basis for inferring that another (contrary) norm belongs to the legal system.

According to Bulygin, Raz's strategy is not only unnecessary but misleading, too, for Raz grants that analytical rules—such as the principle of prohibition—can serve to close legal systems. Analytical rules say nothing, however, about facts (that is to say, the existence of legal gaps), and, therefore, they are useless for eliminating gaps. Indeed, the lack of a clear distinction between norms and normative propositions is responsible for the mistaken idea that in the absence of any law applying to a dispute, a closure rule is automatically triggered, that is to say, non-prohibited actions are permitted.

Alchourrón and Bulygin provide a complete refutation of this classical point of view, and their analysis is deserving of a brief presentation. According to them, the normative proposition 'the action *p* is obligatory' is true in relation to a system S if and only if the norm 'Op' belongs to the consequences of S (that is, CnS). As already noted, this idea could be represented by the symbols:

$$Op = \text{'Op'} \in CnS$$

By the same token, the prohibition of an action *p* according to a system S can be represented as follows:

$$Vp = \text{'Vp'} \in CnS$$

However, the expression 'legally permitted' is ambiguous; it refers to two very different situations—that is, two different facts that render propositions about a legal permission true. On the one hand, one uses the expression 'legally permitted *p*' in

[63] I am following the argument developed in Eugenio Bulygin, *El positivismo jurídico* (Mexico City: Fontamara, 2006), at 84–8.

order to describe the fact that no norm in a system S actually prohibits *p*. On the other hand, 'legally permitted *p*' also means that an explicit or implicit norm in a system S has expressly allowed *p*. To avoid confusion, I will distinguish between 'weak permission' and 'strong permission' respectively.

*Weak permission*: An action *p* is weakly permitted in the legal system S if and only if *p* is not prohibited in S. In symbols,

$$P_w p = \text{'Vp'} \notin \text{CnS}$$

*Strong permission*: An action *p* is strongly permitted if and only if *p* has been explicitly or implicitly allowed by a legal authority, that is, a norm that permits *p* belongs to the legal system. In symbols, this reads:

$$P_s p = \text{'Pp'} \in \text{CnS}$$

Therefore, the principle of closure 'non-prohibited actions are permitted' (henceforth PC) admits of two interpretations according to the two meanings of 'permitted'. The weak version says that an action *p* is weakly permitted in S if and only if no norm that prohibits *p* belongs to S, that is:

PC(*w*): 'If *p* is a non-prohibited action in S, then *p* is *weakly* permitted in S'.

In symbols, this interpretation is ('Vp' $\notin$ CnS $\rightarrow$ P*w*p). However, in so far as 'weakly permitted *p*' only means, by definition, that *p* has not been prohibited, such an interpretation expresses a tautology, and its analytical character is evident after the substitution of equivalent expressions:

PC(*w*'): 'If *p* is a non-prohibited action in S, then *p* is a non-prohibited action in S'.

In symbols: ('Vp' $\notin$ CnS $\rightarrow$ 'Vp' $\notin$ CnS). As with any tautology, this analytical truth cannot be denied, but it does not guarantee that a legal system is complete. This true expression only says that non-prohibited actions are not prohibited in a legal system, and this is precisely what happens in cases of legal gaps for the reason that no normative consequences can be derived.

A more promising interpretation of the principle PC arises from the strong meaning of 'permitted'. By definition, 'strongly permitted *p*' means that *p* has been explicitly or implicitly allowed in S, that is, P*s*p = 'Pp' $\in$ CnS. In this respect, PC says:

PC(*s*): 'If *p* is a non-prohibited action in S, then *p* is *strongly* permitted in S'.

In symbols, this strong interpretation is: ('Vp' $\notin$ CnS $\rightarrow$ P*s*p). After substituting the equivalent expression, it follows that ('Vp' $\notin$ CnS $\rightarrow$ 'Pp' $\in$ CnS). Unlike the weak interpretation, the truth of the strong interpretation is not a matter of its meaning but actually depends on the fact that legal authorities have explicitly or implicitly permitted actions that are not prohibited. Suppose, for example, that a legislator decides that fishing is prohibited on Monday and Friday but is permitted the rest of the week. In this case, our authority explicitly allows a certain action, and, according to this norm, it is true that fishing is permitted on these days. There

is a contingent legislative fact (that is, the issuance of a norm) that guarantees the truth of our statement about the permission to fish.

Some important differences between the strong and the weak interpretations of PC are captured by the following table:

| *Weak interpretation* | *Strong interpretation* |
|---|---|
| It is analytically true | Its truth depends on facts |
| Its negation is necessarily false | Its negation can be true |
| Its truth is compatible with the existence of legal gaps | Its truth is not compatible with the existence of legal gaps |
| No normative contradiction stems from the prohibition of a weakly permitted action | The prohibition of a strongly permitted action yields a normative contradiction |

Finally, two special cases ought to be mentioned. On the one hand, a legal authority could take a decision in advance on permitting all non-prohibited actions. For example, the legislator could issue a *norm* of closure according to which actions that have not been prohibited are permitted. This norm closes the system, that is, it eliminates normative gaps, but such a norm is contingent and, like any other fact, its existence cannot be proven by logic. The existence of a norm of closure in a legal system sheds light on the truth conditions of the strong version of PC. This principle says that non-prohibited actions are strongly permitted in a certain legal system S. If a norm of closure actually belongs to the system S, then it is also true that there are no normative gaps in this system.

On the other hand, questions can arise about the conceptual relations between strong and weak permissions in relation to the coherence and completeness of legal systems. Three possibilities are worth mentioning. First, in an inconsistent system S, a certain action *p* could be strongly permitted, but from this fact it does not follow that *p* is also weakly permitted in S. Therefore, in a logic of propositions about norms, the formula ($P_s p \rightarrow P_w p$) must be rejected. Second, the formula ($P_w p \rightarrow P_s p$) is not valid in a logic of propositions about norms, for its antecedent is true and its consequence is false in cases of legal gaps. Third, both concepts of permission will overlap only if the normative system is a complete and consistent one. That is, the formula ($P_s p \leftrightarrow P_w p$) is true only if it refers to a complete and consistent normative system.



## 7. Conclusions

Philosophical problems do not lend themselves to definitive solutions, and it is sometimes claimed that no progress whatever can be achieved in philosophy.[64] Legal philosophy faces a further difficulty: it deals with normative and social

[64] Georg Henrik von Wright, 'Of Human Freedom', in von Wright, *In the Shadow of Descartes. Essays in the Philosophy of Mind* (Dordrecht: Kluwer, 1998), 1–44, at 1.

institutions. Both aspects—the factual and the normative—are necessary to an understanding of the role played by law in our communities, but at the same time they seem to stand in an irreconcilable tension.[65] Finally, legal positivism—as a specific analytical doctrine in philosophy—often faces the charge of futility.[66] What might then be expected from the legal philosophy developed by analytical legal positivists—for example, by Eugenio Bulygin? To a certain extent, it can be said that Bulygin's philosophy reflects an empiricist and naturalistic epistemology along with a denial of moral objectivity. What understanding of legal practice and legal theory can be gained from such a conception? Sometimes even the most distinguished among the analytical legal positivists express scepticism about this philosophical background. For example, Joseph Raz, in a paper published some years ago, contended that Hart's effort to apply certain tools developed by philosophers of language proved to be futile.

> Very little seems to have been gained in all of Hart's forays into philosophy of language. The problems with the explanation of responsibility, legal agents such as corporations, the nature of rights and duties, the relations between law and morality—none of them was solved nor their solution significantly advanced by the ideas borrowed from philosophy of language. Moreover, the reason for that was not that Hart borrowed bad ideas from the philosophy of language, nor that he did not understand properly the ideas he borrowed. Essentially the fault was in the philosophical analysis of the problems which speech-act theory and other ideas from the philosophy of language were meant to solve. Hart's failure on all the points I mentioned resulted from his adherence to naturalism and to empiricist epistemology, and his rejection of evaluative objectivity.[67]

Raz's words do not seem to be addressed to analytical philosophy generally, but only to certain doctrines. In so far as Bulygin endorses the general approach attributed to Hart, it could be said that his legal philosophy, too, is built on a fragile philosophical base. However, Raz's disappointment over such a philosophical foundation need not be endorsed. He provides no detailed argument that would bring to light the limits and shortcomings of the philosophical doctrines mentioned above. In particular, his pessimistic diagnosis of the utility of certain philosophical conceptions might well be regarded as an exaggeration that philosophers like Bulygin would be anxious to reject.

On the contrary, as I have attempted to show, Bulygin—and Alchourrón, too—has made substantial contributions to legal philosophy that cannot easily be separated from the influence of the analytic philosophical doctrines repudiated by Raz. As examples, one might mention the analysis of derogation and the logical indeterminacy of legal systems, the distinction between a logic of norms and a logic



[65] Jeffrey Goldsworthy, 'The Self Destruction of Legal Positivism', *Oxford Journal of Legal Studies*, 10 (1990), 449–86; Pablo E. Navarro, 'On the Self Destruction of Legal Positivism', in *The Legal Ought*, ed. Pierluigi Chiassoni (Turin: Giapichelli, 2001), 83–101.

[66] David Dyzenhaus, 'The Legitimacy of Law: A Response to Critics', *Ratio Iuris*, 7 (1994), 80–94, at 81.

[67] Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison', in Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), 47–87, at 52.

of normative propositions, the characterization of legal systems as deductive, the propositional nature of legal science, and so forth. All of these are ideas developed with the tools provided by contemporary logic and the philosophy of language. Their importance is clear not only from their pertinence for understanding law, but also from the fact that they now represent a widely accepted starting point for many conceptual enquiries into logic, epistemology, and the philosophy of law. In this respect, although no definitive conceptual answers could be extracted from Bulygin's contributions to legal philosophy and deontic logic, it is abundantly clear that they are not futile and cannot be ignored.

Finally, although I have mainly focused on Bulygin's legal philosophy, it is well to mention, in concluding this introduction to the present volume, that his contribution cannot be entirely separated from the work he has done together with Carlos Alchourrón. As von Wright writes:

> The achievement and lifelong companionship of Carlos Alchourrón and Eugenio Bulygin are a morally elevating example of how intellectual and temperamental differences between two richly gifted individuals can fuse in a philosophical friendship and result in a fuller synthesis than their endowments, developed in isolation, would perhaps have allowed.[68]



[68] Georg Henrik von Wright, 'Epilogue', in *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, ed. Ernesto Garzón Valdés, et al. (Berlin: Duncker & Humblot, 1997), 509–12, at 512.