Ratio Juris. Vol. 9 No. 4 December 1996 (364–86)

Fragments of a Theory of Legal Sources

RICCARDO GUASTINI

Abstract. The author discusses a number of issues in the theory of legal sources. The first topic is whether sources should be conceived of as acts or texts. The alternatives are connected with two competing theories of legal interpretation (viz., the cognitive theory and the sceptical theory), which entail different concepts of legal rules and law-making. The second topic is whether a "formal" or a "material" criterion of recognition of sources should be preferred. The third section is devoted to the analysis of rules of change. Four theories of rules of change are discussed, and five kinds of such rules are distinguished. The fourth section concerns judicial law-making, with special reference to the creation of new legal rules by constitutional courts.

1. From the Concept of Interpretation to the Concept of a Legal Source

1.1. Interpretive Statements and Their Logical Status

Interpretation is the very core of any judicial or juristic reasoning and interpretive statements are the very core of any interpretive discourse. By interpretive statement I mean any sentence to the effect that a certain text gives expression to a certain meaning-content. The standard form of interpretive sentences may be assumed to be "The text T means M," T being, e.g., a statutory provision, while M is the rule expressed (Guastini 1994a).

What is the logical status of such sentences? Interpretive sentences connect words and meanings. But what does "connecting" words and meanings amount to? Does it amount to *describing* or *ascribing* meanings? Two main possible answers can be found in the dogmatic and jurisprudential literature:

(1) First answer: Interpretive statements are cognitive or descriptive—i.e., true or false—sentences. In other words, interpretive statements describe a pre-existing meaning. The underlying assumption is that meaning depends on the utterer's usage of the interpreted words and sentences and interpreting just amounts to discovering that meaning.

(2) Second answer: Interpretive statements are "constitutive" or "meaning-ascribing"—hence neither true nor false—sentences. The underlying assumption is that, any linguistic expression being liable to different and even conflicting interpretations, no meaning is already embodied in words and sentences—meaning just depends on interpretation itself. Hence, there is no pre-existing meaning to be discovered and described.

These competing analyses of interpretive statements reflect two competing theories of legal interpretation— the "cognitive" theory and the "sceptical" theory.

1.2. Two Theories of Interpretation

Indeed, two main competing theories about the very nature of legal interpretation can be found in modern legal thinking (Guastini 1994a).

(1) The *cognitive* theory maintains interpretation to be a matter of knowledge, viz., empirical knowledge, of either the "proper," objective, meaning of normative texts (e.g., statutes) or the subjective intention of normative authorities (e.g., the Parliament) (Evans 1989, 15ff.). "The discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation: or (changing the phrase), its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed" (Austin 1879, 1023–24).

This amounts to saying that interpretive statements can be either true or false. The underlying assumption is either the fallacious belief that words are provided with a "proper," intrinsic, meaning, or the misleading belief that law-giving authorities (which usually are collegial organs) are provided with one univocal and recognizable "will" just like individuals. As a consequence, the aim of legal interpretation is deemed to be but the discovery of this pre-existing meaning or intention, already embodied in statutes and other legal texts, so that for any normative sentence there is always one, and only one, "true" interpretation. As a further consequence, any question of law is deemed to be susceptible of just "one right answer" (Dworkin 1985, 119ff.).

(2) The *sceptical* theory, on the contrary, claims that interpretation is a matter of evaluation and decision. The underlying assumption is the tenet that words have no proper meaning, since every word may bear either the meaning put upon it by the user, or the meaning put upon it by each recipient, and no coincidence between the former and the latter is granted (Dias 1976, 220). Indeed, each statutory text is likely to be interpreted in several ways, depending on the different evaluative attitudes of interpreters. Furthermore, in contemporary legal systems there is no individual legislator on whose opinion one can rely, and collegial organs have no collective "will" at all (Dias and Hughes 1957, 114).

This amounts to saying that interpretive statements are neither true nor false. Interpretive statements are treated as having the same deep logical

structure as stipulative definitions, i.e., definitions which do not account for the actual usage of a given word or phrase, but *propose* to ascribe a definite meaning to the word or phrase at hand (Hospers 1967, 32ff.). It is a matter of course that no stipulation is either true or false.[1]

Each theory of interpretation involves a different concept of a (legal) rule.

1.3. Two Concepts of a Rule

It is a matter of course, in common juristic thinking, that law is a set (or system) of rules. Unfortunately, the actual usage of the word "rule" fluctuates (Guastini 1992b).

(1) In a first sense, quite common in juristic usage, "rule" means a norm-formulation, a normative sentence of the law-giver's language, e.g., a statutory provision—before its interpretation or construction and irrespective of it.

(2) In a second sense, equally widespread in lawyers' language, "rule" refers to (what I propose to call) a norm or rule *stricto sensu*, i.e., an interpreted normative sentence or its meaning content (which indeed amounts to the same).

It is to be stressed that the cognitive theory does not distinguish between normative sentences and rules. According to this theory, the normative sentences enacted by normative authorities *are* rules—in the sense that each normative sentence gives expression to just one definite rule to be discovered by means of interpretation.

In the language of the cognitive theory, "rule" means the same as "normative sentence."

The sceptical theory, on the contrary, does distinguish between normative sentences and rules (Tarello 1974, 389ff.; Tarello 1980). According to this theory, the normative sentences enacted by normative authorities are not rules at all—in the sense that no normative sentence gives expression to any definite rule to be discovered by means of interpretation. "After all, it is only

[1] I do not address in the present context a third theory of interpretation (a tentative reconciliation of the previous theories) which argues that interpretation is sometimes the result of a process of knowledge, sometimes the output of a discretionary decision (Hart 1961; Carrió 1979; Wróblewski 1987; Bulygin 1992b, 1995). This theory emphasizes the irreducible "open texture" (i.e., vagueness, indeterminacy) of nearly all legal provisions, which are mainly formulated in a natural language by means of general classifying terms, and distinguishes, within the meaning of every rule, a "core" of settled meaning from a "penumbra" of uncertainty. As a consequence, for each rule there are cases which certainly fall within its scope ("clear, plain, or easy cases"), as well as borderline cases where the application of the rule is controversial ("hard cases"). Judges make no use of discretion when they decide a clear case. By contrast, judicial discretion is necessarily involved every time a hard case is to be decided, since such a decision is a choice among competing possible solutions. Therefore, two kinds of interpretive statement should be distinguished, depending on the meaning ascribed to the rule-formulation at hand. When the ascribed meaning falls within the core of settled meaning, the interpretive statement can be deemed to be true, being the result of a simple discovery of the accepted meaning. However, when the meaning ascribed falls within the penumbra, the interpretive statement is neither true nor false, being the result of a discretionary decision. See, for criticism, Guastini 1995b, 1995c.

words that the legislature utters; it is for the courts to say what these words mean; that is it is for them to interpret legislative acts. [...] And this is the reason why legislative acts, statutes, are to be dealt with as sources of Law, and not as a part of the Law itself. [...] The courts put life into the dead words of the statute" (Gray 1948, 124–25). The normative texts enacted by the law-giving authorities are usually susceptible of both synchronically conflicting and diachronically changeable constructions. Hence, legal rules do not exist prior to interpretation—they are the result of interpretation. "In effect, what exists before a judgement is not a norm, but a text, for example a legislative text. The norm is not this text, but only its meaning."[2]

In the language of the sceptical theory, rules are the meaning-contents of normative sentences.

1.4. Two Concepts of Law and Law-Making

Prima facie, each of the two concepts of a rule involves a different concept of law and law-making (my analysis is confined to enacted law).

(1) In so far as rules are conceived of as normative sentences, law should be conceived of as a set of normative sentences and law-making, in turn, should be conceived of as a text-creating activity.

(2) In so far as rules, on the contrary, are conceived of as meaning-contents drawn from normative sentences through judicial and juristic construction, law should be conceived of as a set of meanings and law-making, in turn, should be identified with interpretation. "Whoever hath an *absolute authority to interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them" (Benjamin Hoadley, Bishop of Bangor, as quoted by Gray 1948, 102).

Things, however, do not run so smoothly.

(1.1) On the one hand, as a matter of fact, the supporters of the cognitive theory of interpretation maintain that law is a set of rules. This is so because they simply do not distinguish between normative sentences and rules.

(2.1) On the other hand, from the standpoint of the sceptical theory of interpretation, one could argue that—in so far as legislation is deemed to be a law-making activity—legal systems in a sense really *are* but sets of normative sentences. Such an account of legal systems is just meant to stress that normative authorities only create texts liable to different constructions, in such a way that no definite rules arise from legislation until statutes and other normative texts are interpreted by lawyers and judges. "It may be urged that if the Law of a society be the body of rules applied by its courts, then statutes should be considered as being part of the Law itself, and not merely

[2] "En effet, ce qui préexiste au jugement n'est pas une norme, mais un texte, un texte législatif par example. La norme n'est pas ce texte, mais seulement sa signification," Troper 1981, 9; cf. also Troper 1992; 1994, 97ff., 332ff.

as being a source of the Law; that they are rules to be applied by the courts directly, and should not be regarded as fountains from which the courts derive their own rules. [...] And if statutes interpreted themselves, this would be true; but statutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law*" (Gray 1948, 170). The usual picture of legal systems as sets of rules, on the contrary, when combined with the widespread idea that rules are produced by law-giving authorities and that interpretation amounts to cognition of pre-existing rules, conceals the very nature of both legislation and interpretation.

1.5. Two Concepts of a Source of Law

What does a source of law amount to? In the common parlance of lawyers, the phrase "source of law" is actually used with (at least) two different meanings. In most cases the phrase is used to denote certain normative *acts*, such as legislation—understood as the act of enacting statutes.[3] Sometimes, however, the same phrase is used to refer to certain normative *texts*, such as statutes themselves.[4] Therefore, two concepts of a source of law should be distinguished.[5]

(1) According to the first concept, the sources of law are human acts, viz., linguistic behaviours.

(2) According to the second concept, the sources of law are linguistic texts, i.e., the results or products of such human acts (Austin 1879, 526).

Roughly speaking, in the language of the cognitive theory of interpretation the sources of law are normative *acts*, since normative texts are conceived of as compounds of rules and, as a consequence, the enactment of a normative text directly gives rise to rules.

In the language of the sceptical theory, on the contrary, the sources of law are normative *texts*, since normative acts simply produce texts worded in a natural language. Hence, if law is deemed to be a set of rules *stricto sensu*, normative acts are not sources of law at all—legal rules stem from normative texts by means of interpretation.

[3] Cf., e.g., Salmond 1947, 95, 157: "Statute law is that portion of the law which is derived from legislation"; "Legislation is that source of law which consists in the declaration of legal rules by a competent authority."

[4] Cf., e.g., Salmond 1947, 37: "A law means a statute, enactment, ordinance, decree or other exercise of legislative authority. It is one of the sources of law in the abstract sense." Cf. also Gray 1948, 170; Paton 1972, 189.

[5] Some authors also use the phrase to denote the subjects (i.e., the state-organs) from which the law stems. Cf., e.g., Austin 1879, 526: "The source of a law is its direct or immediate author. [...] The fountains or sources of laws are their *immediate* authors or makers." Cf., Bentham 1945, 101, as well.

1.6. On the Concept of a Normative Act

Concerning the concept of a normative act, two further remarks are in order.

(1) In the first place, lawyers are not used to distinguishing clearly between acts and texts.

Indeed, the term "act" is used by and large to denote both acts and texts. For example, the phrase "Act of Parliament" seems to refer both to the action of legislating, which amounts to some kind of linguistic behaviour performed by a body of persons, and to the result or product of such an action, i.e., the enacted statute itself, which is a text worded in a natural language. It is a matter of course that such a mode of expression is deceiving: The uttering of a sentence (or set of sentences) and the uttered sentence (or sentences) should be definitely distinguished.

(2) In the second place, in legal-theoretical literature each normative act is usually pictured as a single speech act, viz., the act of formulating a rule (or a number of rules). The formulation of a rule, in turn, is often called "promulgation" (cf., e.g., von Wright 1963; Alchourrón and Bulygin 1979, 1981).

For my part, this picture of normative acts is unsatisfactory for a number of reasons. First, in most cases the enactment of a law does not amount to a single speech act, but rather to a set of different speech acts. Second, within some legal orders "promulgation" is a technical term of constitutional law, which should not be used in the generic sense of enactment. Third, at any rate, formulating a rule is something quite different from promulgating it, since promulgation presupposes formulation.

Indeed, in most legal systems the act, e.g., of legislating—in the sense of enacting statutes—is a set of (at least) three different speech acts performed by different people. Namely:

(a) The act of formulating a bill, performed, e.g., by the Executive;

(b) The act of passing (approving) the bill, performed by the Parliament; and

(c) The act of promulgating (*stricto sensu*) the statute, performed by the Head of State.

Promulgation, in turn, at least in some legal systems, consists of:

(c_1) declaring that the Parliament has passed the statute;

(c_2) commanding the statute to be published; and

(c_3) commanding the statute to be obeyed by all its addressees (cf. Carré de Malberg 1920, vol. 2, 403ff.).

This means that even promulgation is not just a single speech act, but rather a compound of different speech acts, one of them, in particular, being a second-order "iterated" command, i.e., the command to the effect that the promulgated commands ought to be obeyed.

Hence, perhaps the term "normative act" should be replaced by the term "normative procedure." Legislating is a procedure, i.e., a combination of a number of speech acts.

2. Form and Substance in the Concept of a Legal Source

2.1. Two Criteria of Recognition of Legal Sources

How are we to recognize a source of law? What is the difference, if any, between law-creating and law-applying acts or texts, e.g., between statutes and judicial decisions? Two main answers to this question can be found in legal dogmatics and general jurisprudence (Carré de Malberg 1931; De Otto 1988, ch. 8; Guastini 1993, ch. 1).[6]

(1) The first answer runs as follows: The identification of the sources of law is a matter of general theory. To decide whether a certain act or text is a source of law or not, we should look either at the very nature of the act or at the meaning content of the text. Any act or text which actually produces or creates (legal) *rules* is a source of law. It goes without saying that no act or text which does not create (legal) rules can be deemed to be a source of law.

In other words, according to this first theory, the criteria of recognition of the sources of law are "material" or "substantive." One cannot decide *a priori*—on purely formal grounds, such as its *nomen juris*, its official label (e.g., "Act of Parliament")—whether a certain act or text amounts to a source of law or not. One has to look at its nature or content.

(2) The second answer runs as follows: The identification of the sources of law is a matter of positive law. To decide whether a certain act or text is a source of law or not, we should look at the secondary rules of change of the legal system at hand. Any act or text which is legally *authorized to create* new law by a (previously existing) secondary legal rule is a source of law, whatever its nature or meaning content may be. Provided that each legal rule could be reconstructed as a conditional sentence connecting a conditioning fact-situation to a conditioned legal consequence ("If *f*, then *c*"), the concept of a legal source should be defined as follows. For every *x*, *x* is a legal source if, and only if, there is a legal rule to the effect that "If *x*, then *l*," where the conditioning fact-situation *x* is an act or fact of whatever nature and the legal consequence *l* is the creation of law.

In other words, according to this second theory, the criteria of identification of legal sources are merely "formal." Thus, in deciding whether a certain act or text is a source of law or not, there is no need to look at its nature or content—the issue can be decided *a priori* by looking not at the act or text itself, but rather at the secondary rules of change of the system which enable certain acts or texts to create new law, i.e., at the constitutive rules which ascribe to certain acts or texts the label of source of law.

[6] "Vi sono due modi di intendere le fonti: per il primo, le fonti sono fatti o atti giuridici *in quanto producono* norme, giuridici e normativi per virtù propria, per una proprietà insita in essi; per il secondo, le fonti sono tali in *quanto disciplinate* da norme, dalle norme sulla produzione, sono produttive di norme in quanto fattispecie di altre norme" (Modugno 1994, 72).

2.2. The "Substantive" Theory of the Sources of Law

According to the "substantive" or "material" theory of the sources of law, an act or text is a source of law if, and only if, it creates legal rules. But what does a legal *rule* amount to? Moreover, what does *rule-creation* amount to? Unfortunately, both concepts are highly controversial (in the present context, the distinction between normative sentences and rules *stricto sensu* is immaterial).

(1) As to the concept of a rule:

(1.1) According to a widespread view, a legal rule, properly speaking, is a "general" command (or permission), i.e., a directive addressed to a class of subjects and/or concerning a class of behaviours (cf., e.g., Taylor 1908, 521). As a consequence, not every text enacted by a law-giving authority is a source of law, notwithstanding its official label. For example, a statute may be a source of law or not—statutes are sources of law whenever they contain general commands (or permissions), but they are not sources of law when their contents are individual directives. Moreover, it is in no way excluded that an administrative act may also be a source of law—this is true whenever an administrative act is "normative," i.e., general, in character. At the same time, no private contract can ever be a source of law, since the commands laid down in a contract lack generality—they are necessarily addressed to the parties alone and concern only specified behaviour. In most legal systems the same holds for judicial decisions too.

(1.2) According to a different view, however, the concept of legal rule embraces not only general directives, such as those (usually but not necessarily) enacted by legislators, but also individual directives, such as those stated in judicial decisions, administrative acts, as well as contracts (Kelsen 1962, 313ff.; Kelsen 1992, 67; for criticism see Carré de Malberg 1933). From this standpoint, almost any legal text contains legal rules. Hence, the class of the sources of law, side by side with statutes, regulations, and the like, also includes judicial decisions, administrative acts, and contracts.

(2) As to the concept of rule-creation: The concept of rule-creation seems to refer to the introduction of a *new* rule into the legal system. But what does a "new" rule amount to?

(2.1) According to a well-known theory—the so-called "pure theory of law"—almost any act performed under the law gives rise to a new rule (Kelsen 1962, 318ff.). The enacted rule may be either general or individual in character—legislators usually create general rules, whereas judges, administrative authorities, as well as private persons (while applying general legislative rules) create individual rules. But in any case rule-creation takes place. Therefore, almost any legal act whatsoever amounts to a source of law.

(2.2) Nevertheless, one can argue that, as far as the enactment of individual rules is concerned, a distinction is in order. Enacting an individual rule that derogates from a previous general rule does amount to a rule-creating act,

since as a consequence of such an enactment the law is actually changed (cf., Salmond 1947, 39ff.). By contrast, the enactment of an individual rule which is but a logical consequence of a previously existing general rule is not rule-creation at all—in such a case the law is applied, but in no way changed. It would be quite odd picturing logical inference as a "creative" activity—would it not? Hence, for example, judicial decisions, in so far as judges confine themselves to apply pre-existing rules, are not sources of law (Bulygin 1991).

2.3. The "Formal" Theory of the Sources of Law

The "substantive" theory of the sources of law raises two main problems. In the first place, such a theory makes the identification of the sources of law depend on the competing concepts of legal rule and rule-creation. In the second place, such a theory, when coupled with a definite concept of a legal rule and/or rule-creation, involves a number of odd consequences. It is odd, for example, that statutes may or may not be sources of law depending on their content, since in most legal systems "legislation includes every expression of the will of the legislature, whether directed to the making of rules of law or not" (Salmond 1947, 158)—i.e., statutes count as sources of law whatever their contents may be. Such problems seem to be good reasons for rejecting the "substantive" theory and maintaining the "formal" theory.

From the "formal" standpoint the recognition of the sources of law is no issue of general legal theory—it depends on the positive rules of change actually in force in different legal systems, since "the law regulates its own creation" (Kelsen 1991, 102; Kelsen 1992, 63). "The growth of the law is itself a matter governed by the law. Every legal system contains certain rules determining the establishment of new law and the disappearance of old" (Salmond 1947, 153).

The following part of this paper is devoted to an analysis of rules of change.

3. Rules of Change Revisited

3.1. "Factual" and "Legal" Existence of Rules

A preliminary remark concerning the legal existence of rules is in order.

The creation of a rule (without any further qualification) is to be distinguished from the creation of a *legal* rule, or—in other words—the mere creation of a rule is to be distinguished from, say, the "insertion" or "introduction" of the created rule into the legal order.

Accordingly, the "factual existence" of a rule, which is the result of its mere creation, should be carefully distinguished from the "legal existence" of the same rule, i.e., its membership to a given legal order, membership clearly requiring the introduction of the mentioned rule into the legal order.

In my view, the mere or "factual" creation of a rule just amounts to its formulation in a language. By means of formulation rules achieve actual (or factual) existence (cf. the concept of "formal" existence in Bulygin 1990).

In saying so, I tacitly assume rules to be linguistic (or language-dependent) entities, and this assumption entails two obvious consequences. First, no rule could ever exist, which was not put into words. Second, actual formulation is a sufficient condition of existence of rules.[7]

Moreover, it is quite clear that formulating a rule is not sufficient to introduce it into the legal order—it is not sufficient to make a *legal* rule of it. Otherwise, e.g., a "bill" could not be distinguished from a "statute." A legal rule comes into existence—i.e., a rule achieves *legal* existence—when it is not only formulated in words, but also "posited," i.e., enacted in accordance with secondary rules already existing in the legal order.

Hence, a sharp distinction is to be made between formulation and enactment. While simple formulation brings a rule to factual existence, only enactment is able to make it a member of the legal order. It goes without saying that enactment requires, and indeed presupposes, actual formulation. As a matter of course, no unformulated rule could ever be enacted.

3.2. *Law-Making as an "Institutional" Act*

It is a matter of course that law-making, in so far as it is different from the mere formulation of a rule, is not a "natural" or "brute" act: It is an "institutional" act (or rather an institutional set of acts), i.e., an act (or set of acts) governed by constitutive legal rules (Searle 1969). Indeed, as a rule, no law-making can ever take place unless the enactment (i.e., roughly speaking, approval plus promulgation) of the formulated rules is performed in accordance with a number of second-order rules. Such rules are but the secondary

[7] Of course, I am aware that such an assumption is apparently challenged by so-called customary rules. However, this challenge is immaterial in the present context, where only enacted law is concerned. At any rate, rules should be sharply distinguished from regularities. Custom as such amounts to habit or practice, i.e., regular behaviour. No rule arises from custom until people are able to state their practice in the shape of normative sentences: At least, no rule exists until people do utter evaluative judgments, e.g., criticizing divergent behaviour (such judgments being entailed by normative sentences presupposed and accepted by the speaker) (Hart 1961, 9–11, 54–9).

Another obvious challenge to my assumption arises from "implicit" rules, i.e., those rules which (although not formulated by any normative authority) are nevertheless logically entailed by the formulated rules (cf. Alchourrón and Bulygin 1971, 48). My opinion is that unformulated, although implicit, rules—unlike propositions, perhaps—simply have no factual existence until someoneone (viz., judges or lawyers) puts them into words.

It should also be stressed that, according to common juristic parlance, the class of so-called "implicit" rules does not only include those rules which are logical consequences of the explicit ones. Implicit rules also include: (a) Rules which can be drawn by means of purely logical arguments from explicit rules only by adding some further premises (e.g., dogmatic definitions of the terms involved); (b) Rules which can be drawn from explicit rules only by means of non-logical arguments (e.g., *argumentum a simili*, conjectures about the so-called *ratio legis* or the aims of the legislature, etc.).

rules of change which regulate the production of (further) legal rules (Hart 1961): e.g., constitutional rules regulating the creation of statutes.

Rules of change ascribe to the "brute" act of commanding, performed by specified persons according to specified procedures, the "institutional" label of legislating (Ross 1968, par. 22). They are "constitutive" rules in the following sense: One cannot define "law-making" without mentioning such rules in the *definiens*. Any other definition of "law-making" would not be fitting—it would not capture the very concept of law-making.

The underlying concept of a constitutive rule could be defined as follows: A rule is constitutive, whatever its normative content may be, when it must be mentioned in the very definition of the regulated activity (cf. Searle 1969). Thus, constitutive and regulative rules are not reciprocally exclusive concepts. Any rule of whatever kind may be constitutive, including commands and permissions.

3.3. Four Theories about Rules of Change

In the contemporary legal-philosophical literature, rules of change are usually named "power-conferring rules," and their logical status is much discussed. Four main theories are actually maintained by different authors:

(1) Power-conferring rules are only permissions: e.g., the rule which ascribes to the Parliament the power to legislate is only a permission (addressed to the Parliament) concerning the act of legislating. In virtue of such a rule, the deontic status of the act of legislating (performed by the Parliament) is permitted (cf., e.g., von Wright 1963, ch. 10).

(2) Power-conferring rules are disguised commands: e.g., the rule which ascribes to the Parliament the power to legislate amounts to a command (addressed to citizens) imposing an obligation to obey the laws made by the Parliament (cf., e.g., Kelsen 1991, 103ff.; Ross 1958, 32).

(3) Power-conferring rules are definitions: e.g., the rule which ascribes to the Parliament the power to legislate is only a definition (or a part of the definition) of "law" (viz., "statutory law"). That is, such a rule defines (or contributes to defining) the concept of a statute as a text passed by the Parliament (Bulygin 1992a; cf. also Ross 1968, par. 22).

(4) Power-conferring rules are condition-stating rules: e.g., the rule which ascribes to the Parliament the power to legislate states a necessary condition for the existence or validity of statutory law (Atienza and Ruiz Manero 1994).

For my part, this debate is not satisfactory for (at least) three reasons.

First, lack of conceptual distinctions. Indeed, the class of rules of change is a compound of quite different sub-classes and should not be treated as a unit.

Second, unhappy terminology. Indeed, the phrase "power-conferring rules" is currently used to denote the whole class of rules of change.

Nevertheless, such a phrase seems to be fitting to denote only one sub-class of the set.

Third, lack of clarity in focusing the problem itself. The authors who discuss the problem of the "nature" of power-conferring rules do not seem to be aware of the very "nature" of the problem they discuss.

Furthermore, I am not so sure that the four mentioned theories are really as incompatible as they appear to be. It is quite possible to maintain that each one of them holds and therefore they could coexist.

3.4. *Variety of Rules of Change*

The class of rules of change includes at least five sub-classes (further details in Guastini 1993, ch. 3; Guastini 1994b; Guastini 1995a, ch. 5):

(1) Power-conferring rules *stricto sensu*, i.e., those rules which ascribe to a given subject a rule-creating power, viz., the power to create a specified source of law, provided with a given *nomen juris* (in such a way that no other subject is entitled to create the same legal source).

(2) Procedural rules, i.e., those rules which regulate the modes of exercising the conferred power, viz., creating the specified source.

(3) Rules which circumscribe the scope of the conferred power by determining what subject-matters such a power (viz., the specified source of law) can be used to regulate.

(4) Rules which reserve a certain subject-matter to some specified legal source, in such a way that (a) no other legal source is entitled to regulate that matter and, furthermore, (b) the legal source concerned is not entitled to delegate the regulation of that matter to any other source.

(5) Rules about the content of future law-making, viz., rules which command or prohibit (sometimes in a disguised way) the legislature to enact statutes with specified content (for example, constitutional rules which prohibit the legislature to enact retrospective criminal laws). But, in a sense, constitutional provisions conferring liberty-rights on citizens belong to same class of rules. Indeed, each such constitutional provision is usually construed as expressing two different rules: a permission addressed to citizens as well as a prohibition addressed to law-giving authorities.

In my view, the term "power-conferring rules" is not fitting for the rules of sub-classes (2)–(5). Such rules do something different from conferring power—they "talk about" the conferred power, imposing limits on it. Hence, they presuppose power-conferring rules.

At any rate, whatever the logical status of power-conferring rules (*stricto sensu*) may be, it is doubtful that one and the same analysis could hold for all the kinds of rules mentioned. For example:

(a) If power-conferring rules are commands addressed to citizens, procedural rules as to the exercise of power are, by contrast, commands addressed to the empowered state organ.

(b) If power-conferring rules are permissions addressed to the legislature, procedural rules as to the exercise of law-giving power are, by contrast, commands addressed to it.

(c) If it is plausible to picture power-conferring rules (and perhaps procedural rules, too) as parts of the definition of the legal source concerned (e.g., "statute"), in such a way that a *soi-disant* "statute" which was not approved by the Parliament is no "statute" at all (it does not even "exist" as a statute), the same does not hold for the rules which determine the content of future legislation, since an "unconstitutional" statute is usually deemed to be, although invalid, a genuine (existent) "statute."

(d) One can agree that all of the rules mentioned state "conditions" regarding the legal source concerned: However, while the rules of sub-classes (1) and perhaps (2) state conditions of legal "existence," according to common juristic thinking the rules of the remaining sub-classes state conditions of validity.

But, in this connection, a careful distinction between existence and validity is in order.

3.5. Existence and Validity of Legal Rules

A rule comes into legal existence when it is made in accordance with (at least) *a number* of the rules of change existing in the legal order. It has to be stressed that enactment according to *some* of such rules is *a sufficient* condition for the legal *existence* of a rule, i.e., its membership in the legal order. I mean that compliance with *all* such rules is a necessary condition of validity, but not a necessary condition of existence. Indeed, existence (legal existence, membership) should be distinguished from validity (Guastini 1994b).

A rule is said to be valid when it is in accordance with *all* the secondary rules which govern both its production and its normative content. In most legal systems, however, a rule is held to be "existent"—although possibly invalid—provided that the rule-enacting organ complied with certain secondary rules, although not all of them. For example, in most continental European legal orders, governed by rigid constitutions, statutes contrary to the constitution are deemed to be existent, notwithstanding their invalidity, until their inconsistency with the constitution is "declared" by the constitutional court. The application of "non-existent" statutes (i.e., normative texts which cannot even be recognized as "statutes"), however, may be refused by any judge irrespective of any decision of the constitutional court. Moreover, in a legal order governed by a flexible constitution, where no judicial review of legislation even exists, it is quite possible that judges, although not entitled to hold unconstitutional statutes void, are nevertheless entitled to refuse the application of "non-existent" statutes. Of course, the judiciary is bound to apply the law, but even under a flexible constitution no

judge can be under the obligation to apply a *soi-disant* "statute" which cannot even be identified as a "statute."

It goes without saying that mere (legal) existence is not devoid of legal effects, since in most European legal systems existent (although invalid) statutes ought to be applied by the courts, until their existence is repealed by the constitutional court (in such a way that the repealed rules lose their "membership," i.e., they no longer belong to the legal order). As far as flexible constitutions are concerned, although "non-existent" laws may be ignored by the courts, there are no remedies against "existent" laws (notwithstanding their invalidity).

Moreover, the necessary and sufficient conditions of existence are not easy to state. In principle, compliance with power-conferring rules seems to be a necessary condition of existence: In most legal cultures, a statute which was not passed by the parliament (but was voted by some other state-organ) would be deemed to be not even existent as a statute. (And this is a conclusive argument that approval by the parliament is a definitional feature of "statute." Therefore, no doubt, power-conferring rules provide a part of the definition of "statute.") But, as far as procedural rules are concerned, existence is an open-textured concept. No doubt, in common juristic thinking, compliance with at least *some* procedural rules is a necessary condition of existence. No one, however, can exactly say *what* procedural rules (nor *how many* of them) should be obeyed so as to bring about an existent source of law.

In principle, on the contrary, compliance with rules concerning the scope and content of future legislation is deemed to be a necessary condition of validity, not of existence. And this is the very reason why, in most European countries, such rules may not be enforced by "ordinary" courts, the constitutional court being the one and only organ entitled to ascertain the invalidity of "existing" statutes (under flexible constitutions, where no such court exists, constitutional rules concerning the scope and content of future legislation are not enforceable at all).

3.6. "Formal" and "Material" Invalidity

Jurists commonly distinguish between "formal" and "material" validity (cf., e.g., Bobbio 1954).[8] Formal validity of a law supposes compliance by the legislature with both the secondary rules which confer law-making power on a specified organ and the secondary rules which regulate procedures for the exercise of the conferred power (sub-classes 1 and 2). Material validity supposes compliance by the legislature with secondary rules which bear upon the scope and content of future legislation (sub-classes 3 to 5).

[8] Such a distinction, however, is not exhaustive: see, e.g., Guastini 1992b.

Almost the same distinction can be applied to invalidity. A rule will be said to be invalid on "formal" grounds when it was not enacted either by the competent organ or according to the prescribed procedures. A rule will be said to be invalid on "material" grounds when its subject-matter or normative content are not in accordance with the constitution.

Now, while material invalidity is a "weak" form of invalidity which does not entail non-existence, generally speaking formal invalidity is a "strong" form of invalidity which, as a rule, amounts to non-existence. In principle, material invalidity is the exclusive concern of constitutional courts (provided that the existing constitution is rigid), while formal invalidity can be recognized by any judge.

One also could say that materially invalid laws are *voidable* (by constitutional courts), while formally invalid laws are *void* (in such a way that their voidness may be recognized by any court).

3.7. Interpretation and the Logical Analysis of Rules

In an earlier section I mentioned four theories concerning the logical status of rules of change and raised a doubt about their incompatibility. The matter needs comment.

In view of testing the soundness of the four theories mentioned one could proceed by checking the truth-values of the propositions entailed by such theories.

(a) If the first theory is sound, then the statement to the effect that, e.g., the deontic status of the act of legislating by the parliament is permitted must be true. In my opinion, such a statement is actually true, and I do not see who could deny it. Hence, the first theory is sound.

(b) If the second theory is sound, then the statement to the effect that, e.g., citizens are under an obligation to obey statutes must be true. And, as a matter of fact, it is true. Hence, the second theory is also sound.

(c) If the third theory is sound, then the statement to the effect that, e.g., no text which was not passed by the parliament could deserve the name of "statute" must be true. And, no doubt, it is. Hence, the third theory is also sound.

(d) If the fourth theory is sound, then the statement according to which, e.g., approval by the parliament is a necessary condition of existence of a statute must be true. And, as a matter of course, it is. Hence, the fourth theory is sound too.

Thus, all of the mentioned theories just seem to be sound. How is it possible? Are they not *competing* theories about the logical status of rules of change? My answer is that they are not.

The problem under discussion is a problem of logical analysis (in a wide sense of "logical": Indeed, "philosophical analysis" would be equally fitting). Now, the first question to raise is: Logical analysis of what? Of rules,

of course. Unfortunately, as I said in a different connection, the word "rule" is ambiguous. In a first sense, "rule" means a normative sentence before its *interpretation* or construction and irrespective of it. In a second sense, "rule" refers to (what I proposed to call) a norm or rule *stricto sensu*, i.e., an *interpreted* normative sentence or its meaning contents. Thus, we should ask whether the four theories mentioned bear upon either rules *stricto sensu* (interpreted normative sentences) or not-yet-interpreted normative sentences.

I take it for granted that, in a sense, such theories concern norm-formulations since, in my opinion, one simply cannot speak of any norm whatsoever without referring to a definite norm-formulation. Moreover, any logical analysis of language supposes interpretation of the linguistic entities concerned. I mean that the disagreement among the four theories simply arises from divergent interpretations of the normative sentences concerned. In other words, each theory is grounded upon a different construction of certain statutory or constitutional provisions.

This conclusion may sound a little bit odd, since in standard cases problems of interpretation affect the semantic dimension of norm-formulations (e.g., vagueness and semantic ambiguity), while this is obviously not the case in the discussion of power-conferring rules. It has to be stressed, however, that interpretive problems are not at all confined to the domain of semantics. Interpretive problems and disagreements may also arise as to the syntactic and pragmatic dimensions of norm-formulations. Furthermore, no clear-cut distinctions can be drawn in practice among the different domains.

In the present case—the query about the logical nature of rules of change—the disagreement seems to affect mainly the pragmatic dimension (say the "neustic," or the "mood") of certain norm-formulations. For example, the question whether power-conferring rules are permissions or (disguised) commands just amounts to wondering whether the normative authority performed a speech act of command or a speech act of permission.

However, my thesis to the effect that the four different constructions of power-conferring rules could coexist is still to be explained and argued. It is a well known feature of natural languages that one sentence does not necessarily give expression to just one proposition, since it may give expression to two or more propositions at the same time. And it is a matter of course for every skilled lawyer that one and the same norm-formulation can bear a composite or compound meaning, in such a way as to express not just one single rule or norm, but a number of independent rules. In my view, this is the case as far as power-conferring rules are concerned.

I take it for granted that, in discussing the nature of power-conferring rules, the actual subject matter of analysis is simply a number of statutory or constitutional provisions. (I really do not know what other subject matter of inquiry one could assume: It seems to me that the only legal rules susceptible of analysis are those rules which actually exist in some legal order. Indeed, I

cannot imagine any theory of power-conferring rules which takes no account of positive legal orders.) Now, my tenet is that each such positive provision is liable to a construction according to which it means more than one rule. And the conclusive evidence is that, at least in some legal cultures, they are actually interpreted in such a way.

For example, Italian lawyers entertain no doubt that art. 70 of the Constitution ("Legislative function is exercised by two Chambers") means that: (1) The Chambers are entitled to legislate in the sense that legislating by the Chambers is permitted; (2) Legislating is forbidden to any other state organ; (3) No text which was not approved by the Chambers can deserve the name of "statute" (viz., "national statute" as opposed to the "local" statutes approved by Regional Governments); (4) Approval by the Chambers is a necessary condition not only for validity, but even for existence of statutes. (In fact, lawyers do not draw from art. 70 of the Constitution the rule to the effect that citizens are under an obligation to obey statutes: But the very reason for this is that such an interpretation is unnecessary since art. 54, par. 1, of the Constitution, states that "All the citizens are under the duty to be faithful to the Republic and comply with its Constitution and laws." Thus, art. 70 would be quite redundant if interpreted in the last mentioned sense.)

Another apt example can be drawn from those constitutional provisions which "reserve" to national statutes (Acts of Parliament) the regulation of a given subject-matter, e.g., the matter of crime and punishment, under art. 25 of the Italian Constitution. Such a provision is usually construed as expressing three rules at once (one permission and two prohibitions), viz., (a) the Parliament is permitted to enact criminal laws, (b) any other state organ is forbidden to do so, and (c) the Parliament is forbidden to delegate its competence in matters of criminal laws to any other state organ.[9]

4. On Judicial Law-Making

4.1. Competing Concepts of Judicial Law-Making

In principle, according to the classical doctrine of the separation of powers (Troper 1980), in modern legal systems the judiciary is forbidden to legislate[10] in two main senses (Guastini 1995a, ch. 4):

(1) First, judges are forbidden to legislate in the sense that they are bound to apply pre-existing laws. This means that judicial decisions ought to be drawn from pre-existing legal rules. This further entails that such decisions

[9] In fact, this is a simplified construction of the provision concerned, since, under the Italian Constitution, certain normative texts enacted by the Executive bear the same legal "force" as statutes, and therefore they are deemed to be enabled to regulate (almost) the same matters as statutes.

[10] In a sense, of course, this statement does not hold for common law systems.

—unlike laws—ought to be supported by arguments and the only available arguments for supporting judicial decisions are prior legal rules: "The reasons on which judgements [...] are based and the terms of the law applicable thereto shall be stated" (French Constitution of 1795, art. 208).[11] Moreover, this entails that in no case are judges authorized to refuse the application of existing law. "The courts cannot get involved in the exercise of legislative power or suspend the implementation of laws" (Constitution of 1791, third title, ch. 5, art. 3; cf., Constitution of 1795, art. 203). "The Courts shall not take any part in the exercise of legislative power either directly or indirectly, nor shall they hinder or suspend the implementation of the decrees enacted by the legislative body [...]" (Law of August 16–24, 1790, art. 10).[12]

(2) Second, judges are forbidden to legislate in the sense that they may issue only individual commands,[13] which entails that judicial decisions—unlike laws—are devoid of "general legal effects" (*erga omnes*), i.e., they produce legal effects only for the parties to the process (*inter partes*).[14]

Therefore, judicial decisions are not sources of law. Nevertheless, notwithstanding the doctrine of the separation of powers, it is a well-known feature of all legal orders that judges actually do legislate, although scholars disagree about the concept and scope of judicial legislation.

Three main concepts of judge-made law can be found in current literature.

(a) Judges contribute to the creation of law, since law is a compound of both general and individual rules, and the latter are created only by the so-called law-applying organs, which include judges (cf., e.g., Kelsen 1992, 67ff.).

(b) Judges, and judges only, create the law, since no law at all exists before and independently of judicial construction and application of statutes (cf., e.g., Gray 1948; Troper 1994, 97ff., 332ff.; Oppenheim 1995).

(c) Judges create new law whenever, being under the obligation to decide any case submitted to them, they face a "hard case," namely, a legal gap (cf., Carrió 1979, 195ff.; Bulygin 1991, 1995; Guastini 1992a, 165ff.).

[11] "Les jugements [...] sont motivés, et on y enoncé les termes de la loi appliquée," Constitution de l'an III, art. 208.

[12] "Les tribunaux ne peuvent [...] s'immiscer dans l'exercice du Pouvoir législatif, ou suspendre l'exécution des lois [...]," Constitution du 1791, titre III, ch. V, art. 3; cf., Constitution de l'an III, art. 203. "Les tribunaux ne pourront prendre directment ou indirectment aucune part à l'exercice du pouvoir législatif, ni empêcher ou suspendre l'exécution des decrets du corps législatif [...]," Loi du 16–24 août 1790, art. 10.

[13] "L'interprétation par voie de doctrine consiste à saisir le véritable sens d'une loi, dans son application à un cas particulier" (Projet de code civil, livre préliminaire, an VIII, in Ewald 1989, 95); "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises" (Code Napoléon, art. 5); "L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandeé soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité" (Code Napoléon, art. 1351).

[14] In a sense, this seems not to hold as far as common law systems are concerned, because of the doctrine of *stare decisis*.

4.2. *Judicial Review of Legislation*

The traditional discussion of judicial "interstitial" legislation, however, seems to take no account of the most evident challenge to the separation of powers (and to the democratic principle, too: cf. Troper 1990), which is not interstitial legislation but rather the judicial review of legislation, especially when performed by a "constitutional" court. It should be stressed that judicial interstitial legislation is a feature of any legal order, while judicial review of legislation only takes place within legal orders governed by rigid constitutions.

Two main systems of judicial review can be distinguished (cf. Kelsen 1990). The judicial review of legislation may be accomplished either by "ordinary" judges, i.e., any judge whomsoever (as in the U.S.A.), or by a special constitutional court (as in continental Europe). As a rule, "ordinary" judges may refuse to apply unconstitutional statutes in the case at hand, but have no power to declare them null and void, while constitutional courts are enabled to repeal or void unconstitutional statutes in such a way that such statutes may no longer be applied by the courts.

In the first case, any judge being entitled to review legislation, judges are not unconditionally bound to apply existing laws, in the sense that they are enabled to refuse the application of unconstitutional laws. Nevertheless, no judge is entitled to declare laws null and void. Hence, at least a part of the doctrine of the separation of powers is saved, since judicial decisions are still devoid of general effects: They only affect the parties to the process and no one else.[15]

In the second case, the constitutional court (judicial review being its exclusive concern) is endowed with a genuine legislative power, since it may void existing laws, which amounts to a sort of "negative" legislation (Kelsen 1945, 268). Generally speaking, in continental Europe judges at large are still forbidden to legislate but, in a sense, some judges (viz., constitutional courts) are not. Leaving aside a number of complications which are of no interest in the present context, one could even say that European legal orders are the result of two kinds of concurrent legislation: parliamentary legislation (which is both positive and negative) plus constitutional courts' legislation (which is only negative in nature).[16]

4.3. *"Positive" Legislation by Constitutional Courts*

There is nothing striking in the preceding remarks: That constitutional courts fulfil a *negative* law-making function seems to be a matter of course.

[15] However, this is not entirely true wherever the doctrine of *stare decisis* is accepted.

[16] The case of constitutional decisions voiding statutes shows that there is no clear cut distinction between law-making and law-applying. Indeed, constitutional decisions, although legislative as to their effects, are framed as law-applying (viz., constitution-applying) acts.

(It is striking that judicial review of legislation is in no way considered in current discussion about judicial "creativity.") My point, however, is that such an analysis of the functions accomplished by constitutional courts is not exhaustive. In fact, most European constitutional courts do not confine themselves to *negative* legislation, but rather contribute to legislation in a *positive* way.

For example, the actual practice of the Italian Constitutional Court is highly illuminating in this connection.[17] In particular, two kinds of constitutional decisions are worth mentioning: "rule-adding" and "rule-substituting" decisions (*decisioni additive* and *decisioni sostitutive* being the common juristic labelling of such decisions in Italy) (Guastini 1992c, ch. 12; Guastini 1995a, ch. 4).

(1) Suppose a statutory rule R_1 grants a legal right to the class of subjects S_1 and does not grant the same legal right to the class of subjects S_2. Suppose further that, according to the opinion of the Constitutional Court, the two classes of subjects S_1 and S_2 are equal and therefore deserve equal treatment. As a consequence, the rule R_1 is inconsistent with the constitutional principle of equality: Hence, it is unconstitutional and should be declared null and void.

In most similar cases, the Court does not confine itself to declaring the provision at hand null and void: It does something more (or something different). The Court states that the provision R_1 is unconstitutional *in so far as it does not* grant the legal right in question to subjects S_2.

This does not amount to a mere decision of unconstitutionality. In fact, this does not amount to any declaration of unconstitutionality at all. The rule R_1 is not really voided by the Court, its validity is preserved, since subjects S_1 are not deprived of the legal right ascribed them by rule R_1. The Court's decision amounts to *adding* to the existing statute an apocryphal rule R_2 to the effect that the legal right concerned is granted to subjects S_2 as well.[18] It goes without saying that the rule R_2 is actually created by the Court itself.

(2) Suppose now that a statutory rule R_1 confers a power on a certain state organ O_1. Suppose further that, according to the construction of the constitution maintained by the Constitutional Court, the power in question ought to be conferred not on the state organ O_1, but on a different state organ O_2. As a consequence, the rule R_1 is inconsistent with the constitution (as construed by the Court) and should be declared null and void.

[17] The main source of the following remarks is the actual practice of the Italian constitutional court. But, as far as I know, what I am going to say seems to hold also for German, French, and Spanish constitutional courts.

[18] Such decisions are liable to a different construction, too, aimed at justifying them as non-creative decisions. One could argue that the Court simply declares null and void not just the rule R_1, but a different rule R_{1bis} (drawn from R_1 by means of the *argumentum a contrariis*) to the effect that the legal right in question is *not* ascribed to subjects S_2.

Nevertheless, in most such cases, such a solution is not satisfactory for the Court, which does not confine itself to voiding the rule R_1. The Court states that the rule in question is unconstitutional *in so far as* it confers the power mentioned on the organ O_1 *instead of* the organ O_2.

In this way the Court performs a double operation. On the one hand, it voids the existing rule R_1, and this means that the power in question is no longer conferred on O_1. But at the same time, on the other hand, the Court also replaces the rule R_1 with a different rule R_2 to the effect that the power in question is ascribed to O_2. As a matter of course, the rule R_2 is created by the Court and no one else.

The preceding examples are meant to show how judicial review of legislation, at least in some cases, may turn itself into "positive" legislation. That is why some authors maintain that constitutional courts' decisions are genuine sources of law (cf., e.g., Pizzorusso 1977, 274ff.).

University of Genoa
Institute of Philosophy of Law
via Balbi 30
16126 Genoa
Italy

References

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

———. 1979. *Sobre la existencia de las normas jurídicas*. Valencia: Oficina Latino-Americana de Investigaciones Cientificas.

———. 1981. The Expressive Conception of Norms. In *New Studies in Deontic Logic*. Ed. R. Hilpinen, 95–124. Dordrecht: Reidel.

Atienza, M., and J. Ruiz Manero. 1994. Sulle regole che conferiscono poteri. In *Analisi e diritto 1994. Ricerche di giurisprudenza analitica*. Ed. P. Comanducci and R. Guastini, 55–84. Turin: Giappichelli.

Austin, J. 1879. *Lectures on Jurisprudence or The Philosophy of Positive Law*. Ed. R. Campbell. London: John Murray.

Bentham, J. 1945. *The Limits of Jurisprudence Defined*. Ed. Ch. W. Everett. Westport, Conn.: Greenwood.

Bobbio, N. 1954. Considérations introductives sur le raisonnement des juristes. *Revue internationale de philosophie* 1: 67–84.

Bulygin, E. 1990. An Antinomy in Kelsen's Pure Theory of Law. *Ratio Juris* 3: 29–45.

———. 1991. Sentencia judicial y creación de derecho. In C. E. Alchourrón and E. Bulygin, *Análisis lógico y derecho*, 355–70. Madrid: Centro de Estudios Constitucionales.

———. 1992a. On Competence Norms. *Law and Philosophy* 11: 201–16.

———. 1992b. Sull'interpretazione giuridica. In *Analisi e diritto 1992. Ricerche di giurisprudenza analitica*. Ed. P. Comanducci and R. Guastini, 11–30. Turin: Giappichelli.

———. 1995. Cognition and Interpretation of Law. In *Cognition and Interpretation of Law*. Ed. L. Gianformaggio and S. L. Paulson, 11–35. Turin: Giappichelli.

Carré de Malberg, R. 1920. *Contribution à la théorie générale de l'Etat*. Paris: Sirey.

———. 1931. *La loi, expression de la volonté générale.* Paris: Sirey.
———. 1933. *Confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions consacrées par le droit positif français relativement à sa formation.* Paris: Sirey.
Carrió, G. R. 1979. *Notas sobre derecho y lenguaje.* Buenos Aires: Abeledo-Perrot.
De Otto, I. 1988. *Derecho constitucional. Sistema de fuentes.* Barcelona: Ariel.
Dias, R. W. M. 1976. *Jurisprudence.* London: Butterworth.
Dias, R. W. M., and G. B. J. Hughes. 1957. *Jurisprudence.* London: Butterworth.
Dworkin, R. 1985. *A Matter of Principle.* Cambridge, Mass.: Harvard University Press.
Evans, J. 1989. *Statutory Interpretation. Problems of Communication.* Oxford: Oxford University Press.
Ewald, F., ed. 1989. *Naissance du code civil.* Paris: Flammarion.
Gray, J. C. 1948. *The Nature and Sources of the Law.* Ed. R. Gray. New York: MacMillan.
Guastini, R. 1992a. *Dalle fonti alle norme.* Turin: Giappichelli.
———. 1992b. Rules, Validity, and Statutory Construction. In *Italian Studies in Law.* Ed. A. Pizzorusso, vol. 1, 11–28. Dordrecht: Martinus Nijhoff.
———. 1992c. *Quindici lezioni di diritto costituzionale.* Turin: Giappichelli.
———. 1993. *Le fonti del diritto e l'interpretazione.* Milan: Giuffré.
———. 1994a. Interpretation (Legal). In *The Encyclopedia of Language and Linguistics,* vol. 4, 1738–44. Oxford: Pergamon.
———. 1994b. Invalidity. *Ratio Juris* 7: 212–26.
———. 1995a. *Il giudice e la legge. Lezioni di diritto costituzionale.* Turin: Giappichelli.
———. 1995b. Kelsen on Legal Knowledge and Scientific Interpretation. In *Cognition and Interpretation of Law.* Ed. L. Gianformaggio and S. L. Paulson, 107–15. Turin: Giappichelli.
———. 1995c. Interprétation et description de normes. In *Interprétation et droit.* Ed. P. Amselek, 89–101. Bruxelles: Bruylant.
Hart, H. L. A. 1961. *The Concept of Law.* Oxford: Clarendon.
Hospers, J. 1967. *An Introduction to Philosophical Analysis.* London: Routledge & Kegan Paul.
Kelsen, H. 1945. *General Theory of Law and State.* Cambridge, Mass.: Harvard University Press.
———. 1962. *Théorie pure du droit.* Trans. Ch. Eisenmann. Paris: Dalloz.
———. 1990. Le contrôle de constitutionnalité des lois. Une étude comparative des Constitutions autrichienne et américaine. *Revue française de Droit constitutionnel* 1: 17–30.
———. 1991. *General Theory of Norms.* Trans. M. Hartney. Oxford: Clarendon.
———. 1992. *Introduction to the Problems of Legal Theory.* Trans. B. Litschewski and S. Paulson. Oxford: Clarendon.
Modugno, F. 1994. La teoria delle fonti del diritto nel pensiero di Vezio Crisafulli. In *Il contributo di Vezio Crisafulli alla scienza del diritto costituzionale,* 67–90. Padua: CEDAM.
Oppenheim, F. E. 1995. The Judge as Legislator. In *Cognition and Interpretation of Law.* Ed. L. Gianformaggio and S. L. Paulson, 289–94. Turin: Giappichelli.
Paton, G. W. 1972. *A Text-Book of Jurisprudence.* Ed. G. W. Paton and D. P. Derham. Oxford: Clarendon.
Pizzorusso, A. 1977. *Delle fonti del diritto.* Bologna: Zanichelli.
Ross, A. 1958. *On Law and Justice.* London: Stevens & Sons.
———. 1968. *Directives and Norms.* London: Routledge & Kegan Paul.
Salmond, J. 1947. *Jurisprudence.* Ed. G. Williams. London: Sweet & Maxwell.
Searle, J. R. 1969. *Speech Acts. An Essay in the Philosophy of Language.* Cambridge: Cambridge University Press.

Tarello, G. 1974. *Diritto, enunciati, usi. Studi di teoria e metateoria del diritto.* Bologna: Il Mulino.

———. 1980. *L'interpretazione della legge.* Milan: Giuffrè.

Taylor, H. 1908. *The Science of Jurisprudence.* New York: MacMillan.

Troper, M. 1980. *La séparation des pouvoirs et l'histoire constitutionnelle française.* Paris: L. G. D. J.

———. 1981. Fonction juridictionnelle ou pouvoir judiciaire? *Pouvoirs* 16: 5–15.

———. 1990. Justice constitutionnelle et démocratie. *Revue française de Droit constitutionnel* 1: 31–48.

———. 1992. La notion de pouvoir judiciaire au début de Révolution française. In *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu,* 829–44. Bruxelles: Bruylant.

———. 1994. *Pour une théorie générale de l'Etat.* Paris: P. U. F.

Wright, G. H. von. 1963. *Norm and Action. A Logical Enquiry.* London: Routledge & Kegan Paul.

Wróblewski, J. 1987. An Outline of a General Theory of Legal Interpretation and Constitutional Interpretation. *Acta Universitatis Lodziensis, Folia Iuridica* 32.