Against 'Prohibitions' (First Round)

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Abstract. The distinction between 'conduct norms' and 'sanction norms' is widely assumed to be an essential tool for any correct understanding of criminal responsibility. Conduct norms (often also called 'primary') are referred to with the language of 'prohibitions', and it is normally accepted that a crime is *by definition* a 'prohibited' human behaviour, in the sense that it is always an infraction of a 'conduct norm'. I mean to discuss and criticize this rather consensual assumption. Modern criminal codes don't usually incorporate a catalogue of prohibitions, but this is considered to be of no consequence when it comes to discuss whether the law *prohibits* those behaviours whose performance may lead to the application of a criminal sanction: there is no question that sanction norms may be properly read out of the special parts of our criminal codes, and from a sanction norm it is always possible to *infer* the correspondent prohibition. Or so the current understanding goes. I shall first try to make some sense of this common idea, which I call the *inference thesis*. I will then proceed to show why it is wrong. The inference thesis is necessarily committed to an understanding of conduct norms as *prescriptive* norms addressed to citizens, and the relevant notion of a prescriptive norm has to be characterized in some detail. Having done so, I will argue that such a prescriptive understanding of 'conduct norms' is incompatible with several aspects common to most modern systems of criminal law and unquestionably essential to the concept of a crime.

Introduction

This paper addresses some aspects of the distinction between 'conduct norms' and 'sanction norms'. According to the common characterization, a conduct norm imposes on citizens a duty to omit or adopt some course of action, whereas a sanction norm addresses the official law-applying organs, and judges in particular, prescribing them to apply certain punitive measures against some infringer of a conduct norm. It has now become usual to speak of conduct norms as 'primary' and of sanction norms as 'secondary'.[1] This terminology is certainly more fortunate, for sanction norms are always, in a sense, norms of conduct, too — only addressed to judges, not to citizens in general. Moreover, the distinction is not solely drawn in regard of the addressee, and the adjectives 'primary' and 'secondary' have the further advantage of being allusive to the relevant criterion: sanction norms are 'secondary' because the application of a sanction presupposes that some duty has been infringed — which duty is *hoc*

[1] Since Hans Nawiasky's proposal (1948, 13-14, 99-105). The 'primary'/'secondary' labels are also used to draw some other distinctions, more or less similar to the one under discussion, either in general legal theory (in Hart, for example) or in specific areas of law (in international law, *v.g.*, or in constitutional law). Bobbio explores this (in his words) 'deep jungle' in (1970, 175-183).

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sensu a 'primary' one.[2]

It is frequently assumed that this distinction is an essential tool for any correct understanding of criminal responsibility. The infringement of a primary norm is regarded as a necessary condition (although not a sufficient one) for a crime to have occurred, and the criminal sanction is thought of as applying to someone who has violated the primary norm and partly because of such a violation. Primary norms are typically referred to with the language of 'prohibitions', which allows us to designate in a positive manner the type of behaviour that *ought not* be adopted; and the idea that a crime is a piece of 'forbidden' or 'prohibited' behaviour lies at the very heart of many contemporary theories of crime and criminal responsibility. This rather consensual assumption is the object of the following discussion.[3]

I

1. Modern criminal codes don't usually incorporate an expressly formulated catalogue of prohibitions: in the so-called 'special part' of a criminal code one normally finds a collection of formulations according to which 'whoever does *x* will be punished with sanction *s*'. This, however, is considered to be of no consequence when it comes to discuss whether the law *prohibits* those behaviours whose performance will lead to the application of a sanction. For there is no question that sanction norms, obligating judges to sanction 'whoever does *x*', may be properly reconstructed from the special parts of our criminal codes, and from a sanction norm it is always possible to *infer* the correspondent prohibitory conduct norm — or so the current understanding goes. Some canonical quotations aptly illustrate this idea: Bentham wrote that

> *by implication*, and that a necessary one, the punitory [law] does involve and include the import of the simple imperative law to which it is appended;[4]

Alf Ross similarly maintained that

> if one knows that the courts are directed by these laws to imprison whoever is guilty of manslaughter, then, since imprisonment is a reaction of disapproval and, consequently, a sanction, one knows that it is forbidden to commit manslaughter. *This last norm is implied in the first one directed to the courts; logically, therefore, it has no independent existence*. […] Primary norms, *logically speaking*, contain nothing not already implied in secondary norms, whereas the converse does not hold;[5]

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[2] The distinction of 'primary' and 'secondary' duties is the expression of a relation defined between two norms according to a perspective: a norm is only primary or secondary in relation to some other norm, and a norm imposing on a judge a duty to punish is primary in relation to a norm which happens to provide for the application of a sanction to judges failing to comply with the first. In view of its addressee, and taken in isolation, a norm is neither primary nor secondary.

[3] I will not be discussing whether this current theorization of crime as a 'violation' of a legal prohibition is sufficient to account for the way in which the criminal law addresses, our should address, citizens (cf. Duff 2002, 47), nor shall I be preoccupied with the difference between crimes *prohibita quia mala* and crimes *mala quia prohibita*.

[4] Bentham 1970, 303; my emphasis.

[5] Ross 1968, 91-2; my emphasis.

and one may read in Kelsen's *Pure Theory* that

> When a social order such as the legal order prescribes some behaviour by providing that in the hypothesis of the opposite behaviour a sanction ought to be applied, it is possible to describe this situation in a single sentence affirming that in the hypothesis of a given behaviour a given sanction ought to follow. With this, *one already says* that the behaviour which is the condition of the sanction is prohibited, and that the opposite behaviour is prescribed. The sanction's *ought*-character *implies* [or 'contains': *schließt… in sich*] the *prohibited*-character of the behaviour which is the specific condition of the sanction, and the *prescribed*-character of the opposed behaviour.[6]

As to the precise nature of this inference, some clarification is called for. The quoted passages suggest that the inference is in some way a logical one, but it obviously does not concern the logical structure of sanction norms and conduct norms.[7] It rather concerns the concept of a sanction. This is very clear, for example, in Kelsen's texts, although I think Kelsen has not always been read as attentively as he should have been. In Kelsen's promenade towards an expository reduction of all the relevant normative material of a legal order to his 'legal propositions' stating that if some conditions obtain, a 'sanction' ought to be applied, the term 'sanction' is employed in a particular sense which Kelsen carefully distinguishes from the punitive sense of the word. The word 'sanction', Kelsen says, may be used in two senses: 'in the wider sense', 'one may extend the concept of sanction to every coercive act provided for by the legal order';[8] in the 'narrow sense', it is the equivalent of *penalty* ('*Strafe*'), encompassing any 'disadvantage' or 'evil' applied 'as a consequence of a given behaviour'.[9] For Kelsen, 'conduct norms' are inferred from 'sanction norms' understood in this latter sense:

> if the coercive act provided for by the legal order presents itself as a reaction against a given human behaviour, such an act has the character of a sanction, and the human behaviour against which it is directed has the character of prohibited, contrary to the law, behaviour: it is an unlawful behaviour, or delict.[10]

But Kelsen's thesis that the law may be exhaustively described in normative propositions 'stating that, under determined conditions (determined, that is, by the legal order), there ought to be applied determined acts of coercion (determined, that is, by the legal order)'[11] is a thesis that reduces to a common structure both 'sanction norms' in the strict sense and norms providing for coercive acts without having any human act or omission (but, rather, some other factual situation) as a precondition. And however much may remain to be said about this project and about Kelsen's characterization of the concept of a 'delict' — which characterization, I believe, cannot

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[6] Kelsen 1960, 26; my translation and emphasis.

[7] For this reason, some lines of criticism (such as the one taken by Hernández Marín 1998, 208 ff.) seem to me to miss the relevant point.

[8] Kelsen 1960, 43.

[9] *Id.*, 26. There is also an intermediate concept of 'sanction', conceived as a reaction against a *delict* whose commission by someone is not yet properly determined: an arrest *in flagrante delicto* is an example. Cf. *id.*, 42.

[10] *Id.*, 36.

[11] *Id.*, *ibid.*

eventually be made to work in the frame of his own theory —, this is sufficient to make clear that, for Kelsen, the primary duty (which, in his terminology, is called 'secondary'[12]) can only be inferred from *stricto sensu* sanction norms.

By paying due attention to this explicit claim of Kelsen's, we may observe that some very common arguments which insist on differentiating conduct norms and sanction norms *against* Kelsen's or Ross's reductionisms are unsound, because they miss their targets. That is the case of an argument initially advanced by Hart, but nowadays employed by many authors:

> Without recourse to the simple idea that criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct. This indeed is one grave objection to those theories of law which in the interests of simplicity or uniformity obscure the distinction between primary laws setting standards for behaviour and secondary laws specifying what officials must or may do when they are broken. Such theories insist that all legal rules are 'really' directions to officials to exact 'sanctions' under certain circumstances, e.g. if people kill.[13]

This argument, insofar as Hart expressly presented it as an attack on Kelsen's reductionism, is not a good one. When contrasting a fine and a tax, Hart means to compare the incomparable: for Kelsen, a tax is legally due if lack of voluntary payment is made a condition of a coercive act prescribed by the legal order (which act will be the correspondent civil execution): the legal duty to pay a tax would rather be comparable, for instance, with the legal duty not to kill. This, of course, is not decisive: Hart's argument may be reformulated as an argument concerning the distinction between delicts and other non-delictual facts which may also be the condition of a legally prescribed coercive act. But under this reformulation the argument shall have to be dismissed (as an argument against Kelsen, that is), for it reveals that Hart is trying to invalidate a thesis concerning the structure of 'legal propositions'[14] with reasons that, if sound, amount only to showing that there is a theoretical need to differentiate two sets of norms, although the content of both sets would all be reducible to a common expository structure. But such a differentiation may already be found in Kelsen's works, properly characterized as a distinction internal to that structure. In Kelsen or Ross, the thesis that in an complete exposition of the law it would be superfluous to autonomize conduct norms is perfectly compatible with their insistent references to the delict (or legal wrong) as contrary-to-*duty* behaviour, and with Kelsen's 'nomo-static' struggle with the definition of fundamental legal concepts such as 'delict', 'duty' or 'obligation'.

It is nonetheless true that some but not all prescribed acts of coercion *are* gener-

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[12] Cf. Kelsen 1945, 61. The distinction is absent from the second editon of the *Pure Theory of Law*, but it was resumed in later texts and, notably, in the *General Theory of Norms*.

[13] Hart 1968, 7.

[14] In spite of what is sometimes maintained (cf., *v.g.*, Raz 1970, 77ff.) I don't think that Kelsen's *Sollsatz* is the expression of any principle or theory of norm-individuation (on the contrary: it presupposes some theory of norm-individuation, which Kelsen does not explicitly present). On the other hand, the widespread idea that in the Pure Theory 'real' legal *norms* are conceived as sanction norms addressed only to legal officials should be exposed for the piece of mythology it is, and Kelsen himself had the opportunity to expressly dismiss it: cfr. Kelsen (2003) 12, fn. 11).

ally interpreted as punitive sanctions. The core of Hart's reformulated argument seems to be this: if we interpret some legally prescribed coercive acts as 'sanctions' (in the strict, punitive sense), then we interpret the behaviour which is the antecedent of sanction-prescribing norms as *prohibited*. In other words, the possibility of interpreting a given norm as a 'sanction norm' (in the strict or proper sense) depends on such a norm being conceived as a *second*-order norm, and depends, therefore, on the presupposition of a 'primary norm' whose infraction instantiates the antecedent of the 'secondary' one. This reading gives us a plausible version of the common thesis according to which 'conduct norms' are inferable from 'sanction norms': given the propositions

(1) whoever does *x* shall be sanctioned (*s.s.*) in manner *m*
(2) *x* is forbidden

the *inference thesis* maintains that the verification, relatively to a legal order, of a proposition like (1) *implies* the truth of a proposition like (2) taken as a proposition about a 'primary norm', *for the reason that* it is considered to be analytically true, in virtue of the concept of a sanction, that a necessary condition for an act of coercion to count as a punitive 'sanction' is that it is performed *because* of a norm-violation.[15] The inference of a 'conduct norm' from a 'sanction norm' relies on a hermeneutical or interpretative presupposition which is considered to be necessary to the reconstruction of sanction norms.[16]

2. This clarification seems to adequately reconstitute general allusions to the notion of an 'inference' of 'primary' from 'secondary norms'. Such reconstitution is compatible with expository theories which insist in reducing the totality of legal norms to 'sanction norms' *lato sensu* directly addressed to legal officials, because it does not impede the interpretative definition, in the set *C* of 'sanction norms', of the sub-set *C'* of the *penal* norms in the proper sense; as it is compatible with expressly formulated principles of norm-individuation which insist on the differentiated representation of both types of norms (such as Bentham's[17]). It is, moreover, a reconstitution which aptly explains the absence of expressly formulated 'codes of conduct' from contemporary criminal legislations, since the reconstruction of sanction norms *stricto sensu* from the statutory formulations contained in the 'special parts' of criminal codes imposes the recognition of the correspondent 'conduct norm'. For the purposes of my present discussion, I now ascribe to the common view this version of *inference thesis*.

We may now notice that (2) is a proposition about a conduct norm, *not* about a sanction norm. This means that the inference thesis allows that the truth (relative to a given legal system) of a proposition like (2) be *shown* by means of the demonstration that a proposition like (1) is true in the same system: if it is true, for example, that

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[15] My 'because' is merely colloquial.

[16] Some theorists mistakenly suggest that the inference is not a logical one *because* it is 'dogmatic' or 'interpretative', as if the hermeneutic assumptions of legal science could not operate as premises in deductive reasoning. See, *e.g.*, Silva Sánchez (1992) 314; Hernández Marín (1998) 208 ff.; or Mir Puig (2004) 1.

[17] Cf. Bentham (1970) 302: 'a law confining itself to the creation of an offence, and a law commanding a punishment to be administered in the case of a commission of such an offense, are *two distinct laws*'.

'whoever kills someone shall be punished', then it is also true that 'it is prohibited to kill'.[18]

And as most theorists accept (except for those willing to endorse some kind of 'realist' jurisprudence) that the statutory catalogue of incriminating provisions included in our criminal codes grounds the reconstruction of norms *obligating* judges to apply criminal sanctions, this explains why it is normally accepted that a crime is *by definition* a 'prohibited' conduct, in the sense that it is always an infraction of a conduct norm. Criminal theorists commonly agree that the law includes 'primary norms' addressed to citizens, and that sentences such as 'it is forbidden to kill', which are quite ordinary in the mouths of jurists and citizens alike, are taken to express necessarily true propositions if propositions such as 'whoever kills shall be punished' are true. Conversely, however, the falsehood of a proposition like (2) will imply the falsehood of the correspondent proposition like (1). This brings into our discussion the problem of the truth-conditions of propositions like (2), which is sometimes called, more or less felicitously, the 'problem of existence' of primary norms.[19] Assuming, for the moment being, that the conceptual foundations of the inference thesis are sound, I propose to deal with this problem in the following section.

II

3. In face of the many uses that, in the most diverse contexts, the word 'norm' may receive, it may be important to stress that primary conduct norms are unanimously thought of as *prescriptions* addressed to citizens,[20] and propositions like 'it is forbidden to kill' are accordingly taken as propositions about prescriptive norms: their truth, relatively to a given legal system, is in some sense dependent on the 'existence' in such a system of the prohibition of killing — meaning by this that for a proposition like 'killing is prohibited' to be true, it has to be the case that killing is prohibited in that system.

Prescriptive norms, however, seem to share a number of features which are just not present when it comes to the law. The most telling of those features is the one requiring that the norm-giving authority has effectively succeeded in communicating his intention to the respective addressees. If we wish to distinguish, as G. H. von

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[18] This is, of course, an extremely simplified manner of putting things: in most theoretical or practical jurisprudential contexts, any useful construction of the antecedent of a sanction norm will capture a set of conditions much larger than the set of the conditions necessary for the affirmation that someone as performed a 'prohibited' behaviour. This poses some further problems for the inference thesis, which I will not address here.

[19] In the relevant philosophical literature, there are (at least) two very distinct main topics usually discussed under this designation: the problem of the 'nature' or 'ontological status' of norms; and the problem of determining the truth-conditions of normative propositions. I am now interested in the second of these problems; references to these 'truth conditions' in this paper should be understood in very weak sense, so as not to implicate any thesis concerning the ontological status of legal norms or, even, any particular philosophical conception regarding the notion of 'truth' in connection with normative propositions.

[20] See, *e.g.*, Haffke (1995) 133ff.

Wright does in his well-known discussion of the 'ontological problem of norms',[21] between the act of promulgating a prescription and the establishment of a normative 'relationship' between the authority and the addressee, which implies that the prescription has been appropriately received by the addressee,[22] the existence of a prescription depends as much on the first condition as on the second. If that reception does not take place, there *exists* no prescription, but only, at most, an *attempted* prescription.[23] Our common terminology may induce us in error, for we do talk (as I have just done) about the act of promulgation as the act of giving a prescription, as if a prescription had come to exist independently of its reception by someone. But we need to distinguish, von Wright suggests, between the *act* of prescribing and its *result*, which is the existence of a prescription in the proper sense. Much in the same way, for example, that if I ask someone the time and I do not make myself heard, I may perhaps be said to have put a question, although I haven't *asked* anyone anything (I have only *tried* to ask), so, too, when someone prescribes a given behaviour but, for one reason or another, no 'relationship' obtains between the prescription-giver and its addressee, the result of *someone having been prescribed* to do something didn't come to exist: we only have an *attempt* to prescribe.

That there *are* no prescriptions not communicated to its addressee — or (put another way) that there are no unknown prescriptions — seems to me particularly easy to grasp in the frame of an analysis of prescriptive discourse which emphasises the pragmatic aspect of the uses of language in directing and influencing the behaviour of some person or persons. It was not an original insight of von Wright's, and is indeed a *locus classicus* of much discussion on the nature of legal obligation;[24] but his model may well be taken on behalf of all endorsers of the same underlying idea.

Primary legal prescriptions addressed to citizens, in this sense, are not to be generally found in the law. It is sufficient to draw attention to one aspect which is rather common to modern systems of criminal law, irrespectively of the legal 'family' to which they may belong: in most (if not all) criminal codes, the so-called 'mistake of law' does not (or, at least, does not in all cases) have the status of a full exemption precluding responsibility. This irrelevance of *error juris* is no *penal* idiosyncrasy; it may not, without infinite regress, be theoretically explained as a 'violation' of some other norm imposing a duty of diligence in acquiring such information; and it is incompatible with a prescriptive understanding of 'primary norms' in the sense of 'prescriptive' that we find in von Wright. If legal 'prohibitions' are to be seen as prescriptions in this sense, then the expression 'mistake of prohibition' with which sometimes the *error juris* is designated[25] is a *contraditio in adjecto* (and the expression 'knowledge of the prohibition', redundant). And although it may very well be

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[21] Which he understands precisely as 'the question of knowing what it means to say that there *is* (exists) a norm to such and such effect', and which he discusses particularly in regard of prescriptions: cf. von Wright (1963), 107-8.

[22] *Id.*, 117, 122. On this 'normative relationship', see de Lucia (1992) 53-55, or González Lagier, (1995) 312-315.

[23] *Id.*, 124.

[24] Cf., *v.g.*, Hobbes (1994) 177. See, also, Hägerström (1953) 3, 127ss; van Loon, 'Rules and Commands' (1958) 218ff.; MacCormick (1973) 109. There is a recent and quite detailed discussion of this topic in Molina Fernández, (2001) 497ff.

[25] A common term in German criminal law theory is, indeed, '*Verbotsirrtum*'; similar expressions are common, at least, in the Portuguese and Spanish legal vocabularies.

that some other aspects equally common to most legal orders would bring us to the same conclusion,[26] my present argument does not need to rely upon an exhaustive inquiry. If one adopts a notion of 'prescription' similar to the one discussed by von Wright, then a legal norm commanding a judge to punish someone for the performance of some behaviour *whether or not* the actor knew that his behaviour was described in the law as a condition for a sanction to apply cannot be reconstructed as a 'secondary norm' in the sense with which this expression was employed in the first section of this paper.

Within this frame of analysis, an alternative might be defined: either it is possible to give an account of legal primary conduct norms capable of dispensing with their reception as an existence condition without losing sight of their prescriptive nature, or one would have to conclude that there *are* not, in our criminal law systems, primary prescriptions addressed to citizens. No legal theorist would, of course, lightmindedly accept the second term of the alternative. The irrelevance of *error juris* has been justified in a number of ways, and it seems to be considered of no consequence in what concerns the existence of primary prohibitions addressing citizens. Some may want to substitute 'knowledge' for 'knowledgeability', and be satisfied with some guarantee that criminal laws are given fair publicity; others may resort to a legal 'fiction' or 'presumption' that the citizens know the 'prescriptions' which the law addresses them; some may still stipulate and impose on citizens a general duty to know the law. In all this lies the idea that legal 'prohibitions' may well dispense with their reception without any damage to their clearly prescriptive nature. Hart, for example, when discussing the Austinian model of 'orders backed by threats', sustained that

> [although] it may indeed be desirable that laws should as soon as may be after they are made, be brought to attention of those to whom they apply […,] laws may be complete as laws before it is done, and even if it is not done at all[27]

which did not in any way prevent him from simultaneously maintaining that

> what is usually intended by those who speak of laws being 'addressed' to certain persons is that these are the persons to whom the particular law applies, i.e. whom it *requires* to behave in certain ways.[28]

underlining, that is, the *prescriptive* character of legal norms.

And, at any rate, a theorist partisan to the 'primary norms' thesis will immediately say that if some analysis — be it von Wright's or anyone else's — of the necessary 'existence conditions' for prescriptions happens not to fit those 'primary' prescriptions commonly talked about by jurists and citizens — well, then such an analysis must evidently be discarded (or, at least and if possible, modified in order to adjust to the analysed object): an analysis should serve its *analysandum*, rather than mould it in procrustean manner.

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[26] In most legal systems people may be punished that acted negligently and, at least in what concerns the cases of 'unconscious negligence', the problem seems to me similar to the one posed by the irrelevance of *error juris*; the conceptual admissibility of retroactive punitive norms, too, seems incompatible with any attempt to characterize them as *stricto sensu* 'sanction norms'. Cf. Jakobs (1972) 13 ff., and Alldridge (1990) 489.

[27] Hart (1994) 22.

[28] *Id.*, *ibid.*

But maybe this conclusion should not be formulated so hastily. If von Wright's model is not deprived of plausibility, and if it seems adequate, at least, when it comes to explaining *some* kinds of prescriptions — namely, *particular* prescriptions, such as those originated in commands or orders addressed to a single individual; and if, therefore, it is simultaneously accepted that the existence of a prescription does in *some* cases depend on it being 'received' by the addressee, and that in some other cases (which include our legal 'prohibitions') no such 'reception' is needed, it may be important to understand where the difference lies.

To my knowledge, the most detailed attempt to assess the relevance for legal theory of von Wright's analysis was developed by Alchourrón and Bulygin in two well-known essays.[29] Based on a philosophical explicitation of the necessary conditions for the use of sentences such as 'it is forbidden to kill' by jurists and citizens when referring to the law, Alchourrón and Bulygin come to the conclusion that von Wright's model should indeed be set aside, deeming it inadequate to solve the ontological problem of legal prescriptions. Their line of argumentation seems to properly reconstitute and make explicit some assumptions hidden in the jurist's common discourse about 'prohibitions'; for this reason I shall now, too, take them as apt representatives of the common ideas which they prominently discuss and endorse — and, for that reason, as direct interlocutors.

4. In Alchourrón and Bulygin's discussion of the problem of the 'existence' of norms von Wright's analysis is always kept in close sight; although it is expressly recognized as sound for some cases,[30] the two authors declare themselves prepared to admit that it may need some 'transformation or adaptation' 'in order make his elucidations more suitable for legal discourse'.[31] They are preoccupied with 'the problem whether and to what extent von Wright's analysis may be regarded as an adequate reconstruction of what jurists understand by the existence of a legal norm',[32] and the discussion focuses, in particular, on whether or not the *existence* of a legal norm depends on its reception. Alchourrón and Bulygin mean to draw the conclusion that 'legal norms are treated as existent long before they are "received" by legal subjects'.[33] Their investigation, as von Wright's, is concerned only with prescriptions, understood as conduct norms:

> By a norm we shall understand a prescription to the effect that something ought to or may or must not be done, i.e., a prescription issued by one or several human agents (called norm-authorities), addressed to one or several human agents (called norm-subjects), enjoining, prohibiting or permitting certain actions or states of affairs.[34]

Their argument relies on an analogy, and it is important to follow its thread in

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[29] Cf. Alchourrón and Bulygin (1979) and (1989) 665-693 (an autograph Spanish translation is also available: Alchourrón and Bulygin (1991) 69-102). All quotations included in the present paper will be from Alchourrón and Bulygin (1989 [written in 1973]).

[30] Namely, for 'direct commands and permissions (particularly regarding the subject) and even for general norms addressed to a relatively small or at any rate easily identifiable audience': cf. Alchourrón and Bulygin (1989), 668.

[31] *Id.*, 665.

[32] *Id.*, 666.

[33] *Id.*, 669; similarly, Alchourrón and Bulygin (1979), cit., 31.

[34] Cf. Alchourrón and Bulygin (1989) 666; (1971) 23.

some detail.[35] Alchourrón and Bulygin begin by taking under consideration the 'descriptive use of language', and observe that 'the most common and "natural" use of descriptive language is to communicate something to somebody else'; they make clear that 'in a communication at least two persons are involved, the speaker and the hearer'; and emphasize that the *existence* of a communication depends not only on the emission of a message, but also on its reception. Nevertheless, they sustain, 'we may abstract from the hearer and concentrate our attention on the speaker alone' — and we will have 'what could conveniently be called an "assertion"', which is analysable in two elements: 'the act of asserting and the contents of this act, i.e., an actual assertion or statement'. 'An assertion', they say, 'exists even if nobody has received it'. 'On a still higher level of abstraction, we might even dispense with the speaker' — in which case 'we are left with the contents of a possible assertion', or (in their terminology), a 'proposition'. *Communication*, *assertion* and *proposition* are thus 'three different concepts obtained by successive degrees of abstraction'.

Such remarks set the ground for an analogy between this 'most natural' use of 'descriptive language' of 'communicating something to somebody' and the 'most natural' use of 'prescriptive language' in 'influencing other people's behaviour'. In order for *this* aim to be attained, 'the reception of the prescription is certainly a necessary condition', and in this case they propose that we speak of a '*norm-communication*'. We may, however, 'abstract from the "receiving-aspect"' and be left with something 'analogous to an assertion', which is characterized as 'the content of an actual act of prescribing'. They call this a '*norm-prescription*', and say that the existence of a *norm-prescription* does not depend on its reception by the addressee, in the same way that the existence of an assertion does not depend on its reception by the intended hearer. Lastly, the 'content of a merely possible act of prescribing' — the 'prescriptive counterpart of a prescription' — is called '*norm-lekton*'. The analogy lies in that

> [e]xactly as in the case of assertion and proposition, the concepts of norm-prescription and norm-lekton are obtained by successive abstractions from a common basis (norm-communication).

An important aspect of this analysis and of the proposed taxonomy lies, according to Alchourrón and Bulygin, in the fact that it performs a function of disambiguation: in different circumstances, they say, the term 'norm' is indistinctly used to designate *any* of the three identified concepts, and the task of identifying in which level of abstraction is the discourse about norms situated may not always be an easy one: 'in this field there are no… terminological distinctions' correspondent to those which are available in the field of descriptive discourse. The distinction between *norm-communication*, *norm-prescription* and *norm-lekton*, then, is helpful in dissolving the 'misleading' ambiguity of the term 'norm'.

Having laid down this analogy, they proceed to 'determine von Wrights's *explicandum*', i.e., 'the intuitive notion he wants to clarify'; and the reason they think such a determination is necessary is precisely the fact that, given the 'three different though related meanings of the term "norm"', 'there are at least three possible *explicanda*'. The established disambiguation now shows that von Wright 'takes norm-communication as his *explicandum*'.

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[35] For all the following quotations, cf. Alchourrón and Bulygin (1989) 666-670 (similar passages in Alchourrón and Bulygin 1979, 23-31).

But jurists 'rarely if ever use the term "norm" with the meaning of "norm-communication" when they talk of the existence of norms. Normally they use the term in the sense of "norm-prescription"'. This, according to Alchourrón and Bulygin, is easily demonstrated:

> the large number of legal provisions makes it almost impossible for a legal subject to know them all or even those that concern him directly. But this fact does not prevent the jurists from speaking of existing legal norms before they are 'received' by legal subjects.

Moreover,

> a legal subject may very well be punished for not complying with a norm, e.g. for not fulfilling a legal obligation, even if he can prove that he was not aware of its existence.

The conclusion to be drawn, then, is this: 'legal norms are treated as existent long before they are "received" by legal subjects', and this 'clearly' shows that 'the existence of legal norms is regarded as quite independent from the receiving aspect'. And if 'in legal language the term "norm" is ordinarily used in the sense of norm-prescription', it seems therefore reasonable 'to take norm-prescription as the *explicandum*' when it comes to legal norms. Accordingly, the *legal* norm is 'the content of an actual act of prescribing, whose existence begins with the promulgation'. Briefly put, 'the performance of the act of issuing the norm (promulgation) will be the only requirement for its existence'.

This analysis is a sufficiently clear and seemingly adequate reconstruction of the assumptions which underlie the jurist's ordinary discourse regarding 'primary' norms and their existence, and that is why it was elected for the purpose of my present discussion. I will now argue that Alchourrón and Bulygin's conclusion does not follow from the arguments they submit.

5. Alchourrón and Bulygin's conceptual differentiation of 'norm-communication', 'norm-prescription' and 'norm-lekton' is expressly offered as a distinction grounded on *levels* of abstraction, or 'successive abstractions from a common basis'.[36] This makes clear that the two objects in comparison — *communicating* and *prescribing* as instances of two different uses of language — are connected to some precise basic notion of what it is to 'communicate' or to 'prescribe'. As for prescriptions, which is the main topic under study, this basic notion is, as seen above, defined right from the start. I will now call it '$norm_1$'. It is worthwhile to once again reproduce the relevant passage:

> $Norm_1$: [By a norm we shall understand] a prescription to the effect that something ought to or may or must not be done, i.e., a prescription issued by one or several human agents (called norm-authorities), addressed to one or several human agents (called norm-subjects), enjoining, prohibiting or permitting certain actions or states of affairs.[37]

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[36] Cf. Alchourrón and Bulygin (1989) 668.

[37] *Id.*, 666. The following clarification is made: 'The verbal formulation (whether by means of a sentence in the imperative mood, a deontic sentence or a sentence in the indicative) is immaterial; the important thing is the prescriptive use of words (or symbols)'.

What, then, do the authors understand by 'levels of abstraction'? The basic notion of *communication*, as they say, comprises a speaker, an asserted content, and a hearer, which is why the existence of a communication in that sense depends on the joint verification of all three elements. In the same manner, if there is to be an analogy, the basic notion of $norm_I$ requires the joint verification of an act of prescribing with a given content *and* its effective reception by the addressee. This discrimination of elements (whose soundness or usefulness I don't intend to discuss) is an *analysis* of both cases of discourse: it is an analytical decomposition of the basic notion of *communication* and *prescription* in a set of necessary conditions. In other words, each of those elements is as a necessary condition for the 'existence' of the *analysandum*.

Let us take the descriptive side of their analogy. It is fairly clear that in such an analysis of *communication* it is possible to 'abstract' from the hearer and focus the attention in the *act* of asserting, in the same manner as it is equally possible to 'abstract' from the speaker and separately study the asserted proposition. But the word 'abstraction', here, does not designate any mode or process of concept-formation; it rather refers to the possibility of *disregarding* some of the elements identified by analysis of the basic notion, in order to take each one into isolated consideration as an object of study. The concept of 'assertion', for example, may be discussed or analysed independently (i.e., 'abstracting from') the other elements on which a *communication* always depends; but the *concept* of an assertion does not include in its characteristics, or in its definition, the property of being an element of a *communication*. This is hardly surprising: as is the case with any analysis, the concepts correspondent to each one of the elements in which an *analysandum* is decomposable by analysis may designate objects whose 'existence conditions' are quite autonomous from the existence of the *analysandum*; as Alchourrón and Bulygin themselves affirm, an actual assertion may exist even if nobody happens to hear it. Put another way: the concept of an assertion is not the *result* of a manoeuvre of 'abstracting' certain elements *from* a communication. With their discrimination of elements, therefore, the two authors are not really defining 'higher' or 'lower' '*levels* of abstraction', for the discourse about one of those elements is as 'high' or as 'low' as the discourse about another.

So even if someone's philosophical interest for the concept of an assertion may happen to originate from the fact that in an analysis of the basic notion of *communication* the existence of an assertion has been given the status of a necessary condition for a *communication* to exist, the existence of an assertion, *qua* assertion, is independent of the existence of a *communication*. And this platitude is absolutely irrelevant from the perspective of an analysis of 'descriptive discourse', for the existence of an assertion is a necessary condition for the existence of a *communication*: one should not lose sight of the fact that each of those elements was arrived at by an analysis of the basic notion of *communication* — and that, therefore, each of them counts as a necessary (although not a sufficient) condition for the 'existence' of a *communication*. In short: the 'existence' of a communication implies the 'existence' of an assertion; but the reverse is not true.

So what we get with the proposed discrimination of elements is, in its proper sense, an *analysis*. For the basic notion of $norm_I$ (which is the notion of 'norm' the authors take, from the start, as the *subject* of their investigation), and according to the analysis Alchourrón and Bulygin propose, the 'existence' of a prescription depends on the joint existence of the identified elements: (*a*) the promulgation of a prescription

with (*b*) a given content and (*c*) its reception by the addressee(s).[38] We thus have:

$\text{Norm}_1 = (a) + (b) + (c)$

We may now characterize in a better way the ambiguity Alchourrón and Bulygin ascribe to the term 'norm': depending on context, they say, 'norm' may be employed either to designate *solely* actual acts of promulgation with a given content (i.e., (*a*) + (*b*)), or even to designate solely the prescriptive counterpart of propositions (i.e., (*b*)). It is by now clear that the two authors are not drawing our attention to different conceptions as to what a norm_1 may be: they are rather talking about different *objects*, which have been identified by analysis of the basic notion of norm_1, and to each of which the same name ('norm') may, in some context, be attributed. It is therefore possible to differentiate:

$\text{Norm}_1 = (a) + (b) + (c)$
$\text{Norm}_2 = (a) + (b)$
$\text{Norm}_3 = (b)$

And as they conveniently supplement this differentiation with terminological distinctions, stipulating different names for each of the identified objects, the following equivalence is obtained:

$\text{Norm}_1 = (a) + (b) + (c) =$ norm-communication
$\text{Norm}_2 = (a) + (b) =$ norm-prescription
$\text{Norm}_3 = (b) =$ norm-lekton

This disambiguation is, of course, of great relevance when it comes to solve the problem under discussion — which conditions make true an affirmation that a norm *exists*? — for it makes clear, in face of the fact that the term 'norm' may, according to context, be employed in any of the identified senses, that:

(1) 'There is (exists) a norm_1' is true iff (*a*) + (*b*) + (*c*) exist
(2) 'There is (exists) a norm_2' is true iff (*a*) + (*b*) exist
(3) 'There is (exists) a norm_3' is true iff (*b*) exists[39]

If in the mouths of jurists, as Alchourrón and Bulygin say, the truth of a proposition about the existence of a 'norm' depends only on the joint verification of conditions (*a*) and (*b*) (an act of promulgation with certain content), we may observe that such a proposition is true if 'norm' is used in the sense of norm_2, but false if it is

[38] It may be noted that, in this respect, no disagreement exists between the Argentine authors and von Wright, whose investigation was also an analysis of the existence-conditions of prescriptive norms, which conditions he then submitted to separate characterization. Such an 'abstraction', in this sense, was already present in von Wright.

[39] Proposition (3) is, of course, highly problematic. Alchourrón and Bulygin make clear, in a further section, that in the same way that 'we do not speak of the existence of propositions (except in the sense of truth)' and that 'on the other hand, assertions can exist', so, too, 'existence is a property of norm-prescriptions', but not of 'norm-lekta'. Cf. cit. (1989) 677.

used in the sense of $norm_1$. This shows, according to the two authors, that jurists use 'norm' in the sense of $norm_2$ — i.e., in the sense of 'norm-prescription'.

All the necessary tools are now displayed which make it possible to evaluate the conclusion that Alchourrón and Bulygin mean to derive from this analysis — and to see why that conclusion does not follow from the premises laid down. Their answer to the problem of determining the conditions of an assertion that a norm *exists* is this:

> A [legal] norm is the content of an actual act of prescribing, whose existence begins with the promulgation. The performance of the act of issuing the norm (promulgation) will be the only requirement for its existence.[40]

But it is only natural to ask in *which sense* is the term 'norm' being used in this answer. The reply to this question is far from being evident. It may at first sight seem that, in their conclusion, the term 'norm' is used in the sense of '$norm_2$', given that the two authors expressly affirm that 'in legal language the term 'norm' is ordinarily used in the sense of norm-prescription'.[41] But this hypothesis has to face some obstacles which deprive it of all plausibility. First, if the authors are using 'norm' in the sense of $norm_2$ their answer is trivially tautological, for, as we have seen, 'norm-prescription' is nothing but the *name* stipulated by them to designate the existence of an act of promulgation with a given content. Secondly, one should recall that Alchourrón and Bulygin mean to criticize von Wright by showing that his analysis of the 'ontological problem of norms' is inadequate when it comes to the explanation of legal norms; but if in their conclusion 'norm' is being applied in the sense of '$norm_2$', there is no reason why von Wright would not find himself in complete accord with the resulting conclusion, which at no point poses any threat on his analyses; for in that case Alchourrón and Bulygin would only have shown that jurists call 'norm' to the object von Wright calls 'promulgation', and the three would happily agree as to the set of necessary conditions for the 'existence' of *that object* to which they would only be giving different *names*.[42] Thirdly, if 'norm' is used in the sense of '$norm_2$', that conclusion could easily be arrived at without any of the analytical apparatus put forward by Alchourrón and Bulygin. And fourthly and perhaps more importantly, they would have to recognise that that object which jurists call 'norm' is *not* the object which they themselves took as their *analysandum* since the very beginning of their investigation, which was the basic notion of 'norm-communication', consistently referred to in their text as a 'prescription'. They would have to recognize, that is, that legal 'norms' are *not* prescriptions in the sense (or basic notion) which they gave to the term and which grounded the entire analysis. This result, then, would frontally contradict the very assumption from which they depart: the assumption that legal 'norms' *are* prescriptions.

It would then seem that, in their conclusion, the term 'norm' is used in the sense of $norm_1$. The plausibility of this hypothesis follows precisely from the fact that they were set out, from the beginning, to discuss the problem of legal prescriptions taking a notion of 'norm' equivalent to $norm_1$ *as the object of their analysis*. But in this case the conclusion is evidently false, and, in defending it, Alchourrón and Bulygin commit a fallacy of equivocation — falling victim, perhaps, to the very ambiguity of

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[40] *Id.*, 669.
[41] *Id.*, *ibid.*
[42] Cf., incidentally, von Wright (1989) 875-6.

'norm' which they themselves had previously denounced.[43] The fallacy is quite visible in the following passage:

In legal language the term 'norm' is ordinarily used in the sense of norm-prescription. It seems reasonable, therefore, to take norm-prescription as the *explicandum*. Accordingly, a norm is the content of an actual act of prescribing, whose existence begins with the promulgation.[44]

The third sentence is not 'accordingly' related to the first two. The fact that jurists may call 'norm' to a *part* of the conditions in which the notion of '$norm_1$' was analysed does not allow that the object jurists *call* 'norm' is considered equivalent to the object called '$norm_1$'. The sets of conditions on which the *existence* of '$norms_2$' and '$norm_1$' depends are not equivalent, and the truth of a sentence about the existence of a '$norm_1$' may not be inferred from the truth of a sentence about the existence of a '$norm_2$'.

6. The very possibility of debating and contrasting different thesis on the 'ontological problem' of norms — as well as the contraposition of several conceptions regarding the question of what norms *are*, which is a different issue — depends on the identity of the subject under discussion. If 'norm' is an ambiguous term, the discussion presupposes its disambiguation; but disambiguation does not solve the 'ontological problem'. Alchourrón and Bulygin, with their attempt to dissolve the ambiguity of 'norm', identify three different objects, not three different thesis concerning the 'ontological problem' of norms. Each one of those objects it may or may not be said to in some sense *exist* under certain circumstances, and in relation to each one a distinct 'ontological problem' may emerge. Alchourrón and Bulygin's analysis is nothing more than an exercise in disambiguation — and not a discussion of the problem of the 'existence' of prescriptions, nor a contraposition of two distinct thesis on the 'ontological problem' of norms. If the result of their analysis is, after all, that von Wright and the jurists *call* different things a 'norm', the comparison should have been made between the objects of both discourses — or, rather, between the 'existence conditions' of the object jurists call 'norm', on the one hand, and, on the other, the 'existence conditions' of von Wright's object of discussion. But the philosophical interest of such a comparison seems to be null: there is nothing extravagant about the fact that propositions about different objects may happen to have different truth-conditions.

What, I believe, explains why Alchourrón and Bulygin have set themselves to draw this comparison is the fact that they have based their exercise on two assumptions which are jointly incompatible. One is the assumption that there is no apparent reason to deny, in general, the soundness of von Wrights' analysis of prescriptive discourse, for, as they expressly recognize, such analyses appear to be correct for direct commands and general norms addressed to small audiences;[45] and the other is the assumption that that those objects referred by jurists when talking about primary legal 'norms' which dispense 'reception' are *prescriptions* in the very same sense. The

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[43] Their proposed terminology was already something of a *linguistic* entrance-door for the confusions they meant to have dissolved by analysis: instead of talking about *communication* and *prescription*, they choose the expressions '*norm*-communication' and '*norm*-prescription'.

[44] Cf. Alchourrón and Bulygin (1989) 669.

[45] Cf. fn. 30 above.

first one is quite sound, but the second is clearly mistaken: and it is this assumption which grounds, I believe, the current talk about 'primary conduct norms'. The mistake, obviously, does not lie in its contrariness to von Wright's analyses, for these may very well be more or less discussable, and in need of more or less reconstruction or modification. Von Wright was here invested, as mentioned, in the role of representative of a thesis much propagated and often made explicit in most analyses of the so-called 'prescriptive (or directive) use' of language: the thesis that there *are* no prescriptions which have not been properly communicated or received. It is certainly true, as already mentioned, that we normally refer to the act of promulgation as an act of 'prescribing' or of 'giving a prescription', but such an act may not be confused with its contingent result — the existence of the prescription. Prescriptions, *ex definitio*, may be obeyed of infringed; but a non-received act of 'prescribing' may not be obeyed nor violated, nor may it be taken as a guide or standard for conduct. And likewise have Alchourrón and Bulygin been taken, in this paper, on behalf of many other authors who, in the field of general jurisprudence or in that of criminal theory, commonly agree in assigning to 'primary norms' the nature of prescriptions; the Argentine authors offer what is perhaps the most articulate and clear philosophical attempt to argue for a thesis which often remains unstated in much of the work of legal scientists. Whatever they may be, legal 'primary norms' are not prescriptions; the reconstruction, from the available legal material, of primary prescriptions addressed to citizens is impossible.

The widespread acceptance of the contrary idea stems, perhaps, from the notorious fact that jurists and citizens alike indeed talk about the 'prohibitions' and 'duties' which the law generally 'imposes' on them: anyone would say, for example, that it is *true* that in Portuguese or English law 'killing is prohibited'. This fact, nevertheless, should not — at least, not without the minimum elementary cautions[46] — be taken as a reason for sustaining that the law comprises primary prescriptions addressed to legal subjects. One may not simply put forward an analysis of the truth-conditions of propositions about, *v.g.*, some object named '*x*' *starting* from the assumption that those propositions are in fact about some object *x*, for the term '*x*' may indeed be ambiguous, and any ambiguity must be expunged as a necessary precondition to any analysis. Ambiguities are not always evident, of course; but if good reasons exist for one to suspect that an ambiguity may affect a given term, it will be convenient to address it. And I believe that there are some good reasons why we should suspect that the expressions which jurists employ when speaking about 'primary norms' may suffer from a characteristic ambiguity — and, thus, some good reasons for an analysis of the truth-conditions of sentences such as 'it is forbidden to kill' not to be carried out based on the assumption that such sentences are about a predetermined object (about prescriptions proper). It is normally said that the norm commanding judges to punish murder, for example, is a norm sanctioning the infraction of the 'primary norm' according to which 'it is forbidden to kill': we thus use an *impersonal* deontic statement to refer to the so-called 'primary norm'; but it has already been pointed out in some literature that such impersonal deontic statements may be understood in either one of two ways[47]: (*a*) as *propositions about general prescriptions*, or (*b*) as

[46] Cautions that Hart, for example, tends not to adopt: this sort of argument is quite typical of much of his passages. In what concerns my present topic, and for an example, cf. Hart (1994) 27-8.

[47] See, *v.g.*, Hilpinen (1997) 335.

'evaluative' propositions disconnected from any discourse regarding prescriptions.

This ambiguity is highly relevant for my present topic. If taken in acception (*a*) — if taken, that is, as propositions about general prescriptions and, therefore, about what a class of subjects *ought to do* —, propositions like 'it is forbidden to kill' always lend themselves to an analytical breakdown in a conjunction of singular prescriptions, and they are only capable of being true relatively to a universe of addressees in the proper sense.[48] In this case, the impersonal formulation (in which one does indeed 'abstract' from the aspect of 'reception') provides us with a shorthand linguistic device which may be convenient for a number of expository purposes. But to 'abstract' from an element, as we saw, does not allow us to *do without* its existence. This is the *faux pas* taken by Alchourrón and Bulygin, as well as by many criminal law theorists: the existence of an effective reception by *each* addressee in the relevant universe is a necessary condition for 'it is forbidden to kill' to be true. And in this acception, more importantly, the possibility of analysing the impersonal statement in a conjunction of singular prescriptions is essential to the possibility of affirming that someone 'obeyed' or 'complied with' or 'infringed' or 'violated' the prescription: only particular prescriptions, not general ones, may be obeyed or disobeyed. Moreover, for the following propositions:

(1) It is forbidden to kill
(2) *A* killed somebody else
(3) *A* violated the prohibition to kill

two conditions are necessary (although not sufficient[49]) for (3) to be true: one condition, naturally, is the truth of (2); and the other is that *A* belongs to the universe of the addressees of the singular prescriptions in which (1) may, in this acception, be decomposed. In other words, it is necessary that the truth of (1) be dependent on the truth of '*A was* forbidden to kill' — which would amount to something like von Wright's 'normative relationship'.

On the contrary, in acception (*b*), the impersonal predicate 'is forbidden', when associated to a state of affairs (which may well be a human action or omission), expresses only that such state of affairs *ought not to be* — and (1) will be simply interpreted as 'it *ought not to be* that someone kills somebody else' —, but it does not imply the existence, for someone, or anyone, of the 'prohibition' to kill in the proper sense.[50]

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[48] The false assumption of which I previously accused Alchourrón and Bulygin clearly underlies the following passage: 'von Wright's concept of existence is particularly suitable for direct commands and permissions (particularly regarding the subject) and even for general norms addressed to a relatively small or at any rate easily identifiable audience (like military commands). But in the case of general norms addressed to a class of persons whose members are not easily identified — as with most legal norms — the situation is different': cf. Alchourrón and Bulygin (1989) 668; similarly, (1979) cit., 30.

[49] The set of the necessary conditions for the existence of a particular prescription and the set of the necessary conditions for the violation of a prescription are evidently not coextensive.

[50] Between acceptions (*a*) and (*b*) the following relation obtains: a *stricto sensu* prescription of type (*a*) always presupposes an evaluation of type (*b*), much in the same way that a theory of *ought(-to-do*) pressuposes a theory of value: cf. Raz (1990) 11.

It is not in acception (*a*), as we have seen, that jurists *use* sentences such as 'it is forbidden to kill' or talk about 'violations' or 'infractions' of 'primary norms'; for the purposes of the present paper, this is all I would like to defend and commit myself to. As to the possibility of characterizing the sentences with which jurists and citizens normally speak about what 'is forbidden' as sentences of type (*b*), I shall not develop it much, as it falls outside the scope of my investigation. However, I believe that it may be argued that, in the mouths of jurists, propositions about 'prohibitions' express only what *ought-to-be* from a given perspective — and not what someone *ought to do*.[51] A possible line of reasoning towards such conclusion would perhaps draw some attention to the legal terminology of 'norm-violations': if we interpret (1) according to acception (*b*), the type of behaviour described in (1) ('to kill') may be of course be instantiated by particular actions, but we may not see in this any *violation* of a prescription proper. The truth of (1) under interpretation (*b*) rather determines that certain actions of certain agents *count as* 'violations' for certain legal effects (meaning that any particular action which is taken to exemplify the type of behaviour which *ought not to be* will for that reason be called 'prohibited'), independently on any other conditions whatsoever and, namely, on any knowledge those agents might have of the possibility of such effects. It seems to me that this is more closely related to behaviour of the 'primary norms' which so interest jurists (although the topic will have to be dealt with in a *second* 'round'): in fact, they are unsusceptible of being *violated* or *obeyed* in any proper sense — they are rather instantiated, or satisfied, and nothing more.[52]

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[51] This idea needs much elaboration and refinement. It bears some relation to the century-old doctrine of the double 'nature' of criminal norms in German (and German-influenced) criminal theory, according to which criminal norms would function both as prescriptive 'determination norms' (*Bestimmungsnormen*) and as 'evaluation norms' (*Bewertungsnormen*) of a more or less 'objective' character. However, this 'double nature' thesis, widely accepted in in some form or other, remains ultimately committed to a prescriptive understanding of criminal norms: while in its 'evaluation' aspect, criminal norms would encompass only those elements of crime relevant for the characterization of wrongful behaviour, the 'determination' aspect would extend to the conditions for the personal imputation of wrongdoing to some agent, without which no 'infraction' or 'violation' in the proper sense is considered possible.

[52] I have not maintained (nor have I contested) that there are in the law *no* prescriptive norms in the proper sense. In this respect, it may be observed that in Alchourrón and Bulygin's texts one occasionaly finds affirmations such as 'jurists *rarely if ever* use the term "norm" with the meaning of 'norm-communication'. *Normally* they use the term in the sense of "norm-prescription"' (Alchourrón and Bulygin 1989, 668, emphasis added) or 'The admissibility of the excuse of mistake of law in criminal law shows that criminal norms are *sometimes thought of* in terms of "norm-communication"' (Alchourrón and Bulygin 1979, 111, my translation, emphasis added). These affirmations are indeed equivocal in view of the internal economy of the texts in which they appear: it is unclear whether the authors think that (*a*) jurists, irrespectively of how they happen to speak, are always referring to the same object ('the' legal prescription) in different levels of discourse, or rather that (*b*) in each case we shall be dealing with objects of different types. In the first case, which is the one most coherent with their line of reasoning, the diversity of truth-conditions for propositions about $norms_1$ and $norms_2$ would remain unaccounted for; in the second case, the result of their proposed disambiguation would have to lead, as I argued for, to the conclusion that 'norms-prescription' are not prescriptions at all.

III

7. I tried to suggest that it is not possible to reconstruct, from the legal (and, especially, the statutory) material one usually has to deal with in a modern legal order, the prescriptive citizen-addressing 'primary norms' which many criminal legal theorists tend to admit as in some sense 'existing'. Such a possibility, moreover, would require a transformation far more drastic than the simple collection, in statutory texts, of expressly stated 'prohibitions'.[53] And it is not the case, contrarily to what is often assumed,[54] that the discussion of a model of parallel individuation of a set of 'norms for citizens' and a set of 'norms for judges' is dependent only on its greater or lesser convenience or usefulness as a theoretical model: this idea presupposes that such a model would be eligible for competition with other equally possible ones, and this possibility was precisely what I tried to impugn. The *prescriptivist assumption* is therefore mistaken; and although it has occasionally been the target of some objections relatively similar to the ones I have tried to develop,[55] it obstinately remains as a central feature of most theoretical accounts of crime and criminal responsibility. Its main consequence has been the translation of several results of philosophical analyses of prescriptive discourse into the field of legal responsibility, and (indirectly) an unwarranted approximation, in several aspects, of the models of *moral* and *legal* responsibility — which is probably the cause of some persistent problems in the area of criminal theory which may well be unsolvable.

These extreme and very broad claims are evidently in need of more and detailed arguments supporting them, which may not be presented in the scope of the present paper. But now and in view of the characterization of the *inference thesis* given in Part I, the conclusion will have to be one of the following two: either we may still conceive of our sanction norms as *penal* or *punitive* norms in the strict sense, in which case the inference thesis is false; or the impossibility of reconstructing 'primary' prescriptive norms would have the implication that our penal law is not really 'penal' or punitive in any proper sense. This second hypothesis is evidently implausible; but the first one is not difficult to lay bare. In order to do so, we may perhaps return to an argument of Hart's which has already been mentioned in connection with the inference thesis, and now point that such an argument appears to rely on a *non sequitur*. Let us recall the reasons adduced by Hart, quoting more extensively from passages contiguous to the one already reproduced in Part I:

> [W]e must identify a preliminary question to which the answer is so simple that the question may not appear worth asking; yet it is clear that some curious 'theories' of punishment gain their only plausibility from ignoring it, and others from confusing it with other questions. That question is: Why are certain kinds of action forbidden by law and so made crimes or offences? The answer is this: to announce to society that these actions are not to

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[53] The 'Code of Conduct' drafted by Paul Robinson is considered to be 'violated' independently of any knowledge the agent may have to that effect, and 'mistake of law' does not constitute an absolute excuse: cf. 'Section 226' of his 'Code of Adjudication', included in Robinson (1997) 228.

[54] Cf., *v.g.* Dan-Cohen (1984) 625-9; Eser (1998) 36.

[55] For a summarized presentation of the classical discussion of 'imperativism' in the frame of continental criminal theory, Dias (1995) 53 ff., 125 ff.

be done and to secure that fewer of them are done. These are the common aims of making any conduct a criminal offence and until we have laws made with these primary aims we shall lack the notion of a 'crime' and so of a 'criminal' (…) Yet only if we keep alive the distinction between the primary objective of the law in encouraging or discouraging certain kinds of behaviour, and its merely ancillary sanctions or remedial steps, can we give sense to the notion of a crime or offence .[56]

Hart seems to be suggesting that the preventive and conduct-guiding functions of penal laws may not be explained without resorting to the idea that the criminal law is primarily composed of 'prohibitions', and only secondarily of sanctions applied to whoever happens to violate those 'prohibitions'.[57] But from the fact that the criminal law performs a conduct-guiding function it does not follow that it must be conceived as including 'conduct norms'.[58] Surely, a *proprio sensu* 'conduct norm' would be able to fulfil this normative task (although it is arguable whether this would be the case if no correspondent sanction were provided for); but there are other ways of explaining the way in which the law 'guides' the conduct of citizens and legal subjects in general.

In the first place, this legal conduct-guiding function, rather than being theorized as an exclusive task of single norms, may be globally conceived as a function carried out by a set or system of norms (and it is sufficient that it is carried out only *in general*), without obliging us to see in each or any of its norms a *proprio sensu* prescription able to perform it by itself. In a legal order, such preventive and conduct-guiding functions are sufficiently carried out if citizens have some very general idea as to the *types* of behaviour which, if adopted, will make them probable candidates to some types of sanctions, and if the *quantum* of the sanctions provided for in the law is enough to function, also generally, as a conduct deterrent.[59] None of this signifies that one should be theoretically committed to an understanding of the criminal law dependent on 'prohibitions' addressed to citizens.

In the second place, as far as only single norms are concerned, and although in the literature treating conduct-guidance as a 'function' of legal norms[60] there is some tendency to identify the person *guided* by the norm and the norm's *addressee*, maybe it would also be feasible to portray such a guidance as a possible (but not necessary) and, besides, non-exclusive *effect* of norms — an effect which (in a way much similar to a 'perlocutionary' effect in the frame of speech act analysis) may well be thought of as willed by the normative authority. This would enable us to say that with a prescription addressed to some person (to a judge, for example) the legal authority might attain the effect of guiding the conducts of some class of persons (of legal subjects, for example).[61]

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[56] Hart (1968) 6-7.

[57] See, also, Hart (1994) 27; and Hart (1983) 299-300. Similar or agreeing observations are made, for example, by MacCormick (1973) 124; or Raz (1970) 87-8, 231.

[58] Cf. Honoré (1977) 104.

[59] It is interesting to contrast this with Hart's remarks on the 'ordinary citizen''s 'obedience' to 'the law', in Hart (1994)114-7.

[60] And as an essential one: in the words of Joseph Raz, as a function performed 'by virtue of their normative nature, their mode of normativity'; cf. Raz (1973) 280.

[61] Cf., on this regard, Drury Stevensons' use of the distinction, put forward in Sociolinguistic theory, between a text's 'auditory' and 'addressee' in Stevenson (2003) 105.

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