RICCARDO GUASTINI

ON LEGAL ORDER: SOME CRITICISM OF THE RECEIVED VIEW

ABSTRACT. The author discusses a number of topics related to the concept of 'legal order' and the structure of legal orders. In particular, the following theses are challenged: (1) legal orders are sets of rules; (2) the criterion of membership to such sets is validity; (3) legal orders are dynamic sets; (4) legal orders are provided with a hierarchical configuration; (5) legal orders are coherent and consistent sets.

KEY WORDS: coherence, consistency, hierarchy, interpretation, invalidity, legal order, legal rules, legal system, validity

INTRODUCTION

The aim of this paper is discussing a number of topics related to the concept of 'legal order' and the structure of legal orders. According to the received view, by and large accepted in common juristic thinking:

(a) A legal order is but a set of rules;
(b) The criterion of membership of rules to legal orders is validity;
(c) Legal orders are dynamic sets;
(d) Every legal order has a hierarchical structure; and
(e) Every legal order is a system.

In my view, all such ideas are subject to criticism.

1. THE LEGAL ORDER AS A SET OF RULES

The thesis, according to which a legal order is a set of rules – although apparently obvious – raises two problems. The first problem concerns the concept of 'set', while the second one regards the concept of 'rule'.

1. As to the concept of set, the problem is the following (Raz, 1973, ch. VIII; Alchourrón & Bulygin, 1991, 393 ff). Any set can be identified extensionally, i.e., by simply enumerating its compounding elements. But this entails that, from the extensional point of view, the set at stake loses its own identity – it becomes a different set – each and every time one of its elements is changed.

Ethical Theory and Moral Practice **3**: 263–272, 2000.

Every legal order changes whenever: (a) a new rule is introduced in it by enactment; (b) an old rule is repealed or derogated; (c) an old rule is substituted (substitution being the result of enactment of a new rule and derogation of the old one). Nevertheless, no one would say that a legal order loses its identity each and every time a new statute is enacted or an old one is derogated or substituted.

This means that, properly speaking, a legal order is not just 'one' set, except from the synchronic point of view, i.e., looking at it in a specified moment of its historical existence. While, from the diachronic point of view, a legal order is not a set of rules – rather, it is a set of sets, namely, a diachronic (non-momentary) sequence of synchronic (momentary) sets.

2. What do we mean when speaking of legal rules? (Guastini, 1998, ch. 2). In common juristic thinking – still dominated by a formalist (or new-formalist) conception of statutory construction (Guastini, 1997, 279 ff) – there is no habit of distinguishing between legal texts (e.g., statutes) before interpretation and their meaning contents which are the outputs of interpretation. Therefore, what does a rule amount to? Is it a text, namely, a sentence? Or is it its meaning? In other words: should we say either that a legal order is a set of sentences or that a legal order is a set of meanings?

If we use the term 'rule' to denote legal (e.g., statutory) sentences, there is no problem. Remark however that, in such a case, getting knowledge of a legal order simply amounts to getting knowledge of a set of texts whose meaning remains nevertheless unknown. This is to say that we have no idea of the normative contents of the legal order at stake.

If on the contrary we use the term 'rule' to denote the meanings of the legal texts, then some problems arise, since no text has a definite meaning unless after interpretation.

(a) First, meanings, i.e., rules *stricto sensu*, do not stem from the official sources of law – they stem from interpretation, or from interpreters, namely, from judges. As a consequence: either the so-called sources of law are not sources of rules (since, as a matter of fact, they simply are sources of texts), or interpretation should be understood as a source of law – maybe, the only 'true' source of law.

(b) Second, the legal order, understood a set of meanings, has a content hence an identity – which cannot be grasped, since any enacted

text is susceptible of both synchronically conflicting and diachronically changeable interpretations.

2. Which Criterion of Membership?

Which is the criterion of membership of rules to the legal order? The standard answer is: the criterion is validity (Cf. Von Wright, 1963; Bulygin 1995). Usually, membership and validity are even identified. This thesis, however, raises two problems.

1. In the first place, when accepting such a criterion of membership, one is forced to conclude that, paradoxically, no legal order includes its own constitution – the constitution (either in the formal or in the material sense, this is not important) does not belong to the legal order which it 'constitutes'. The reason why of this paradoxical conclusion is simple.

   Validity is but the double relationship of a rule to other rules: on the one hand, the rules which govern its production; on the other hand, the rules which are higher-ranked in the hierarchy of legal sources. Unfortunately, however, in any legal order no rule exists which regulates the creation of the constitution and/or which is higher-ranked than the constitution.

   This is a consequence of the very concept of constitution, since a constitution – at least, the 'first' constitution – is the output of the so-called 'pouvoir constituant', i.e., an 'extra ordinem' power, which is in no way regulated by any pre-existing rule whatsoever. And, at the same time, the constitution is the 'supreme' source of the legal order – hence, there is no source, in the hierarchy of sources, 'over' the constitution. As a consequence, the concept of validity does not apply to constitutions. Any constitution is neither valid nor invalid (Guastini, 1994, 216 ff.).

   We are forced to conclude that any legal order is composed not only of valid rules, but also by supreme rules, neither valid nor invalid (Cf. Carracciolo, 1998).
2. In the second place, when accepting validity as the criterion of identity, one is also forced to accept that any unconstitutional statute as well as any illegal regulation do not belong to the legal order at stake. Nevertheless, in most legal orders there are lot of unconstitutional statutes and 'contra legem' regulations which are – even for a long

time – actually applied by judges and executive bodies before the competent judge (e.g., the constitutional court as far as parliamentary acts are concerned) recognises their invalidity.

Should we conclude that such rules were valid before being declared invalid by the competent judge? Or should we say that such rules did not belong to the legal order notwithstanding their application by judges and the public administration?

The first answer – they were valid, and the declaration of invalidity has a 'constitutive' value – seems to not distinguish between validity and 'validation'. They are two quite different things, indeed. Validity is an 'objective', i.e., subject-independent, relationship between a certain rule and other rules – those which regulates the creation of the rule at stake and the higher-ranked rules in the hierarchy of legal sources. What I propose to call 'validation', on the contrary, is the result of someone's 'subjective' act – the act of recognising the validity of a rule.

The second answer – they did not belong to the legal order even before they were declared invalid –cannot explain the application of a rule which does not belong to the legal order at stake.

Well, the most simple solution is recognising that a legal order is composed not only of valid, but also of invalid rules – rules whose invalidity can be recognised and declared by the competent judge.

As a consequence, validity is not the criterion of membership of rules to the legal order. Rather, the criterion of membership is simple 'existence', i.e., actual enactment by a 'prima facie' competent normative authority (Guastini, 1998, 129 ff).

3. Legal Orders as Dynamic Sets

Legal orders are dynamic sets – no one could deny. Nevertheless, such a statement cannot be accepted without caution. In fact, every legal order is dynamic in character, for sure, but no developed legal order is 'purely' dynamic.

A legal order can be said to be purely dynamic if and only if the only existing criteria of validity are 'formal'. In other words, validity does not depend on the contents of rules. Every rule enacted by the competent authority in accordance with the established procedures is valid,

whatever its contents may be. But the most part of contemporary legal orders cannot be deemed to be purely dynamic because of two reasons (Guastini, 1998, 144 ff).

1. In the first place, in any developed legal order there are substantive criteria of invalidity – criteria which regard the contents of rules and can yield the invalidity of a rule (notwithstanding its formal validity).

   This is the case in legal orders where a rule is considered as invalid whenever it is inconsistent with a higher-ranked rule in the hierarchy of legal sources. Such a rule is invalid although validly enacted, i.e., notwithstanding its formal validity. Such a phenomenon is especially clear in legal orders governed by rigid constitutions.
2. In the second place, in any legal order there are also substantive criteria of validity. In other words, some rules are deemed to be valid because of their contents, independently of any valid enactment. In particular, such rules are considered as valid although no competent authority did ever enact them. I am alluding to the 'implicit', unexpressed, rules which are worked out by jurists and judges. There are three kinds of such rules.

   (a) First, rules derived by means of logically valid (i.e., deductive) arguments whose only premises are expressed rules. For example: the combination of a rule and the statutory definition of a term used in its formulation.
   (b) Second, rules derived by means of deductive arguments adding, however, some premises which are not expressed rules. For example: combination of a rule and a juristic or judicial definition of a term used in its formulation.
   (c) Third, rules derived by means of non-deductive – hence logically invalid – reasoning: e.g., by analogy.

Unexpressed rules of the first kind can be considered as 'implicit' in the strict sense (if one admits a logic of normative language), hence 'positive', i.e., enacted by the law-giving authority although unformulated. The rules of the second kind, on the contrary, result from construction, viz., from a combination of deduction and interpretation. While the rules of the third kind result from juristic or judicial 'interstitial' legislation – hence, in a sense, they are 'non-positive' rules.

4. Varieties of Hierarchical Relationships

It seems a matter-of-course that every legal order has a hierarchical structure. But what kind of hierarchy are we talking about?

According to Kelsen (Kelsen, 1962, titre V), there is just one kind of hierarchy, namely, the relationship between the rules which regulate the creation of law and the rules created according to them. In this sense, for example, constitutional rules concerning legislation are higher-ranked than legislation itself, even under a flexible constitution.

According to Merkl (Merkl, 1987, 37 ff), however, there is a second kind of hierarchy (side by side with the foregoing one), namely, the relationship which exists between two rules when one of them cannot be (validly) contradicted or derogated by the other one. Remark that, as far as legislation and constitution are concerned, such a relationship only holds if the constitution is a rigid one.

However, the relationship between the rules which regulate the creation of law and the rules created according to them is often conceived of as a logical relationship – the one that holds between two levels of language, a meta-language and its object-language. This standpoint amounts to a confusion between this kind of relationship and a quite different one – I mean the relationship which exists between two rules when one of them bears upon the other, 'talks' about it – it is relationship which holds, e.g., between a derogating rule and the derogated one.

Moreover, everyone seems to believe that each and every hierarchical relationship pre-exists to interpretation, in such a way that interpreters cannot do anything else than recognising it. But things do not run that simply, since it is quite evident that certain hierarchical relationships are not 'found' by interpreters – they are created by them. This is the case, e.g., of the axiological relationship which holds between fundamental or general principles and particular rules. This is the case, moreover, of the relationship between the constitution and those 'super-constitutional' principles which, according to many constitutional courts' jurisprudence, cannot be modified or derogated in any way – not even by means of the procedure of constitutional amendment.

The conclusion is that no single hierarchical structure exists in contemporary legal orders. In fact, there are four such structures (Guastini, 1997, 463 ff).

1. Formal hierarchy: between the rules which regulate the creation of law and the rules created according to them.
2. Substantive hierarchy: a first rule A is higher-ranked than a second

rule B when a third rule C states that B may not contradict A. Any flexible constitution is higher-ranked than legislation only in the formal sense, while a rigid one is higher-ranked to legislation also in the substantive sense.

3. Logical hierarchy: between rules and meta-rules. For example: the derogating rules and the derogated ones; rules which define a term of the legislative language and the rules where such a term is used.
4. Axiological hierarchy (i.e., concerning the 'value' of the rules concerned): between rules and principles. But this kind of relationship can be established among principles, too – the solution of conflicts between two principles (e.g., freedom of the press and privacy) just requires postulating an axiological relationship between the principles involved (Alexy, 1993, 89 ff).

5. Legal Orders as Systems

The phrase 'legal order' is sometimes used in an innocent and harmless way, as a synonym of 'law'. Often, however, by saying that law amounts to a legal 'order', one means that law is an 'ordered' set of rules – a 'system', i.e., a consistent and coherent unity (Tarello, 1985, 173 ff).

1. Coherence requires that all the rules belonging to the system can be traced back: (a) from the formal standpoint, to a common ground of validity, i.e., a single basic and supreme rule; and (b) from the axiological standpoint, to a unique principle or a constellation of consistent principles (MacCormick, 1984). In this connection, however, two remarks are in order.

   (i) In the first place, as we said, it is not true that all the rules belonging to a given legal order can be traced back to a common ground of validity, because every legal order also includes a great deal of invalid rules.
   (ii) In the second place, the thesis according to which all the rules belonging to the legal order share a common axiological foundation (the very basis of Dworkin's 'one right answer' thesis) is clearly false (Dworkin, 1985, 119 ff). Every legal order results from a great variety of political doctrines and legislative policies, and this is true even at the constitutional level (although the constitution amounts to a single normative text) – otherwise there would be no explanation to the existence of conflicts among constitutional principles.

2. Consistency requires less than coherence: it simply amounts to lack of contradictions among rules. Nevertheless:

(i) First, the rules belonging to a given legal order were enacted, in different times and under different circumstances, by various normative authorities, each one pursuing its own legal policy (possibly conflicting with the other ones). Such rules are not consistent and, indeed, they could not be. Hence, in every legal order there are contradictions – which also explain the existence of the mentioned substantive criteria of invalidity.
(ii) Second, such contradictions demand solution – this requirement being connected both with the principle of equality and the need for legal certainty. And this is why every legal order comprises certain criteria of solution of normative contradictions, such as the 'lex posterior' and the 'lex superior' criteria. But the existence of such criteria does not entail the legal order to be consistent – it entails that the legal order can be made consistent, 'systematised'. Lack of contradictions and the possibility of solving them are two quite different things, since the 'system' appears to be not something granted, a 'datum' which pre-exists to legal dogmatics (interpretation). Rather, the legal 'system' is the result of legal dogmatical work (Bulygin, 1996).
(iii) Third, the criteria of solution of contradictions are not susceptible of any 'mechanical' application. On the one hand, they require construction of the texts at hand, since there is no other thing than construction which can identify contradictions – no contradiction before interpretation. It is a well known feature of legal dogmatics, however, that interpretation can avoid contradictions – this is the case, for example, of that method of statutory construction which, facing a statute which could be construed as expressing either a rule contrary to the constitution or a rule consistent with it, chooses this second construction, in such a way that there is no reason to declare the statute at stake unconstitutional. But, if interpretation can avoid contradictions, it also can create them (Guastini, 1998, 220 ff). In the second place, contradictions (second-order contradictions) can arise even among the criteria of solution, i.e., between the 'lex posterior' and the 'lex specialis' criteria. However, no positive meta-criterion exists to solve such contradictions (Bobbio, 1964, 237 ff). In the third place, no criterion exists for solving contradictions among constitutional principles (Zagrebelsky, 1992).

(iv) Fourth, the legal 'system', as a consequence, is but the output of systematising activities of jurists.

Moreover – this is my last remark – one often talks about the legal system making reference to legal order as a whole. In a sense, unfortunately, such a system simply does not exist – since no jurist ever even tried to systematise the whole legal order. Every jurist takes care of much smaller sets of rules , 'cut', within a synchronic set, in accordance with his/her scientific, practical, or teaching interests (Cf. Alchourrón & Bulygin, 1971, 9 ff). The idea of a legal order as whole is a something for legal philosophers to think about, but it is of no interest for jurists.

References

Alchourrón, C.E. and Bulygin, E., *Normative Systems*. Wien: Springer Verlag, 1971.

Alchourrón, C.E. and Bulygin, E., Sobre el concepto de orden jurídico, in C.E. Alchourrón, E. Bulygin, *Análisis lógico y Derecho*. Madrid: Centro de Estudios Constitucionales, 1991, pp. 393 ff.

Alexy, R., *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales, 1993.

Bobbio, N., Des critères pour résoudre les antinomies, *Dialectica* 18 (1964), pp. 237 ff.

Bulygin, E., Legal Dogmatics and the Systematization of Law, in *Rechtstheorie*, Beiheft 10, Berlin Duncker & Humblot, 1986., pp. 193 ff.

Bulygin, E., *Norme, validità, sistemi normativi*. Torino: Giappichelli, 1995.

Caracciolo, R., *El sistema jurídico. Problemas Actuales*. Madrid: Centro de Estudios Constitucionales, 1988.

Dworkin, R., *A Matter of Principle*. Cambridge (Mass.): Harvard University Press, 1985.

Guastini, R., Gerarchie normative, *Materiali per una storia della cultura giuridica* 27(2) (1997), pp. 463 ff.

Guastini, R., Interpretive Statements, in E. Garzón Valdés et al. (eds), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*. Berlin: Duncker & Humblot, 1997, pp. 279 ff.

Guastini, R., Sur la validité de la constitution du point de vue du positivisme juridique, in M. Troper and L. Jaume (eds), *1789 et l'invention de la constitution*. Bruxelles-Paris: Bruylant, 1994, pp. 216 ff.

Guastini, R., *Teoria e dogmatica delle fonti*. Milano: Giuffré, 1998.

Kelsen, H., *Théorie pure du droit*. Paris: Dalloz, 1962.

MacCormick, N., Coherence in Legal Justification, in A. Peczenick et al. (ed)., *Theory of Legal Science*. Dordrecht: Reidel, 1984, pp. 231 ff.

Merkl, A., Prolegomeni ad una teoria della costruzione a gradi del diritto, in A. Merkl, *Il duplice volto del diritto*. Milano: Giuffré, 1987, 37 ff.

Raz, J., *The Concept of a Legal System*. Oxford: Clarendon, 1973.

Tarello, G., *Cultura giuridica e politica del diritto*. Bologna: Il Mulino, 1988.

Wright, G. H. von, *Norm and Action. A Logical Enquiry*. London: Routledge & Kegan Paul, 1963.
Zagrebelsky, G., *Il diritto mite. Legge, diritti, giustizia*. Torino: Einaudi, 1992.

Dipartimento di Cultura Giuridica
'Giovanni Tarello'
Via Balbi, 30
I-16126 Genova