Chapter 10
An Analysis of Some Juristic Techniques for Handling Systematic Defects in the Law

Giovanni Battista Ratti

Abstract The contribution carries out an analysis of some of the main techniques used by legal scholars in order to systematize the law, i.e. to provide it with a systematic character. In particular, the contribution first reconstructs some of the juristic operations consisting in deriving (deductively or not) implicit norms from expressed ones. It then goes on to analyze the operations consisting in reformulating a certain set of norms, singling out the "founding" elements of a normative system, highlighting the formal and axiological characteristics, and suggesting, if necessary, the expulsion, from the normative set, of the norms that do not allow this set to have a genuinely systematic nature. Then, the paper carefully examines, in the light of the conceptual dichotomy first/second interpretation, the systematizing tools employed by jurists in order to create, avoid, or ascertain systematic defects of the law, such as normative gaps and inconsistencies. The operations consisting in ordering legal materials in light of a set of underlying principles are finally examined.

10.1 Foreword

Both in common law and civil law systems alike, academic jurists are said to play a basic role in the description and cognition of law. According to a traditional thesis of legal positivism, jurists' main task is to provide a clear and systematic image of the law actually in force in a given (subset of a) legal system, at a certain time t_1.[1] Thus, the jurists' perspective is, at the same time, eminently static and partial.[2]

Jurists – unlike theorists and philosophers of law – do not seem to be interested in the legal system considered as a whole; they rather aim to analyze subsets of the legal system: private law, criminal law, business law, or even more restricted sets

[1] See Aarnio (2011, pp. 177–184) and Jori (1985, pp. 263 ff.).

[2] See Alchourrón and Bulygin (1971).

G.B. Ratti (✉)
Tarello Institute for Legal Philosophy, Department of Law, University of Genova,
Via Balbi, 30/18, 16126 Genoa, Italy
e-mail: gbratti@unige.it

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such as torts, homicide, the powers of the prime minister, the legislative procedure, and so on.

As Carlos Alchourrón and Eugenio Bulygin (1971, pp. 68–69) have pointed out, "it must be emphasized that the jurist is always concerned with a limited field of problems and although every legal problem is studied by some jurist, no jurist can take an interest in all the problems at the same time".[3]

Moreover, even though jurists are often concerned with the evolution and the possible future developments of the topic they are focusing on, their principal purpose is to reconstruct the present state of a given subset: more precisely, the actual set of rules and their normative consequences with regard to a specified topic.

In order to do so, they usually carry out a plurality of activities that, although mixed in everyday practice, conceptual analysis must keep separate.[4] The epistemological *status* of such activities is rather controversial. In fact, the activities carried out by jurists are not, considered as a whole, a mere descriptive (i.e. cognitive) enterprise. In the perspective of the analytical legal theory, legal scholarship is commonly regarded as a set of "discursive" activities, composed of several operations.

In particular, at least 11 typical juristic operations can be singled out[5]:

1. Identification of a "relevant" normative problem[6];
2. Identification of the legal sentences forming a "sentential basis";
3. Validation of the sentences which belong to the sentential basis;
4. Interpretation of each of the sentences belonging to the sentential basis (the product thereof being a normative basis)[7];
5. Argumentation of the interpretations that have been provided;
6. Development of the normative basis, by means of either logical rules of inference (*stricto sensu* logical development), or of different rules of inference commonly used by jurists (e.g.: argument *a simili*), in order to infer implicit norms that cannot be derived by the simple interpretation of the sentential basis[8];
7. Analysis of some possible defects of the normative basis: in particular, gaps and inconsistencies;
8. Conservative reformulation of the normative basis, by means of generalizing methods (so called "legal induction"), which allows one to eliminate the possible redundancies;
9. Removal of inconsistencies;
10. Filling of gaps;
11. Ordering the normative material according to a certain scheme.

[3] Alchourrón and Bulygin (1971, pp. 68–69).

[4] Bulygin (1986) and Guastini (2013 b).

[5] See Guastini (1986).

[6] Cf. Alchourrón and Bulygin (1971, ch. I). In a comparative perspective, see Sacco (1988: pp. 48 ff.).

[7] See Aarnio (1977, pp. 16 ff.); (1986, pp. 161–162); Alchourrón (1986, pp. 172–175).

[8] See Bobbio (1994, ch. XV).

In the following pages, I aim to analyze, in particular detail, the activities consisting in systematizing and ordering a normative basis (operations 7–11), being a normative basis a set of norms understood as the main product of previous identifying, interpretive, and developing operations (1–6). Accordingly, I shall briefly summarize such hermeneutic and inferential activities in the next two sections, while I shall devote the remaining sections to the thorough examination of the strictly systematizing tasks, such as the identification and filling of gaps and the identification and solution of inconsistencies. When examples are needed, I shall refer mainly to the Italian legal scholarship, the one I happen to know a little about, but I suspect that its *modus operandi* is not very far away from that of legal scholars in other Western legal systems.

10.2 The Identifying and Interpretive Activities of Legal Scholarship

What jurists are mainly interested in, when carrying out their "expository" task, is the determination of the normative qualification of a certain conduct, according to the law in force. In such case, it is the set of all the relevant actions that may be performed when some circumstances obtain that determines the identification of a certain normative problem. If, for instance, a certain jurist wants to determine the legal *regime* of the patrimonial assets of cohabiting couples in Italy, she has to single out all those normative provisions that, at least at first sight, seem to refer to the different actions which are related to. In other words, if a jurist wants to provide her normative problem with a solution, she has to single out all those provisions whose propositional contents describes the action or the actions, whose deontic *status* is determined by the normative qualification. In so doing, she can follow the order imposed on the topic by the lawgiver (if such order exists) or by the courts, or substitute this order with another one. Indeed, the jurist's first step is to identify an action: the action the normative qualification thereof she is interested in. The second step is to find the legal materials (statutory and constitutional, but also judicial and doctrinal) which are relevant for the solution of the problem, in the light of previous judicial and doctrinal interpretations.

The outcome of the operations analyzed so far is the identification of some legal sentences, belonging to the legal sources. Put in other words, what jurists do, after having approached a particular normative problem and after having identified a specific topic, is to cut out, inside of legislation (typically in civil-law legal systems) or case-law (typically in common-law legal systems), or both, "a finite set of relevant sentences".[9]

In civil-law countries, this operation can be reduced to singling out some statutory provisions assumed to be relevant with regard to the solution of the original

[9] Guastini (1986, p. 296).

normative question. This happens when, using the same conceptual categories used by the legislator in systematizing a certain topic, jurists identify the relevant provisions according to legislative design.[10]

When a legislative systematization is lacking, jurists may find themselves in front of a fragmentary normative discipline, dispersed in many legal documents,[11] or even in front of an inexistent one. The selection of every relevant sentence can be anything but easy with regard to some topic, alternatively either because of the modern legal systems enormous amount of legislation and the consequent difficulty of knowing all the relevant sentences, or because of the nearly total lack of legal provisions related to some specific topics. It must be added, however, that often jurists approach a topic in the light of previous identifications, carried out by other jurists, which make it easier for them to find the relevant legal sources, also in the extreme cases of super-abundance or complete lack of legal provisions.

The identification of the sentential basis logically involves (and temporally is accompanied by) other two important operations: (1) the *prima facie* (or first) interpretation of involved sentences; (2) their formal validation.

In the first interpretation phase, often in the light of previous doctrinal analysis, jurists identify a language segment as a sentence and ascribe a first tentative meaning to it.[12] This meaning, "fruit of a not pondered comprehension", seems not to be mechanically identified with the product of so-called "literal" interpretation (i.e.: with the "literal" meaning). It is rather its current legal meaning, diffused in the legal community, on the basis of consolidated scholarly and judicial views.[13]

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[10] Alchourrón and Bulygin (1971, p. 76): "When the source is legislation, the problem has been usually solved in advance (at least in part) by the legislator himself who normally orders the statutes and their contents according to some criterion. This means that he also is engaged in the activity of systematization. This tendency to legislate in a systematic way has increased remarkably since the enactment of the Code Napoleon (the trend towards codification of the law). The characteristic feature of this procedure is that the statutes or the paragraphs of a code are grouped according to different topics […] It should be noted that so far as theory is concerned, the legislator who draws up a statute is engaged in exactly the same activity as the dogmatic jurist: both are constructing a normative system, although the former is not bound by pre-existing (valid) sentences, but chooses them more or less freely".

[11] Cf. Van Hoecke (1986, p. 219): "D'un pont de vue historique la dogmatique juridique a longtemps eu comme objectif principal la systématisation d'un droit coutumier et d'une jurisprudence fragmentaire et hétérogène. Les grandes codifications […] ont d'ailleurs été le travail d'éminants jurisconsultes".

[12] Chiassoni (1999a, p. 91): "At the first-interpretation stage, interpreters perform the following activities: (a) they identify an object as a sentence, or a string of sentences, in a (to them) familiar language; (b) they ascribe to the sentence(s) a first, tentative, meaning – or an array of tentative, possible, meanings".

[13] See Bowers (1989, pp. 49 ff.), who distinguishes "semantic meaning" and "situational meaning", observing about the latter. At p. 52, the author states: "Although the detailed exposition of situational meaning is complex, involving factors of social background, culture, participants' knowledge of the world, and the formal status of a text, the basic principles are simple; the effect of an utterance is strongly coloured by its "field", "tenor", and "mode". The field of a discourse is the social action of which it forms a part, including its subject-matter; its tenor is the set of relationships existing among the participants in the discourse – the social roles and status of speakers, hearers and overhearers; the mode of a discourse is its form of expression – spoken, written, formal, informal, private, public, and so on to the details of its actual physical qualities".

When jurists select a set of the sentences to form a sentential basis, from which they will start their exposing enterprise, they make sure that these sentences present determined requirements so that they can be considered formally valid or applicable.[14]

To do so, they use some criteria, which "establish what requirements legal sentences must satisfy in order to be valid".[15] The notion of formal validity is, accordingly, relative to a given set of criteria, which, following Alchourrón and Bulygin's terminology, we can call "criteria of identification". Criteria of identification consist, roughly, of two classes of rules: (1) rules of admission, which establish the conditions for a sentence to be valid; and (2) rules of rejection, which establish the conditions under which a sentence, previously valid, is no longer valid. A sentence, enacted in accordance with the rules of admission and not eliminated because of a rule of rejection, can be chosen as a basic sentence.

By "applicable" I mean a norm, the application thereof is prescribed by another valid norm.[16] In legal scholarship, it may be (and often is) the case that the normative systems built-up by jurists are made also (or even eminently) of applicable norms: think for example of foreign norms which are to be applied in a jurist's domestic legal system, or moral norms which are applied in decisions bearing on ethically sensible issues.

We have seen that the prima facie or first interpretation is the juristic operation that makes it possible to pass from a set of legal sources to the narrower set of prima facie relevant sources, by assigning a first, tentative, meaning to them and identifying their linguistic function.[17]

Second or all-things-considered interpretation (also dubbed "reinterpretation") is the operation that makes it possible to pass from the (relevant) legal sources to legal norms, or, from a slightly different perspective, from a sentential basis to a normative basis, which constitutes the foundation of all the following juristic operations.

The activity of reinterpretation consists in assigning to a certain text a particular meaning, which is the "final interpretative response" of the jurist and constitutes the final product of a complex exegetic process which is articulated in four phases: (a) the evaluation of the results of first interpretation; (b) the enumeration of some (or even all) the further interpretive options which may reasonably pursued by the interpreter; (c) the choice of one of such options or the creation of a new interpretive option; (d) making more precise the content of the chosen interpretation.[18]

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[14] Alchourrón and Bulygin (1971, pp. 72–73); Guastini (1986); and Niiniluoto (1981).

[15] Alchourrón and Bulygin (1971, p. 72).

[16] Applicability, as a consequence, is a concept which is parasitic to that of validity. On applicability, see at least Bulygin (1982) and Rodríguez (2014, pp. 265–270).

[17] It cannot be excluded that only after having carried out one or more reinterpretations, the jurists regard as useless, due to an ascription of meaning different from the one carried out prima facie, some sentences that she had considered prima facie relevant for the solution of the normative problem at hand.

[18] Chiassoni (1999b).

On such an interpretive result (which is the product of reinterpretation), the jurist founds her main non-interpretive responses, such as the possible construction of a general doctrine (e.g. of sanctions, of contracts, of torts, etc.), the coherentization and integration of a normative set, and the subsequent elaboration of a dogmatic system. Each of such operations may involve the modification of the normative basis and, consequently, the changing (not only of first interpretation, but also) of the reinterpretation which is at the foundations of each of them.

10.3 The Derivation of Implicit Norms from a Normative Basis

The activities of jurists do not end with the construction of the normative basis. Quite the opposite: it is a widespread view that the *main activity* of legal scholars consists in logically developing and reformulating the normative bases of the different sectors in which the legal order is subdivided, according to criteria of concise exposition and systemic elegance.

The "empirical" observation of the activities of jurists shows that they complete the discourse of legal authorities deriving unexpressed norms, from the expressed norms which are assumed to be the meaning-contents of normative provisions.

More precisely, seven kinds of unexpressed norms can be singled out, depending on the reasoning and/or the premises from which they can be derived[19]:

(1) Norms derived from expressed norms by means of deductive reasoning;
(2) Norms derived from expressed norms by means of non-deductive reasoning, not expressly allowed/contemplated by positive law;
(3) Norms derived from expressed norms by means of particular rules of inference expressly allowed by positive law (e.g. analogy);
(4) Norms derived from expressed norms by means of particular rules of "legal logic" (such as the *a contrario* argument or the *a fortiori* argument);
(5) Norms derived from expressed norms by means of (sound or unsound) reasoning the premises thereof are made not only of expressed norms, but also of doctrinal theses;
(6) Norms derived from expressed norms by means of finite induction;
(7) Norms derived from unexpressed norms by means of non-finite induction.

For the sake of brevity, the analysis of each kind of derived norm cannot be completely carried out here. Here I shall only touch on them quickly.

[19] See Guastini (2013 b, pp. 155–157).

10.3.1 Deductively Derived Norms

The theory of normative systems claims that, a posteriori, many (if not all) juristic arguments can be reconstructed as deductive, often under the condition of making implicit premises explicit.[20] However, one can find some clear doctrinal examples of deductive reasoning, intended to produce implicit norms (understood as strict logical consequences of expressed norms).

An example of such kind of reasoning is apparent in the case of vicarious liability for culpable conduct of the employee within the Italian legal system; this, according to legal scholars, is not limited to the specified work duties of the employee, but reaches out to voluntary conducts of the employee exceeding his specific work incumbencies[21]:

> The liability for the negligence of the employee is not limited to the execution of the task specifically entrusted to him, but extends to deviations from the activities specifically ordered, and completion of related operations that the employee has voluntarily undertaken. Thus, if a skilled worker, sent by a company that supplies electricity to install a meter at a private place carries out, beyond the scope of his duties, the testing of the electrical power alimented by the meter he put in place, and, during this testing, negligently causes injury, his employer responds for damages.

Such kind of reasoning can be formalized as follows[22]:

[1] $\forall x(Dx \rightarrow ORx)$ [23]
[2] Da

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[3] ORa

Indeed, the conclusion (the employer's obligation to compensate the damages) necessarily follows from the premises (the norm [1] and the statement [2] which describes the employee's damage): this is so-called deontic modus ponens. Observe that, in the passage under scrutiny, so-called "logical enrichment" is also applied.[24] If there is a damage caused by the employee, there must be a compensation granted by the employer, both in the case that the damage is caused by the employee in carrying out her "ordinary" tasks (let's symbolize them by "I") and in the case it is caused by the employee in carrying out "extraordinary" tasks he has voluntarily undertaken (symbolized by "L").

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[20] Alchourrón and Bulygin (1971), Navarro and Rodríguez (2014).

[21] Trimarchi (1961, p. 159). Translation from Italian, here and elsewhere, is mine.

[22] "D" is for "damages", "R" is for "responding for damages".

[23] Which reads: "If there is damage caused by the employee, then the employer is obliged to restore it".

[24] Logical enrichment is the rule according to which if a certain proposition p is a sufficient condition of another proposition q, no matter how many proposition we add to p, in case p is instantiated, q will continue on following from p anyway. In symbols: "$(p \rightarrow q) \rightarrow (p \,\&\, r \rightarrow q)$".

In symbols:

$[1'] \ \forall x\big(Dx\&\big(Ix \vee Lx \vee \ldots Nx\big) \rightarrow ORx\big)$
$[2'] \ Da\&\big(Ia \vee La \vee \ldots Na\big)$

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[3] ORa

The identification of new *relevant* properties does not alter the nature of reasoning, provided that the normative basis is enlarged in order to contain further norms from which one can derive such properties: i.e. provided that implicit exceptions are made explicit. If relevance of properties is only recognized implicitly, then what we have is a case of enthymematic reasoning.

A relevant property, ruling out enrichment (or, from a slightly different perspective, calling for the revision of the premises) in the case at hand, is found in the following lines[25]:

> An employee may carry out, at times, without the employer knowing, a task that was up to another employee. If damages arise therefrom, in order to determine whether this is within the risk of the enterprise, one should consider the greater or lesser affinity between the duties of the employee and the specific activities carried out by him, and the extent to which the performance of the enterprise activities may be divided into branches, offices, and factories.

According to Trimarchi (who "introduces" this norm into the Italian legal system, inspired by the U.S. *Restatement of the Law of Agency*),[26] when an employee undertakes an activity which is up to another employee, without having the skills, exceeding his competences, and without the employer knowing (let's symbolize by "M" this set of circumstances), the employer does not respond for damages. In symbols:

$[4] \ \forall x\big(Dx\&Mx\big) \rightarrow\sim ORx$

In the passages we have quoted, Trimarchi enlarges the normative basis of vicarious liability of the employer, first reconstructing norm [1] regarding the liability for the employee's conduct, and then identifying the properties which rules out the application of such a norm, or more precisely rules out "logical enrichment" regarding [1] in a certain context – as it happens in [4]. However, it is manifest that if one wants to avoid inconsistencies within the system, the normative basis must be reconfigured as follows:

$[1''] \ \forall x\big(Dx\& \sim Mx\big) \rightarrow ORx$
$[4] \ \forall x\big(Dx\&Mx\big) \rightarrow\sim ORx$

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[25] Trimarchi (1961, pp. 159–160).

[26] This norm is considered in force within the Italian legal order due to its implicit derivation from the principle of liability based on (direct or indirect) negligence of the employer: here we have a first example of non-deductive reasoning.

Indeed, deductively developed, such a normative basis constitutes a complete and consistent normative system.[27]

10.3.2 Other Kinds of Derived Norms

From the point of view of the "empirical" analysis of juristic reasoning, it can be observed that jurists carry out many kinds of reasoning which are not deductive in nature.

According to a widespread opinion among jurists, deductive reasoning is insufficient to reconstruct the conceptual content of a legal system. This is due, among other things, to the important fact that the law itself admits, in addition to deductive reasoning, also other types of reasoning.[28] As is known, it may be the case that a legal order admits (and in certain cases even requires) that legal officials, jurists and lawyers reason in a non-deductive way (e.g. analogically).

In addition to this, there is a widespread view among jurists, according to which legal scholars cannot confine themselves to deductively developing a set of norms (unless they want to build a merely "tautological" science) but should instead "systematize" legal materials, which, at first, often appear under the forms of an unordered set of normative provisions.[29] Therefore, it is common for jurists to derive norms from legal materials by means of logically unsound reasoning.

From the point of view of rational reconstruction, it is possible to distinguish the procedures used by jurists to develop legal requirements, at least between: (1) arguments expressly based on specific provisions of law; (2) arguments that have no explicit recognition in the law, but which are implicitly required by the law; and (3) arguments, not expressly provided or implicitly required by law, but developed by legal scholarship.

[27]Of course, the system at hand is made complete by what we can call "the norm of closure of liability" ([NCL] ~Dx → ~ORx), which is implicit in Trimarchi's discourse and is generally recognized by legal scholarship.

	[1″] Dx & ~Mx → ORx	[4] Dx & Mx → ~ORx	[NCR] ~Dx → ~ORx
Dx & Mx		~ORx	
Dx & ~Mx	ORx		
~Dx & Mx			~ORx
~Dx & ~Mx			~ORx

[28]Guastini (2013a): 134–135.

[29]Trimarchi (1961, p. 6): "With the only tool of formal logic one can infer from legal norms nothing more than what it is expressed by them, since formal deduction is tautological. To go further, to solve the problems that the legislature did not contemplate, or did not solve, often with the stated purpose of entrusting the solution to judges, it is necessary to study the functions that can be regarded as pertaining to the norms, by adequately coordinating and developing them".

Some qualifications are in order here.

(1) The first category contains those arguments, specifically productive or integrative of the law (such as analogy in the Italian legal order, or the variety of integrative arguments allowed by the first section of the Swiss Civil Code[30]), which have their foundations in legal provisions.

Although these arguments are generally deemed to be invalid from a logical point of view, there is no doubt that they are more than "sound" from a legal point of view, since they are allowed, if not imposed (at least in some cases), by law itself.

(2) The second category includes those kinds of reasoning that, though not being expressly recognized by the law, are implicitly required by the law in order to regard it as a complete and consistent whole. In particular, the judges, who are the addressees of a general prohibition of denial of justice and of the obligation of justifying their decisions on the basis of pre-existing legal norms, cannot but conceive the law as a complete and consistent normative set,[31] otherwise they could not judge or could not base their decisions on legally valid norms. Well, all the (logically unsound) procedures which, from time to time, the judges (and jurists) use to reach a solution for an unqualified case or a inconsistently qualified case, are admitted in so far as law requires the court to resolve any dispute whatsoever. In other words, there are situations where the only existing option for the judge of deciding a case on a legal basis consists in using arguments, not explicitly provided by the law, which allow one to fill in a normative gap or to solve an antinomy. These arguments usually make use of positive norms to create other norms. A paradigmatic example of such kind of arguments is the *a contrario* argument in its productive function (*Expressio unius est exclusio alterius*).

(3) Finally, there are procedures that are used to produce unexpressed norms, which are neither provided for, nor implicitly required by the law, but are grounded on extra-legal elements, and especially on the ideological theses defended (often surreptitiously) by legal scholars. For instance, jurists interpret constitutional provisions in a "dissociative" way, in order to distinguish cases that were not differentiated by the lawgiver.[32]

We have just seen that jurists often use different rules of inference to reach, on several occasions, diverging results. It is even more common, though, that they change the premises of their reasoning (rather than the rules of inference), by adding to positive norms non-positive premises derived by legal scholarship.

[30] Section 1 of the Swiss Civil Code provides: "1. The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. 3. In doing so, the court shall follow established doctrine and case law".

[31] Alchourrón (2012, pp. 40–44).

[32] Parodi (1996, pp. 102 ff.).

As a consequence, the development of the normative basis can be carried out, not only by changing the rules of inference (as we have explained so far), but also (and even more frequently) by *adding "non-positive" premises of different kinds*. Unluckily, this feature of the logical development of a normative basis has seldom been taken into account in relevant literature.[33]

In addition to specific dogmatic theses elaborated by jurists, the discourse of legal scholarship is full of conceptual theories, which are not only used to "integrate" the discourse of normative authorities, but are likely to affect the interpretation of the relevant statutory provisions and the normative consequences which can be derived from them.

Examples are legion. It suffices here to record just one of them, concerning the "legal nature" of pre-contractual responsibility in the Italian legal system, where section 1337 of the Italian Civil Code[34] has been interpreted, alternatively, as bearing upon an offense tort or as a responsibility of a contractual nature. The former thesis has been propounded on the basis of the theory according to which interest protected in terms of pre-contractual liability is that of freedom of contract. The latter thesis has been defended by arguing mainly that "the responsibility is of a contractual kind, on the assumption that torts would require violation of absolute rights, while those at play in negotiations are of a relative nature".[35]

Another major operation carried out by legal scholarship is so-called "legal induction", which consists roughly in deriving principles from specific rules. In other words, it consists in "summing up" a large number of rules, which have aspects in common, by means of one or more general principles. The logical nature of this process is controversial. Some authors hold that it has a deductive nature, whereas others believe it is a genuine inductive process.

For Alchourrón and Bulygin (1971, pp. 78–84), for instance, in reformulating several norms (which have at least one common element) into a more general norms containing such a common element and normatively equivalent to the original norms, the inferential nature of the procedure is ensured by the fact that the number of norms is finite (and that the conclusion necessarily follows from the premises). From the norms N_1 (Dx & Ix → OR); N_2: (Dx & Lx → OR); N_3: (Dx & Sx → OR) one can surely infer the norm (Dx → OR). It is a strictly deductive inference, since the transition from more detailed norms to the more general rule is a strict inference, and not merely a "probable" one.

It should, however, be noted that, in addition to N1, N2, N3, one can derive from N4, by means of enrichment, many other norms, which were not previously belonging to the legal order. This evidently shows that the argument according to which legal induction is not a creative process can be maintained in so far as the context (i.e. the normative system in which the induction is carried out) does not change.

[33] But see Guastini (2011, pp. 155–163) and (2013 b).

[34] Section 1337 of the Italian Civil Code provides: "The parties, in negotiating and forming the contract, must act in good faith".

[35] Musy (1997, p. 400).

A view which runs counter to that of Alchourrón and Bulygin is defended by Jori, who holds that "any group of norms that have something in common can be used to 'induce' an infinite number of principles, that justify them (for example, by varying the level of generality at which 'induction' is stopped): from each of these different principles, then, it will also be possible to deduce the correct set of original norms".[36]

At any rate, one can find in legal scholarship examples of both deductive generalization (*à la* Alchourrón e Bulygin) as well as examples of strictly inductive generalization (*à la* Jori).

An example of the first kind of generalization is derivation of the so-called "principle of safety and health of the workers in working places", which is drawn from several provisions of the Italian legal system, such as sections 2, 32, 35, 41 of the Constitution, and section 2084 of the Italian Civil Code, as well as from many provisions of the legislative decree N. 626/1994. Generalization seems to be deductive in the case at hand, since given those premises (i.e. that specific meaning-attribution to that sentential basis) one cannot but derive such a principle (and there are no other norms of labor law which put such a principle into doubt).[37]

By contrast, an example of a principle extracted by means of a genuine inductive generalization is given by the principle of strict liability for enterprise risk.[38] Such a principle may be inferred, although not in an uncontroversial way, from some of the norms regarding torts. However, there are many other norms which justify the opposite principle, according to which the employer only responds in case of negligence. It is clear that also in this case the induction of the principle of strict liability is a "finite" one. But such finiteness is always capable of being jeopardized by adding new norms to the normative basis. As a consequence, its results are merely, as it were, "probabilistic".

10.4 Reformulation and Choices Among Alternative Normative Systems

Legal principles – often the product of the "inductive" activities we have just analyzed – play a twofold "systematic" role: (1) on the one hand, they constitute the ultimate "axiomatic basis" of a certain system of norms; (2) on the other hand, they justify the norms of the system, in that they are the axiological foundations of such norms. From combining such two functions, one can infer the distinction between "justifying" axiomatic bases and "non-justifying" axiomatic bases and observe that, generally, jurists prefer the former over the latter.

[36] Jori (1985, pp. 320–321).

[37] Cf. Minale Costa (2004, pp. 206 ff.).

[38] Cf. Trimarchi (1961, pp. 1–6).

According to this view, principles are the elements which are capable of making a certain normative set consistent, complete, and axiologically coherent.[39] This would be for the following reasons. First, a principle is often (if not always) "in collision" with (at least) another principle, so that by introducing a preferential ordering among principles one can order the whole normative set (in other words, by making consistent the set of the axioms one makes consistent the theorems too). Secondly, a principle allows one to infer other norms in addition to those from which it was derived (i.e. the completeness of the axioms warrants the completeness of the theorems). Finally, it is a widespread view that principles allow one to reduce a certain normative set to its ultimate values, highlighting its possible axiological defects and disharmonies. In the example above, the principle of strict liability, inferable from some of the norms on torts, was in conflict with other norms of the same field, from which it was possible to induce the principle of negligence or fault liability: in lieu of a unique system of liability for enterprise risk, legal scholarship has produced two, each of which may be traced back to a different principle.

The reformulation of the system makes it possible to single out the "founding" elements of a normative system, highlighting the formal and axiological characteristics, and suggesting, if necessary, the expulsion, from the normative set, of the norms that do not allow this set to have a genuinely systematic nature.

In particular, such a reformulation makes it possible to reconstruct a normative system as a deductive set, from which all the consequences can be derived by deduction. In other words, if it is true that before the reformulation, a normative set may have gaps and contradictions, as well as axiological disharmonies, it is also true that, after that the reformulation took place, it is easier to connect the normative set to the systematic characters of which the law is predicated.

This can be demonstrated, by formalizing the Italian regulations on strict liability for enterprise risk which were mentioned previously.

In "axiomatic" terms, the system of torts in Italian legal scholarship is formed by the two following principles, each of which is (supposedly) derivable from some provisions of the civil code:

[1] $\forall x(\mathrm{D}x \rightarrow \mathrm{OR}x)$

Which means "For any x, if x is a damage, then it is obligatory to redress it"; and

[5] $\forall x(\mathrm{D}x \,\&\, \sim \mathrm{F}x \rightarrow \sim \mathrm{OR}x)$

This means "For any x, if x is a faultless damage, then it is not obligatory to redress it". This is tantamount to the usual slogan in Italian legal scholarship "No liability without fault".

[39] See Ratti (2014).

Clearly, this set of norms is inconsistent, to the extent that [1] connects "Dx & ~Fx" to the contrary solution to the one connected by [5] to the same case.[40] If one rephrases [5] in the sense that it includes negligence or fault in its formulation, one can clearly grasp that, for the principle at hand, it is irrelevant whether there is fault or not:

[6] $\forall x\left(Dx\&\left(Fx \vee \sim Fx\right)\right) \rightarrow ORx$

In this sense, [6] is a happy formulation of the principle of strict liability, since one can derive from it – as well as [1] – both the norm "Dx & Fx → ORx" and the norm "Dx & ~Fx → ORx".

There is no way of making the system of torts consistent, if not by "repealing" one of these two general norms. In order to make such a system consistent, one must reject those norms from which the principle of fault liability can be derived or reinterpret the provisions from which such norms are derived. By contrast, if one wants to make consistent the system of fault liability, then one has to reject those norms from which the principle of strict liability is derived: what can be done also by reinterpreting the provisions from which it is extracted.

The reformulation of the system makes it possible to understand more clearly the choice between two alternative sets which have as their basic principles the standards we have just mentioned.

10.5 The Formal Features of the Normative Basis

In the formal analysis of the formal defects of normative systems, commonly an abstraction is made regarding interpretive questions. If one removes such an abstraction, one can notice that the formal properties of a system depend, to a great extent, on the ascription of meaning to the provisions which constitute the sentential basis identified by the jurist.

[40]The normative system can be developed as follows (taking into account the fact that this system also contains what we have called the "norm of closure of liability"): [NCL] ~Dx → ~ORx):

Cases/Norms	[1] Dx → ORx	[5] Dx & ~Fx → ~ORx	[NCL] ~Dx → ~ORx
Dx & Fx	OR		
Dx & ~Fx	OR	~ORx	
~Dx & Fx			~ORx
~Dx & ~Fx			~ORx

To make the system consistent, one has to eliminate one of the two inconsistent norms. The elimination of each of the two norms brings about two alternative systems: the system of liability based on negligence and the system of strict liability.

In an interesting case discussed before the European Court of Justice (ECJ),[41] the relationship of priority between two Directives was debated. The first one was the *Doorstep Selling Directive*, the second one was the *Consumer Credit Directive*. Both directives provided two incompatible solutions for the same generic case, i.e. the right to cancel a consumer's loan secured by charge. While the *Consumer Credit Directive* did not allow for such a cancellation (providing, at section 2.1(a), the exclusion of the applicability of the Directive to such a case),[42] the *Doorstep Selling Directive* recognized it, within certain limits, at section 5.1. Finding itself in front of such an antinomy, the Court (re)interpreted section 2.1 of the *Consumer Credit Directive* as not applicable to the case at hand.[43]

Interpretation is, inter alia, the operation by means of which the jurist (or the judge) builds up a normative basis, starting from a sentential basis. Once having selected, more or less discretionally, the provisions composing the sentential basis, the jurist deals with the possible semantic options which it admits in order to build up a normative basis.

Indeed, in this passage from the sentential basis to the normative basis, the jurist makes choices that will have repercussions on the formal properties of the normative set. She can interpret provisions, in fact, so that gaps or antinomies are produced or ruled out.[44]

The system of liability based on negligence must be reformulated as follows (the addition of [7], of course, is required by the expulsion of [1], which provided that a compensation was due in the case "Dx & ~Fx"):

Cases/Norms	[7] Dx & Fx → ORx	[5] Dx & ~Fx → ~ORx	[NCL] ~Dx → ~ORx
Dx & Fx	ORx		
Dx & ~Fx		~ORx	
~Dx & Fx			~ORx
~Dx & ~Fx			~ORx

The system of strict liability should be so reformulated:

Casi/Norme	[1] Dx → ORx	[NCR] ~Dx → ~ORx
D	OR	
~D		~ORx

[41] ECJ, *Heininger and another v. Bayerische Hypo und Vereinsbank AG*, January 24, 2002, 9945, in "All England Law Reports", 2004, European Cases, pp. 1 ff.

[42] Section 2.1 (a) provides that: "This Directive shall not apply to: (a) credit agreements or agreements promising to grant credit: – intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building".

[43] ECJ, *Heininger and another v. Bayerische Hypo und Vereinsbank AG*, p. 11: "To inquire as to a relationship of precedence between the two directives presupposes that they both apply to the case. But that is not the position".

[44] Guastini (2004, pp. 231–237, 248–249).

It is important to recall here the distinction, previously introduced, between first and second interpretation. First interpretation is the operation by means of which jurists, dealing with some of the sentences of the legal sources, attach a first, tentative, meaning – which usually consists in what is called "current legal meaning", i.e. the meaning which is widespread within the legal community, on the basis of settled doctrinal and judicial theses.

In approaching a certain set of legal materials, the jurists use some doctrinal or judicial theses, which lead them to spot some formal features which we can call prima facie, in analogy to the interpretation which produces them. Such formal features are then re-elaborated during the process of reinterpretation, so that it is possible to maintain that a first "systematization" is carried out at the interpretive level.

Such systematization responds to the regulative ideal that law, as a product of doctrinal interpretation, *must* have a systematic nature. However, if law must have a systematic nature, and if jurists may carry out several operations on pre-interpreted materials, then a more detailed analysis of such operations is needed in order to reconstruct the methods by means of which such a nature is attributed or denied. In the next section, we shall deal with the operations which are used to deny or assert that law is incomplete, while in the following sections we shall examine those operations which are designed to affirm or deny that law is inconsistent.

10.6 The Identification of Gaps

The traditional account of normative gaps understand them as "data of experience", which jurists cannot but ascertain.[45]

This is not the case: on the one hand, expressed norms are the product of a complex interpretive process, which in any of its phases involves interpretive choices and is influenced, at every step, by dogmatic theses. On the other hand, unexpressed norms are derived from expressed norms by means of a variety of inferential ways, the choice among which is also influenced by doctrinal theses regarding interpretation and logical development.

Hence, if norms are the product of such a complex interpretive and "expansive" process, and gaps are regarded as the lack of a norm, the presence or the absence of a gap in a certain normative system depends upon a series of *lato sensu* interpretive, constructive, and systematizing operations carried out by jurists.

In facing the problem of gaps, then, it is important to call to mind some basic concepts, such as those of:

(1) "Normative provision", by which we understand any sentence of the legal sources;

[45] Chiassoni (2001, p. 45).

(2) "Expressed norm", by which we understand the meaning-content of a certain normative provision, assigned to it by an act of interpretation (i.e. meaning-ascription)
(3) "Unexpressed norm", by which we understand a norm derived, by means of several kinds of inferences, from an expressed norm.

Moreover, it will be useful to remind the distinction between first (or prima facie) interpretation and second interpretation (or reinterpretation), understanding the former as an attribution of a tentative meaning, product of a first "intuitive" approach to the sources to be interpreted, and the latter as the final meaning, product of a "all-things-considered" investigation on the elements which are relevant for attaching a certain set of meanings to a certain sentential basis.

The distinction between first and second interpretation makes it possible to refine the conceptual analysis of the operations carried out by jurists in order to "ascertain" the incompleteness of a certain system of norms.

As we have noticed, interpretation may rule out or create gaps, but it cannot fill them up: the filling-up of gaps is something which occurs when interpretation has already been carried out.[46]

But it is also true that, in jurists' works, the cases in which a gap is expressly admitted are relatively rare. The construction of normative materials usually is carried out in a way that it gives the impression that the law is always complete, at least in the sense that it contains no implicit gap.[47] In other words, the jurist, when recognizing an explicit gap regarding a certain system, tends not to admit that the law does not provide any solution at all for a certain generic case. There is always the possibility, for instance, that a principle can be developed in a way that it allows one to find a solution for such a case, or that the analogical application of a norm, prima facie not taken into consideration, can provide the normative problem with a solution regarded as satisfactory or reasonable by the jurist.

Let us consider the following example. In order to avoid responsibility, some enterprises assign some risky activities to other enterprises (so-called "satellite enterprises"), which are often constituted with small capitals, and hence are barely capable of bearing the economic burden of repairing damages. On a first interpretation, Italian law provides nothing on the joint responsibility of both enterprises. Only the enterprise which materially carries out the activity (i.e. "the satellite enterprise") ought to restore the damaged subjects. Obviously, this involves some great difficulties regarding the safeguard of damaged people and the distribution of the risk in carrying out the dangerous activity: there is indeed a high probability that the

[46]Cf. Guastini (2013b).

[47]Here I am referring to the interesting distinction between explicit and implicit gaps provided by Chiassoni (2001, p. 46). By the phrase "explicit gap" Chiassoni means the lack, in relation to a certain set of legal materials LM and a normative question Q, of an explicit norm which provides for the legally relevant case C. By the phrase "implicit gap" he means the lack, in relation to a certain set of legal materials LM and a normative question Q, of an implicit norm which provides for the legally relevant case C.

damaged subject will be unable to receive compensation. In order to avoid such an undesired effect and fill up the gap regarding the responsibility of the contractors, Italian jurists have analogically extended, to the case at hand, section 2049 of the Italian Civil Code (which provides that "The owners and the clients are responsible for damages caused by the unlawful acts of their workers and clerks in the performance of duties to which they are put"), and so regarded the contractor enterprise liable for damages (of course, jointly with the contracting "satellite enterprise").[48]

The identification of a gap is only the last, possible, stage of a composite reconstructive process. More precisely, one can distinguish at least six operations carried out by jurists in order to prevent or create gaps, and that allow the jurist, respectively, to avoid or carry out the integration of a certain normative micro-system[49]: (1) prima facie negative ascertainment, (2) prima facie positive ascertainment, (3) creation, (4) prevention, (5) pondered weak ascertainment, and (6) pondered strong ascertainment.

Some qualifications are in order here.

(1) Prima facie negative ascertainment consists in denying, at the stage of first interpretation, and on the basis of legal scholarship's common opinion (if any), the existence of a gap regarding a certain conduct. This kind of ascertainment depends on the selection of legal materials, on the interpretation of such materials, and on the rules of inference used by the jurist in developing the content of such a normative set. In many cases, this negative ascertainment is implicit in the argument of the jurist. However, it happens sometimes that it is made explicit, mostly when considering scholars' disagreements on the "gappiness" of a case, the evolution of a certain set of legal regulations, or judicial attempts to fill in a pre-existing gap.
(2) Prima facie positive ascertainment consists in affirming, at the stage of first interpretation, and on the basis of legal scholarship's common opinion (if any), the existence of a normative gap regarding a certain conduct.

In other words, the jurist approaches a certain normative system, according to the most widespread interpretive and doctrinal theses, regarding it as a gappy system, which does not connect any normative solution to a generic case. This happens often, since the systems built-up by different jurists for different aims hardly overlap. This is to say that a certain jurist singles out a specific set of provisions and extracts from it a certain normative system which is considered, in ordinary doctrinal reconstruction, as incomplete. However, it is often the case that, subsequently, the gap is filled-up by different legal scholars in diverging ways.

For instance, by denying that section 156.1 of the Italian Civil Code[50] – providing on the maintenance of separated spouses – can be extensively or analogically

[48] Bessone (1987, pp. 354–355).

[49] Chiassoni (1999c, pp. 294 ff.), (2007, pp. 203 ff.).

[50] Section 156.1 of the Italian Civil Code provides that "In pronouncing the separation, the judge provides that the spouse, to whom the separation cannot be charged, is entitled to receive what is necessary for his or her maintenance, if he or she does not have adequate incomes of his or her own".

applied, one creates a gap regarding the case of maintenance of the former unmarried partner. Since this is the common view among Italian scholars, the positive ascertainment is the "natural move" in order to begin the reconstruction of the normative system bearing upon the obligations of unmarried partners after they split up.

When the jurists carries out a negative ascertainment, and so denies the existence of a gap within the portion of a legal system she takes into consideration, she can confirm or reject, at the stage of second interpretation, the result of her first ascertainment. In the former case (i.e. confirmation), the system the system will conform, from the very beginning, to the ideal of completeness that usually guides the activities of scholars. In the latter case (i.e. rejection), she creates a gap probably in order to fill it up later on, and so modifies the normative system (by adding new materials, by changing the interpretations of the legal materials previously identified, or by admitting new rules of inference).

(3) There is creation of a gap when the jurist, at the second interpretation stage, creates a gap which *did not exist* at the first interpretation stage. For instance, this is the case of those who defend the view that section 48 of the Italian Constitution contains a gap regarding the right to vote of foreign people, whereas the most common reading (the "current legal reading") is that foreign people have no right to vote in Italy (except for resident UE citizens in administrative elections).

(4) There is prevention of a gap when the jurist cancels, at the second interpretation stage, a gap which existed at the first interpretation stage. According to Italian legal scholarship, for instance, there is no rule which, prima facie, provides strict liability for assuming the risk upon those who carry out a dangerous activity.[51] However, a different reading of section 2050 of the Civil Code makes it possible to fill up this gap and to eliminate the relevance of negligence. This is made clear by the following passage[52]:

> Is it possible to say that there are no rules of the [Italian] Civil Code in which cases of strict liability are identifiable? […] At a first reading of the rules, only two of them seem designed to regulate forms of faultless liability [ie: section 2049 and 2054 of the Civil Code]. However, if one deepens the analysis of the other rules where, in various ways, a *relative* presumption of fault is introduced, and therefore the opportunity to offer discharging evidence is given to the responsible person, it is easy to identify other rules of strict liability. The formulas from time to time endeavored to indicate the content of discharging evidence (according to section 2050, the responsible must prove that "[she has] taken all the appropriate measures to avoid the damage" […]) are in fact many expressions of directives of strict liability.

(5) We are in front of a weak ascertainment when the jurist *does not* cancel, at the second interpretation stage, a gap which existed at the first interpretation stage, even though it was argumentatively easy to do so.

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[51] According to the theory of normative systems, the qualification of finer cases does not reach less fine cases. It is not possible to infer from the norm "(Dx & Fx) → ORx" the other norm "Dx → ORx". The case consisting in damages, but not also in the negligence of the liable person (a case which corresponds, roughly, to the case of strict liability) lacks any normative solution.

[52] Bessone (1987, pp. 351–352).

Going back to an example we used before: a weak ascertainment of a gap is made by someone who, approaching section 48 of the Italian Constitution, reads it, at first, as expressing a incomplete set of norms regarding the vote of foreign people in Italy, and, at a later stage, *does not* fill in such a gap, though she could easily do it by means of the a contrario canon "Expressio unius est exclusio alterius".

(6) We are in front of a strong ascertainment when the jurist confirms the existence of a gap, already identified by first interpretation, since it is difficult, if not hardly possible, to justify another interpretive result.[53]

This happens for example in the case of the recovery of damages for infringement of the right to privacy when the fact is not a criminal offense. The Italian scholar Cosimo Mazzoni observes[54]:

> The protection of the right to privacy requires that the legal system has a serious impediment in the lack of compensability of the damages that do not have a patrimonial character, established by section 2059 of the [Italian] Civil Code. The matter of confidentiality is among those most affected by the inadequacy of the rule, which now several parties have urged to review, or even to repeal. The damage caused by the violation of the right to privacy is mostly a damage of a moral nature, such as pain, discomfort, embarrassment, irritation, anger, hurt on the injured party because of the means used in the aggression of her own sphere of intimacy and for the dissemination of news or pictures offered to the curiosity of the public. Legal scholars have begun to use the phrase *existential damage*. Well, unlike what happens in other countries, and in particular in the Anglo-Saxon systems, where this type of damage does not differ for the purposes of recoverability from the damage of a patrimonial nature, in our country it is recognized to it a very limited scope of protection: in particular, the damage is compensable according to the criteria of the financial loss only when the action constitutes a crime, according to the rule laid down by section 185 of the Criminal Code.

In all those situations where we are in the presence of a gap (whether it is the result of creation or ascertainment), there is the need to integrate the law, if we want to confer to it the formal feature of completeness. Now, the legal gap regarding the right to privacy has generally been filled by means of a variety of techniques, by jurists and judges, who in doing so mainly referred to section 32 of the Italian Constitution.

10.7 The Identification of Inconsistencies

The notions we have just sketched with regard to legal gaps can be profitably used, *mutatis mutandis*, in relation to the analysis of the doctrinal operations prior to the possible solution of inconsistencies. We have to distinguish, in this case too, six

[53] Chiassoni (1999c, p. 295).

[54] Mazzoni (2003, p. 71).

different operations[55]: (1) prima facie negative ascertainment, (2) prima facie positive ascertainment, (3) creation, (4) prevention, (5) weak ascertainment, and (6) strong ascertainment.

Let me elaborate.

(1) Prima facie negative ascertainment consists in denying that two sentences belonging to the same micro-system, understood in their literal meaning or current legal meaning, express two (partially or totally) incompatible norms.[56] This kind of ascertainment is usually an implicit one.
(2) Prima facie positive ascertainment consists in affirming, at the stage of first interpretation, and on the basis of legal scholarship's common opinion (if any), the existence of a situation of incompatibility between two norms derived from the same sentential basis. In other words, the jurist approaches a certain normative micro-system that, according to the common view among scholars, attaches two conflicting solutions to the same generic case. According to the prevalent view in Italian legal scholarship, for example, there is a hardly solvable conflict between the freedom of the press and the right to privacy, both derivable from constitutional provisions.[57]

In the same way as for gaps, the jurist may confirm or reject the prima facie ascertainment, whether it was a negative or a positive one, at the second interpretation stage.

(3) We have the creation of an inconsistency whenever the interpreter, in the second interpretation stage, brings about a contradiction that did not seem to exist at the stage of first interpretation. This happens, for example, when an interpretation-product prima facie is reinterpreted broadly, so as to overlap and conflict with an interpretation-product of opposite sign.
(4) There is the prevention of an inconsistency whenever the interpreter eliminates, in the second interpretation stage, an inconsistency whose existence was positively ascertained in the first interpretation stage.

This is the case of the principle-oriented interpretation section 2043 of the Italian Civil Code advocated by the Constitutional Court.[58] If such a section is read according to the prevalent view, it provides that damages other than patrimonial damages and so-called "moral damages" cannot be restored. This interpretation creates an inconsistency – the Court argues[59] – between the statutory rule and sections 3, 24,

[55] Here I follow closely Chiassoni (1999b, c, pp. 297 ff.), (2007, pp. 277 ff.).

[56] On the concept of (total or partial) inconsistency between norms, see Ross (1958, pp. 128 ff.) and Chiassoni (2007, pp 262 ff.).

[57] Alpa (1986, p. 174).

[58] Alpa (1985, pp. 213–214, 216–217).

[59] Italian Constitutional Court, decision 88/1976.

and 32 of the Italian Constitution, respectively stating the principles of equality, of the legal protection of subjective rights, and the right to health. Such an inconsistency disappears (or is prevented) if one understands section 2043 as admitting the restoration of other kinds of damages.

(5) We are in front of a weak ascertainment when the jurist *does not* cancel, at the second interpretation stage, an inconsistency which existed at the first interpretation stage, even though it was argumentatively easy to do so.

An example of weak ascertainment concerns the crime of creation of constituting subversive associations (section 270 of the Italian Criminal Code).[60] This section is generally considered by many commentators (who carry out a weak ascertainment) as a rule suspect of unconstitutionality with respect to various parameters, namely for alleged violation of the right to freedom of thought (Section 21 of the Constitution), of the right of association (Section 18 of the Constitution), and the right of association in political parties to concur by means of democratic methods to determining national policy (Section 49 of the Constitution) and, finally, for being allegedly contrary to the principle of offensiveness which generally characterizes criminal offenses. Another line of thought, avoiding weak ascertainment and carrying out prevention, would resolve the antinomy by arguing that section 270, far from sanctioning an association for the sole reason of supporting a subversive program, rather represses the "violent means" that the association intends to use in order to achieve the desired objective: from this point of view, the contested provision would be perfectly compatible with both sections 18 and 49, provided that the rights inherent to freedom of association are limited by the prohibition to pursue purposes which are forbidden by criminal law (and the use of violence would fall precisely within the aforesaid prohibition).

(6) Finally, we have a strong ascertainment when a jurist confirms the existence of an inconsistency, which is the outcome of a positive prima facie ascertainment, since it is difficult, or hardly possible, to justify a different result.

A hardly solvable conflict in the Italian legal order, for instance, is that between the crime of criminal apology and the right to free expression of thought. As one may gather from the following passage, a prevention of such an inconsistency is carried out (wrongly, according to the authors, who favor a strong ascertainment) by the Italian Constitutional Court[61]:

> With regard to the relationship between criminal "apology" (or propaganda) and free expression of thought, the jurisprudential view, that tries to tends to reduce apology to a simple favorable opinion regarding a particular fact or episode [constituting a crime], is certainly unacceptable. So interpreted, apology is in fact a form of expression certainly protected by section 21 of the Constitution. In order to make compatible the indictment of the facts of apology or propaganda with section 21 of the Constitution, the Constitutional Court, in the decision n. 65/70, laid down the principle that the punishable apology "is not

[60] Fiandaca and Musco (1988, pp. 31–32).

[61] Fiandaca and Musco (1988, pp. 65–66).

> the pure and simple manifestation of thought, but a manifestation of thought which constitutes a behavior in fact capable of causing the commission of crimes". In so doing, however, the features of apologetic conduct are surreptitiously distorted, because the subject of the indictment is now the so-called "indirect incitement", with the result that the incrimination of apology results in an unnecessary duplication of the criminalization of incitement. The Court has clearly reached a compromise solution, due in all probability to the desire to avoid alleged gaps in protection. […] Therefore, it would have been preferable to openly acknowledge that the incrimination of merely apologetic facts creates in our system an irreconcilable conflict with constitutional principles.

10.8 The Solution of Inconsistencies and the Ordering of Legal Materials

After having identified an inconsistency, in one of the ways previously exposed, the jurist can chose among different procedures in order to solve it.

The traditional criteria used by jurists are, as everybody knows, *lex superior* (i.e. superiority), *lex posterior* (chronology), and *lex specialis* (specificity).

The last of these criteria is used to resolve contradictions eminently through interpretation: in other words, it enables one to change the connections between cases and solutions established by the rules of the system, by changing the rules that can be derived from the sentential basis.

> The jurist – notes Jemolo[62] – must identify the lawgiver's idea regarding the various institutes, without being able to add or take away. However, what will happen in subsequent legislation if the legislature does not remain faithful to that which had been its original idea of a certain institution? In this case, the lawgiver commits a sin against legal logic, by enacting two incompatible rules: the remedy is given by the institution of implied repeal of the earlier measures.

This is the modus operandi of the criterion of *lex posterior*. From the passage, however, one cannot derive the "dual nature" of this criterion (dual nature that it shares with the principle of *lex superior*). Both criteria may in fact affect, in turn, the sentential basis, by repealing the provision that expresses the contradictory rule, or the normative basis, expelling the norm without affecting the formulation of the provision.

By bringing the system back to its founding principles, the jurist may also carry out balancing or, alternatively, reconciliation. Both techniques, however, are generally considered unsuitable for resolving contradictions *in abstracto*: they would act only in specific cases, for which it is possible to determine the "weight" of each principle involved in the process of balancing.[63]

Finally, the jurist can proceed to systematize the elements of the system, by ordering them.

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[62] Jemolo (2004, pp. 129–130).

[63] Cf. Guastini (2004, pp. 219–221). Regarding the differences between balancing and conciliating, see id., p. 219, fn. 60.

The ordering of legal materials is the last, merely possible, operation which systematization in the broad sense (i.e. the building-up of a complete and consistent system of norms) is made of. Obviously, this is a logical sequence, not a chronological or a psychological one. One cannot order materials that have not been, at least, previously interpreted and logically developed.

Ordering consists in putting the norms of the system in a certain order, with the result that certain norms serve as general rules and other rules as norms of detail, with the effect of expunging from the system those norms that are incompatible with its "axioms".

In this sense, ordering is similar to repealing: by changing the order of the norms, and the relationships of "preference" among them, the solution which a normative system connects to the relevant generic cases also changes.

Indeed, ordering is also configurable – in partial antithesis with balancing (which brings about an axiological hierarchy which varies from case to case) – as a fixed axiological hierarchy. Its solutions are conceived as abstract ones, so that they are, in general, applicable to infinity of cases. Once the issue of liability is traced back to the principles of faultless damage and strict liability, then the norms which do not conform with them are "expelled", and this operation brings about potentially durable results (to be sure, the effects of such an ordering can be more durable than some legislative derogations).

It often happens that the jurist confers the status of a principle to a norm, expressed or unexpressed, and structures the normative set on its basis. In other words, by using the ideal of system, the jurist creates normative hierarchies in favor of some general norms, which later elevates to the rank of principles.

Introduced into a system elaborated by the jurist, principles, so understood, are used to carry out three main functions: explication, integration, and "preparation". First, they are used to build a sort of explicative theory of existing legislative materials.[64] Secondly, they are used to fill in possible gaps of the normative basis. Finally, they are employed to reduce the system to its ultimate elements, among which, in case of conflict, an ordering is made.

Principles are used to understand a system not as a simple set of norms, but as an ordered set of norms.[65] Their function consists in orienting the explication and the integration of law towards a systematic ideal: they are instrumental to attributing, to all the operations carried out on legal norms, the rationality one can find in a system. As has been said, "when the interpreter builds-up a principle she "is creating" the system".[66]

Ordering – we have said – is the last of the scholars' operations of systematization of a certain normative set.

However, in the actual formulation of scholarly works, ordering appears not at the end, but at the beginning of the inquiry. In other words, the work of the jurist shows the results of the inquiry by expounding a certain ordering hypothesis.

[64] Guastini (1986).

[65] Atienza and Ruiz Manero (2012).

[66] Prieto Sanchís (1992, p. 182).

Examples of ordering are legion, but a very clear one is provided by the aforementioned division between the system of fault liability and the system of strict liability.[67]

By recognizing the existence of a system of strict liability alongside a system of fault-based liability, many of the cases, previously subsumed under the fault-based liability and hence allowing a much easier release from liability, can now be traced back to the principle of strict liability which provides a much harder release for risky activities. The construction of the principle of strict liability makes it possible to change the system of civil liability, by propitiating the reinterpretation of the irreconcilable provisions, filling up legislative gaps, and extending the liability to pay compensation to ever new cases.

For instance, in the beginning of one of his works devoted to strict liability,[68] which we referred to above,[69] the famous Italian jurist Pietro Trimarchi sets out to build a system based on the principle of strict liability for business risk. The entire work is based on this ordering hypothesis. Yet there is insufficient evidence to suggest that this presumption is the final element of the whole reconstruction of the author. On closer inspection, indeed, he moves from the identification of a few statutory sentences; gives them prima facie meaning following the interpretation which is found in the prevailing doctrine; it provides a new interpretation that rejects the results of the first interpretation; builds a normative basis; draws its implications; induces its "structural" principles, from which he draws additional rules to fill in the statutory gaps; identifies conflicting standards; where it is possible he tries a reinterpretation of the provisions from which they are extracted; resolves residual conflicts ousting the rules do not accord with the apical principles of the system.

If all the above is correct, the model developed in this contribution can aspire to be a proper explanation of the activities commonly carried out by jurists in order to make the law, or at least some of its subsets, a systematic whole.

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[67] Trimarchi (1961, p. 39).

[68] Trimarchi (1961, pp. 1–6).

[69] See, *supra*, section 2.1.

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