

SYSTEMACITY OF LAW: A PHANTASM?

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The subject-matter of this article is the 'systemacity of law' concept and its methodological feedback. Continuing a series of articles on this subject, the author focuses on the internal rationality of claims about the systemic character of law. This rationality is embedded in the legal thinking of Modernity and reveals itself in the belief in the rational nature of law. According to this style of legal thinking, such internal rationality impedes law from being chaotically or randomly organized and structured. Therefore, law shall have a reasonably organized structure, even if in reality it does not have such a structure. In this way, the belief in an internal rationality of law transforms itself into the requirement for the rational organization of law. These two elements – belief in an internal rationality and the requirement of the rational organization of law – are the pillars of the dogmatic conception of law which was established in Begriffsjurisprudenz of the 19th century and which still holds sway over contemporary continental legal thinking.

Keywords: normative systems; legal system; positivity of law; unity of law; identity of legal system; phantasm; coherence.

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1. Introduction

In the following lines we will scrutinize whether there is any place in the legal sciences for the concept of systemacity, and will argue for a negative answer to this question. This criticism has already been articulated in several Russian and English publications,¹ and here we will revert to the analysis of the irrational character of this concept as applied to law. We assume, following Eugenio Bulygin and Carlos Alchourrón,² that 'systemacity' is one of the 'rational ideals' of the legal thinking of Modernity. This ideal requires all law to be unified and rationally structured. At the same time, this ideal embodies the reflective belief that all law is unified and structured. The notion of a 'system of law,' in this perspective, pretends to be at the same time a modal requirement and a factual description. This results in an internal contradiction and triviality of this notion, but nonetheless makes it invulnerable to criticism as in the final account this notion is based on a rational belief (that law should be and already is unified and rationally structured) and not on positive knowledge. This belief is omnipresent in discussions about the pretended systemic character of law.³

The systemic approach to law expresses the realistic vision of reality, albeit in quite a naive version, based on the assumption that the image of law we perceive is the 'true' reality of law. In other words, what we observe or perceive is identified with some concrete legal order that is empirically real and seemingly systemic. However, this in itself is a paradigm of the interpretation of reality – a certain image of law crafted by ideology, doctrine, and practice. It says that we do not need any special notions to act as intermediaries between the perception of the law as of an order, and reality to grasp it, because what we perceive as an order is already the order. Thence, the paradigm of interpretation of reality dictates, or is interrelated with, the paradigm of facts.⁴ In continental legal doctrine, the concept of a 'legal system'

¹ See Mikhail Antonov, *Legal Systems Integrity in Philosophy*, National Research University – Higher School of Economics Working Paper No. WP BRP 34/LAW/2014, <<http://ssrn.com/abstract=2420315>> (accessed Jul. 27, 2015); idem, *Some Reflections about Unity of Law and of Normative Systems*, 5(2) Arts Soc. Sci. J. (2014), available at <<http://www.omicsonline.com/open-access/some-reflections-about-unity-of-law-and-of-normative-systems-2151-6200.100068.pdf>> (accessed Jul. 28, 2015). doi:10.4172/2151-6200.1000068

² Carlos E. Alchourrón & Eugenio Bulygin, *Normative Systems* 165–80 (Springer 1971).

³ The discussion about the applicability of the 'systemic approach' or 'systems theory' (initially developed by Bertalanffy and other representatives of hard sciences), to law deserves special attention and does not fall within the scope of the present research. We have exposed our position on this matter in a Russian publication (Антонов М.В. О системности права и «системных» понятиях в правоведении // Правоведение. 2014. № 1. С. 24–42 [Antonov M.V. *O sistemnosti prava i 'sistemnykh' ponyatiyakh v pravovedenii* // *Pravovedenie*. 2014. No. 1. S. 24–42 [Mikhail Antonov, *On Systemacity of Law and on 'Systemic' Notions in Legal Science*, 2014(1) *Legal Studies* 24–42]), to which we address readers.

⁴ See Lidia Rodak, *Objectivity of Legal Facts from Semantic Point of View*, 28(41) *Studies in Logic, Grammar and Rhetoric: Language, Culture, Meaning* 127 (2012), available at <<http://logika.uwb.edu.pl/studies/index.php?page=search&vol=41>> (accessed Jul. 28, 2015).

constitutes the predominant paradigm of interpretation, which in turn indicates that law shall be described and interpreted as a whole. Even if this approach can appear intuitively correct within the continental legal paradigm,⁵ it remains basically devoid of any serious analytical evidence.

This enables us to reformulate the question about the objectivity of systemacity into questions about the objectivity of the meaning of systemacity and the objectivity of the interpretation of the pretended systemic characteristics of law. In the title of this paper, we utilize the term 'phantasm' in order to show the illusory nature of systemacity in law. The term 'phantasm,' as explained by Gilles Deleuze, generally refers to a simulation removed from the origin of social and historical experience. Deleuze shows:

The affective charge with the phantasm is explained by the internal resonance whose bearers are the simulacra . . . As the simulacrum dismisses identity, speaks and is spoken, it takes hold at the same time of both seeing and is speaking and inspires both light and sound. It opens up to its difference and to all other differences. All simulacra rise to the surface, forming this mobile figure at the creation of the waves of intensity – an intense phantasm.⁶

On the one hand, the fact is that lawyers speak about the system of law, and on the other hand, the fact is that law is not a system, *i.e.* a consistent, irredundant and gapless normative entity. This is one of the principal dichotomies of law which legal philosophers try to circumvent via various metaphysical speculations. These speculations, as different as they can be, aim to demonstrate that even if (the) law⁷ is not a system properly speaking, it is nevertheless a system in some other sense. When legal philosophers reiterate the alleged systemacity of law, they accumulate under this term various ideological postulates requiring that law as 'the most visible symbol of social solidarity'⁸ shall regulate social life in a coherent, integral, 'systemic' way. A fallacy of this style of reasoning about systemacity is, as we will attempt to demonstrate, first of all due to the disregard of Hume's law which prohibits inferring any evaluative conclusion whatsoever from any set of factual premises, and *vice*

⁵ In fact, this seems to be true only within the paradigm of the civil law. What concerns the common law, the customary law or the non-Western legal orders based on religion or traditions, their 'systemacity' can be highly questionable and counterintuitive from the internal standpoint of the corresponding legal doctrines underpinning these legal orders.

⁶ Gilles Deleuze, *The Logic of Sense* 298 (Mark Lester & Charles Stivale, trans, Constantin V. Boundas, ed.) (Columbia University Press 1990).

⁷ For the present exposition we do not admit analytical difference between 'law' and 'the law,' although do not deny its pertinence for other purposes.

⁸ Emile Durkheim, *The Division of Labor in Society* 24 (Macmillan 1984).

versa.⁹ The proposition according to which law functions better being coherent and consistent proves nothing about the factual or normative dimensions of law which, as a rule, are quite far from meeting this requirement. That is why asserting that law functions ‘as a whole,’ ‘as a system,’ and arguing for the systemacity of law on this basis is justified (if ever!) only under the assumption of the contra-factual character of this assertion. As John Balkin wisely suggests, albeit in a more general perspective, ‘accounts of coherence in the social world, or in the actions and beliefs of others, are, at bottom, driven by our need to believe that our own beliefs are ordered, coherent, and rational.’¹⁰

2. The Systemacity Claim and the Structure of Law

The history of legal philosophy exemplifies that lawyers have an intrinsic incentive to understand law as a whole.¹¹ This trend was often connected with speculative investigations into the nature of law, which implies rearrangement of the legal material (facts, texts, behavior acts . . .) around one or several pivotal axes in order to reconstruct law as a plausible object for definition. Such a trend is quite explicable as law cannot be perceived without presupposing some kind of order between legal rules, which doctrinally is often translated through the catchphrase ‘systemacity of law.’ In this wide meaning we can understand ‘systemacity of law,’ together with Jeremy Waldron, as

the quality of being systematic or of working as a system. The systemacity of a set of items refers to the fact that an operation performed on one member of the set will have an impact on other member too, and on their relations with one another.¹²

⁹ According to Hume, ‘[i]n every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, ‘tis necessary that it should be observed and explained; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it’ (David Hume, *A Treatise of Human Nature* 469–70 (Clarendon Press 2000)).

¹⁰ John M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *Yale L.J.* 105, 117 (1993), available <<http://www.yale.edu/lawweb/jbalkin/articles/understandinglegalunderstanding.pdf>> (accessed Jul. 28, 2015).

¹¹ See Антонов М.В. Проблема системности в «Нормативных системах» // Конфликтология. 2011. № 4. С. 109–117 [Antonov M.V. *Problema sistemnosti v 'Normativnykh sistemakh'* // *Konfliktologiya*. 2011. No. 4. S. 109–117 [Mikhail V. Antonov, *The Problem of Systemacity in 'Normative Systems,'* 2011(4) *Conflictology* 109–17]].

¹² Jeremy Waldron, *Transcendental Nonsense and System in the Law*, 100 *Colum. L. Rev.* 16, 20 (2000), available at <<http://emoglen.law.columbia.edu/persp/waldron-cohen.pdf>> (accessed Jul. 28, 2015). In this sense, the term ‘systemacity’ can be used as interchangeable with such terms as ‘unity’ or ‘integrity’.

This view allows for *a priori* intuitionist acceptance of systemacity which can be strong (acceptance as of a self-evident truth, *e.g.*, Ronald Dworkin who sought to explain the nature of law as determined by the view of a subject making coherent arguments within the legal system) or weak (a fiction, as it was in the case of Kelsen). This acceptance was modeled differently in various philosophical conceptions (unity of law can be thought in ontological, epistemic, axiological, narrative, intellectual, normative and other terms), within different legal philosophies (*e.g.*, natural-law, positivist, realist doctrines).¹³ Evidently, a rule or a principle or any other element of the legal order (legal system) cannot, as such, exert any influence on other elements; because, for this effect, these elements would need actors (legal subjects) capable of producing changes through their (speech or behavioral) acts. Neither can an act of one legal subject have an automatic (predetermined, and in this sense 'systemic') impact on acts of other subjects and affect their relations in this way, as any impact will finally depend on the mutual behavior of legal actors and on the reaction of legal practitioners. If 'systemacity' just translates the idea that any act influences other acts and in this way all the phenomena of this world are in a sort of interconnection, then we face the trivial theory of everything already voiced by ancient philosophers. 'All things come out of the One and the One out of all things,' as taught Heraclitus. Or, in the words of Marcus Aurelius,

[a]ll things are implicated with one another, and the bond is holy; and there is hardly anything unconnected with any other thing. For things have been coordinated, and they combine to form the same universe. For there is one universe made up of all things . . .¹⁴

In this aspect, the systems theory could be true, but it is trivial and contributes nothing to understanding the nature or the structure of law. If the 'systemacity of law' is only about the statement 'everything is connected with everything outside and inside of law,' then this term is simply analytically empty. For example, the research undertaken on the forms of systemacity in legal theory by the Belgian legal scholars, François Ost and Michel van der Kerchove, reveals that, as absolutely different

¹³ On weak and strong senses of the term 'system' in legal studies see Mark van Hoecke, *Law as Communication* 109–10 (Hart Pub. 2002). One can also mention an important distinction between strong, modest and minimal objectivity of legal knowledge that can also reflect the degree of the assumed 'systemacity' of law. As Connie Rosati suggests, strong objectivity sustains that our perception is fully independent of our subjectivity; modest version of objectivity admits that perception is partly dependent on the subject; and the minimal version of objectivity is based on the acceptance of the majority in a certain group (Connie S. Rosati, *Some Puzzles about Objectivity of Law*, 23(3) *Law and Philosophy* 275 (2004)). In this triple aspect, law cannot be objective in the first, strong version – surely, provided that we accept that law is about social facts and not about transcendent realities.

¹⁴ Marcus Aurelius, *Meditations* 7.9.1, in 2 *Harvard Classics* (P.F. Collier & Son 1909).

conceptions (Bulygin-Alchourrón, Hart, Kelsen, Perelman, Luhmann, Wroblewski . . .)¹⁵ can be characterized with the help of the common pointer 'systemacity'.¹⁶ In the perspective of analytical philosophy, the term 'systemacity' can translate the idea that one linguistic unit can substitute another unit without changing the grammatical structure of a sentence. In the words of Robert Cummins,

[s]ystem is said to exhibit systematicity if, whenever it can process a sentence 's,' it can process systematic variants of 's,' where systematic variation is understood in terms of permuting constituents or (more strongly) substituting constituents of the same grammatical category.¹⁷

The term in question necessarily involves the idea of a preestablished harmony of law (even in a weak sense – 'law must be something coherent'). This was patent already with the ancient philosophers who found that law is a part of the universe and therefore is subject to some universal regularities. More or less this idea of harmony also transpires in the writings of Nicolas Luhmann, Talcott Parsons and other proponents of the theory of social systems, who saw 'systemacity' as a whole that emerges from interacting parts, providing selectable variations in the relation of elements and enabling new re-stabilizing structuration.¹⁸ However, this Luhmannian account of systemacity can be challenged with regard to law, its mechanism and structure. From the statements, 'law *can* be described as something' or 'law *should* be understood as something,' does not necessarily follow that law *is* always described as something or that it *is* always asserted that law should be understood as something. Therefore, we can conclude that the idea of harmony in law remains analytically empty (anything can be put in the place of 'something') unless it is based on some preestablished values or precepts (*e.g.*, theories like those of Ronald Dworkin, Robert Alexy or Alexander Peczenik) which serve as an axiomatic base for construing law and its structure ('system'). This assertion appears to be counterintuitive for lawyers trained to see and interpret law as a whole. Such an interpretation does not

¹⁵ Michel van der Kerchove & François Ost, *Legal System between Order and Disorder* (Iain Stewart, trans.) (Clarendon Press 1994).

¹⁶ For the purposes of the present analysis we assume that depicting law as a whole which embraces interconnected parts allows for different terms – 'unity,' 'systemacity,' 'coherence,' 'integrity' which equally translate the idea of being depending on the conceptual scheme they presuppose that there is a more or less strong harmony in law (between legal norms, propositions, principles, policies, values that are conventionally referred to as 'law'), for the purposes of this presentation these terms can be used as interchangeable.

¹⁷ Robert C. Cummins, *Systematicity*, 93(12) *Journal of Philosophy* 594 (1996). However, this perspective is not related with the set of ideas which is subsumed under the term of 'systemacity of law,' so that we can leave this aspect aside.

¹⁸ Niklas Luhmann, *Social Systems* 25 (John Bednarz, Jr. & Dirk Baecker, trans.) (Stanford University Press 1995).

correspond to the real appearance of law – insofar as law consists of various sets of rules, principles which are not necessarily logically connected among themselves. Anyways, this logical connection is not a *prima facie* fact of law, but rather a result of the reconstruction of legal norms and principles by lawyers and legal scholars, as famously asserted by Carlos Alchourrón and Eugenio Bulygin. The asserted systemic reality of law can be contested on the grounds of immediate jurial experience (to employ Georges Gurvitch's term¹⁹). In this regard, it can be useful to use Chaim Perelman's ideas to distinguish the two kinds of appearances:

At first sight, appearance is nothing but a manifestation of reality: it is reality as it appears, as it presents itself to immediate experience. But when appearances are incompatible—when, for example, the oar is plunged into the water and appears broken to our sight and straight when we touch it, they cannot represent reality as it is, since reality is governed by the principle of noncontradiction and cannot simultaneously, and in the same relationship, have and not have a given property. It is therefore essential to distinguish between appearances which correspond to reality and those which do not and are deceptive.²⁰

From this standpoint the structure of law is not preestablished but created *ad hoc* through construction (interpretation) depending on the pragmatic and other goals of lawyers, judges and members of a legal community engaged in interpretative practices.²¹ There can be as many reconstructions of this structure as there are various goals, practical situations and normative solutions. To claim that a statement of proposition has a binding force, or, in other words, to admit that any of these reconstructions has an objective meaning, one has to connect it with a hypothetical presupposition (be it *Grundnorm* or rule of recognition, or any other axiomatic normative entity) or to state its necessary congruence with the reality which *per se* reveals the binding force (be it laws of universe, laws of nature, rules of social solidarity, divine or human reason, etc.). In any case, the result will be the same: a proposition acquires its binding force, but the connection link can lead to two sorts of appearances: fictive²² or real (always to a certain degree).

¹⁹ See on it Reza Banakar, *Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jurial Experience*, 16(1) *Can. J.L. & Soc.* (2001), available at <http://papers.ssrn.com/abstract_id=1777167> (accessed Jul. 28, 2015).

²⁰ Chaim Perelman, *The Realm of Rhetoric* 126–27 (William Kluback, trans.) (University of Notre Dame Press 1982).

²¹ Alexander Peczenik admitted that the legal dogmatists can be more disposed to holistic interpretation than the pragmatically minded judges, but this is the matter of degree and not of principle (Alexander Peczenik, *Jumps and Logic in the Law. What Can One Expect from Logical Models of Legal Argumentation?*, in *Logical Models of Legal Argumentation* 141, 147 (Henry Prakken & Giovanni Sartor, eds.) (Kluwer 1997)).

²² The use of the term 'fictive' in this aspect means 'non-positd' and does not imply that the corresponding entities (as physiological projections or rational beliefs) are inexistent or false.

3. Fictitious Character of the Systemacity Claim

Our assertion here is that in the realm of law there can be no appearances (notions, institutes, principles . . .) fully congruent with reality. Different legal schemes and conceptions allow for various degrees of such congruence, but some of them analytically require full congruence. Among such conceptions is that of systemacity of law.²³ Constructing the structure of law is a logical operation and does not imply any isomorphism with facts, with norms or with values (all these are finally a result of interpretation) – its main criterion can be solely logical coherence. With a view to this criterion, one can evaluate the pertinence and practicality of various interpretations (schemes, structures) and choose that which seems to be the best for the particular goals of a legal scholar or practitioner.

As MacCormick and Weinberger insisted,²⁴ law is not a set of natural (or, as they expressed themselves, ‘brute’) facts that can be inspected directly. Rather, it is an ‘institutional fact’ setting out a scheme of interpretation²⁵ under which certain acts acquire a special meaning. That is why, according to MacCormick, such facts are dependent on human activity. That assignment of meaning to a social fact (*i.e.* a speech or a behavioral act) depends on the scheme of collective intentionality in general,²⁶ and, for the sphere of law, on frameworks of legal reasoning in each particular legal community.²⁷ And, as Wittgenstein explains, there are no facts that determine meaning. Neither do interpretations: ‘Any interpretation still hangs in the air along with what it interprets, and cannot give any support. Interpretations by themselves do not determine meaning.’²⁸ In order to construct law as an object of interpretation, MacCormick introduces the conception of institution that characterizes some norms as a bundle of interconnected rights, obligations, principles and values in which a legal idea resonates in relation to other legal ideas which lawyers use to justify their decisions.²⁹ From this vantage point, ‘law as a system’ signifies that the legal community creates the institutional reality, which individuals can use to embed their arguments and concepts, to entwine them into a coherent fabric of legal reasoning. It is worth repeating that the reconstruction of the structure of law

²³ There are several other conceptions such as natural law, but their analysis falls out of the scope of the present paper.

²⁴ Neil MacCormick & Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel Pub. 1986).

²⁵ To think about the depiction of law as a scheme of interpretation (*Deutungsschema*) in *Pure Theory of Law!*

²⁶ John R. Searle, *The Social Construction of Reality* 46 (Penguin 1995).

²⁷ Julius Stone, *Legal System and Lawyers’ Reasonings* (Stanford University Press 1964).

²⁸ Ludwig Wittgenstein, *Philosophical Investigations* 198 (Wiley-Blackwell 2009).

²⁹ MacCormick & Weinberger, *supra* n. 24, at 49–74.

is not subject to the criterion of veracity,³⁰ and no condition of isomorphism is to be met here.³¹

The features of legal order are based on assumptions related to either the cognitivist or the non-cognitivist approach. Surely, if we follow a cognitivist approach and subscribe to a certain philosophy of absolute values (be it a version of iusnaturalism or another non-positivist philosophy of law), and if among these values there is a value of order or coherence, then the thesis of systemacity of law turns out to be a self-fulfilling prophecy: law is systemic as systemacity is its intrinsic value. Or, which is analytically similar, the law of the country is a system, insofar as it is structured by the constitution which describes this law as a system. These theses will be true within the given framework of references, but they will be desperately trivial. If, following the tenets of iuspositivism, we assume a non-cognitivist position, this makes it impossible to consider systemacity in terms of true and false. Only descriptive facts can be proven descriptively; evaluative facts are dependent on defining their values and characteristics. Given that no legal order is systemic (absolutely consistent, gapless and irredundant), the assertion of systemacity can bear only on the evaluative dimension of law which is highly controversial for those who do not subscribe to a metaphysical philosophy.³²

While a lawyer intellectually reestablishes the structure of law, coherence is established not between norms³³ but between propositions which describe norms or values; a description of these realities (norms and propositions) requires diverse normative and logical tools. Thence, logical coherence does not require finding a value consensus (axiological hierarchy, 'the best interpretation' . . .) or returning to an ultimate source of validity (*e.g.*, a basic norm) – a logical description can be coherent if it consistently sticks to the same criteria. A description is valid if it has binding force in the given circumstances (*e.g.*, formulated by a judge or an officer within their competences), but in this case it ceases to be descriptive and becomes normative. As an example, the concept 'universe' serves as a conventional criterion to

³⁰ At least, in terms of the substantive truth theories, such as correspondence or coherence theories, the question about other theories of truth deserves a special research.

³¹ Some theories can, however, insist on isomorphism. Like that of the Finnish philosopher Kaarle Makkonen who based his theory of legal reasoning on the logical primacy of an isomorphic relation between descriptions of facts, the one as given in a legal norm and the other as (possibly) existing in the world (Kaarle Makkonen, *Zur Problematik der juristischen Entscheidung: eine strukturanalytische Studie* (Turun yliopisto 1965)). Even in this theory, which uses Wittgenstein's philosophy as a point of reference, we can see that isomorphism is not an absolute requirement of congruence with reality.

³² Jerzy Wróblewski, *The Judicial Application of Law 137–49* (Zenon Bańkowski & Neil MacCormick, eds.) (Kluwer 1992).

³³ Norms can be understood as deontic entities whose validity is exempt from the criterion of veracity, according to the famous distinction between norms, normative statements and normative propositions introduced by G.H. von Wright (Georg H. von Wright, *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul; The Humanities Press 1963)).

unite norms according to the ideas of 'Normative Systems'.³⁴ According to this logic, legal systems are subjective constructions – they can be fixed in a constitution or in other normative acts, and thus obtain binding force (e.g., description of sources of law in a procedural code which binds judges so that they are not empowered to justify their decisions with reference to other sources), or can remain within the dogmatic province (rather with recommendation force). In the first case, a logical description turns into a rule of law and changes its nature; in the second, and similar cases, its subjective nature remains intact (unless the doctrine has normative value in the respective legal community).

When we look at legal systems in the way Alchourrón and Bulygin do, the description of law as of a legal system implies that each set of norms (of normative propositions) is described with a view to all its logical sequences.³⁵ In this logic, the basic element for constructing a legal system (for 'systematization of law') is a set of norms. There can be different sets composed of the same norms, so that thinking of law as a system does not analytically require accepting that law is a whole – thinking legal systems (in a certain sense) are possible even when abandoning the idea of systemacity (unity, harmony, integrity). Coherence is only a contingent matter for the law.³⁶ Let us suppose that there are several sets of norms which are valid within a certain territory, are backed with the coercive force of the same political community, stem from the same constitution, etc. It is analytically possible that all these norms be described with reference to the same criteria (are described within the framework of the same 'universes'). In this case, the reconstructed legal system will include all the valid norms. In the legal parlance, this analytical possibility is usually meant when referring to a 'legal system' (unity of sources of law, of all the valid norms, of all legal processes . . .). However, such a complete system is not analytically or practically necessary, as there can be incomplete descriptions (interpretations, structures) which stick to the same criteria and in this sense are logical descriptions, but which are not conclusive or coherent. Moreover, law enforcement does not require that all the valid norms be interpreted into a coherent and whole unity in order to have binding force.³⁷ On the contrary, incoherence is implied in technically developed legal communities which usually provide for conflict rules – like that of *lex posterior derogat legi priori*.

³⁴ Alchourrón & Bulygin, *supra* n. 2.

³⁵ There can be other criteria but they do not yield a 'system' logically speaking and are therefore irrelevant for this discussion.

³⁶ Eugenio Bulygin, *Objectivity of Law in the View of Legal Positivism*, in *Analisi e diritto 2004. Ricerche di giurisprudenza analitica* 219 (Paolo Comanducci & Riccardo Guastini, eds.) (Giappichelli 2005), available at <http://www.giuri.unige.it/intro/dipist/digita/flo/testi/analisi_2004/15bulygin.pdf> (accessed Jul. 28, 2015).

³⁷ Frederic Schauer, *Playing by the Rules: A Philosophical Examination of Rules-Based Decisions-Making in Law and in Life* 164 (Clarendon Press 1991).

Taken in this sense, a legal system can be differentiated from a legal order, which is a chain of empowerments (competences). According to Hans Kelsen, the former is a description with no normative value (forming no source of validity or empowerment); the latter serves as a base for lawmaking and law enforcement, and therefore has normative value (being a source of validity).³⁸ However, both 'system' and 'order' are intellectual reconstructions but with different sequences. Unlike a legal system, a legal order should be interpreted into a logically coherent whole – otherwise the chain of validity (empowerments) would be broken. From this standpoint, (partial) systemacity of law has a normative and not ontological character: rules of law can be binding only insofar as they belong (or are interpreted as belonging) to a legal order. At the same time, nothing guarantees that a particular rule will in fact be interpreted as belonging to the order and / or as having a certain place in it – because of the intrinsically dynamic character of legal order.

Systemacity of law, seen in the Kelsenian perspective,³⁹ is a function of normativity of law: legal rules are interpreted as if (*als ob*) they enter into a legal order (because they stem from the same basic norm, the rule of recognition, issued by the same political power, etc.). This scheme of interpretation is nothing but an intellectual reconstruction which usually remains subjective, and which can pretend to be objective only insofar as some objective grounds of normativity (*e.g.*, an obligation to follow rules of law) are introduced. It can be asserted that there is no isomorphism, but identity between the object of interpretation and the results of interpretation (interpretation in this context can mean both normative and logical reconstruction), as here the object is created through interpretation and is tantamount to its results. Admitting that interpretation and reconstruction are of the same nature and yield the same results, one can conclude that 'law as a system' appears only *a posteriori*: after but not before the appropriate act of thinking (of interpretation or reconstruction). Then, to invest this act with any normative or truth value means to ascribe such an act to a kind of objective authority (practical reason, etc.). However, from the analytical standpoint, such an act can be conceived of as a purely intellectual construction with no binding force.

This gives us sound grounds to assume that, when thinking about 'systems' in law, one can abandon the idea of an objective unity of law which presupposes isomorphism between a 'systematic interpretation' of law (which constructs a legal order) and the facts (texts, acts . . .) which are thus interpreted. In legal philosophy, this isomorphism is a consequence of postulating an axiomatic base of normativity or of truth which bridges a connecting link between a deontic prescription and a state of affairs (*e.g.*, inasmuch as law should be obeyed, law is a system of the obeying

³⁸ See Michael S. Green, *Hans Kelsen and the Logic of Legal Systems*, 53(2) Ala. L. Rev. (2003), available at <<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1172&context=facpubs>> (accessed Jul. 27, 2015).

³⁹ Kelsen utilizes the term 'system' as synonymous to the term 'order.'

behavior or the interpretations which depict law as something to be obeyed are true). Legal propositions can be interpreted by various actors into logically coherent systems without there being any analytical need (there can be a need of ideological or speculative character) to integrate these systems into one whole system. The legal interpretation of facts is a different question as facts are not interpreted (neither logically, nor normatively) but qualified through connecting them with a legal rule. Anyway, there is no need to interpret facts as belonging to a legal whole in order to qualify them as legally relevant. Such qualification can, however, reinforce the obligation to obey the law: if a legal subject under certain circumstances entwined into the fabric of the law is bound to act in the prescribed way, then subjectivity is limited by the objective qualities of the system (into which rules, facts, principles, and practices are integrated). Referring to the 'systemacity of law' can then have a similar function to Kelsen's *Grundnorm*, which sets forth that we can comprehend law when we look at it *as if* there was a basic norm which serves as a base of validity.⁴⁰ Kelsen reiterates:

Along with the basic norm, presupposed in thought, one must also think of an imaginary authority whose (figmentary) act of will has the basic norm as its meaning. With this fiction, the assumption that the constitution, whose validity is grounded by the basic norm, is the meaning of an act of will of a supreme authority, over which there can be no higher authority. Thus the basic norm becomes a genuine fiction in the sense of Vaihinger's philosophy of 'as if.' A fiction in this sense is characterized by its not only contradicting reality but also containing contradiction within itself.⁴¹

In this sense we could speak about law as a system; however, keeping in mind that this systemacity (like *Grundnorm*) is a fiction (in the later version of Kelsen's Pure Theory of Law inspired by Vaihinger's *Als-Ob* Philosophy) which has nothing to do with reality and rather contradicts reality:

The cognitive goal of the Basic Norm is to ground the validity of the norms forming a positive moral or legal order, that is, to interpret the subjective meaning of the norm-positing acts as their objective meaning (*i.e.* as valid norms) and to interpret the relevant acts as norm-positing acts. This goal can

⁴⁰ 'Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation' (Hans Kelsen, *The Pure Theory of Law* 202 (Max Knight, trans.) (University of California Press 1967) [hereinafter Kelsen, *The Pure Theory*]).

⁴¹ Hans Kelsen, *The Function of a Constitution*, in *Essays on Kelsen* (Richard Tur & William Twining, eds.) 117 (Clarendon Press 1986).

be attained only by means of a fiction . . . A fiction differs from a hypothesis in that it is accompanied – or thought to be accompanied – by the awareness that reality does not agree with it.⁴²

4. Conclusion

The approach which has been proposed in the foregoing seems to be the only way to argue that law possesses some systemic qualities, *i.e.* that it is a pure fiction utilized by lawyers to describe law in the terms of the legal thinking of Modernity, and through appealing to 'systemacity' to call for more rationality in law. The juristic method consists of the following: in order to be interpreted as legal, rules and norms are intellectually connected within a legal community into a legal order as into a normatively (more or less) coherent whole. This method reveals certain utility, especially in the ideological dimension, but we should not forget that there is no isomorphism between legal order and legal system(s) as they represent results of different reconstructions (normative for the former, logical for the latter). The 'systematization of law' can be performed on the base of elementary logical connections between norms and their sequences. From this standpoint, 'systematization' does not depend on how the legal order to which these norms belong is structured, as this structuring has a dynamic character and reveals itself in constant process of (re)interpretation.⁴³ At the same time, 'systemacity' is a hypothesis presupposed as a condition of establishing logical connections – evidently, not all acts of interpretation in reality are based on this presupposition. Therefore, this presupposition of 'systemacity' is contingent on the purposes of various actors; it can serve some of these purposes (when one needs to prove that a certain interpretation is not acceptable as it does not fit 'the integrity of law' . . .) but not necessarily all purposes. Also, there is no systemacity or law in the sense of objective qualities of the legal material (facts, texts, behavior, and norms) – such qualities can be attributed to law through interpretation which pursues different normative, ideological, speculative or other purposes, which inevitably brings subjectivity into any interpretation. It can be said that these qualities exist only in the specific sense of the existence of legal norms (their validity, in the terms of Kelsen), but do not exist in the ordinary (ontological) sense of factual being.

To better reassess the 'systemic' way lawyers think about law (as something whole, integrated, coherent . . .), one can consider the difference between the normative and logical reconstructions of law. This difference shows that a lawyer can at the same time perceive law as an order (in the normative sense – as of a continuous network of empowerments) and as a plurality. In the logical sense it will signify that organizing

⁴² Hans Kelsen, *General Theory of Norms* 256 (Michael Hartney, trans.) (Clarendon Press 1991). doi:10.1093/acprof:oso/9780198252177.001.0001

⁴³ This, according to Kelsen, signifies that a legal order is reconstructed each time one creates, interprets, and applies legal norms (Kelsen, *The Pure Theory*, *supra* n. 40, at 193 ff.).

parts of the law into 'legal systems' will allow for different logical sequences from the same normative sets or for the same factual situations. Law does not represent a factual unity or a coherent whole (in the ontological sense) but it can be interpreted as if it were united and coherent in order to attribute binding force to the rules of law (for Kelsen, it means to attribute an objective meaning to these rules) and to reinforce the ideological postulate that law shall be obeyed.

Adopting this point of view, there is nothing contradictory in thinking of a set of norms as a 'system,' stripping this term of the properties (such as completeness, consistency, or irredundance) usually attributed to a 'system' in logic, in linguistic, and in exact sciences.⁴⁴ We then have a 'system(s) of law' which is (are) only relatively integrated and identified.⁴⁵ This could be a point of tangency where legal, linguistic and logic theory can effectively work together describing from different methodological viewpoints on how law is integrated. This approach seems to be quite reconcilable with the basic idea of 'Normative systems' by Alchourrón-Bulygin – the idea that all the normative sets can be imagined as independent entities, united solely by (more or less) the logical reasoning of judges, law-enforcement officers and law professors, and that there can be as many such normative systems as there are actors reasoning about the law and systematizing the legal propositions (and consequently, the norms contained in these propositions).⁴⁶

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⁴⁴ Eugenio Bulygin, *On Legal Interpretation*, in 4 Rechtssystem und praktische Vernunft / Legal System and Practical Reason: Verhandlungen des XV. Weltkongresses für Rechts- und Sozialphilosophie (IVR), Göttingen, 18. bis 24. August 1991 (= 53 Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)) 11, 20–22 (Hans-Joachim Koch & Ulfrid Neumann, eds.) (Franz Steiner Verlag 1993).

⁴⁵ *The Identity of Legal Systems*, in Joseph Raz, *The Authority of Law: Essays on Law and Morality* 79–102 (Clarendon Press 1979).

⁴⁶ See Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011).

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