

PHENOMENOLOGICAL CONSTITUTION OF THE LEGAL NORM AND IDENTIFICATION OF LAW

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ABSTRACT

In legal theory, we can speak of normative validity in several senses. Here we will focus on the notion of validity as the *identification* of the legal norm. In trying to analyse the characteristics underlying the process of identification of law, the result will be the recovery of the *phenomenological perspective* in the form of the constitution of the norm in consciousness. From the point of view of the ideology of the sources, however, the present author will adopt a position of *moderate legal positivism* that reduces the substantive dimension of justice to the paradigm of argumentative correctness.

Keywords: validity, identification of Law, competence, correctness, positivism

In legal theory, we can speak of normative validity in several senses. Here we will focus on the notion of validity as the *identification* of the legal norm. In fact, even before asking whether it is worth observing and obeying a norm, it is appropriate to ask whether a norm is valid in the sense of being capable of being identified as a legal norm. In trying to analyse the characteristics underlying the process of identification of law, regarding method, the result will be the recovery of the *phenomenological perspective* in the form of the constitution of the norm in consciousness. Regarding the ideology of the sources, however, the present author will adopt a position of *moderate legal positivism* that reduces the substantive dimension of justice to the paradigm of argumentative correctness.

I. Three meanings of legal validity

Within general legal theory, the validity of a norm can take on different meanings. Here three senses are adopted and distinguished. First, it is said that a norm is valid in the sense that it is capable of *being valid* as a norm. In this sense, the suitability of a norm as a valid norm coincides, as already mentioned, with the problem of the *identification of the law*, or rather, of the *identification of the legal norm*.

A second profile, on the other hand, sees the validity of a norm as *the adequacy* of the norm itself for some purpose. In this sense, a valid norm is a *good* norm because it is suitable for achieving certain purposes. A physical object, such as the apple that is before my eyes, or an ideal object, such as, for example, a poem or a norm, are good only with respect to the criterion which coincides with the concept of the thing itself.

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A good poem is a poem that corresponds to the idea of poetry, which realises the concept of poetry, that is, the intrinsic beauty of every work of art. Similarly, a legal norm, after being identified as such, will be said to be good if it succeeds in achieving its intrinsic purpose or the purpose of law in general, which is defined here as the *concept of law*. Therefore, in this second sense, it can be said that the validity of a norm will therefore be the congruence of a norm with respect to that concept or purpose of the law.

Finally, we can also speak of validity in a third sense. A norm is valid if it belongs to a legal system. If we ask when a norm belongs to a legal system, we find no other answer than the one that identifies this third meaning of validity with its enforceability by the judges. In this third sense, the validity of a norm coincides with its *enforceability*².

II. The two conditions for the identification of the legal norm

Let us limit our analysis to the identification of legal norms, asking ourselves when a norm is perceived as such or, rather, to adopt the terminology used so far, when a norm is identified as a valid norm. Here it would seem that a norm can be perceived as a valid norm only in the simultaneous presence of two conditions:

- 1) the first, which is external to the norm and as such has a pragmatic nature, is that the norm has been issued by a *competent authority*;
- 2) the second, on the other hand, is internal to the norm, and consists of the fact that the conditional antecedent of the normative pronouncement is true or plausible, i.e. correct, where *correctness* means the truth or likelihood of the conditional antecedent. If I say, “You must close the door,” that command or norm expresses a prescriptive sense insofar as the antecedent is true or plausible, that is, the pronouncement that the door is open. The “Close the door” norm can be perceived as a norm, and therefore as a norm that is valid as a norm, only on the assumption that the door is open. If the door were already closed and both the sender of the command and the recipient were aware of it, then the command “close the door” would not be perceived as a valid norm.

Before returning to these two points, however, it is worth making a brief reference to the structure of the legal norm. The typology of legal norms presents a wide taxonomic range³; however, it is beyond the scope of this study to classify them further. On the contrary, here we will focus on what seems to be the main type of legal norm, i.e. the *norm of conduct*⁴, characterized by a conditional form with the consequential presence of a deontic mode⁵. Let us now resume our analysis of the first condition for the identification of legal norms, that is, the competence of the body that issues them.

² Similarly, but not identically, Bulygin distinguishes between validity as binding force or “obligation”, which is prescriptive or normative in the broad sense; validity as the “belonging” of a norm to a given legal system, which is descriptive in character; and validity as the “enforceability” of an N_2 norm on the basis of another N_1 norm, which is also descriptive. On this point, cf. E Bulygin, *Norms, validity, regulatory systems* (Turin: Giappichelli 1995) 66 ff., 71–73. It is a distinction based on positive norms, while the distinction of the three senses of validity advanced in this theory is conceptual in nature.

³ Cf. G Carcaterra, *Presupposti e strumenti della scienza giuridica* (Turin: Giappichelli 2012) 40 ff.

⁴ On the norms of conduct as the main type of norm, cf. N Bobbio, *Teoria generale del diritto* (Turin: Giappichelli 1993) 96–99.

⁵ On the presence of a deontic operator of permission, obligation and prohibition as a sign of the directive nature of a norm of conduct, cf. E Bulygin, *Norms, validity, regulatory system* (n 1) 244.

III. Formal validity, competence and the norm of recognition

The first condition for which a norm of conduct is valid, and therefore valid to be identified as a legal norm, is that it has been issued by a *competent* authority. A prescriptive pronouncement uttered by a person without competence, for example, a child walking in the street, does not count as a norm in the sense that it is not identified or perceived as a legal norm⁶.

Of course, the idea of competence is not the only indicator, but it is still the most important one within a set of defining traits that define the notion of *formal validity* (generality, promulgation, clarity of norms, absence of antinomies, norms that ask for the impossible, constancy over time, etc.) and which has found its most apposite formulation in the concept of *procedural morality*⁷.

With the observance of these criteria of formal validity, together with that of the correct conditional antecedent, a pronouncement *definitively takes* the form of a legal norm. And it will remain so even if it is repealed. A law promulgated hundreds of years ago and repealed fifty years ago is still validly to be considered as a norm only if it has been issued by a competent authority, and if the antecedent of the conditional case is correct. It is for this reason that we also define as norms the norms of ancient Roman law, even though they have been repealed, despite the fact that in this way the universe of legal norms risks becoming platonically crowded with an infinite number of ideal objects⁸. Of course, a repealed norm, if it is still identified as a norm, is no longer enforceable, unless it is referred to by valid norms belonging to the legal system.

In this regard, two clarifications should be made. In the first place, the universe thus obtained of valid norms, in the sense of norms that are identifiable as such, will subsequently be divisible into enforceable norms, and norms that are no longer enforceable. Secondly, the inclusion of the criteria of formal validity in terms of the identification of the law implies the distinction between formal validity and enforceability, making the latter mutually irreducible⁹.

But let us return to competence. In advanced legal systems, the latter tends to be connected to compliance with procedural and substantive norms. Thus, a norm of conduct is valid as a norm, that is, it is capable of being perceived as a norm, not only if the participant is aware that it has been issued by a competent body, but also

⁶ There is no need here to recall the debate on the reduction of the norms of competence to the norms of conduct. In this regard, however, it is worth recalling an attempt at such a reduction that is actually misunderstood. Reference is made to the thesis of R Alexy, in Id., *Teoria dei diritti fondamentali*, edited by L Di Carlo (Bologna: il Mulino 2012) 408–411, according to which the principle of competence derives from the principle of freedom: if there were no competences, the regulatory authorities would arbitrarily produce law, which would lead to the loss of freedom. In reality, Alexy does not claim that the idea of competence is reduced to permissions, but only that the principle of competence is implied by the principle of freedom. Therefore, Sieckmann's objection that Alexy reduces the idea of competence to norms of conduct cannot be shared: cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos Verlagsgesellschaft 1990) 48–50.

⁷ Cf. LL Fuller, *The morality of law*, edited by A Dal Brollo (Milan: Giuffrè 1986) 65 ff.

⁸ In a similar way, cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (n 5) 28, according to whom the adoption of a semantic conception of the norm, separate from the criteria of validity, would lead to considering as norms even norms that are no longer valid according to the criteria of validity; N Jansen, 'Die Geltung des Rechts. Begriffsgeschichte und Begriffsbildung' in C Bäcker (ed), *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff. Elemente einer diskursiven Theorie fundamentaler Rechte* (Tübingen: Mohr Siebeck 2022) 405–406 which highlights the distinction between validity and existence in the sense that there are norms that are no longer valid, and therefore no longer enforceable, but equally existing because they are still perceived as such.

⁹ On the opposing thesis that reduces validity to enforceability, it is worth recalling the contrary position of Bulygin, expressed in *Norms, validity, regulatory systems* (n 1) 83–87.

if it has been issued in compliance with the procedural norms provided for its issuance, such as, for example, in democratic regimes, having been approved by a majority in Parliament. If one is aware of the fact that a law has been approved by a minority of 2% of the members of parliament, the participant does not perceive that prescriptive pronouncement, perhaps uttered by a competent authority, as a law of their own legal system, nor therefore as a norm endowed with prescriptive force. Of course, among these procedural indicators, the most important remains that of competence. A law of the legal system of a liberal democracy, even if passed with a minority of 2% of the votes, is always perceived as a norm better than a normative act issued by a body without competence, such as primary school pupils who are role-playing as members of a legislative assembly.

If compliance with procedural norms affects the validity in terms of the identification of the norm, here it would seem that this is because compliance with procedural and substantive norms could fall within a broad meaning of competence, therefore, within the idea of *competence in the broad sense*. A prescriptive pronouncement is valid as a norm only if an authority issues such a norm in the exercise of its competence: a mayor of a city, according to the Italian system, cannot declare war on a foreign state. It is also necessary that this norm be issued in compliance with formal criteria – a mayor cannot issue a building permit unless they have obtained the opinion of the municipal technical office – as well as in compliance with substantive criteria, such as constitutional and ordinary urban planning regulations, which are hierarchically superior to administrative regulations. Without these three procedural conditions in the broad sense, the prescriptive force of a norm, and thus the validity of a norm as a legal norm, is weakened. Obviously, for the ordinary citizen it would be a generic “secular” knowledge of the principle of competence, beyond these three internal articulations which, on the other hand, require at least the bare minimum of legal culture.

Within this broad meaning of competence, even the substantive criteria, which the competent authority authorised to issue a given norm should observe, become *procedural in a broad sense*. Compliance with the substantive criterion, which the competent body must take into account, should not be interpreted as a predetermination, by the higher norm, of the content of the lower norm that the authority in question is enacting. On the contrary, the substantive criteria that the authority must take into account – and in this “taking into account”, while remaining of a substantive nature, they would also acquire a procedural nature – if they were not to be understood as criteria for predetermining the content of the lower norm, they would have to be read only as simple parameters of mere *conformity* of the lower norm to the higher norm. For example, constitutionally established fundamental rights should not be understood only as norms from which other norms at the legislative level are derived, but also as norms that the legislative body “should take into account” when issuing an ordinary norm¹⁰.

¹⁰ On this point, cf. L Di Carlo, ‘Nomodinamica come teoria procedurale del diritto. Between normativism and axiomatic theory’ (2018) 1 *Diritto e processo amministrativo* 220–226. On this assumption, if nomodynamics has procedural value – in the sense that every norm is not so much a substantive parameter to which the lower norm must adapt, but rather a procedural situation to which the lower norm must more or less *conform* – then the indication of Kelsen’s theory as a decision-making theory cannot be shared. In this sense, cf. JJ Moreso, ‘La giustificazione kelseniana del judicial Review’ in JJ Moreso and M Troper (ed), *Giustizia costituzionale e Stato di diritto* (Naples: Edizioni Scientifiche Italiane 2012) 20–21 where the doctrine of the “alternative clause” is discussed. According to Kelsen’s doctrine, any norm, always and exclusively having a constitutive character, could never be invalid: in other words, if a norm is valid unless it is annulled by the Constitutional Court – and, therefore, potentially always valid – the idea of a hierarchical legal system in which the validity of a norm derives from its being in accordance with some superior ruling would lose its meaning.

This objection is doubted here. If Kelsen’s grading is interpreted in a procedural sense, then a graded reconstruction is already a first form of epistemic control in the creation of norms. In the same vein, cf. B Celano *Lezioni di filosofia del diritto* (Turin: Giappichelli 2018) 187–188, who speaks of the “paradox of nomodynamics” in Kelsen: in a nomodynamic structure, the substantive, even if reduced to a procedural situation, would tend to recur over and over again.

Beyond the narrow or extended meaning of competence, the latter should be seen as part of a system of sources, in which the highest body is identified by the *rule of recognition*¹¹, which it would therefore be appropriate to place within the dimension of the constitutive identification of the norm itself.

IV. Conditional antecedent and factual and regulatory correctness

The second condition that allows a norm to be valid, and therefore to be identified as a legal norm and thus expressing prescriptive force, after the parameters of competence and *formal validity*, is that of the true or plausible conditional antecedent. The characteristics of the truth or verisimilitude of the conditional antecedent can be summarised under the concept of *correctness*¹². It can therefore be said that the second condition for the identification of a norm is the presence of a correct conditional antecedent.

If one then asks what it means that the conditional antecedent of a norm of conduct must be true or plausible, and therefore correct, we can immediately affirm that, for a good percentage of norms, the norm must express a purpose, and therefore contain the idea of *functionality*. A norm that does not express a purpose is an invalid norm, that is, it is unsuitable for being perceived as a norm. Of course, it may happen that a norm, on closer analysis, turns out to be aimless. The idea of functionality, however, must be present, at least potentially. And this happens when the conditional antecedent is correct, that is, true or plausible. Correct antecedent and the idea of functionality here seem to be interchangeable. A clearly and evidently false conditional antecedent, where the interpreter is aware of this falsehood, leads to the denial of functionality. That an Italian citizen acquires the right to vote at the age of eighteen implies a purpose that would be completely absent if the same norm allowed the exercising of the right to vote from the age of ninety onwards. In fact, since it is patently false, and therefore incorrect, that psychological maturity is reached at ninety years of age, a norm that allowed Italian citizens to participate in any type of election only from that age would be meaningless and, as such, devoid of prescriptive force.

¹¹ Cf. HLA. Hart, *The concept of law*, edited by M Cattaneo (Turin: Einaudi 2002) 118 ff. On the conceptual, and therefore definitory, character of the rule of recognition, cf. E Bulygin, *Norms, validity, normative system* (n 1) 24, 220–224, 227–228, 245–246, 252–256: only in this way would the objection of circularity formulated against the rule of recognition be avoided. For the opposite thesis that reduces the rule of recognition to precepts, and in particular to sanctions, cf. G Tarello, *Diritto, enunciati e usi* (Bologna: il Mulino 1974) 107–111.

Although it tends to be postulated as a single position – cf. HLA Hart, *The Concept of Law* (n 10) 144–145 – there is no lack of positions asserting the existence of more than one rule of recognition, as in J Raz: on this point, cf. J Raz, *The Concept of Legal System* (Bologna: il Mulino 1977) 75, 267–269; Id., *Praktische Gründe und Normen* (Frankfurt am Main: Suhrkamp 2006) 176–178 and, above all, 198–199, 208; on Raz, cf. also B Bix, *Teoria del diritto. Ideas and contexts*, edited by A. Porciello (Turin: Giappichelli 2016) 53 and D Kuch, *Die Autorität des Rechts. Zur Rechtsphilosophie von Joseph Raz* (Tübingen: Mohr Siebeck 2016) 240. On the rule of recognition as a norm of obligation and not as a norm of power in Raz's interpretation, *ibid.*

¹² With regard to correctness, one cannot ignore the fundamental work of R. Alexy, *Theory of Legal Argumentation. The theory of rational discourse as a theory of legal motivation*, edited by M. La Torre (Milan: Giuffré 1998) 149 ff., which sees correctness as a new paradigm for the constitutive identification of legal norms. On the interpretation of the rules of discourse in Alexy as a condition for the constitutive identification of legal norms, cf. L Di Carlo, 'Robert Alexys Diskursregeln zwischen funktionaler und transzendentaler Dimension' in *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff* (n 7) 74–77. Overall, the paradigm of correctness as a new model of interpreting the law as a whole is part of the broader phenomenon of the rebirth of practical reason in the second half of the twentieth century: on this point, cf. M Kriele, *Recht und praktische Vernunft* (Göttingen: Vandenhoeck & Ruprecht 1979) 19 ff.

Alongside the conditional antecedent of a *factual type*, which has been referred to so far, there could also be a conditional antecedent of a normative type, as in the case of judicial or administrative norms. In such a case, the correctness of the conditional antecedent depends on compliance with the *principle of lawfulness*, which thus constitutes a parameter of assessment for the correctness of the conditional antecedent. An administrative act or a judicial judgment *clearly* in contrast with the legislative regulatory parameter would appear to be *manifestly* incorrect and, therefore, cannot be identified as a legal norm.

The two constituent elements for a norm to be a norm, although so far coming within the norms of conduct, could also be considered as norms expressed by *performative acts*. This is not the place to analyse the complex and fascinating phenomenon of constitutiveness¹³. Even with regard to performative acts, however, it can be said that they fulfil felicity conditions if the two conditions of competence and correctness are respected. The performative act “I declare you husband and wife” exerts its effects on two conditions: if these words are uttered by a state official or a minister of religion, both with competence, and if the postulate of correctness is respected: it makes sense to say “I declare you husband and wife”, but it would be absolutely senseless to say “I declare you master of the universe”.

In any case, the profile of correctness, beyond its possible positivization in regulatory texts, remains an ideal element of legal experience. Although it could also be prescribed by positive norms of the legal system, it remains autonomous from any type of ruling, including constitutional ones. Argumentative correctness, in fact, always transcends positive law¹⁴. Two arguments support this. First, a constitutional norm that is manifestly “unconstitutional” can only be repealed by the principles of general practical discourse¹⁵. Secondly, the fact that constitutional values are often balanced with non-constitutionalised values can probably be adequately explained by the idea that this is required by the principles of practical reason, or rather by the principles of general practical discourse.

V. Validity as a constitutive identification between descriptive and prescriptive judgments

The validity of a norm as the suitability of the norm to be perceived and identified as such is also a process of *constitution* of the norm itself. By virtue of this process of constitution, a norm is perceived as an object that is separate and independent from other objects of reality, which no subsequent act of repeal can ever eliminate. What should be emphasised is that this identification of the norm is the identification of the norm within the consciousness of the subject, because the identification of a norm as a norm is also a *constitution* of the norm in the consciousness of the participant.

¹³ For Italian legal theory, cf. G Carcaterra, *Le norme costitutive* (Turin: Giappichelli 2014) 62–63; Id., *Lezioni di filosofia del diritto. Legal Norms and Ethical Values* (Rome: Bulzoni Editore 1992) 99; A G Conte, *Filosofia del linguaggio normativo* (Turin: Giappichelli 1995) vol. I, 337–339.

¹⁴ Cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (n 5) 196.

¹⁵ For an opposite opinion, cf. C Bäcker, *Gerechtigkeit im Rechtsstaat* (Tübingen: Mohr Siebeck 2015) 302–304, who, in the case of “unconstitutional” constitutional norms, proposes the amendment of the Constitution by Parliament, rather than appealing to the principles of practical reason by the Constitutional Court itself. On the principles of general practical discourse, cf. R Alexy, ‘Grundlage der juristischen Argumentation’ in W Krawietz and R Alexy (eds), *Metatheorie juristischer Argumentation* (Berlin: Duncker & Humblot 1983) 46–47.

From the foregoing a substantially phenomenological approach to the identification of legal norms can be derived. As such, the process of constitutive constitution or *identification* is a substantially *phenomenological* process of separation of the norm from other types of objects. A prescriptive pronouncement that has the two conditions just mentioned – formal competence/validity and correct conditional antecedent – emerges by separating itself from the totality of prescriptive pronouncements, among which it is still confused, to become a legal norm. And if this norm thus constituted were to lose one of the two requirements or both, it would return to be confused in the indistinct totality of prescriptive pronouncements.

This is an example of Husserlian reduction, but here we are in presence not of a world of things, but of universe of prescriptive utterances: we know that this reduction is only a formal method¹⁶. As in the Husserlian perspective we must suspend the judgement above the existence of the things – this is the reduction of the world in the consciousness: the world as universe not of things but of universe of phenomenons and perceptions in the consciousness¹⁷ – so in Law we must suspend the judgement above the existence of the legal norms and believe that the universe of practical utterances is made only by prescriptive utterances¹⁸. Afterward a prescriptive utterance which has the two conditions of competence and correct conditional antecedent emerges by separating itself from the totality of prescriptive pronouncements: a legal norm emerges in the consciousness as legal norm.

Moreover, the phenomenological position needs to be understood as both a supplement to the limitations of a legal theory based upon language and argumentation. Thereby it is capable of encompassing the Alexyian position or, better, the argumentation's field.

The merit of the constitutive-transcendental perspective is that it is more attentive in terms of grasping the legal experience in its entirety. The constitutive character of normative identification originated as a category before the famous Hartian pair of *internal aspect* and *external aspect*¹⁹. The concepts of internal and external aspects turn out to be secondary concepts insofar as they only have the function of correctly identifying which norms actually belong to a legal system and which are not part of a legal system. However, once the internal attitude is assumed, and the correct identification of the norms of a legal system is reached, a further question remains: why is norm N_1 correctly indicated as belonging to system X perceived as a legal norm? To answer this question, the concepts of internal and external aspects seem to be inadequate insofar as they say nothing about the fundamental characteristics for the identification of the law. The correct identification of legal norms, in fact, already presumes that consciousness is able to outline the structure of the norm itself. Therefore, something else, here called the process of identifying the legal norm, is needed to serve as the first dimension of legal experience.

The validity of a norm as a predicate attributed to a prescriptive pronouncement by means of its constitutive identification makes it appropriate to revisit the conceptual pair of external aspect and internal aspect in

¹⁶ On the Phenomenology in general see F Kaufmann, *Die Kriterien des Rechts: eine Untersuchung über die Prinzipien der juristischen Methodenlehre*, Tübingen: Mohr 2024 and F Schreier, *Grundbegriffe und Grundformen des Rechts*, Wien: Deuticke 1924; G. Stella, *I giuristi di Husserl*, Milano: giuffrè 1990. On the critical aspect of the interpretation of reduction after Husserl, see J. Taminiaux, *The Metamorphoses of the Phenomenological Reduction*, Milwaukee: Marquette University Press 2004. On the relationship between F. Kaufmann and the legal phenomenology see S. Loidolt, *Einführung in die Rechtsphänomenologie. Eine historisch-systematische Darstellung*, Tübingen: Mohr Siebeck 2010, 144 f.; on the relationship between F. Schreier und the legal phenomenology, *ibid.* 153 f.

¹⁷ On the relationship between reduction, constitution and transcendental idealism in Husserl, *ibid.*, 34–35

¹⁸ On the reduction in Law, *ibid.* 54 ff.

¹⁹ Cf. HLA Hart, *The Concept of Law* (n 10) 106 ff.

a further direction, with respect to the one just considered. We have already seen how constitutive identification is the true original attitude of the legal operator.

On this basis, it is worth adding a further reflection. When consciousness perceives and identifies a prescriptive pronouncement as a legal norm, this constitution of the norm takes place through the release of a prescriptive meaning, which could be defined as a *prescriptive force*.

Now, it is worth asking whether the constitutive identification of a norm as a valid norm has a descriptive nature or a prescriptive nature. In the constitution of the object, the subject has an active role: the object emerges from ..., it is constituted on the basis of other objects, amongst which it is initially confused, by virtue of certain properties perceived by the subject. The constitutive identification of the norm as a norm genetically shows how a deontic pronouncement is transformed into a norm. If the constitutive identification of a norm coincides with its suitability to *be valid* as a norm, and if this suitability is nothing more than the ability of consciousness to perceive the prescriptive force of the norm itself, it follows that the constitutive identification of the norm is conceptually close not so much to the external descriptive aspect, but rather to the internal and prescriptive aspect. Indeed, as mentioned above, the very concept of prescriptive force here suggests the idea that the classical dichotomy between external and internal aspects, or between the observer's perspective and the participant's perspective, should be overcome in the sense of adopting only the internal and prescriptive aspect of the participant²⁰.

VI. From the constitutive identification of the norm to the legal system: the concept of law

The constitutive identification of a norm by means of the parameters of formal validity and correct conditional antecedent implies the transition from the single norm to the organised set of norms defined as *the legal system*. In fact, the idea of legal order is rooted in the dimension of the constitutive identification of the norm. Once a norm has been constitutively identified as a valid norm, it remains in being perceived as such only insofar as it does not contradict other norms. In other words, the properties of *formal validity*, especially that of *coherence*, are essential for the identification of a norm as a norm. If I perceive a norm N_1 as a norm on the basis of the two characteristics listed above, and then I place it next to norm N_2 , which, on the other hand, is antinomian to it, what happens after a while is that the perception of the prescriptive force of both norms gradually weakens, with the consequence that over time they can no longer be identified as legal norms.

Obviously, this happens in the case of norms whose mutual disvalue is not immediately perceived by the participants. On the contrary, of two antinomian norms N_1 "killing is forbidden" and N_2 "killing is allowed" – whose axiological asymmetry is immediately evident – the participants will tend to disapply N_2 which is clearly antithetical to civil coexistence, thus observing and applying N_1 . However, out of two norms such as N_3 "it is mandatory to pay taxes at a rate of 60% of income" and N_4 "it is permitted not to pay taxes at a rate of 60%", the participants would not know which of the two norms, N_3 or N_4 , to prioritise. The result is that both would

²⁰ On the inclusive surpassing of the descriptive attitude only in its internal and prescriptive aspect – particularly with regard to the concept of law as an interpretative practice by R Dworkin, expressed in Id., *Law's Empire* (London: Fontana Press 1986) 58 ff. and Id., *Justice in Robes* (Cambridge Mass.: The Belknap Press 2006) 11 ff. – cf. M La Torre, *The right against himself. Essay on legal positivism and its crisis* (Florence: Leo S. Olschki Editore 2020) 16–21.

gradually lose their preceptual force until they are downgraded from legal norms to simple prescriptive pronouncements of models of conduct.

Therefore, the absence of antinomies also implies the conceptual necessity of the possibility of a plurality of norms, and therefore of a legal order as an organised totality of norms. However, in order to ensure the criterion of coherence to the greatest extent possible, the notion of the concept of law must be introduced.

The constitutive identification of a norm, as we have seen, is closely linked to the notion of competence. The latter, however, already presupposes the notion of law and legal norm: if a body has the competence to issue norms, this already presupposes that it knows what law is and what a legal norm is. Therefore, to avoid this circularity, it is necessary to know the very general notion of law – which we could define as the *concept of law in the broad sense* or, more simply, *the definition of law* – which allows us to distinguish law from other social subsystems such as economy, religion, etc. To give an example, consider the Kantian definition of law as a set of norms relating to external conduct, etc. It is a very general notion of law, firstly, conceivable by everyone irrespective of their degree of knowledge of legal-institutional culture and which, secondly, allows for a distinction, albeit minimal, between law and other social subsystems.

In this context it's appropriate to underline, that, if we use a conceptual and linguistic tools near to system's theory of Luhmann, nevertheless it isn't our purpose to apply the system's theory of Luhmann, which falls outside of this paper. The relationship between social subsystems and environment here isn't important, because this analyses remains exclusively into the law. The here adopted perspective isn't dynamic and social, but develops only on the conceptual level. The phenomenological standpoint of norm's perception goes before of the difference between law and environment. We know that Luhmann's social system's theory is explicitly post-phenomenological: as a theory of social systems, she is elaborated beyond Husserlian phenomenology²¹.

Now, in addition to protecting us from the objection of circularity, the concept of law in the broad sense allows us to recall one of the most widespread notions of the general theory of contemporary law, namely Raz's idea of *norms as reasons for action*²², which is rooted here in the context of the constitutive identification of norms. In fact, to state that a legal norm is a reason for action that prevails over other competing reasons would be like saying that the law, in effectively directing the conduct of the participants, is the only social subsystem that manages to prevail, for definitional reasons, over other competing subsystems. Regardless of the degree of effectiveness of a norm, a legal norm is such if it succeeds in directing the conduct of participants by prevailing over other types of norms, including moral ones: if it fails to prevail, it means that it is not a reason for action and, therefore, it is not a legal norm. For definitional reasons, law is that subsystem which prevails over other subsystems in order to coordinate the actions of individuals: social integration, for conceptual reasons, is the responsibility of legal norms, not of moral ones. Raz's idea of norms as reasons for action is nothing more than the repetition of the definition of the idea of law. And if the underlying idea of norms as reasons for action is nothing more than the re-proposition of the definition of law, it follows that it would be nothing more than an analytical definition.

To avoid the trivialization of Raz's idea, here it is suggested to place it within the dimension of the constitutive identification of legal norms. It is true that Raz often emphasises the need for the legal system to be

²¹ On the Luhmann's social system's theory as explicitly post-phenomenological theory, see N. Luhmann *The Modern Sciences and Phenomenology* in N. Luhmann, *Theories of Distinction. Redescribing The Descriptions of Modernity* (Stanford: Stanford University Press 2002) 33–61.

²² Cf. J Raz, *Praktische Gründe und Normen* (n 10) 16–17, 67.

such if it is effective²³. Effectiveness, however, is not the defining feature of law. In fact, it is an emphasis that is already present within the law, therefore subsequent to the other fundamental idea that law for definitional reasons must prevail over other practical subsystems, such as the moral one. On the basis of this interpretation, the idea of a norm as a reason for action implies the other interpretation according to which, in order to identify a norm, extrajudicial moral criteria are not necessary. In this way, we can see the strictly positivistic nature of Raz's thesis more clearly, its theoretical scope emerging not only after contextualising the idea of norms as reasons for action in the identification of norms, but also after comparing it, as will be done below, with Radbruch's Formula, which should also be rooted in the constitutive identification of law, emphasising the necessary connection between law and justice²⁴.

Returning to coherence, we have seen how a legal norm has meaning and prescriptive force, and therefore remains valid, only if it is not antinomian with other norms. In order to avoid and overcome normative antinomies, however, it would be appropriate to have a final goal, a final value to which the production of legal norms should be directed and which would guarantee the harmonization of legal norms in a totality that can be posited as a legal system. This final goal is defined here as *the concept of law in the narrow sense*²⁵.

VII. Constitutive identification of law and legal positivism

Within the dimension of the *constitutive identification* of the norm, here a moderately *positivist position* is maintained. A norm is suitable for being perceived as a norm and, therefore, for being valid as a norm, if it meets the requirements of formal validity and the correct conditional antecedent or of functionality, which is the same thing.

Now, an unjust norm – for example, think of the National Socialist laws that hatefully discriminated against citizens of Jewish citizens should remain a legal norm like all the others, even if intolerably unjust, unless this injustice, whether slight or serious, were to succeed in translating into *incorrectness*. The incorrectness of the conditional antecedent, reflected in the loss of the requirement of functionality, would consequently bring with it the loss of the physiognomy of the norm, and therefore its validity. Conversely, if the injustice of a norm were not to succeed in translating into incorrectness, such injustice would not be relevant for the validity of the norm.

On this basis, we are closer to the positivist position of pre-war Radbruch than to the non-positivistic, or rather post-positivistic one of the homonymous post-1945 Formula. On the basis of the generally accepted, but not proven, assumption of Radbruch's conversion from positivism before 1945 to non-positivism after the Second World War – though there is no shortage of scholars asserting the thesis of Radbruch's non-positivistic

²³ Cf. J Raz, *Praktische Gründe und Normen* (n 10) 168–170, 174.

²⁴ On the debate between Raz and Alexy, see G. Pavlakos (ed.) (2007) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart) 17–58.

²⁵ This is the reason that may have prompted theorists such as Santi Romano to affirm that the legal system is not reducible to a sum of norms, but it is a totality that precedes the single norm: on this point, cf. S Romano, *L'ordinamento giuridico*, edited by M Croce (Macerata: Quodlibet 2018) 27. On antinomies in general and in practice, cf. N Bobbio, *General Theory of Law* (n 3) 213–217. The issue of antinomies in concrete terms can then be traced back to the legal clashes of principles that can be resolved by finding a point of equilibrium: on this point, cf. R Alexy, *Teoria dei diritti fondamentali* (n 5) 108 ff.

continuity²⁶ – for Radbruch’s *Philosophy of Law*, for the purposes of the constitutive identification of a norm, not only equality but also certainty and functionality are relevant, the latter being conceptually close to the parameters stated here of formal validity and the correct conditional antecedent or functionality²⁷.

It is the second Radbruch, the non-positivist one of the Formula, who, while still giving space to the concepts of certainty and functionality, ends up emphasising the fundamental role of equality in terms of the *constitutive identification* of the norm. The Formula, in fact, states that the value of certainty prevails over justice even when the law is slightly flawed from a moral point of view, unless the threshold of intolerable injustice has been crossed; and that those norms which, by consciously denying the right to equality, do not present any aspiration to justice, should be considered as non-legal²⁸.

More specifically, the Formula distinguishes the following three situations: there are slightly unjust norms that have the character of legal norms and that must be enforced by the judge; then at the opposite extreme we find norms devoid of the character of law because they have consciously violated the principle of equality and, as such, should not be enforced by the judge; finally, in an intermediate position, there are intolerably unjust norms, which, while still retaining a legal nature, should nevertheless not be enforced in court by the judge.

This Formula, together with its assumption by Alexy²⁹, represents the most recent attempt from the point of view of the history of ideas to insert justice as a factor for *identifying* a legal norm: an intolerably unjust norm is no longer a valid legal norm, because it is no longer identifiable as a legal norm³⁰. The second Radbruch ends up representing the modern variant of non-positivism in terms of validity as a *constitutive identification* of the norm.

Here, however, it seems that the Radbruch Formula, although appealing from a theoretical point of view, presents some critical points. An unjust norm is still a norm if it reflects the criteria of certainty and functionality, or, in the lexicon adopted here, if it respects the criteria of formal validity and functionality, that is,

²⁶ Cf. SL Paulson, *The Philosophy of Law of Gustav Radbruch*, edited by N Bersier Ladavac, P Chiassoni and A Sardo (Milan: Mimesis 2023) 53, 75, 91, 120–123, 141, where it is highlighted that the idea of justice to which law is instrumental is already present in writings before 1945. Moreover, both before the Second World War and after, the idea that legal certainty is a question for the judge to solve while equality as an absolute value is a question for the legislator to solve have remained unchanged: *ibid.*, 125; with the only difference being that, if in the *Philosophy of Law* of 1932 the judge must always enforce the law, even an unjust one, after 1945 the judge must not enforce an intolerably unjust law, or one that consciously denies equality: *ibid.*, 159. On this change of attitude towards the judge in the enforcement of an unjust law, cf. G Radbruch, *Rechtsphilosophie*, edited by R Dreier and S Paulson (Heidelberg: C. F. Müller Verlag 2003) 84–85; C Bäcker, *Gerechtigkeit im Rechtsstaat* (n 14) 41–43 and p. 60 where it is emphasised that the annulment of an intolerably unjust law should be the sole responsibility of the judges of the higher courts or even of the legislative body. On the idea of the annulment of an intolerably unjust law being reserved for the Superior Courts or for the legislative body itself, cf. also G Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Rechtsphilosophie* above, 217.

²⁷ For the influence of neo-Kantianism on the first Radbruch – values and validity of the norm as prerequisites for the legal evaluation of conduct – cf. S Ziemann, *Neukantianisches Strafrechtsdenken* (Baden-Baden: Nomos Verlagsgesellschaft 2009) 66 ff. On Baden neo-Kantianism as a common perspective for both the non-positivist Radbruch and the positivist Kelsen, cf. SL Paulson, *Gustav Radbruch’s Philosophy of Law* (n 25) pp. 55–56, 201 ff.

²⁸ Cf. G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in Id., *Rechtsphilosophie* (n 25) 215–217; SL Paulson, *The Philosophy of Law of Gustav Radbruch* (n 25) 70–71, 111–112, 141.

²⁹ On the interpretation of Radbruch’s Formula by Alexy in terms of correctness, see B. Bix, ‘Robert Alexy, Radbruch’s Formula, and the Nature of Legal Theory’ in (2006) 37 *Rechtstheorie*, 139–149 (141). On relationship between law and justice in Alexy, see too R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (Oxford: Oxford University Press 2002); *ibid.*, *Law’s Ideal Dimension* (Oxford: Oxford University Press 2021), 18 f.

³⁰ Cf. R Alexy, *Concept and validity of law*, edited by M La Torre and translated by L Di Carlo (Rome: Carocci 2022) 49, 65–67, 93 ff.

of the correct conditional antecedent. Such a norm, however, begins to lose the characteristics of a legal norm as soon as the threshold of injustice begins to rise beyond the limits of tolerability. An unjust norm is still a norm that could gradually and progressively begin to lose the defining features of a norm. A norm validly constituted as such, at a certain point, loses the physiognomy of a norm; that is, it loses its identity. In Hegelian terms, quantity changes the quality of an object. When does this happen? How is it possible that a norm, which guarantees certainty and functionality, at a certain point is no longer itself? Yes, this is possible as long as we interpret the idea of *justice* in terms of *correctness*³¹.

As anticipated, a norm validly constituted as such could lose its physiognomy as a norm only if the internal parameters of the structure of the norm itself that guarantee its identity and validity as a norm, at a certain point, are lost. And they fail when, as the intolerability of the injustice increases, the parameter of functionality, and therefore of correctness, fails. The National Socialist norms that led to the intolerable persecution of the Jews were intolerably unjust norms because they were based on absolutely false empirical data and on weak and ridiculous arguments already at the time of the National Socialist regime, without having to wait for the development of genetics from the 1950s onwards which showed that Jews are perfectly equal to all other people. If it is not possible to translate injustice and inequality into terms of correctness and incorrectness, here it is affirmed that not only does an intolerably unjust norm remain a valid norm, but that even a norm that knowingly violates the principle of equality continues to have the quality of a legal norm.

Therefore, the dimension of the constitutive identification of the norm does not seem to imply any appeal to natural law and morality as the criterion for identifying the norm itself. If a norm is constituted as such on the basis of the criteria of formal validity and of correct conditional antecedent, or of functionality, and therefore correctness, this correctness, however, is not interchangeable with the idea of morality. Also, from a linguistic point of view, if I say that “this norm is immoral”, I have already pronounced the expression “this norm”, which is possible only after identifying a prescriptive pronouncement as a legal norm³².

In order for a natural law position to be relevant in terms of the identification of law, two situations have to exist. Firstly, any immoral or highly immoral content should automatically be interpreted as the incorrectness of the conditional antecedent of the normative proposition; an idea which has been excluded insofar as this produces immoral norms which, nevertheless, respect the parameter of correctness. Secondly, an intolerably immoral norm which respects the parameter of correctness if it wants to be defined as a legal norm must also lose its physiognomy as a norm and therefore no longer be identifiable as a legal norm. However, this would be a paradoxical and contradictory hypothesis; that is, a borderline case: on the one hand, the norm in question is correct, and is therefore a norm; on the other hand, it is devoid of its physiognomy as a norm, so it is no longer identifiable as a norm. Only in this remote and very unlikely eventuality would a natural law position be admissible even in terms of the identification of the norm.

On the basis of these considerations, therefore, in the phase of the constitutive identification of the norm, a *moderate positivism* is professed here. We are dealing here with positivism because it excludes moral content from the process of identifying the legal norm. And we are dealing here with moderate positivism because the will of the legislative body that has the competence to issue norms must always pass through the filter of correctness.

³¹ For justice as correctness, cf. R Alexy, *The dual nature of law*, in *Concept and validity of law* (n 23) 147, 150.

³² Cf. N McCormick – O Weinberger, *Law as an institution*, edited by M La Torre (Milan: Giuffrè 1990) 227–231.