Archiv für Rechts- und Sozialphilosophie – Band 163

Franz Steiner Verlag | Auszug aus:

DIE REINE RECHTSLEHRE AUF DEM PRÜFSTAND

HANS KELSEN'S PURE THEORY OF LAW: CONCEPTIONS AND MISCONCEPTIONS

Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie vom 27.–29. September 2018 in Freiburg im Breisgau

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Franz Steiner Verlag, Stuttgart 2020

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Kelsen on Derogation and Normative Conflicts
An Essay in Critical Reconstruction

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Abstract: This article focuses on Hans Kelsen's late period, in which, breaking from views that he had previously held dear, Kelsen espoused a novel theory of normative conflicts. He claimed that since the principle of non-contradiction does not apply to norms, normative conflicts are not logical impossibilities. Two equally valid norms may conflict; whether the law provides the tools to solve such a conflict is not a logical matter, but is dependent on contingent positive legal norms, also known as "metarules" such as Lex posterior. However, Kelsen did not want to cut the link between normative conflicts and invalidity (or non-validity). He claimed that conflicts are solved through derogation. This is the claim the present paper intends to analyse and ultimately refute. I then go on to introduce a new conception of metarules conceived as norms of applicability, with no special bearing on the conflicting norm's validity.

Keywords: Hans Kelsen, derogation, normative conflicts, normative systems, legal validity, applicability

Schlagworte: Hans Kelsen, Derogation, normative Konflikte, normative Systeme, rechtliche Geltung, Anwendbarkeit

In[1] 1962, Hans Kelsen published an article called "Derogation"[2], in which he shook up some of his own well-entrenched beliefs. Even if the shortcomings and inconsistencies of his earlier views did not totally disappear, that article made a crucial step in (what

1 Previous versions of this paper were presented at the Legal Philosophy Seminar of the University Pompeu Fabra in Barcelona and at the Conference of the German Section of the IVR in Freiburg. I would like to thank Jose Juan Moreso, Chiara Valentini, Stanley L. Paulson, Jörg Kammerhofer and Thomas Hochmann for invaluable comments.

2 Hans Kelsen, Derogation in: *Essays in Jurisprudence in Honour of Roscoe Pound*, ed. Ralph Newman, 1962. This essay was reprinted in Hans Kelsen, *Essays in Legal and Moral Philosophy*, 1973. I cite and quote it here from the 1973 edition.

I believe is) a good direction. It opened the way to Kelsen's so-called late, sceptical[3] period and was re-used – sometimes *verbatim* – in his last *opus magnum*, the *General Theory of Norms*.

In this paper I shall try to re-elaborate and defend some of the basic tenets developed by Kelsen in the "Derogation" article, while trying to solve some of its main inconsistencies. Here are some of the things which, controversial as they may be, I think Kelsen basically got right:

(1) Repeal – or abrogation, or derogation[4] – is a specific, self-standing normative function. It does not prescribe, nor prohibits nor authorizes any behaviour. It suppresses the validity of another norm from the normative system they both belong to.

(2) Normative conflicts are not a matter of logical contradiction. Two conflicting norms may be equally valid in a legal system; therefore, two conflicting normative propositions (*Sollsätze*, descriptive propositions about norms) may be true in the same time[5]. This is a major move by Kelsen away from what he

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3 "Sceptical" should not be understood here as referring to so-called "rule-scepticism", i. e. the thesis according to which rules can never guide behaviour. Although Kelsen has sometimes been understood as somehow paving the way for an interpretation-centred rule-scepticism, it is not what is at stake here – see, on such an understanding, Michel Troper, *La Théorie du droit, le droit, l'Etat*, 2001, 67 ff.; Riccardo Guastini, Rule-Scepticism Restated, in: *Oxford Studies in Philosophy of Law. Volume 1*, ed. Leslie Green / Brian Leiter, 2011, 138 ff.; for a critique, see Christoph Kletzer, Kelsen's Development of the *Fehlerkalkül*-Theory, *Ratio Juris* 18 (2005), 53. The later Kelsen is sometimes dubbed sceptical because of his newfound stance that there are no logical relations between norms (Hans Kelsen, *General Theory of Norms* (trans. M. Hartney), 1991, 189–193), or at least that norms are subject neither to the principle of non-contradiction nor to rules of inference; but as Bruno Celano notes, Kelsen has to grant that at least *some* logical relations between norms may exist (see Bruno Celano, Norm-Conflicts: Kelsen's View in the Late Period and a Rejoinder, in: *Normativity and Norms*, ed. Stanley Paulson / Bonnie Litschewski-Paulson, 1998, 345 ff.).

4 In what follows, I will use all those terms as broadly synonymous. Kelsen himself argues that the classical distinction between abrogation (as total repeal) and derogation (a partial repeal) is mistaken, due to a failure to appreciate the importance of (1). See Hans Kelsen, *General Theory of Norms*, 111–112. Therefore, I will use the three words interchangeably. I must warn at the outset that in my own native language, French, "derogation" does not mean the suppression of a norm, or of the validity thereof, from a normative system; rather it means the creation of an exception in an individual case (as in "accorder une dérogation", which means roughly "*to grant an exception*"). When one uses the word "*dérogation*" in French, it is obvious to any speaker that what is at stake is not a *validity* problem, but rather a momentary non-application of a norm. Since I will argue that what is at stake in most normative conflicts is a matter of applicability and not of validity, I shall make it clear that I will only use "derogation" in the technical meaning defined above, lest I am accused of begging the question by using a French-infested notion of "derogation".

5 Indeed, the downside of this conception is that two conflicting normative propositions (i. e. descriptive propositions about norms) may be true in the same time. Depending on whether normative propositions describe the *norm-content* or the *norm's validity*, such a claim may entail very unfortunate consequences. Kelsen himself does not seem to choose between the two functions of normative propositions, although he only mentions propositions about validity (See Hans Kelsen, *General Theory of Norms*, 164). As Kelsen shows (Hans Kelsen, *General Theory of Norms*, 223) statements about the validity / existence of the conflicting norms are not contradictories: if p = *there is a valid norm to the effect that that it is obligatory that P* and q = *there is a valid norm to the effect that it is forbidden that P*, since $q \neq \sim p$, p and q are not contradictories. Whether such statements of validity amount to statements of fact will not be discussed here (see generally

wrote just two years before in the second edition of the *Pure Theory of Law*: "A conflict of norms is just as meaningless as a logical contradiction"[6]. In "Derogation", Kelsen claims that when two descriptive propositions contradict each other, one of them is false from the outset, whereas in the case of a conflict of norms, both norms are valid until one is repealed – or both are.

(3) Metarules (such as, per Kelsen, *Lex Posterior*[7]) are not logical principles but positive legal norms[8].

And here are the main flaws and shortcomings of Kelsen's new theory:

(4) Kelsen's classification of normative conflicts is clumsy at best. It confuses two distinct problems: the conflict's *scope* (regarding the classes of cases covered by the norm's antecedent) and the conflict's *nature* (regarding the deontic features of the norm's consequent).

(5) More importantly, due to a confused notion of legal validity, Kelsen could not take himself to apply (2) above to conflicts arising between norms of different ranks within the normative hierarchy. Just a few paragraphs after writing that a conflict between two norms does not entail anything about either norm's validity, Kelsen writes that in the case of "unconstitutional statutes" "no conflict exists". This is due to a confusion made by Kelsen (and many others) between validity as membership (of a norm within a legal system) and validity as conformity with higher ranking norms, including those prescribing the procedure by which lower-ranking norms are to be created. More on this later.

(6) Although Kelsen's formulation on this matter is quite ambiguous[9], he seems to believe that the only solution to a normative conflict is through repeal and

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Carlos E. Alchourrón / Eugenio Bulygin, The Expressive Conception of Norms, in: *Normativity and Norms*, ed. Stanley Paulson / Bonnie Litschewski-Paulson, 1998, 383 ff.). On the other hand, if normative propositions describe the norm-content, the description of a normative conflict necessarily yields two contradictory descriptive statements: if p = "it is forbidden to *phi*" and q = "it is not forbidden to *phi*", then p and q are contradictory. The same goes for r = "it is obligatory to *phi*" since $r \rightarrow q$ according to the axiom D of standard deontic logic. Kelsen's new tenet that the principle of non-contradiction does not hold for *norms* entails that it does not hold any more for *descriptive propositions about the content of norms*.

6 Hans Kelsen, *Pure Theory of Law* (2nd ed., trans. Max Knight), 1967, 206; Hans Kelsen, *Reine Rechtslehre*, 1960, 210.

7 For reasons soon to be obvious, Kelsen refers only to *Lex Posterior*, and sets aside *Lex Superior* and *Lex Specialis*.

8 For an overview of Kelsen's shifting positions throughout his lifetime, see Stanley L. Paulson, On the status of the Lex Posterior Derogating Rule, *Liverpool Law Review* 5 (1983), 5–18.

9 Kelsen writes: "The conflict can, but need not be, solved by derogation" (Hans Kelsen, Derogation, 271). There are two ways to understand this sentence: on the first reading, Kelsen means that conflicts can be left unsolved, but that when they are solved, the solution is always derogation; on the second reading, Kelsen means that conflicts can be solved by derogation, but may also be solved through other means. Context indicates that the first interpretation is correct as an exegetical matter – although I will argue that, as a matter of fact, Kelsen should have meant the second one.

that metarules are "norms which regulate derogation" (in the sense of repeal). But this is clearly not the case as a matter of empirical fact. Judges often solve normative conflicts without altering the validity of either norm.

(7) Even if we grant that metarules are "norms which are about derogation" – which I am going to argue is not the case – there still remains an ambiguity regarding what they actually do. On one interpretation, they are (*pro futuro*) *derogating norms*. For instance, *Lex Posterior* means: "whenever a conflict occurs, the prior norm ceases to be valid whenever the posterior norm becomes valid". On another interpretation, they are *norms regulating derogation,* that is, *power-conferring* norms giving some officials (e. g. judges) the power to repeal one of the two conflicting norms (or both).

In this paper, I will try to vindicate propositions (1)–(3) while showing that most of the shortcomings of (4)–(7) can be avoided. Throughout, my claims will not be exegetical in nature; my aim is to offer a conceptual and critical reconstruction of Kelsen's later views, by trying to build a coherent picture of normative conflicts on what I believe are correct intuitions on Kelsen's part.

My main claim is that normative conflicts are a matter of applicability, not validity, and that metarules are not norms of derogation but norms of (in)applicability, even if some legal systems *also* empower certain law-applying organs to repeal one of the conflicting norms (or both). The paper is comprised of four parts. In the first part, I will propose a tentative and incomplete classification of normative conflicts; in the second part I will try to adumbrate the distinction between validity and applicability; in the third part, I will show that metarules are norms of applicability, beginning with Lex posterior. This claim vindicates Kelsen's intuition that *Lex Posterior* is a positive law norm and not a logical principal and in the same time rebuts his tenet that the only way to deal with normative conflicts is through derogation. In the last part I will try to show that the same holds for *Lex Superior*, against Kelsen's clear and trenchant claims to the contrary.

I. Types of Normative Conflicts

Let us assume that legal norms (and perhaps other norms as well) are conditional norms. A conditional norm has the following structure: a factual antecedent specifying the norm's *scope*, that is, the properties of the generic or individual case regulated by the norm; a normative consequent (or as Alchourrón and Bulygin would put it, a *normative solution*), prescribing the behaviour to be adopted when the antecedent is instantiated; and between the two a logical link (a conditional) which I will leave

non-specified[10]. In that perspective, categorical norms are conditional norms whose antecedent is T, i. e. whatever tautology. This presentation of legal norms as conditional norms[11] leaves unanswered the question of the individuation of norms. I shall not try to defend any theory of norm-individuation here.

A crucial distinction has to be made between, on the one hand, the nature of a normative conflict, i. e. the ways two norms may conflict with each other, and, on the other hand, the scope of the normative conflict, i. e., the classes or subclasses or cases in which the conflict actually occurs.

A. Contradiction, contrariety, incompatibility

The conflict occurs when the normative consequents of both conflicting norms cannot be applied in the same time. Contrary to a persistent misconception, the criterion of a normative conflict is not that both norms cannot be *obeyed* at the same time[12]. As a matter of fact, what I will call normative contradiction is about two conflicting norms which can both be obeyed. However, they cannot both be applied in the same timeby law-applying organs: a law-applying organ cannot use both norms to justify its decision. If we were to say that norms conflict only when they fail to motivate behaviour, we would reduce norms to motivational reasons. Here I will primarily take norms as providing justificatory reasons for action. If you disagree with that, it does not matter terribly, since it is rather a side issue for the present purposes.

There are three kinds of normative conflicts[13].

The first kind of normative conflict can be called *normative contrariety*. In such a case, the conflict involves two normative solutions with the same deontic operator and opposite internal negations: for instance, *OA* (it is obligatory to do A) and *O~A* (it is

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10 Here I will not elaborate on the problems that representing that link as the material implication (whether internal or external) creates (see on this Mathieu Carpentier, *Norme et exception. Essai sur la défaisabilité en droit*, 2014, 92–106). Neither will I ask here whether normative conflicts – and, more specifically, the kind of normative conflict which is called in the literature "defeasibility" – call for a specific, defeasible conditional. On this, see for instance, Mathieu Carpentier, *Norme et exception*, 268–281. For the present purposes, I shall assume that all these problems have already been settled, one way or another.

11 Which is endorsed by Kelsen himself, see Hans Kelsen, *Pure Theory of Law*, 100.

12 A pathbreaking analysis in this respect is H. Hamner Hill, A functional taxonomy of normative conflict, *Law and Philosophy* 6 (1987), 227 ff.

13 This typology borrows a lot from H. Hamner Hill (footnote 12), and also Stephen Munzer, Validity and Legal Conflicts, *Yale Law Journal* 82 (1973), 1041–1043 and Risto Hilpinen, Normative conflicts and Legal Reasoning, in: *Man, Law and Modern Forms of Life*, ed. Eugenio Bulygin / Jean-Louis Gardies / Ikka Niiniluoto, 1985, 195). However, neither Munzer nor Hilpinen consider what I call normative incompatibility, and they both write about normative subcontrariety (PA and P~A) which does not strike me as involving a genuine normative conflict (which Hilpinen candidly acknowledges). The very distinction between normative contrariety and contradiction, which I share with Hilpinen and Munzer, can already be found in Jeremy Bentham, *Of Laws in General*, 1970, 110–111.

obligatory not to do A), which is the same as ~*PA*. Those solutions are *deontic contraries*. In such a case, both norms cannot be obeyed in the same time[14].

The second kind of normative conflict can be called *normative contradiction*: here again we have two normative solutions with the same deontic operator but opposite external negations: for instance, OA (it is obligatory to do A) and ~OA (it is not obligatory to do A), which is the same as P~A. Obviously such a conflict does not involve a motivational conflict. One can obey both norms, simply by doing A. You cannot be said to have disobeyed a norm which permits you not to help your neighbour if you do in fact help your neighbour, unless, of course there is also a norm forbidding you to help your neighbour, which *ex hypothesi* is not the case here (if it were we would have a case of normative contrariety, not contradiction). So, both norms can be obeyed. However, both norms cannot simultaneously justify one's behaviour. If a norm forbids you to steal and another one authorizes you to steal, a judge who has to apply both is faced with a genuine dilemma.

The third kind of normative conflict can be called normative *incompatibility*[15]. It involves two actions A and B which can only be described by two incompatible propositions. Two propositions *p* and *q* are incompatible if and only if they cannot both be true, but they can both be false: *p* and *q* are incompatible *iff* $p \wedge q$ is always false and it is false that $\sim(\sim p \wedge \sim q)$. It means that although $p \rightarrow \sim q$ and $q \rightarrow \sim p$, it isn't the case the $p \leftrightarrow \sim q$ nor that $q \leftrightarrow \sim p$, because it is not the case that $\sim p \rightarrow q$ nor that $\sim q \rightarrow p$. Two actions can be called incompatible if they can be described by two incompatible propositions. For instance: *it is obligatory that all houses are entirely paint in white* and *it is obligatory that all houses are entirely paint in blue*. Such norms are incompatible. Normative incompatibilities break into two distinct subclasses, according to the kind of deontic operator at stake. For any two incompatible actions A and B, there is a normative contradiction-incompatibility when OA and PB (or ~O~B) and there is a normative contrariety-incompatibility when OA and OB.

What is the point of distinguishing normative incompatibility (and its two subclasses) from normative contradiction and contrariety? When two actions A and B are incompatible, it is not the case that $\sim A \rightarrow B$ (and vice versa). Therefore, even though

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14 According to Lars Lindahl, Conflicts in Systems of Legal Norms: A logical point of View, in: *Coherence and Conflict in Law*, ed. Bob W. Brouwer / Ton Hol / Arend Soeteman / Willem van der Velden / Arie de Wild, 1992, 39, only normative contrarieties are genuine normative conflicts since only them cannot be simultaneously obeyed. But as I have hinted, I will consider normative conflicts as involving not only conflicting motivations, but also, and mainly, conflicting normative justifications. I would add that what some normative incompatibilities (see *infra*) also involve conflicting motivations.

15 Such cases are not to be confused with what Uta Bindreiter calls "normative incompatibility", which is what happens when obeying simultaneously both norms is materially possible but is morally – or otherwise normatively – subject to blame. (See Uta Bindreiter, *Why Grundnorm?*, 2000, 139–141). Bindreiter also refers to what he calls empirical incompatibility, when there is an empirical impossibility to perform both actions: for instance: *you ought to work from noon to midnight*; *you ought to work from midnight to noon*. Neither cases are normative conflicts for the purpose of this paper.

A→~B, O~A^O~B is not a normative conflict, whereas O~A^O~~A *is* a normative conflict: it is a normative contrariety. If it is forbidden to paint one's house in white and not to paint one's house in white, we have a normative contrariety; if it is forbidden to paint one's house in white and to paint one's house in blue, there is no normative conflict whatsoever. Just paint your house in pink or in purple.

This triple (or even quadruple) distinction between contrariety, contradiction and incompatibility is indeed schematic. It does not account for a certain type of normative conflicts which are not predicated on the classical deontic modalities (permission, prohibition, obligation). For instance, it does not prove useful in case of a conflict between two power-conferring norms[16].

B. The Scope of Normative Conflicts

Normative conflicts do not always occur in all cases. They occur *modulo* the facts specified in the norm antecedent. Therefore, conflicts differ in their *scope*.

Here I will use (and marginally modify) Alf Ross' famous classification of normative conflicts in *On Law and Justice*[17]. He distinguishes between three kinds of conflicts in what concerns their scope.

The first kind is what Ross calls *total* (or, more precisely, *total-total*) conflicts, when the sets of cases X and Y regulated by both norms are identical. For instance: *for every x, if x is a vehicle, it is forbidden for x to enter the park; for every x, if x is a vehicle, it is permitted for x to enter the park.*

The second kind is what Ross calls *total-partial* conflicts, when the set of cases X regulated by one norm is a subset of the set of cases regulated Y by the other. The conflict occurs only when an instantiation of X obtains, and not when other cases belonging to Y but not to X obtain. For instance, *for every x, if x is a vehicle, it is forbidden for x to enter the park; for every x, if x is an on-duty ambulance, it is permitted for x to enter the park.*

The third kind is what Ross calls *partial* (or, more precisely, *partial-partial*) conflicts when the set of cases X regulated by one norm intersects with the set of cases Y regulated by the other norm (a non-normative example of such a conflict is the famous Nixon Diamond used in most systems of non-monotonic logic). The conflict occurs only when an instantiation of X∩Y occurs; it does not in other instantiations or X nor

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16 See for instance what Lindahl and Reidhav call "capacitative conflicts" (Lars Lindahl and David Reidhav, Conflict of Legal Norms: Definition and Varieties, in: *Logic in the Theory and Practice of Lawmaking*, ed. Michał Araszkiewicz / Krzysztof Płeszka, 2015, 49 ff.).

17 Alf Ross, *On Law and Justice*, 1958, 129. For a recent formalisation of Ross's taxonomy, see Abdullatif Elhag / Joost Breuker / Bob Brouwer, On the Formal Analysis of Normative Conflicts, in: *Legal Knowledge Based Systems (JURIX '99)*, ed. Jaap van den Herik, 1999, 37–38.

Y. To borrow an example from Jorge Luis Rodriguez[18]: *if the light is red, one should stop one's vehicle; if one is driving through a military zone, one should not stop one's vehicle*.

This classification seems correct. I will add a caveat however. In cases of *partial-partial conflicts*, no specificity-based criterion of conflict-resolution (such as *Lex Specialis*) can be used, because none of the conflicting norms is "more special" than the other. Or so Ross claimed[19]. It is however a bit more complicated than that. In most legal systems, what seems to be a *prima facie* partial-partial conflict will often be transformed in *total-partial conflict* due to certain (conscious or unconscious) interpretative assumptions. Consider the two following norms. N1: *For every x, if x wilfully causes the death of another human being, x shall be punished with thirty years in prison.* N2: *For every x, if x is suffering from a psychological disorder and commits a crime, x shall not be punished.* Now it seems that what we have here is a partial-partial conflict, which cannot be solved using *Lex Specialis*. However, most lawyers share an interpretative assumption of *specificity* which operates in favour of N2. Either they presuppose an additional norm N3: *whoever commits a crime shall be punished,* in which case there is a total-partial conflict between N2 and N3; or they conceive N2 as being not a single norm, but the sum of a great number of specific norms, such as N2': *For every x, if x is suffering from a psychological disorder and commits murder,* N2'': *For every x, if x is suffering from a psychological disorder and commits theft, etc.,* in which case there is a total-partial conflict between N2' and N1.

This is why *Lex Specialis* applies even in cases where the conflict at hand looks like a partial-partial one, due to some specificity assumption.

C. What About Kelsen's Own Classification?

In "Derogation"[20] and in *General Theory of Norms*[21], Kelsen worked out a theory of normative conflicts which rests on a specific typology. Conflicts are distinguished according to whether they are "necessary" or "possible", "bilateral" or "unilateral", and "total" or "partial". I have criticized this classification elsewhere, and I will not rehearse my arguments here[22]. Suffice it to say that it is riddled with confusions, insofar as it fails to distinguish between the nature of a conflict and the scope thereof.

For instance, the notion of a necessary conflict rests on considerations about the conflict's scope: a conflict is necessary when it occurs in every case, whereas it is

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18 Jorge Luis Rodríguez, Contradicciones Normativas. Jaque a la concepción deductivista de los sistemas jurídicos, *Doxa* 17/18 (1995) 372.
19 Alf Ross, *On Law and Justice*, 131.
20 Hans Kelsen, Derogation, 269
21 Hans Kelsen, *General Theory of Norms*, 123 ff.
22 See Mathieu Carpentier, *Norme et exception*, 228–230.

merely possible when it occurs only on some cases. The notion of a bilateral conflicts deals with the presence of a conflict "on the side" of the norm: in what Ross calls a total-partial conflict, the conflict is necessary on the side of the special norm, and merely possible on the side of the general norm. The problem with such a classification is that what Kelsen calls an "unilateral" conflict is not a conflict at all. His example of such a "conflict" is the following: "Norm 1: Murder is to be punished by death, if the murderer is over 20 years of age. Norm 2: Murder is to be punished by death, if the murderer is over 18 years of age". There is no conflict on the side of Norm 1, but according to Kelsen there is a possible conflict on the side of Norm 2 (since Norm 2 may entail the punishment of a 19-year-old murderer for instance). Whatever problems are raised by the formalization of conditional norms, it is common ground that the antecedent of a norm is a *sufficient* condition of the realization of the consequent. But Kelsen's notion of a unilateral conflict rests on a more robust conception of conditional norms, which is predicated on the antecedent being a *necessary* condition as well. There is a conflict between Norm 1 and Norm 2 only if Norm 1 is reinterpreted as "Norm 1a: Murder is to be punished by death, *if and only if* the murderer is over 20 years of age". Norm 1a implies Norm 1b: "If it is not the case that the murderer is over 20 years of age, then murder is not to be punished by death" which then (and only then) conflicts with Norm 2. It is what Ross calls a partial-partial conflict, since the class of cases about murderers over 18 intersects with the class of cases about murderers under 20. But if Norm 1 expresses only a *sufficient* condition, there is no conflict since the *same* normative solutions is applied to two classes of cases one of which is included in the other. There is no conflict between Norm 1 and Norm 2, not any more than between Norm 3: "If one owns farm animals, one ought to pay a tax" and Norm 4: "If one owns a cow, one ought to pay a tax".

To sum up: Kelsen's classification of conflicts is flawed; hence I will use the classification elaborated above instead of Kelsen's, however partial and incomplete it may be.

II. A Few Words on the Validity / Applicability Distinction

It is well known that Kelsen defines validity as the specific mode of existence of norms[23]. This definition rests on an assimilation of the norm's *existence* with its *bindingness*. There exists a norm to the effect that one ought to φ if and only if it is the case that one

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23 On this, see (among an extensive literature), Dick W. P. Ruiter, Legal validity qua specific mode of existence, *Law and Philosophy* 16 (1997), 479–505; Carlos S. Nino, Confusions surrounding Kelsen's concept of validity, in: *Normativity and Norms*, ed. Stanley Paulson / Bonnie Litschewski-Paulson, 1998, 255 ff.; Andras Jakab, Problems of the *Stufenbaulehre*. Kelsen's Failure to Derive the Validity of a Norm from Another Norm, *Canadian Journal of Law and Jurisprudence* 10 (2007), 35–68. A very clear introduction can be found in Clemens Jabloner, Der Rechtsbegriff bei Hans Kelsen, in: *Rechtstheorie: Rechtsbegriff – Dynamik – Auslegung*, ed. Stefan Griller / Heinz Peter Rill, 2011, 24 ff.

ought to φ. A norm's existence coincides with the duty to obey it. Such a conception of validity may be labelled a *strong* conception of validity. It can be contrasted with a *weak* notion of validity which treats validity as a matter of *membership* of a norm within a normative system. According to the weak conception, a norm exists only if it belongs to a normative system. A legal norm exists if and only if it belongs to a legal system. The notion of membership is useful insofar as it has no stakes in the ontological question of what makes a norm exist *qua* norm. In that sense, legal validity, understood as membership within a legal system, is what endows a norm with its legal character – i. e. what makes it exist *qua law* –, regardless of what makes it exist *qua norm* in the absolute. It answers the question: why is it the law that one ought to φ? And it sets aside the quite trickier question: what makes it the case that one ought to φ? On the weak conception, a legal system uses a set of criteria of membership which will be picked out by a specific rule or set of rules. This is roughly the Hartian notion of a rule of recognition, and it is quite remote from the Kelsenian conception of validity as *bindingness* (although Kelsen occasionally comes close to using "validity" in the weak sense[24]).

On the weak conception, derogation is merely about the suppression of a norm's membership, and it does not bear on other dimensions of what is usually called "validity". Indeed, a weak notion of validity allows us to distinguish membership from applicability.

The notion of applicability in contemporary jurisprudential literature (flowing mainly from Eugenio Bulygin's seminal work[25]) is a reinterpretation of the notion of bindingness, severed from the membership dimension of normative validity. The applicability of a legal norm is to be understood as the duty (or power) that a law-applying organ has to apply it. As Bulygin has shown, a norm's applicability is contingent on the legal system containing norms of applicability, i. e. norms which regulate the way other norms ought to be applied. Such norms of applicability regulate not only norms of the legal system but norms belonging to other normative (not necessarily legal) systems as well. Norms of applicability come in various types. They may be general norms meant to be applied to a vast range of norms: for instance, the *nullum crimen* principle and the principle of retroactivity *in mitius* are such general norms of applicability. They also may be particular norms regulating the applicability of a specific norm or set of

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24 For instance, Kelsen writes: "Why does a certain norm belong to a certain order? And this question is closely tied to the question: Why is a norm valid, what is the reason for its validity" (Hans Kelsen, *Pure Theory of Law*, 193). In the German original text: "warum gehört eine bestimmte Norm zu einer bestimmten Ordnung? Und diese Frage steht in einem engen Zusammenhang mit der Frage: Warum gilt eine Norm, was ist ihr Geltungsgrund?" (Hans Kelsen, *Reine Rechtslehre*, 196). However, Kelsen is clear that "closely tied" is not the same as "equivalent". And in the following paragraph, Kelsen does equate validity with bindingness (*Verbindlichkeit*).

25 See mainly Eugenio Bulygin, Time and Validity, in: *Essays in Legal Philosophy*, ed. Carlos Bernal et al., 2015, 171–187.

norms: for instance, the section of a statute which deals with the statute's own "entry into force".

Applicability thus understood is a kind of bindingness. In order to grasp the difference between applicability and membership, we can go back to the Ross/Kelsen debate on validity. As Alf Ross showed in a famous article[26], a distinction must be made between a legal norm's bindingness and a legal obligation. For instance, legally you may not kill or steal. Legally a judge may not refuse to adjudicate a matter brought before her. Those are legal statements, referring to legal obligations (or rather prohibitions). Bindingness, on the other hand, must be understood as a duty to obey. As Ross astutely noticed, there is no legal obligation to obey the law. There only is a legal obligation or permission to φ. This is why Ross dismissed Kelsen's conception of validity as bindingness as hopelessly infected with some natural law disease. An obligation to obey the law cannot be legal; it must be a moral obligation.

As Bulygin observed[27], the nexus of Ross's objection to Kelsen's notion of validity is that it ultimately rests on an absolute conception of bindingness: absolute bindingness means that a norm is binding on its own (moral) merits. However, the notion of applicability reveals a thoroughly relative conception of bindingness, which allows for a specifically legal kind of bindingness: courts are vested with a duty (or at least a power) to apply legal norms, which is grounded in other legal norms, which Bulygin calls norms of applicability. When we say that laws are binding on judges we do not mean that they have a duty to obey, but rather a duty to apply. Legal norms are legally binding when a certain set of officials is under the duty to apply them. This kind of bindingness is strictly legal, since it is predicated on the existence of a specific set of legal norms.

The distinction between membership and bindingness understood as applicability[28] is not necessarily incompatible with Kelsen's general outlook since it does not say anything about the question of absolute bindingness. And it is able to account for legal complexities that the mere identification of validity with bindingness cannot allow. For instance, it allows us to account for situations where applicability and membership are somehow disjoined. In cases of *vacatio legis*, the norm belongs to the legal system (which is proven by the fact that normative operations such as amendment or derogation are possible in the interim) but it is not yet applicable: though it is not

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26 Alf Ross, Validity and the Conflict between Positivism and Natural Law, in: *Normativity and Norms*, ed. Stanley Paulson / Bonnie Litschewski-Paulson, 1998, 153.

27 Eugenio Bulygin, The Problem of Legal Validity in Kelsen's Pure Theory of Law, in: *Essays in Legal Philosophy,* ed. Carlos Bernal et al., 321.

28 I have raised doubts about this distinction in Mathieu Carpentier, Validity versus Applicability: a (Small) Dose of Scepticism, *Diritto & Questioni Pubbliche*, 18 (2018), 107–132. However, my doubts do not as much bear on the correctness of the conceptual distinction itself as they are concerned with the poor heuristic value of the notion of "mere membership".

quite normatively inert[29] in the meantime, judges and other officials have no duty to apply them. This shows that membership is not a sufficient condition of applicability. Conversely, it is not a necessary condition either: a judge is sometime bound to apply a foreign legal norm when a choice-of-law rule directs her to do so. And in cases of normative post-activity, a judge is sometimes bound to apply a norm to a set of cases which occurred *after* the removal of the norm from the legal system.

III. Metarules as Norms of Applicability

My claim in the present paper is that metarules are norms of applicability. I will first show it using the very metarule Kelsen focuses on: *Lex posterior*. Following the distinction sketched out in (7) above, I will try to show that *Lex posterior* is neither a *pro futuro* derogating norm, nor a power-conferring norm regulating derogation.

A. Meta-rules are not pro futuro derogating norms

Derogation is a central feature of legal systems. A legal authority could not properly discharge her job or fulfil her function if she were not able to cancel past pronouncements made by her predecessors or by herself. It would be difficult to conceive a legal system close to the ones we know, and work with, that would not have such a feature. Derogation is a specific normative function, as Kelsen pointed out. A derogating norm has the sole effect of removing the norm from the legal system; that is, because the legislature enacted the relevant norm, a previous norm disappears from the legal system. Derogation is what allows a legal system to change; it is a function of what Hart called the "rules of change" of a given legal system[30], which empower lawmakers to repeal earlier las and to make new ones.

It is tempting to think that this is the kind of process which is captured by the maxim *Lex posterior derogate a priori*[31]. However, I will argue that Lex Posterior captures another kind of situation. Indeed, it should be stressed out that there is *no conflict* between a derogating norm and the norm it derogates. If Lex Posterior is to play the role of a metarule allowing officials to solve a normative conflict that, it makes no sense to argue that it should be used when a norm derogates another. On the contrary, Lex Posterior, *qua* metarule, deals with situations where a norm is neither a derogating norm,

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29 Mathieu Carpentier, Validity versus Applicability: a (Small) Dose of Scepticism, 122.

30 On which see *infra*.

31 See e. g. Jörg Kammerhofer, *Uncertainty in International Law*, 2011, 157–158: "it seems obvious how the problem of change is a problem of norm-conflict, what is being argued is the reverse, namely that change in law presupposes the lex posterior maxim".

nor a compound of norms one of which being a derogating norm, yet it conflicts with a previous norm of the legal system[32].

From here, one of the easiest moves is to claim that Lex posterior itself is a derogating norm: whenever two norms conflicts, Lex posterior derogates the prior norm. This is the view Kelsen seems to espouse, both in "Derogation" and in the *General Theory of Norms*: derogation is "the function of (…) a positive legal norm; this norm [*Lex Posterior*] is not one of the two conflicting norms but a third norm which specifies that one of the two conflicting norms loses its validity, or that both norms lose their validity"[33]. This view leads to a theory of implied repeal. Due to norm A (*Lex posterior*), whenever norm B conflicts with posterior norm C, then B is not valid, and is thereby repealed whenever C becomes valid[34]. When we say that C impliedly repealed B, what we mean is that B is repealed by Lex posterior itself.

Kelsen maintains that this a matter of positive law, not logical truth. He is right in that respect. However, this picture is not without problems in other respects.

First, it happens that metarules conflict one with another. Whenever the posterior norm is more general than the earlier norm, there is a conflict between *Lex posterior* and *Lex specialis*[35]. For instance, let us suppose that, due to norm N1, vehicles have permission to enter the park between 6PM and 6AM, and they are forbidden to do so between 6AM and 6 PM. Then, let us say that a norm N2 is enacted to the effect that ambulances on duty are allowed in the park at all times and that a few months later a norm N3 is enacted to the effect that N1 is derogated and vehicles are banned from the park at all times. Does Lex posterior or Lex specialis apply? Which of these two metarules ought to prevail? It is plain that N3 derogates N1 insofar as N1 permits cars

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32 This I take to be Kelsenian orthodoxy. See Hans Kelsen, *General Theory of Norms,* 108. See also on the same idea Giovanni Battista Ratti, Negation in Legislation, in: *Logic in the Theory and Practice of Lawmaking*, ed. Michał Araszkiewicz / Krzysztof Płeszka, 2015, 147, who accepts this picture but admits that "it is interesting to observe that, strictly speaking, no act of derogation is carried out here".

33 Hans Kelsen, *General Theory of Norms,* 125 (see also Hans Kelsen, Derogation, 273).

34 Kelsen would accept, I think, that this picture is oversimplified. Norm B may remain applicable however repealed by C if C is due for entry into force at a later date. But it does not affect the basic point made by Kelsen here.

35 In cases of total-partial conflicts Lex specialis seems particularly well suited to resolve the conflict, for instance by creating an *exception*. It may seem strange to claim that creating an exception derogates, that is repeals, the rule from which it is excepted; in other words, it seems strange to conceive Lex specialis as a derogating norm. However, it is plain that if Lex Specialis is a derogating norm, it is only insofar as it derogates the general norm *pro tanto*. What is derogated from the legal system is not the defeated norm, but som" *logical consequence* of that norm (on the idea of legal systems are deductively closed, insofar as they comprise not only valid norms but also the logical consequences thereof, see Carlos E. Alchourrón / Eugenio Bulygin, *Normative Systems,* 1971, 185; Carlos E. Alchourrón / Eugenio Bulygin, *Análisis lógico y Derecho*, 1991, 129, 163, 219…). In the context of a discussion of defeasibility and implicit exceptions, J. Ferrer Beltran and G. B. Ratti have recently made a case for this notion of exception as pro tanto derogation (see Jordi Ferrer Beltran, Giovanni Battista Ratti, Validity and Defeasibility in the Legal Domain, *Law and Philosophy* 29 (2010), 601–626). I will not have the time to study this theory in detail; suffice it to say that I intend to defend a contrarian view in the present paper.

to enter the park between 6AM and 6PM. But does N3 "implicitly" (or "impliedly") derogates N2 as well? (to reformulate: does *Lex Posterior* derogates N2 as well?) Or is it the case that N2 is still valid, and that N3 is "impliedly" derogated by Lex specialis insofar as it prohibits ambulances on duty? If both metarules are derogating norms[36], this conflict of metarules entails that N2 and N3-insofar-as-it-covers-ambulances are both valid and invalid. This seems rather unfortunate. On the other side, the idea of a conflict of norms of applicability is much more appealing since it is common-sensical that a judge can be subject to two conflicting duties.

Another defect with the view of metarules as derogating norms is that in such a conception metarules (that is, per Kelsen, mainly Lex Posterior) play the same role in the positive law conception of normative conflicts than in the logical conception, which Kelsen once espoused before rejecting it at a later stage, as proposition (2) above has shown. Under the logical conception, when two norms conflict, it is impossible that both be valid in the same time, so it must be the case that one of them ceases to be valid. So if Kelsen's new stance is that although it is not a logical necessity, it is always the case that a normative conflict produces derogation as all legal system *have* a Lex posterior metarules as part of their positive law, one cannot see clearly what is gained in Kelsen's new view and why it should be deemed ground-breaking. Once we distinguish between membership and applicability, we can understand how a norm may cease to operate due to some normative conflicts without being forced to draw the conclusion that it stops belonging to the normative system.

A third defect is that such a conception of metarules in general, and Lex Posterior in particular, does not fit with some of our basic intuitions about what is commonly called – in UK law for instance – "implied repeal", which, it turns out, is not about repeal at all. The very fact that judges use Lex Posterior shows that there is a conflict in the first place, and that the conflict has not been pre-emptively solved by an implicit repeal. If there is a conflict to be solved, then there is a conflict in the first place. Moreover, if there is a conflict between N1 and N2 (N2 having been enacted at a later time than N1) and if N2 is itself repealed by a subsequent repealing norm N3, then the earlier law N1 becomes applicable again, without any further act from the lawmaker[37] (whereas in cases of derogation, it is commonly admitted that the derogation of a derogating norm does not reinstate the norm that was derogated in the first place). Interpreting that repealing norm, to wit N3, as not only abrogating N2, but also as somewhat implicitly "re-enacting" N1 seems quite a heavy price to pay. Therefore, Lex Posterior is best un-

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36 I set aside the hypothesis that Lex specialis and Lex posterior do not discharge the same function. I will say more about this at the end of this paper.

37 As Jeffrey Goldsworthy (who writes about the UK doctrine of implied repeal) puts it : "The inconsistent provisions of the earlier statute are not, as it were, expunged from the statute book: if the later statute were to be formally repealed, the earlier one should be fully revived" (Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates,* 2010, 289).

derstood as a norm of applicability directed at legal officials, and mainly law-applying organs. It directs officials not to apply the earlier of two conflicting norms.

One last point. As Kelsen observed[38], in some legal systems Lex Posterior coexists with Lex Prior, according to which the earlier of the two conflicting norms is repealed in case of a conflict. For instance, in the UK, the doctrine of "constitutional statutes" asserts that when a statute is of constitutional significance, the doctrine of implied repeal cannot be used to solve conflicts with later statutory norms. Instead, the courts ought to disapply posterior statutory norms which conflict with constitutional statutes insofar as they clash with them[39]. But it would make little sense to claim that the later norm is repealed in the process, unless we are ready to be committed to the idea of a norm's *nullity* (rather than its annullability): the later norm would then never exist in the legal system, even though it was duly passed and enacted. This is not a conceptual impossibility, but it does sound counter-intuitive. Indeed, if the idea of Lex posterior as a derogating rule is attractive, it is because of the intuition I mentioned in the beginning of the present section: a future legislator must be able to change past legislation. As there is "explicit repeal", there should be "implied" repeal when none of the conflicting norms are derogating norms. But as soon as we notice that Lex prior cannot be reasonably described as operating this way, we can have doubts about the derogating function of Lex posterior itself.

B. Meta-rules are not power-conferring norms regulating derogation

As we saw in (6) there is another option on the table: we can analyse metarules as rules regulating derogation. On such a conception, meta-rules are norms empowering a certain subset of officials to repeal whichever of the two conflicting norms is defeated. Let us examine this view in further detail.

First, a basic distinction between law-creating and law-applying organs should be assumed[40]. Such an assumption will not be disputed here, however debatable it may be. There is no doubt that law-creating organs are empowered to derogate earlier norms. That's part of the very notion of normative empowerment. But again, Lex Posterior, and metarules in general, do not apply to derogating norms enacted by the lawmaker

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38 Hans Kelsen, *General Theory of Norms*, 126.

39 See the opinion by Lord Justice Laws in *Thoburn v. Sunderland City Council*, [2002] EWHC 195 (Admin). This doctrine has recently been espoused by the Supreme Court: see *H v. The Lord Advocate*, [2012] UKSC 24; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, [2014] UKSC 3. See also, for an audacious use of the notion of "constitutional statutes" (although it does not concern the implied repeal doctrine) *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5.

40 See on this distinction Paolo Sandro's important new book, *The Creation and Application of Law: A Neglected Distinction*, 2020 (forthcoming).

itself: it is agreed that law-creating organs are empowered to repeal norms from the legal system, because it is what lawmakers do.

In the view discussed here, law-applying organs, which have to deal with normative conflicts, are empowered to repeal the norm which is defeated due to the application of a meta-rule, sometimes with retroactive effect. Thus understood, meta-rules empower judges and other officials to derogate, that is suppress the norm from the legal system.

I am not sure such an interpretation is consistent with what Kelsen has to say about Lex posterior. However, as we shall see in the next section, the idea that one of the conflicting norms is resolved through derogation by a certain organ *other than* the lawmaker is essential in the way Kelsen deals with conflicts (or, according to Kelsen, the absence thereof) arising between lower- and higher-ranking norms.

For now, suffice it to say that the claim that normative conflicts are necessarily solved through derogation of either conflicting norms by the law-applying organ does not square well with the common conception of law-application. Removing a norm from a legal system is not normally part of the job a law-applying organ. Such is rather the lawgiver's task. The distinction between membership and applicability allows us to understand what happens when a judge resolves a normative conflict: meta-rules do not as much direct her to remove the norm from the legal system (which is a matter of membership) as they empower her to disapply the defeated norm.

Of course, further power-conferring norms, which are not identical to metarules themselves, may empower the law-applying organ to resolve the conflict through derogation. But it is by no means a conceptual necessity. It is contingent on the existence of further norms within particular legal systems. The default option available to judges and other law-appliers is the use of metarules which are merely norms of applicability. Of course, as Kelsen claimed throughout his later writings, the existence of meta-rules themselves *is* a contingent matter, since it is thoroughly dependent on positive law. However, from a conceptual point of view, it makes much more sense to claim that metarules are norms of applicability rather than norms regulating derogation, given that they are to be used by law-appliers rather than by law-creators. Besides, although it is true that no metarule expresses a logical law, it is necessarily[41] the case that a legal system should at least comprise one metarule, whatever it is. Judges and other officials are always bound to be faced with normative conflicts, and necessarily at least one metarule will emerge, if only by way of custom. Sometimes they will also be empowered to derogate norms, but that is quite distinct from applying Lex posterior or Lex specialis.

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41 This may not be a logical or conceptual kind of necessity. A weaker conception of necessity (e. g. material, or natural, necessity) will suffice for the present purposes.

IV. And the Same Goes for Lex Superior

Until now, I have talked of metarules in the abstract, although my main example was Lex posterior. A special case seems to be *Lex superior*. On Kelsen's view, Lex superior is not a meta-rule proper, it is rather a structural feature of every legal system. In other words, the reason why Kelsen never pays attention to Lex Superior is that he is still committed to the logical conception of it: Lex superior as a logical principle is precisely what Kelsen means by legal dynamics. In any legal system a norm is valid if and only if it has been created according to the procedure set out in a higher-ranking norm.

In this fourth and last section I intend to claim that Kelsen should have bitten the positive-law bullet; he should have acknowledged that Lex superior is no more a logical principle of legal systems than Lex posterior ever was. In other terms, he should have realized that Lex superior is a meta-rule like any other, and that it has no bearing on the conflicting norms' membership, but only on their applicability.

A. The Problem of Unlawful Law

The problem of unlawful law is as old as legal philosophy itself[42]. Hobbes famously pronounced that no law may be deemed unlawful since all law derives from the sovereign. Modern constitutionalism grappled with this problem, never to completely solve it. If law is to be the expression of the sovereign (even more so in case of a popular sovereign), it cannot be circumscribed by legal limits: the sovereign cannot bind itself. However, modern legal doctrine during after the French and American Revolutions evolved a series of conceptual tools[43] which allowed to solve this paradox – or so it was claimed.

The notion of unconstitutional statutes, and, more generally, of unlawful law, created a different kind of problem for Kelsen, and for other members of the Vienna School as well[44]. The paradox is well known: if a norm is valid, then its creator must *ex hypoth-*

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42 See generally Paulo Sandro, Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law, in: *Legal Validity and Soft Law,* ed. Pauline Westerman / Jaap Hage / Stephan Kirste / Anne-Ruth Mackor, 2018, 112 ff.

43 Such as the *pouvoir constituant vs. constitué* distinction by Sieyès (on which the best analysis remains Carl Schmitt, *Verfassungslehre*, 1928, 98 ff.).

44 See Christoph Kletzer, Kelsen's Development of the *Fehlerkalkül*-Theory, 46 ff.; Jörg Kammerhofer, *Uncertainty in International Law*, 189 ff.; Johannes Buchheim, Fehlerkalkül als Ermächtigung? Kelsens Theorie des Rechts letztverbindlicher Entscheidungen vor dem Hintergrund von H. L. A. Harts Rechtstheorie, *Rechtstheorie* 14 (2014), 59–78; Thomas Hochmann, Les théories de la "prise en compte des défauts" et de l'"habilitation alternative", in: *Un classique méconnu: Hans Kelsen*, ed. Thomas Hochmann / Xavier Magnon / Regis Ponsard, 2019.

esi have been empowered to take such a norm[45]. Therefore, if a norm is valid it cannot – as a matter of logical principle – conflict with higher-ranking norms, since its very conformity with higher-ranking norms grounds its legal validity. The logical conclusion is that whenever a conflict occurs between two norms whose rank in the normative hierarchy is different, the conflict is only apparent. This conclusion is paradoxical insofar as unconstitutional statutes do not look like they are logical incompatibilities. If they were, one could hardly understand why Kelsen would (rightly) be celebrated as the creator of European-style constitutional courts[46]. If unconstitutional norms were a logical impossibility, that is if unconstitutional norms were null *ab initio*, there would be no need for a special organ empowered to remove them from the legal system. Only if unconstitutional statutes are valid in the first place is such an organ necessary. And, of course, Kelsen rightly endorsed the idea that legal norms are not null, insofar as they are only annullable[47].

It is well known that Kelsen solved this paradox by developing a theory of alternative authorisations. The basic idea is that a Constitution does not only comprises norms empowering the legislature to legislate in such-and-such manner. The Constitution also contains an "alternative" clause which empowers the legislature to act as it sees fit. Whenever the legislature (for instance) passes a statute that conflicts with a constitutional norm, this statute must be deemed consistent with the alternative authorization, which is why it *is* valid. It is valid insofar as, though conflicting with a constitutional norm, it conforms with an alternative constitutional norm which empowers the legislature to pass this statute. This is a strange idea, after all: a constitution is meant to be a frugal menu, not an all-you-can-eat buffet. If the Constitution creates a special procedure for legislation, then it should implicitly preclude any other procedure from being lawfully followed by the legislature[48]. *Expressio unius, exclusio alterius*.

The crucial point is that, according to Kelsen, when a constitutional court finds a statute to be unconstitutional and thereby repeals it, it does not entail that the statute

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45 I gloss over some serious problems which I will not be able to address at length: for instance, there may be an asymmetry between on the one hand procedural constitutional norms which regulate the *procedure* the legislature must follow if it is to legislate and on the other hand substantive constitutional norms which regulate the *content* of legislation. For brevity's sake, I will lump those (arguably) very different dimensions together and focus only on the scope of the constitutional empowerment.

46 A very interesting contribution on Kelsen's role in the creation and early life of the Austrian Constitutional Court is Christian Neschwara, Kelsen als Verfassungsrichter, *Hans Kelsen: Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, ed. Stanley L. Paulson / Michael Stolleis, 2005, 353 ff.

47 Hans Kelsen, *Pure Theory of Law*, 276 ff. It bears noticing that in his seminal 1929 article on constitutional adjudication, Kelsen was not very clear on that problem, since he claimed that nullity and annulability were equivalent, and equally plausible, ways of organizing a normative system (see Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit. 2. Mitbericht von Professor Dr. Hans Kelsen in Wien, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 5 (1929), 44–49). He later repudiated this view.

48 Kelsen sometimes seems to think that the only thing a statute must have to be valid is to be published in the Official Gazette (see Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, 46).

was *void ab initio*, even though the court's decision may be retroactive. What the court does is repealing a perfectly valid statute, just as a legislature would do, hence the famous theory of the "negative legislator"[49]. However, the court can only do so on the grounds of the statute's incompatibility with the *explicit* constitutional norm, whereas the legislature may repeal an earlier statute for whatever reason it likes. But when no organ (other than the lawgiver) is empowered to "annul" the defective norm, then the norm remains fully valid (it fully belongs to the legal system).

However, Kelsen, adhered until the end of his life to the notion of alternative authorization, and he did so well after his "sceptical turn"[50]. In the *General Theory of Norms*, he wrote: "[In the case] of an unconstitutional statute, it should be noted that according to positive law a so-called 'unconstitutional' statute can be valid, but its validity can be repealed by a special procedure provided for in the constitution, e. g. by the decision of a special court. In such a case, there is no conflict of norms. For if the norm in question is valid, it is also constitutional, that is, the constitution empowers the legislator to enact the statute in question but provides that it can be repealed by a special procedure"[51].

B. The Possibility of Genuine Normative Conflicts Between Lower- and Higher-Ranking Norms

There are many problems with Kelsen's view. The main one is that Kelsen refuses to allow that there are genuine normative conflicts between lower- and higher-ranking norms. I aim to show that such genuine conflict is possible, although the conflicting norms are equally valid. Such a hierarchical normative conflict is to be solved by metarules. Lex superior is one such metarule, and like any other, it is a norm of applicability. On such a view there is no need to have recourse to the baroque notion of an alternative authorization. The downside is that the very notion of legal dynamics is put into question; law is then seen as a system of non-hierarchical sources of validity.

How can such a bizarre (but sound) theory be achieved? There are actually many ways to that, and although I have advocated for one specific theory somewhere else[52], I

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49 Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, 54.

50 For a very interesting reconstruction of Kelsen's later views on the unlawful law problem, see Jörg Kammerhofer, *Uncertainty in International Law,* 192–193. Kamerhofer argues that in his sceptical phase, Kelsen would have distinguished between a norm's existence (which results from any kind of act of will) and its membership (which is a specific *property* of certain norms). However, such a distinction does not explain how un unlawful law may still *belong* to the legal system, which is the very problem addressed here.

51 Hans Kelsen, *General Theory of Norms*, 125 (taken verbatim from Hans Kelsen, Derogation, 272).

52 Mathieu Carpentier, Sources and validity, in*: Legal Validity and Soft Law*, ed. Pauline Westerman / Jaap Hage / Stephan Kirste / Anne-Ruth Mackor, 2018, 84 ff. In the same vein, see Michael Giudice, *Understanding the Nature of Law*, 2015, 113 ff., where Giudice argues for what he calls a "contingent relation between invalidity and unconstitutionality".

will not rehearse my arguments here. Suffice it to say that such a theory must somehow assume that a norm's membership within a legal system is to be divorced from its conformity with higher-ranking norms[53]. Under such an assumption, a norm may belong to a legal system although it conflicts with higher-ranking norms. In this outlook, higher-ranking norms are power-conferring norms – what Hart calls "rules of change"[54]. They regulate the way legal norms ought to be posited – or derogated – and to some extent their content. Whenever a norm conflicts with a higher-ranking norm, it does not mean that it does not belong to the legal system; it just means that the law-maker acted *ultra vires*. So, we do not need to abandon the idea of a hierarchical structure of the legal system; what we need to do is to divorce this legal structure from the notion of a dynamic production of legal validity – insofar as validity is understood as mere membership within a given legal system[55].

One way to achieve such a theory is to use the notion of a rule of recognition, conceived as a social fact. The rule of recognition picks out the legal system's criteria of validity. In a positivist outlook, sources are such criteria. A norm is valid, i. e. it belongs to the legal system, if and only if it can be traced to a source of law, that is to a complex set of social facts. Whether it conflicts with higher-ranking norms is prima facie irrelevant as long as the basic facts for there to be a *legal* norm are present. Of course, such facts overlap to some extent with the "facts" that make up the procedure through which the norm ought to be produced according to higher ranking norms. When the facts in the overlap are missing, not only is the norm contrary to a higher-ranking norm, but there may be doubts whether the "norm" is a *legal* norm at all. For instance, if the French President enacts a "statute" which has not been passed in either House of Parliament, I am not sure such a statute would be at all treated as a legal norm. However, this example shows that two different questions are at stake. First, there is a demarcation problem: is this "thing" a law, i. e. a legal norm, or is it a non-law? If I sign a piece of paper where I "enact" a "law", no one will dispute that this is *not* a law: the reason *why* it is not a law is not that I have violated some constitutional requirement or any other power-conferring norm; it is because the basic facts for there to be a law in the first place are missing. We could argue that the same goes in our example, even though the President is a legal authority. The second question is whether the president has acted *ultra vires*, i. e. whether he has been violating a higher-ranking norm[56]. These are two distinct questions.

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53 A careful (albeit different from mine) analysis of the distinction between conformity and validity can be found in: Régis Ponsard, Validité et conformité juridiques, in: *Un classique méconnu: Hans Kelsen*, ed. Thomas Hochmann / Xavier Magnon / Regis Ponsard, 2019.

54 HLA Hart, *The Concept of Law* (3rd ed.), 2012, 95 ff.

55 Of course this is debatable, and it is clear that Kelsen's is a much more robust notion of validity. But as I made clear in Section II above, I am working with a *weak notion* of validity.

56 One objection could be that in our example, there is not a conflict in the sense elaborated in Section I above, since the conflict is not about the content of the norms at stake. This is correct; however I have hint-

There are many other ways through which such a result may be achieved without divorcing membership from conformity. You can claim that validity is a compound of membership and conformity – that is you can save to some extent Kelsen's dynamic theory of law – and, in the same time, accept that norms may be valid even though they conflict with higher-ranking norms. In other words, you do not have to agree with the previous paragraph in order to accept that genuine conflicts between equally valid, different ranking norms exist. For instance, some authors distinguish existence from validity[57], in which existence is understood as some kind of presumptive or *prima facie* validity.

The upshot is that any theory that allows for genuine normative conflicts between lower-and higher-ranking norms serves better the Kelsenian motto that "laws are not null but only annullable" than Kelsen's own theory of alternative authorizations. Kelsen is right to argue that before it is repealed by a constitutional court, an unconstitutional statute is perfectly valid within the legal system. As we framed it in section III, Kelsen is right to claim that Lex superior is not a *pro futuro* derogating norm (even if he erroneously thought such was the case with Lex posterior). However, as we shall now see, he is wrong to argue that the conflict must be solved through derogation.

C. Lex Superior as A Norm of Applicability

We saw in Section III that metarules are not power-conferring norms regulating derogation. The same goes for Lex superior. Indeed, the reason why Kelsen was so reluctant to mention at all Lex superior as a metarule is not only that Kelsen refused to treat conflicts across the normative hierarchy as genuine conflicts; it is also that Kelsen thought that metarules (such as Lex posterior) function as derogating norms. And since there is no nullity, but only annullability, Lex superior cannot be such a derogating norm. However, Kelsen's theory of alternative authorizations and of the role of constitutional courts may be reframed as a specific theory of Lex superior, understood as a power-conferring norm directing law-applying organs (or a subset thereof) to derogate an inferior norm whenever it conflicts with a higher-ranking norm. Kelsen seems to presuppose that the only way to solve the "conflict" (which according to him is only

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ed that the classification sketched out in Section I was incomplete (it excludes what Lindahl and Reidhav call capacitative conflicts). However, I needed such an example because the overlapping facts I focused on are generally facts about procedure and not facts about content. The fact that a norm has such-and-such content has nothing to do with the source of that norm's legal character (i. e. with its membership). However, the fact that a norm was passed in Parliament and enacted by the head of state is generally part of the reason why it is a legal, rather than a non-legal, norm.

57 In the recent literature, see Paolo Sandro, Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law, 114 ff.; see also Matthew Grellette, Legal Positivism and the Separation of Existence and Validity, *Ratio Juris* 23 (2010), 22 ff.

apparent) is through derogation, i. e. repeal. But, as Kelsen was well aware[58], it need not be so. Kelsen was right to insist that before the court rules, the statute is still valid. But there are many cases in which the statute remains valid *after* the court's decision. Many courts (be they constitutional courts or supreme courts) are not empowered to repeal unconstitutional statutes. They are only empowered to disapply them or to enjoin lower courts from applying them[59]. This mundane observation points to another solution, which is predicated on the general tenets outlined in Section IV.B above. Once we understand that Lex superior is not about membership at all and that the reason why norms belong to a legal system is not because they are created within the scope of the powers conferred upon their creators, it makes it easier to treat Lex superior as a mere norm of applicability. In that respect, Lex superior is a metarule like any other.

Such is actually the crux of Chief Justice John Marshall's reasoning in *Marbury v. Madison* (and Alexander Hamilton's reasoning in the *Federalist* 78)[60]. Interestingly, when discussing unconstitutional statutes, Marshall does not use the common phrase "null and void"; he only says that such statutes are "void". Moreover, Marshall insists that judicial review is part of the *ordinary* province of the judiciary, because an unconstitutional statute does not differ from ordinary normative conflicts. "If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty"[61]. Judges have always been faced with normative conflicts and they solve them by disapplying the defeating norm. The same goes for unconstitutional statutes, and for unlawful laws in general.

Of course, in many legal systems, judges are specifically barred from applying Lex superior, at least in what regards unconstitutional statutes. Some legal systems have not adopted judicial review, be it American- or European-style. This shows that Lex superior as a norm of applicability is not part of their positive law, or that, in what regards legislation, Lex posterior defeats Lex superior. In other legal systems, further norms empower law-applying organs to repeal (i. e. derogate) the inferior norm, but, as we saw at the end of Section III, it is a purely contingent matter. Sometimes law-applying organs (or a subset of them, e. g. Constitutional courts) are further empowered to repeal unconstitutional statutes: such is the case in France, where the Constitutional

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58 See Hans Kelsen, Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution, *The Journal of Politics* 4 (1942), 184 ff.

59 Mathieu Carpentier, Validity versus Applicability: a (Small) Dose of Scepticism, 115 ff.

60 *Marbury v. Madison,* 5 U. S. 137 (1803). I am aware of the political overtones of Marshall's opinion, which must be taken with a grain of salt. I should be clear that I do not use *Marbury* to prove my point, but rather to illustrate it by way of a very famous example.

61 *Marbury v. Madison,* 5 U. S. 137, 177–178.

council is empowered to repeal an unconstitutional statute. But remember that European-style constitutional courts are specialised organs. They are law-applying organs insofar as they apply the Constitution, but they are not part (not even at the top) of the ordinary judiciary, and they are never called upon to apply statutes[62]. Hence, they are never really faced with genuine normative conflicts, insofar as they are not bound to apply one of the two conflicting norms in the first place. Only when a court must apply *both* the constitution and the unconstitutional statute is there a genuine normative conflict. When it is the case, the court will apply Lex superior and disapply the statute. Whether the court can also repeal the statute is a different question entirely.

Conclusion

In this paper I have tried to vindicate some intuitions which are central to Kelsen's last, sceptical move. In the same time, I have aimed to identify and solve some flaws in Kelsen's account of normative conflicts and derogation by showing that it was not a radical enough move. Kelsen is right to claim that metarules (such as Lex posterior) are not logical necessities. They are part of a legal system's positive law: even though they are not necessarily formally enacted, some metarules at least exist under a customary form.

Kelsen is also right to argue that derogation is a specific normative function. But he is wrong to assume that derogation is a function of metarules. The link between normative conflict resolution and derogation is weaker than Kelsen is willing to accept. This is shown by the fact that metarules are most and foremost norms of applicability. This goes for Lex posterior, which is the only metarule actually discussed by Kelsen. But as I have shown, the same goes for Lex Superior. Deflating it as a logical principle gives room for a much more flexible view of hierarchical normative conflicts.

It could be objected that the *unified* conception of metarules which has been advocated here is mistaken. Metarules, the objection goes, serve each a different function. Such is the view espoused by Riccardo Guastini[63] and Giovanni Battista Ratti[64]. They claim that Lex superior is a criterion of invalidity *ex tunc*, whereas Lex posterior is a criterion of derogation *ex nunc*, and Lex specialis is a criterion of priority, in the sense that it derogates some logical consequences of the more general norm. It bears stressing out that this picture still rests on a strong link between normative conflict

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62 This is over-simplistic. I am mainly talking here about constitutional review; constitutional courts generally have other functions (such as adjudicating electoral disputes), where they will have to apply statutes as well as other sources of law.

63 Riccardo Guastini, *Interpretare e argomentare*, 2011, 113 ff.

64 Giovanni Battista Ratti, Normative Inconsistency and Logical Theories: A First Critique of Defeasibilism, in: *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*, ed. Michał Araszkiewicz / Jaromír Šavelka, 2013, 133; Giovanni Battista Ratti, Negation in Legislation, 147

resolution and derogation. As such, there are many problems with it. For instance, the idea that Lex superior is a criterion of invalidity *ex tunc* can be understood two ways. On a "strong" reading, it means that in a hierarchical conflict, the defeated norm has never been valid in the first place: I refer the reader to Section IV.A and B above for my arguments against this idea. On a weak reading, it means that when courts invalidate an unconstitutional statute, such an invalidation has retroactive effect. But this claim is wrong as an empirical matter of fact. Moreover, I could argue that a unified conception of metarules as rules of applicability fits better our intuitions about how legal systems function and law-applying organs solve normative conflicts. It rests on a simple distinction between membership and applicability and does not need any further distinction or superfluous elaboration. As such it serves better than its rivals the requirement of *Denkökonomie*[65] which is central to Kelsen's jurisprudential method.

One last thought. The reader may ask: what is the philosophical relevance of all this? Why analyse normative conflicts in the first place? Pierluigi Chiassoni once quipped that there are two traditions in modern jurisprudence: one the one side, there are the watch makers "who deal with a clumsy conceptual machinery laid down by tradition and embodied in lawyers' common sense"; on the other side, there are the philosophers who address "the real, big, theoretical (and practical) issues at stake"[66]. The present paper is definitely an essay in watch-making. However normative conflicts have philosophical relevance as well. They are ubiquitous in practical reasoning, and moral philosophy has been debating for centuries the question whether there are genuine *moral* normative conflicts. Law and legal reasoning are the product of human reason; the way they deal with normative conflicts is instrumental for any study of law's inner (ir)rationality.

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65 Kelsen borrowed this methodological principle from Mach via Pitamic. Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze, 1922, xv.*

66 Pierluigi Chiassoni, A Tale from Two Traditions: Civil Law, Common Law, and Legal Gaps in *Analisi e diritto 2006*, ed. Paolo Comanducci and Riccardo Guastini, 2007, 49. Chiassoni uses the distinction between the watchmaker and the philosopher in the course of an analysis of the literature on legal gaps, but it can be generalized to cover the topic of normative conflicts as well. However, Chiassoni identifies these two traditions with the civil law / common law divide. This seems to me to be over-simplistic. Joseph Raz for instance is certainly both a watchmaker (see for instance his *Concept of a Legal System*) and a philosopher in that respect; so is Robert Alexy.